

THE FAILURE OF THE EU'S CONSTITUTIONAL PROJECT

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Maybe the European constitutional project was a mistake. Maybe it was a mistake to try to confer a formal benediction on the EU's already existing material constitution and, at the same time, to transfer the constitutional rhetoric from elite discourses to the general discourse on the EU.

1. A cultural discrepancy

The fate of the Constitutional Treaty attests to a wide discrepancy between the legal and political culture of the European elites and that of the general public. The elites may be justified – and, indeed, may be even forced – to speak about a constitution in the European context. However, the constitutional vocabulary finds much resistance among the general public. In their constitutional enthusiasm, the elites easily think that constitutional rhetoric will contribute to the general legitimacy of the EU, in the same way as they are used to think that a constitution contributes to the legitimacy of the political and legal system of a nation-state; but that seems to have been a misjudgement. The general public often enough experiences the constitutionalisation of Europe more as a threat than a promise. Why?

In constitutional scholarship, much energy has been spent in the effort to detach the concept of constitution from its nation-state template, to demonstrate the viability of a more general concept which would also allow for the use of constitutional language in a trans-national context. However, in the general legal and political culture constitution appears to remain inseparably linked to the nation-state. Thus, the constitutionalisation of the EU was commonly seen to lead into the EU's acquiring state-like attributes. And this is not what the general public, which still invests its main political allegiance in the nation-state, is willing to accept. At the cultural level, constitution can be analysed as a condensed symbol, as a symbolic framework of

reference (see Walker 2003, 33-34). But it does not refer only to human rights, democracy and the rule of law; at least in the general culture, it also refers to the nation-state.¹

If this assessment holds, the error did not lie in the submission of the Constitutional Treaty to a referendum in some of the Member States. In fact, it can be argued that the legitimatory effects would have required or at least benefited from a Europe-wide referendum. Nor should the main reason for the obvious failure be sought in the contents of the Constitutional Treaty, e.g., in the inclusion in a formal constitution provisions of an a-constitutional nature, that is, provisions falling outside the accustomed scope of a material constitution. The main misappraisal consisted in the use of constitutional rhetoric as a means to achieve aims which in themselves are wholly acceptable, even praiseworthy, such as increasing the EU's legitimacy among the general public.

The fate of the Constitutional Treaty, especially the results of the referenda in France and the Netherlands, has proved that there was no constitutional momentum in Europe, at least not among the general public, the citizenry of Europe. If there was a constitutional momentum, it was confined to the European legal and political elites.

Then, what about the lively constitutional discussion by scholars in and about Europe? Has it also been a futile enterprise? Has the academia also erred in the adoption of the constitutional language? Here my answer is in the negative: No, it has not been a futile enterprise, a waste of time, energy and scholarly imagination.

2. Law and politics

The recent debates on trans-national constitutional theory have produced or revitalised a plethora of constitutional concepts and analytical distinctions; through this upsurge of interest, constitutional theory really has taken a leap forward. The benefits fall not only on the elaboration of trans-national constitutionalism but also on constitutional

¹ There are of course many reasons for the rejection of the constitutional project by the general public and the failure of the referenda in France and the Netherlands, some of them perhaps more connected to domestic politics than the development of the EU. I do not claim that the links which in the general constitutional culture are seen between constitution and state were the only or even in empirical respect the main factor; I only claim that it played a non-negligible role. Here we should also be wary of too sweeping generalisations: there certainly are differences in the respective political and legal cultures in different Member States with respect to the links between constitution and state. Thus, in federal states, the idea of multi-level constitutionalism is perhaps easier to accept than in unitary states.

theory in its traditional nation-state focus. And not only that: one of the most significant results of the debates will be – so I venture to predict – a heightened awareness of the interaction between the national and trans-national even in constitutional issues.

The discussion has also proffered ample evidence of how difficult and even evasive the constitutional concepts – including the very concept of constitution – are. Conceptual difficulties are already due to the fact that we can approach constitutional issues, both at the national and the trans-national level, from two different viewpoints. Niklas Luhmann (1993, 470 ff.) has drawn our attention to the constitution's peculiar position in a modern, differentiated society. The constitution belongs to two of modern society's sub-systems: to both the legal and the political system. Thus, the functions of the constitution can be examined from the perspective of both the legal and the political system. In addition, the constitution fulfils the important function of linking these two sub-systems together: it channels the influences of the legal into the political system and of the political into the legal system. In Luhmann's terms, the constitution establishes a structural coupling between the two sub-systems.

