

The European Way. History, Form and Substance

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Between 11 March and 29 October 2004, between Madrid and Rome, the European Constitution has turned from an uncertain possibility into a certain (albeit not full) reality. The day of the Madrid train bombs killing 190 and wounding 1500 is as inseparable from the history of the Constitution as the date of its signature, 29 October. Those events of 11 March (and the ensuing government blunders) moved the Spanish people to end the reign of Aznar's Popular Party. This in turn unblocked the Constitution talks that had got gripped, among other things, due to Spanish intransigence in December.

In several ways the particular sequence or succession of events from 11 March to 29 October can also be seen as symbolic for this particular European Constitution. Let us select three angles: an historic, a formal and a substantive one.

1. HISTORY: EVENTS OVER IDEAS¹

A new written constitution is normally considered the founding act of a political community, a *tabula rasa* in which the past is forgotten or overcome. In the European way, however, the past is being made an integral part of the Constitution. Europe is not created, as Schuman spoke in 1950, in a single act but in a sequence of steps. This is so both in terms of historical fact and in terms of European legal acts. It is difficult presently to understand the constitutional structure created without thorough reference to the historical events that are its building blocks. And it is hard to read the present document without knowledge of European Union law as it has developed over fifty years.

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¹ All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

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It used to be said that the American Constitution made, two hundred years ago, a clean break with the past. Presently this idea has been refuted by scholarship to some extent.² But there is no denying that the American Constitution of 1787 was a brand new legal document, hardly making any reference to the previous situation. The European counterpart is, in this respect, much more like the good old British Constitution: thoroughly historical, thickly layered, and deeply embedded in practice and case law. That it should be so intimately related to, or even built on, dramatic historic events is then simply part of its character. Peter Norman's well documented story of the European Convention rightly goes under the title *The Accidental Constitution*.³ Hannah Arendt's observation that it is not ideas but events that change the world is true in the field of European constitutionalism.⁴ This is so for a good reason, grasped and expressed fifty years ago by Monnet and Schuman (who knew the risk of entrusting reality to an idea). True, belonging essentially to historical fact makes Europe's evolution erratic and nourishes scepticism among intellectuals and despair among believers. Such feelings may be understandable in view of the future. In hindsight, however, Europe invariably goes through astonishing changes, creating new structure for itself including incipient forms of leadership.

2. FORM: MEMBER STATES HERE TO STAY

The Atocha bombings and their direct effects were also pregnant of meaning as to the formal, institutional, aspects of this particular Constitution. Theoretically, a new Constitution will bury previous political foundations and structure. In the terms of French revolutionary priest, theorist (and schemer) Sieyès: the *constituant* (creating agent, constitutional assembly or convention, representing the popular masses and/or victorious power) will withdraw in favour of the *constitué*, the powers that be. The Spanish events convincingly prove this theory untenable for the Union. No one doubted the full authority of the Spanish population to act on its judgement over Aznar and thus blow life into the Constitution. The document itself now fully acknowledges the remaining crucial role of national parliaments and peoples in running the European republic. True, this power on its face has a strong bias. It is the seat of old sovereignty in its negative aspect, as was demonstrated by the notorious Danish and Irish referendums of 1993 and 2001. Giscard wanted to turn the national parliaments

² Michael Leinesch, *New Order of the Ages. Time, the Constitution, and the Making of Modern American Political Thought*, Princeton 1988.

³ Brussels 2003.

⁴ *The Human Condition*, Chicago 1958, subchapters 36 and 37, pp. 257-273.

together into a positive, legitimising agency through his 'European Congress'. This proved a few steps too far. What has remained is a perpetuation of the 'convention method' as part of the rules of change, heavily involving national parliamentarians. We shall soon know if this really helps to push changes through the national popular hesitations.

An at least equally important affirmative power of national peoples is to act, through national elections, directly into European political reality. This is familiar from the way the German Länder elections each in turn (erratically) impact on the German federal situation. Nothing was a better proof of this capacity in the Union than that provided by the Spanish elections on the ides of March 2004.

Much is now to be done to think this new thing over. 'Mir fällt zunehmend auf, dass wir das europäische Denken noch nicht genug an die Wirklichkeit angepasst haben' said German foreign secretary Fischer, whose part in the process has to be acknowledged, recently to the *Berliner Zeitung*.

