

Constitutional Values and the Construction of Europe as a Polity

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Constitutional question: what kind of Europe?

- A Europe of rights and values, freedom, solidarity and security, promoting the Union's values, introducing the Charter of Fundamental Rights into European primary law, providing for new solidarity mechanisms and ensuring better protection of European citizens.

Democratic Values and Rights

- Democratic values: values and objectives on which the Union is built are reinforced. These values aim to serve as a reference point for European citizens and to demonstrate what Europe has to offer its partners worldwide.
- Citizens' rights and Charter of Fundamental Rights: the Treaty of Lisbon preserves existing rights while introducing new ones. In particular, it guarantees the freedoms and principles set out in the Charter of Fundamental Rights and gives its provisions a binding legal force. It concerns civil, political, economic and social rights.

Freedom, Solidarity, Security

- Freedom of European citizens: the "four freedoms" and the political, economic and social freedom of European citizens.
- Solidarity between Member States: the Union and its Member States act jointly in a spirit of solidarity if a Member State is the subject of a terrorist attack or the victim of a natural or man-made disaster. Solidarity in the area of energy is also emphasised.
- Increased security for all: the Union will get an extended capacity to act on freedom, security and justice, which will bring direct benefits in terms of the Union's ability to fight crime and terrorism. New provisions on civil protection, humanitarian aid and public health.

The Constructivist Gambit

- Constitutional values and principles reflect the moral aspirations of a given political community - its identity and character.
- They help *mobilise* the community and have the potential to even change its character as a political association.
- Neil Walker: “the constructivist gambit, is to the effect that to the extent that the European *demos* remains underdeveloped... the Constitution-making act itself may act as a catalyst for its deepening and strengthening.”



A Constitutional Moment: A Second Chance?

- Neil McCormick: EU "a people to whom can reasonably be imputed some consciousness that they have a 'common weal', something which really is a common good."
- Weiler: "a commonwealth of "multiple *demos*"
- Habermas: Proceduralist ideals - "constitutional patriotism"

Constitutional values: abstract or concrete?

- Universal democratic values v. value neutrality (Weimar v. Grundgesetz).
- A large family of liberal-democratic constitutions.
- What is distinctive of the EU from this point of view: not the most democratic, not the most militantly democratic.
- Democracy is working at various levels. Mobilising who? National electorates? European demos?
- The mobilisational force of ambiguity: enchanting but weak.

Habermas' and Derrida's Proposed Values (May 2003)

- The threshold of tolerating coercion against persons is low.
- The desire for multilateral and legally regulated international order.
- EU: Secularised; suspicious of the dilution of the borderline between politics and religion.
- Comparatively substantial trust in the organisational efficiency and the governing capacity of the state; scepticism of the efficiency of the market.
- EU does not cherish excessively optimistic hopes about technological process.
- Preference for the guarantees of the welfare state, and the normative principle of solidarity.

Morally Binding v. Morally Optional Values

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| • The right to life | • Secularism |
| • The right to dignity | • Welfarism and distrust in the market |
| • Human rights generally | • Suspicion of technological progress |
| • "Low tolerance of coercion" | • Commitment to UN |
| • Peace | • Problem: why should these be constitutionalised at all? |
| • Problem: what is so distinctively European about these? | |

The Argument from Deliberation

- Benhabib: 1) participation in such deliberation is governed by the norms of equality and symmetry...; 2) all have the right to question the assigned topics of conversation; and 3) all have the right to initiate reflexive arguments about the very rules of the discourse procedure and the way in which they are applied or carried out
- A more rational Europe. But will people recognise it as “theirs”?
- Has such deliberation really happened, or we’d better avoid it?

Arguments from Sociology and Tradition: Europe is just like that

- Ivan Krastev: “...the West Europeans are rhetorically social-democrats when it comes to their societies, but are convinced neoliberals when it comes to Eastern Europe”;
- “Quasi-constitutionalisation” of neoliberalism in Eastern Europe through the Copenhagen criteria, Euro zone, etc;
- How deeply entrenched are these attitudes? Should we not be more experimental about them?

Dilemma based identities?

- Right to life v. the right to choice
- Unilateralism v. multilateralism
- Welfarism v. neoliberalism
- Individual rights v. collective (minority) rights
- Secularism v. accommodation of religion
- Militant democracy v. clear and present danger in the protection of freedom of speech
- “Money is speech” v. cartel parties?

Legally binding v. declarative values

- The Charter is becoming legally binding on EU bodies
- Declarative value of preambles: “Drawing inspiration from cultural, religious and humanist traditions...universal values of inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law”
- Social rights: conditional on further measures at EU and national levels - aspirations

Has the EU been hijacked by the left?

- Inclusion of social rights
- Solidarity
- Environmental concerns
- Supranational institution necessary to withstand the pressures of a globalised world (Habermas)
- Mobilisation of the left through the constitution (reform treaty): ultimately, it did not happen

Has the EU been hijacked by neoliberals

- Bolkestein and the Polish plumber
- The EU is the realm of “free marketeers”
- It is true that constitutions entrench the right to property and the freedom of enterprise, but they also provide opportunities for massive redistribution of wealth, essentially through taxation. As a rule, taxation is left to democratic politics.

Conclusions

- Universal moral values (democracy, human rights) obligatory but without identity-building and polity-building potential. Anyhow committed to them.
- Optional values - better not to be constitutionalised
- Political values (left and right) - unavoidable, their place is in the ordinary political process, not so much in the constitution
- A constructivist constitutional moment - rather not. But a gradualist constitutional practice possible.
- Shift of powers to courts: discretion and why institutions ultimately matter more.