One of the first requirements in scholarly constitutional discussion is to specify the perspective from which the issues are examined. This applies, for example, to the debate on whether the EU already has a constitution in the material sense. The definition of a material constitution is based on certain typical functions assigned for the constitution, and how we conceive of these functions depends on whether we adopt the perspective of the legal or the political system.

The scholarly constitutional debate has primarily been conducted from the point of view of the legal system. By contrast, the Constitutional Treaty was essentially a political project: its chief aims were of a political, not of a legal nature, such as enhancing the EU's legitimacy and rationalising its institutional organisation. Consequently, the failure of the political project does not necessarily affect the claims of a scholarly debate which adopts the perspective of the legal system.

3. Trans-national law beyond national and international law

EU law is a case of trans-national law, and the conceptual difficulties encountered in the examination of the EU's constitutional issues exemplify the difficulties of conceptualising trans-national law. Not only our constitutional concepts but our legal concepts in general adhere to the nation-state template. This, of course, is due to the fact that modern law, in essence, has been law of the nation-state. The modernisation of law, its differentiation as positive law, and the emergence of the nation-state were

parallel and interdependent processes. Modern law has received its positive character from the decisions made by state institutions, the legislature and the courts, and the coercive machinery of the state has guaranteed the execution of the courts' decisions and, hence, the law's realisation. Modern, positive law would not have been possible without the legislative, adjudicative and administrative bodies of the state; but nor would the modern state have been conceivable without support from the law. The state has relied on law as an instrument in organising its institutional structure and in implementing its political decisions, and as a source of legitimacy.

International law has shared modern law's dependence on the nation-state. The traditional view defines states as exclusive subjects and objects of international law. Norm-formation in international law has been based on bi- and multilateral treaties between nation-states, and the legal effects of the treaties have also been confined to states. International law has not intruded into the internal domain of the nation-states; what transpires within the state boundaries and under what norms, has been of concern only to the sovereign nation-state. Sovereignty has included the power to decide on the relationships between domestic and international law. Whether these relationships adhere to the monistic or the dualistic model, has depended on the constitutional choice of the state in question. William Twining (2000) has fittingly talked about a black-box view of the relationships between municipal and international law.

Modern society with its nation-state has not only constituted modern law's extra-legal environment; it has also in a sense been effective within the law. Law and legal doctrine always give expression to a certain conception of the surrounding society, of the social relationships submitted to legal regulation. This can be seen by examining the so-called general doctrines or dogmatic theories within different fields of law. Such doctrines and theories with their general legal concepts are always based on a 'hidden social theory', on an implicit conception of the social field under regulation. Sociologists have discussed the extent to which their concept of society has confined social relationships and processes within the boundaries of the nation-state. We may presume that the modern law's attachment to the nation-state can also be detected in its social-theoretical premises. The political system constitutes constitutional law's social field of regulation and, correspondingly, the object of its 'hidden social theory'. Of all the fields of law, constitutional law's dependence on the nation-state is perhaps most obvious. In analysing these dependencies we also analyse the implicit social theoretical assumptions of constitutional law.

Comprehensive legal theories try to capture the unity of law. They also include a 'hidden social theory' – a view of the society whose law they purport to expose. It is obvious that the great representatives of 20th century legal theory – such as Hans

Kelsen, H. L. A. Hart or Ronald Dworkin – have conceived of law primarily as the law of the nation-state. The basic norm crowning Kelsen's hierarchy of legal norms commands obedience to the (historically first) constitution of the nation-state, with the norms on the lower echelons issued by state organs empowered by this constitution. Hart's rule of recognition addresses the judges and other enforcers of the law of the nation-state. Furthermore, Dworkin's political community, whose law is supposed to be governed by the principle of integrity, is one and the same as the citizenry of a nation-state.²

The difficulties in conceptualising trans-national law ensue from the deficiencies of the black-box model based on the dichotomy of national and international law; trans-national law transcends this dichotomy. Trans-national law may have its origin in international treaty law, as is the case in, e.g., EU law or European human-rights law, but in its further development it has detached itself from its international law foundation in both the normative and the institutional dimension.

Constitutional concepts share modern legal doctrine's dependence on the law of the nation-state. The central concepts employed in the debates on EU constitutionalism have received their present established meanings in the context of modern nation-states, although they may originally date from the pre-modern period; 'state', 'sovereignty', 'constitution', 'democracy' and '*demos*', 'separation of powers', 'citizenship', 'civil society' and 'public sphere' all suggest the nation-state as governing structure. However, constitutional scholars do not really have a choice: the concepts and theoretical frameworks developed in the nation-state context are often enough the only available starting-point for an examination of the politico-legal peculiarities of the EU. This examination can only proceed through a *critical* application and, at the same time, modification of the inherited conceptual apparatus. This is not an easy task, and perceptive writers, like Neil Walker (2003), have pointed to the difficulties encountered in the translation of constitutional concepts coined in the nation-state context.³

² It is true, though, that both Kelsen and Hart have tried to include international law in their accounts of law. But at issue has been international law as understood within the black-box model and seen from nation-state perspective.

