

The European Constitution: Past and Future

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Does Europe need a Constitution? This is the question that has attracted the attention of observers of the European scene, especially lawyers and political scientists, ever since the debate over Giscard d'Estaing's draft Constitution revived public interest in the European project. The general consensus is that the European Union needs a Constitution because it does not have one in the true sense of the term. This paper will evaluate whether or not the *living Constitution* upon which the Union is based, the product of the interaction between the Treaties and the case-law, meets the functional and formal criteria that are understood to universally define Constitutions in a politico-democratic context.

A *functional definition* of the Constitution concentrates on the two purposes it must serve. First, a Constitution must legitimise political rule. This it does by establishing the legitimising principle for political rule and the basic legitimacy conditions of its exercise along democratic lines. That is, the Constitution places sovereignty in the trust of the people, the *pouvoir constituant*, and makes its exercise by the State, the *pouvoirs constitués*, admissible only on their behalf and for the purposes they set. Secondly, a Constitution must legalise political rule. This it does by institutionalising and regulating political rule. In other words, the Constitution gives effect to the rule of law: that political rule be through law, via its institutionalisation, and under law, via its regulation.

A *formal definition* of the Constitution concentrates on the character of the legal norms constituting it. A Constitution is a body of primary norms. The primary character of these norms is traced back to three factors. First, because primary norms are responsible for legitimising and legalising State power, they are, out of democratic necessity, formulated by the popular sovereign and not the State, which is responsible for enacting secondary norms only. Secondly, to prevent the State power from enacting norms in contradiction with the Constitution, primary norms take primacy over secondary norms. Thirdly, to bar the State power from amending the Constitution, it is established that primary norms be amended by the people only. They cannot be modified by the same flexible procedures that apply to secondary norms.

Turning to the European Union, it is argued as a matter of empirical observation, based on these functional and formal criteria, that the Union does not have a Constitution and that, as Giscard d'Estaing's Convention concluded last June, it needs one. Functionally, political rule at the Union level is legalised but is not legitimated: it is a case of *democratic deficit*. Formally, the Treaties and the case-law, the *living Constitution* upon which the Union is based and whose functional scope is confined to the legalisation of political rule by the Union, neither originates from the people nor can it be amended by them. Moreover, the quality of legal supremacy that has been judicially conferred on the Treaties contrasts with, and its alleged certainty potentially put into doubt by, the precariousness of judicial decisions which, in a system dismissive of the value of precedent, have no supremacy except between the parties and with respect to that particular case. It is for the above reasons that it is generally agreed that Europe needs a Constitution.

On the question of legitimacy, political rule at the Union level falls short of the standard normally set by Constitutions. Constitutions define legitimacy in democratic terms. Union governance, however, is best defined as a case of *democratic deficit*.

The public power exercised by the Union does not emanate from the people, but is mediated through the States. Because the Treaties only possess an external, as opposed to an internal, reference point, they cannot be the expression of a society's self-determination as to the form and objectives of its political unity. That it is the voice of the Member States that is being heard by the government of the Union as opposed to that of the people is nowhere else better illustrated than in Strasbourg, the seat of the European Parliament. The European Parliament replicates none of the three basic functions that Parliament, the embodiment of rule by the people, is designed to serve. First, the European Parliament does not keep the Union executive accountable. While the work of the formal executive organ, the Commission, is adequately scrutinised by the European Parliament, the work of the *de facto* executive, the governments of the 15 Member States, is not. Secondly, the European Parliament does not translate policy into legislation. The Council has the final power of decision for the adoption of legislative proposals made by the Commission. Thirdly, the European Parliament is not an effective public forum for debate. It is gripped by the problem of structural remoteness.

Other equally significant factors erode the democratic character, the legitimacy, of political rule by the Union. First, the degree of political significance and the level of control of each individual within the functional and political boundaries of the Union polity is minimal. This phenomenon is referred to as *inverted regionalism*, a consequence of increasing the membership of the polity and of adding a tier of government thereby alienating democratic government further from the people it claims to represent and work for. Secondly, domestic preferences are perverted in a substantive sense. Moreover, the principle of proportional representation means that the smaller States will be, qualitatively, better represented, in both Council and Parliament, than the larger ones. Thirdly, the democratic say of regions that have a certain degree of political autonomy within a broader state framework, as is the case of the Basques in Spain, goes practically unheard in the Union polity, where States are the principal actors. Lastly, the overall lack of transparency, as illustrated by the infamous closed-door meetings of the Council, that pervades all Union governance severely undermines the democratic process too.