First we need to rid ourselves of the idea that democracy is essentially related to a single people, in *chic* terms a *demos*, defined in cultural or even ethnic terms. This would deny Europe a democratic future in part based on a plurality of populations or peoples. That the idea is a mistake is easily demonstrated by reference to the birthplace of our very idea and word of democracy. Athens itself (from Clisthenes' reforms onward) was a constitutional assemblage of demes in the region of Attica, whence the plural *Athens* (Athenai).⁵ Its unity was seen in part as a political artifice, not a result of natural development. If the *demos* came to stand for a *natural* or *ethnic* unity, this was seen not as desirable but as degenerate. When Pericles moved to restrict citizenship to a somewhat ethnic concept, this contradicted fundamental ideas of a nascent tradition. Pericles's funeral words (as thought up by Thucydides) were quoted in the Convention Draft. It is no bad thing that they have been scrapped.

Most clearly the Union defies formal constitutional theory by keeping the Member States fully involved in running the Union and especially its evolution. Article (Draco) IV-7, leaving binding action of revision with the Member States and thus asserting their full sovereignty, contradicts the very idea of a constitution in the traditional sense. It amounts to a denial of any formal power of change to the Union's own political institutions, notably to the European Parliament. Now a substantial remaining role for constituent powers may not be a total impediment to qualifying a document as a Constitution. But to squarely leave the constituted popular representative out of the binding process of

⁵ In recognition of this it would not be strange to talk of *Europae*, plural, in the way Germany for a long time went under the name of *Les Allemagnes*.

change is a slap in the face of that institution and anathema to the Western constitutional tradition.

To answer this challenge extended by constitutionalism to the present European Constitution is in part a matter of history and in part a matter of rethinking. If these Member States insist on remaining in charge, as they seem to, they will have to be drawn inside the Constitution. They will need to be made an EU institution, in the way kings were drawn into their constitutions in the eighteenth and nineteenth centuries, finally to be reduced to symbolic status in the twentieth. This is the task of the present institutions and it must be the historic process undertaken in the name of the European Constitution. The European Council, presently a full Union institution, went down this way before. It was outside the system at its creation in 1974. It has been drawn inside over a period of thirty years and now has formal constitutional status. Its integration has been a matter of fact and one of understanding, combined.

Part of the challenge to adapt thinking to new reality (in Fischer's terms) is addressed at constitutionalism, at scholarship. It is now time to conceive these Member States as part of the present constitutional framework, in fact if not in name. A constitution is more than what can be made of its text and its nomenclature. We have to understand that, while these states are all powerful in theory, in practice they are, in the context of the Union, severely limited in *individual* action. They have acquired new scope and power of action only on the condition of acting jointly. This conditioning is an effect of the Union's Constitution as historical structure.

In political science, there have been attempts at understanding this new conditioning of the situation. The sterile opposition between supranational and intergovernmental models, which block constitutional rethinking, still largely grips institutional legal scholarship.

What should be said, finally, about the European Parliament's blatant absence as a binding participant from the formal rules of change of Article IV-7? Let us just take it as a challenge addressed at that institution. Presently, for everyone to see, the Parliament has not acquired substantive representative capacity of its European citizens warranting decisive involvement in the most fundamental acts of change. In the long run it is the only candidate for this representative capacity. Once the Parliament musters up the courage of its calling – or is called upon by the governments together – it will not need a formal legal power to assert itself by way of practice. Thus, according to one of the trusted recipes of constitutionalism, evolution is being conveniently delegated to the tests of reality.

3. SUBSTANCE: THE EUROPEAN WAY

Whatever else a constitution is about, it must express some fundamental commitments of solidarity between those involved. Monnet's and Schuman's famous 'solidarity of fact', referring to growing *economic* interconnection between people and states, has fallen short of the real thing for not being expressive and remaining at the implicit, sociological level. It does not stand up to critical tests and does not win over hearts. Nor do affluence and wealth, the primary results of European integration, generally do the job. True solidarity breeds on common reality, felt and understood as shared. This explains the power of tragic events, such as the Atocha bombings, at the level both of governments and of peoples in Europe and their common acceptance as sources of change.

In creating its common reality, the Union has followed an unconventional way. If one builds a house it is normal to start with the structure, including the walls, to be topped by the roof. A constitution thus normally starts from the institutions, topped by a monopoly of violence (internally) and mutual security commitment (externally). The Union in this respect is like a well decorated and furnished home with walls incomplete, doors lacking and as yet without a roof. It is vulnerable to being called a fair weather system, or even an illusion. As in a charming little rhyme:

When I was sitting in my chair,
I saw the bottom wasn't there,
nor back, nor legs, but I just sat
ignoring little things like that.⁶

Turning this seeming madness into method, however, one may discover some of the system's ingenuity. We need to distinguish commitments between (Member) States from those involving persons. We shall start from the latter and call the method that of *inversion*.