³ In the following, I will rely on the metaphor of translation in the analysis of the relations between nation-state centred constitutionalism and European or trans-national constitutionalism. It should, however, be pointed out that there are obvious pitfalls in the metaphor. When translating from a language to another, the act of translation leaves the former language untouched. By contrast, the elaboration of European or trans-national constitutional theory, proceeding from the basis of nation-state centred theory, may well affect its own basis, i.e., constitutional theory in its nation-state setting. See also Samantha Besson in this volume.

4. The political and legal functions of constitution

The critical examination of the inherited concepts should begin from the very concept of constitution. I have already referred to this basic concept's dependence on an analysis of the functions which the constitution is expected to perform. Let us now briefly explore the constitution's functions, first in the political and then in the legal system. Let us also all the time keep in mind the important observation of the constitution's role as an intermediary between the legal and the political system. The organisation of political power on the one hand receives its legal form from the constitution, and the constitution also lays down the basic legal limits to the exercise of political power by this organisation. On the other hand, through constitutionally regulated lawmaking procedures political actors may influence the development of the legal order.

In the political system, the constitution fulfils both an organisational and a legitimising function. The organisational part of a constitution defines the basic institutional structure of political power: the main state organs, their competence and their mutual relationships. The constitution renders this organisation the necessary stability for its effective and frictionless functioning. This is an important accomplishment in itself, that is, regardless of the specific organisational choices of the constitution.

In a democratic *Rechtsstaat*, the constitution's organising function cannot be separated from its other crucial task, namely its legitimising function. The constitution channels the legitimacy of the law into the political system. We can contend that a minimum condition for the legitimacy of the exercise of political power consists of its compliance with the constitution: unconstitutional exercise of power cannot be regarded as legitimate.

What about the constitution's functions in the legal system then? Modern law is positive law; under the conditions of 'mature' modern law, legal validity is accorded only to positive law, that is, to law which results from conscious human action, primarily from explicit decisions by the law-maker and the judges. In its positivity modern law is also reflexive law: it regulates its own production, i.e., determines which human actions can have legal normative consequences. It was here that Hans Kelsen, perhaps the greatest theorist of positive law, saw the function of the constitution: the constitution regulates the issuance of new legal norms, defines the structure of the legal *Stufenbau* and formulates the validity criteria of positive law. Kelsen attached his material concept of constitution to this very task: according to him, constitution in the

material sense of the term refers to ‘the positive norm or norms which regulate the creation of general legal norms’ (Kelsen 1989, 222). This central function of the constitution can also be put in Hartian terms: the constitution defines the rule of recognition of the legal order.

Thus, through its provisions on the use of legislative power, the constitution creates the very possibility of modern law’s positivity, lays down the intra-legal validity criteria of positive law. In addition to this Kelsenian function, the constitution performs another central task, necessitated by the law’s positivisation. Every type of law must solve the problem of its limits: the law is a coercive order, and not all coercion in the name of law is justifiable. Under the conditions of modern, positive law, the traditional way of posing and solving the problem of the law’s limits in terms of natural law is no longer available. Particularly through its provisions on fundamental rights and constitutional review, the constitution of a modern democratic *Rechtsstaat* appears to provide to the problem of the law’s limits a solution which respects modern law’s positivity.

An analysis of the functions of the constitution, like the one presented above, is by no means necessarily tied to its nation-state origins but can be transferred to the examination of trans-national politico-legal entities, such as the EU. Let us use our analysis as a basis for a tentative answer to the question whether the EU already has a constitution in the material sense.

From the legal point of view we are quite obviously entitled to speak of an already existing constitution. The founding treaties include provisions on the issuance of new EU-norms and on their application. The development of the basic rights dimension and the reliance on basic rights principles in the praxis of the Luxembourg court are evidence of the restricting function of an EU constitution. We can also argue that the structural coupling enabling the reciprocal influences between the EU as a legal and as a political system is already functioning. The EU-norms defining the use of legislative power and determining its limits certainly fall short of the clarity of an ideal Kelsenian constitution. This does not, however, invalidate the principal claim of an already-existing material constitution of the EU.