For the reasons outlined, it thus becomes quite clear that insofar as Constitutions are concerned with the legitimisation of political rule by those subject to it, the European Union falls short and, thus, needs a Constitution. On the question of legalisation, however, political rule at the Union level adequately meets the standard normally set by Constitutions. Primary Union law together with the principles established by the European Court of Justice have had the effect of both institutionalising and regulating political rule by the Union. In other words, Treaties and case-law combine to engender a *living Constitution* which secures the rule of law throughout the Union: that political rule be through law and under law.

Primary Union law institutionalises political rule at the Union level and, in so doing, it ensures that political rule be through law. It does this in four ways: first, it constitutes the Union; secondly, it sets its objectives; thirdly, it establishes its institutions; and, fourthly, it assigns their powers and orders their procedures. Apart from institutionalising political rule, primary Union law also legalises it and thus partly

ensures that political rule by the Union be under law as well as through law. More particularly, primary Union law binds the exercise by the Union of public power and claims comprehensive validity.

First, primary Union law regulates political rule by binding the public power and sovereignty transferred to the Union by the Member States in those areas agreed by them. It establishes a basic order which regulates the Union's exercise of public power both in organisation and in content with the Union. Secondly, primary Union law regulates political rule by claiming comprehensive validity. It governs those who may act bindingly for the Union and what conditions have to be complied with thereby. There is no European public power outside primary Union law and no manifestation that cannot be traced back to it.

There are some aspects of the regulation of political rule which are, inevitably, not met in the Treaties, the Union's primary source of law. It has been the main endeavour of the European Court of Justice to remedy the inadequacies of the Treaties. Interpreting them in a typically teleological style, the European Court of Justice has sought to *constitutionalise* the Treaties: that is to fashion a framework for the regulation of political rule in Europe.

Observance of the law is a principle central to the effective regulation of political power which must not only be exercised through law but also under it. In the case of the Union, the problem lay not so much in having the Union itself comply with the laws that governed it but in having the Member States comply with Union law. Appreciating the magnitude of the problem, the European Court of Justice has sought to ensure that Union law be observed throughout the Union in three main ways.

One way has been to find Union provisions, relating to policy areas where the Union had exclusive competence, supreme over all conflicting national laws. The cases consistently demonstrate not only that Union law, be it either of a primary or a secondary character, takes primacy over all forms of *ordinary* national legislation but also that it is supreme over national constitutional law.

Another way in which the European Court of Justice has sought to ensure national compliance with Union law has been through the doctrine of direct effect. This doctrine empowers the Union citizen, subject to certain conditions, to plead any Union provision in the national courts to secure the rights conferred on him or her by it. While the doctrine extends to any form of Union law, it is particularly relevant to provisions lacking direct applicability, namely, directives. Directives were often not adequately implemented or not implemented at all, wholly challenging the rule of law at the Union level. Through direct effects, the European Court of Justice has greatly reduced the advantages to be gained by the Member States from non-compliance.

A final way in which observance of the law has been promoted by the Court is through the doctrine of judicial review of legislation. The European Community Treaty empowers the European Court of Justice to review the validity of acts (Art 230) and failures to act (Art 232) of certain Union institutions. The Treaty, however, does not enable the European Court of Justice to review national laws, apart from the obvious exception of review under Art 226, which empowers the Commission to bring actions

against the Member States on the grounds of Treaty infringement. The European Court of Justice, therefore, has interpreted Art 234, originally a tool whereby the uniform application of Union law throughout the Member States was to be realised, into a tool whereby the Court may monitor national laws for incompatibility with primary or secondary Union law. Strictly, Art 234 merely empowers the European Court of Justice to rule with binding character, on a reference from the national courts, on any question of interpretation and legality of Union law raised before them. Having done that, the Court will usually go further and indicate to what degree a *certain type* of national legislation can be considered as compatible with that measure.

In contrast to the initial reluctance of the Treaties, the European Court of Justice has, from the time of its establishment, been fully committed both to the protection of fundamental rights and to the generation of related principles of law. The two are necessary to define the limits to state coercion, ensure that political rule is under law, and, hence, that it be better regulated. First, the European Court of Justice endorses the catalogue of fundamental rights provided by the *European Convention on Human Rights* as part of the general principles of Union law. Secondly, the particular principles of equality and non-discrimination enshrined in the European Community Treaty have been held by the Court to apply to all areas of Union law. Thirdly, the European Court of Justice has recognised several rules of natural justice and procedural law: namely, the right to judicial review, the principle of confidentiality or legal privilege, and the principle of legal certainty. The principle of legal certainty has been held to include the sub-concepts of legitimate expectations and the protection of vested rights; proportionality; and, non-retroactivity.