Commitments involving persons

An ideal constitution in the sense of Hobbes and Rousseau involves a social contract. In this the mass of individuals, tearing themselves away from older and less performing allegiances, dissolve into a single action of submission to authority. This is in return for peace, protection and justice. If this is a figment not wholly without reality for the past of many countries, it is not the way Eu-

⁶ Hughes Mearns, 'The perfect reactionary', in A. Silcock (collection) *Verse and Worse*, London 1958, p. 217.

rope is going about it. Europe is not tearing, but rather *teasing* individuals from their traditional allegiances. Its rallying cry has been not protection but opportunity, not police but prosperity.

By itself this has been unconvincing to the majority of even those who profited from it, only securing allegiances of a practical and sectoral nature: of farmers, industrialists, commercial people, tourists, etc.

It is congruent with this that the Union never tried to impose itself too heavily on what not unduly is called its *clientèle*, neither imposing its own taxes nor other hard duties. It left this to the Member States and tried to please the Europeans by granting and enforcing rights mainly as against their own governments, much less as against each other. This was at the cost of popular involvement. No obligation and no taxation, so no representation either, to turn around the old adage. Which explains that this soft method has not been conducive to European citizenship in the political sense.

In place of this, legal commitments, involving human and social rights and even citizenship, are gradually being built on the basis of partial and sectoral rights. Different from the US constitutional history, where civil rights have repeatedly played the role of a crowbar between Washington and the states, in Europe these rights have been destined to play a modest role in future European evolution; they are, here, a solid part of the national or Member States *acquis*.

What these rights are doing, however, is to transcend the sectoral level, to become *general* or *public*. In this way they are a certain step towards the creation of a public (shared, common, general) European sphere or interest.

Commitments between the Member States

As concerning persons, between Member States the essential constitutional obligations seem to be lacking in the EU constitution. There is no monopoly of foreign relations, let alone a mutual security guarantee. Several Member States are even allowed to play their neutrality and stand aside in case others are aggressed! If there is any conclusive symbol of the unfinished nature of this constitution, this is it. The good thing is that it is also becoming symbolic in the opposite meaning of the word: to be of little relevance to reality.

Instead, again, substantive solidarity between the Member States is also building up from below. To understand this, one had best follow the growth of case law and practice concerning the internal market. Pushed by the market freedoms and the energies they release, the Court's case law has had to acknowledge countervailing elements of domestic public interest and their relevance at the Union level. From *Dassonville* (1974) to the consolidated Rule of Reason

jurisprudence, one witnesses an authentic growth of Union level public concerns countering market excesses (environment, consumers, intellectual property). It is remarkable that most of these formulae of Union public interest are fed into the Union level from domestic concerns, thus expressing the relevance of the adage *unity in diversity*, which may be read *unity (won) out of diversity*.

Equally, social concerns are validated against the market forces. Witness ECJ-judgments such as *Altmark*, in which local authorities were allowed to support their public transport provider in return for its keeping up a service much wider than profitable. In our lectures of European law, this case law is now read as an expression of '*the European way*'. While fully acknowledging the virtues of the market, it respects public concerns.

Speaking of '*the European way*', and to conclude this oversized introduction, a word or two must be spent on the relations between Europe and the US. There is no real constitution for a polity essentially dependent on and loyal to an outside power. It is symbolic (in the pregnant sense) that this Constitution was being debated at the time of deepening division between the Member States over their allegiance to the US over Iraq. Remarkably the Constitution bears no traces of these divisions. Instead, in February 2004, the three dominant Union members met in Berlin to iron away some of the differences and create practical military co-operation. And the office of European Council president, whose presentation and discussion in the Convention had intelligently been postponed by Giscard during *Iraq*, has now materialized. Its primary function is precisely to prevent the sort of open rifts between the members over security matters involving the US. It is, nevertheless, symbolic that the Spanish vote of 15 March, which unblocked the IGC Constitution talks, also dealt a rebuke to the US by forcing troop withdrawal from Iraq.

So what news is the Constitution between EU and US? It is an old and current mistake that Europe should only be able to define itself (or find an 'identity') in distinction from, let alone in opposition to, the US. In as far as it does pick up on a fundamental change in geopolitical reality from 1989, the present Constitution may mark the beginning of a certain redefinition of this crucial relationship. There is nothing wrong with this. Redefinition, even if painful, will lead to the US finding that, however critical and difficult, Europe will remain a more durable and kindred partner to the US than any of the coming and going alternatives: China, Russia, India or Japan. And Europe will find the same about the US. This is not mainly due to both being part of the great Western constitutional tradition. But it helps.