In the political dimension, the Treaties clearly perform the task of organising the use of political power and, at the same, time, defining its limits. In this dimension, we can, however, also point to an obvious lack which the abortive constitutional project was aimed at curing. The existing constitutional norms (in the substantive sense) do not fulfil the legitimating function a constitution is expected to accomplish. In Joseph Weiler’s words (1999, 298), the EU has a constitution without constitutionalism, in Miguel Poiares Maduro’s terms (2003, 80), it has a constitutional body without a soul.

In order to be able to grasp this deficiency we have to enrich our constitutional vocabulary.

5. Constitution, constitutional culture and constitutional practices

The recent debates on European or – more generally – trans-national constitutionalism have employed an abundant vocabulary of constitutional concepts; most of them are familiar from nation-state contexts, some are innovations for the present purposes. It certainly does not appear very original to engage once more in conceptual examinations. But, actually, I will be able to do with only few central concepts: constitution, constitutional culture and constitutional practices. I will leave ‘constitutionalism’ aside; suffice it to say that it comes close to what I mean by constitutional culture.

My conceptual scheme is based on, not only one, but two translations: first, from general legal theory to constitutional theory and, second, from the nation-state setting to the trans-national level. In my *Critical Legal Positivism* (2002), I have argued that the law can be approached both as a normative legal order and as specific legal practices – such as lawmaking, adjudication and legal scholarship – producing and re-producing this legal order. Correspondingly, constitution can be examined both as a symbolic-normative phenomenon and as constitutional practices upholding the constitution in its normative sense. The reference of the concepts of both material and formal constitution lies in the symbolic-normative dimension.

The law as a legal order is not exhausted by the surface of explicit, discursively formulated legal material, such as individual statutes and other regulations on the one hand, and court decisions on the other hand. A ‘mature’ legal order also includes ‘sub-surface’ layers, which both constitute the possibility for and impose restrictions on what can appear on the law’s surface in the shape of, say, new legal regulations and court decisions or legal dogmatical standpoints by legal scholars. I have termed the law’s sub-surface layers ‘the legal culture’ and ‘the deep structure of the law’. The law’s surface is connected with the sub-surface layers through reciprocal relations, such as relations of sedimentation, constitution and limitation. These relations are channelled by the same legal practices which are responsible for the production and reproduction of the law as a legal order, that is, primarily, lawmaking, adjudication and legal science.

Modern law is the result of processes of differentiation. These include the emergence of a professional legal culture of legal elites which has distanced itself from the general legal culture. It is specifically the elite culture of legal professionals which can – and should – be regarded as a constituent part of the law. A central element of

the elite legal culture consists of what is often called legal doctrine: legal theories, concepts and principles, as well as patterns of argumentation, that is, specific ways of dealing with the legal theories, concepts and principles. In legal practices, the legal culture operates mainly as tacit (practical) knowledge of legal actors; it provides the *Vorverständnis* through which lawyers approach their practical legal tasks and which, in fact, makes legal practices possible in the first place. Only in hard cases do judges, for example, openly thematise, say, the criminal law principle of *nulla poena sine lege* or the contract law principle of *pacta sunt servanda*.

Like other fields of law, constitutional law is not only about discursively formulated surface-level material; it is not only about the constitutional norms to which the customary concepts of material and formal constitution refer. Constitutional law also includes sub-surface levels. It is also about constitutional culture: constitutional theories, concepts and principles, and ways of dealing with these, i.e., patterns of constitutional argumentation. Constitutional culture plays both a constitutive or enabling and a restricting role with respect to constitutional practices. As the *Vorverständnis* of constitutional lawyers, the constitutional culture provides for the very possibility of constitutional practices, such as the interpretation and application of the constitution. At the same, its theories, concepts and principles impose restrictions on what interpretations and applications can be adopted in these practices.

How does the legal culture arise and change? Here my answer is: through legal practices. One of the relations connecting the law's surface with the sub-surface levels and realised through legal practices is the relation of sedimentation. The elements of the legal culture have their origin on the law's surface, in the law-maker's, the judges' and the legal scholars' doctrinal innovations. Subsequent legal practices determine which innovations survive, sediment into the legal culture and are transformed into the cultural *Vorverständnis* of legal actors. This also holds for the development of constitutional culture: constitutional culture also evolves through constitutional practices, practices which include constitutional scholarship. Unfortunately – or maybe fortunately! – not all of the innovations of legal scholars survive and sediment into elements of the legal culture. Only in retrospect can we tell which of the recent suggestions of constitutional theorists will pass the test of subsequent constitutional practices.