It is, then, quite clear that insofar as Constitutions are concerned with the legalisation of political rule, the *living Constitution* of the Union, namely, the interaction between the Treaties and the case-law, leaves little to be desired. From that particular perspective, therefore, Europe does not need a Constitution for it has one already. That same *living Constitution* which, as a whole, has been established to adequately legalise political rule by the Union must be split into its two distinct components if it is to be accurately analysed from a formal perspective.

With respect to the first component of the Union's *living Constitution*, the Treaties, it is argued that the validity of their claim to represent norms of a primary nature is, at best, questionable. First, Treaties do not come from the people but from States which, as it has been established above, are responsible for enacting secondary norms only. Secondly, their character as supreme provisions of law within the Union has been judicially conferred. Unlike Constitutions, Treaties forming international entities do not usually enjoy higher-law status *vis-à-vis* the domestic laws of the contracting parties. This is apparent from the Treaties which neither make any express declaration nor provide a specific legal base for the primacy of Union law. Ultimately, it has been through the decisions of the European Court of Justice that a supremacy clause in the Union framework has been recognised to exist. The Court has repeatedly held that the Treaties, along with other forms of Union law, take priority over all conflicting, and hence invalid, provisions of national law. It may be argued that, in practice, the fact that the supremacy now commanded by the Treaties is judicial in origin is not relevant. But it is. While it is true that the principle of supremacy has with time

become a well established feature of the Union's legal order, it is also true that it stands on shaky ground. It is founded on a judicial decision which, in a system that does not recognise the binding character of precedent, is subject to potential revision or even to revocation. Thirdly, the Treaties cannot be amended by the people. They can be amended only by the Member States to which the Union owes its being.

With respect to the second component of the Union's *living Constitution*, the case-law, it is readily apparent that it meets none of the three formal characteristics of Constitutions or primary norms. First, judicial decisions do not spring from the people. Secondly, they lack primacy over conflicting provisions of law. Because the system of precedent is absent from the Union's legal order, decisions of the European Court of Justice have no binding force except between the parties and in respect of that particular case. Thirdly, judicially established principles cannot be amended by the people. Only the European Court of Justice is empowered to revise or repeal them in its subsequent judgements.

For the reasons outlined, it thus becomes quite clear that, insofar as Constitutions are constituted by primary norms, the *living Constitution* of the Union fails to meet the formal criteria that have been established to universally define Constitutions. From a formal perspective, therefore, Europe needs a Constitution for it does not have one.

Does Europe need a Constitution? It is generally agreed that it does. In a politico-democratic context, Constitutions are universally defined in both functional and formal terms. From a functional perspective, a Constitution is the answer to the democratic calls for political rule to be legitimised and legalised. From a formal perspective, a Constitution is a body of primary norms coming from the people, commanding supremacy over the legal order and capable of amendment by the people only. In the light of this definition, it is empirically observed by lawyers and political scientists alike that the European Union is not founded upon a Constitution and that, therefore, it needs one. Functionally, political rule by the Union is illegitimate. It is a case of *democratic deficit*. Formally, the *living Constitution* of the Union, the Treaties and the case-law whose interaction has the effect of adequately institutionalising and regulating political rule at the Union level, cannot be said to represent a body of primary norms. To conclude, the functional and formal insufficiencies of the *living Constitution* upon which the European Union is based at present inspire the call for the introduction of a Constitution in the true sense of the term.

On 18 July 2003, the Chairman of the Convention on the Future of Europe, Giscard d'Estaing, handed over the draft Treaty establishing a Constitution for Europe to the Italian Presidency of the European Council. Mr Giscard d'Estaing called on the Italian Presidency to conduct the Intergovernmental Conference at the highest political level in December 2003 to enable the Constitution to be signed in May 2004, prior to the European elections in June that year. The ten acceding countries will by then be members of the Union.

With the draft Constitution, Europe is taking a decisive step towards a political union: citizens and Member States will, as the preamble to the draft states, be 'united in their diversity'.

I believe that the draft Constitution will be a success: it strikes the necessary balance between people, between states new and old, between institutions, and between dreams and reality.

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