So far, so good. My translation of the insights of general legal theory into the discourse of constitutional theory seems to have succeeded. But it is not this simple. I have ignored the complications which result from the constitution's peculiar dual domicile, its simultaneously legal and political character. Constitutional culture can – and should – be examined not only in legal but also in political terms. The actors of the political system – Members of Parliament, Government Ministers, politicians from the

opposition – are in their activities guided by a specific political culture through which they tackle their practical political tasks. This political culture includes constitutional ingredients, elements of constitutional culture. The legal culture of constitutional lawyers and the political culture of political actors interact, of course, but they can also show significant divergences. The borders can be fluid but they do exist; a politician does not usually approach constitutional issues in the same way as a justice of a constitutional court or a scholar of constitutional law. Thus, what for a constitutional lawyer appears as an end in itself, is often judged by politicians in instrumental terms, as a means for or an impediment to the attainment of their policy goals.

Up until now my discussion has focused on the constitutional culture of legal and political elites. However, especially in the examination of the constitution's political functions, an analysis of merely the elite culture does not suffice. There is clearly one function that is dependent on the existence or at least the subsequent formation of a supportive general constitutional culture: that is the constitution's legitimating function. If there does not exist a receptive general constitutional culture, the constitution cannot contribute to the legitimacy of the polity. In this general constitutional culture, the borderline between its two dimensions is effaced: no clear distinction between legal and political aspects can be made.

The constitutional culture of legal and political elites is formed through constitutional practices. Correspondingly, crucial for the formation of a general constitutional culture are constitutional practices or citizenship practices in which citizenship rights are exercised and their underlying principles affirmed. This process is the formative process of a civic *demos*. It does not, of course, transpire in a cultural vacuum but is promoted or inhibited by surrounding cultural factors. Thus, at the level of the nation-state civic and nationalistic cultural elements may interact in a rather paradoxical way: nationalism may first contribute to the rise of civic legal and political culture, but, subsequently, a robust civic culture can free itself of supportive nationalistic ingredients and also weaken nationalism's general cultural impact.

6. The problem of the European *demos*

I accept the Habermasian idea that a polity adhering to the principles of a democratic *Rechtsstaat* is viable only if it is supported by a civic constitutional culture. The problem is that the formation of such a constitutional culture cannot start from a cultural void. The citizens, even if endowed with formal citizenship rights, will not engage in constitutional practices without some preceding cultural support, without

some shared sense of belonging to the same political unity and without acknowledging its political concerns as their common concerns.

The political and legal elites face the task of translating nation-state constitutional theories, concepts and principles into a trans-national, European constitutional language. The general public also approaches the European Union through the lenses of the political and legal culture they have internalised as citizens of their nation-state. And in this culture, the constitution is in a rather self-evident way connected to the nation-state. Obviously, the general public does not want the EU to supersede their nation-state. Seen against the background of their nation-state constitutional culture, that is exactly what the EU's constitutional project in their eyes threatened to do. It has not been an easy task for the European elites to detach constitution from its nation-state connotations. In the general legal and political culture, the translation process is an even more difficult and time-demanding.

The European citizenry or at least large segments of it did not experience the Constitutional Treaty as an act of their self-legislation but as an imposition; they did not experience themselves as constituting a European demos, a *pouvoir constituant* determining the political form of its existence. We seem to face an irresolvable dilemma. A Europe-wide *demos* is possible only as a civic *demos*, united by a civic political culture. Unlike at the level of the nation-state, at the European level such a culture cannot rely on the initial support of nationalism but must arise from common democratic practices. A constitution based on the principles of a democratic *Rechtsstaat* provides the legal means for such practices. On the other hand, the acceptance of a (formal) constitution by the European citizenry already requires at least rudiments of a receptive trans-national constitutional culture. It is apparent that this requirement is not yet fulfilled. Would it, after all, have been wise to avoid referenda and to let the European elites take care of the ratification? No, it would not. This would probably have affected negatively the legitimacy of the constitution and the EU as a polity.

A material constitution can exist even if its norms are not gathered together in a formal constitution. The democratic practices in which the European citizens can exercise their public autonomy and through which a trans-national civic political culture can arise do not necessarily need a normative basis in a formal constitution or the support of constitutional rhetoric. The laudable aim of promoting democracy, human rights and legitimacy in the context of the EU should not be abandoned. But what should be given a second thought is the means to achieve this aim. Maybe the time simply is not yet ripe for its realisation through a formal constitution? Maybe we should be patient and allow time for the emergence of a European *pouvoir constituant*, a

European *demos* interested enough in providing itself with a constitution through an act of self-legislation?

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