A Plea for a Compound *Res Publica Europaea*: Proposals for Increasing Constitutionalism Without Increasing Statism

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I. INTRODUCTION

Once upon a time, back in 1978, a team of Spanish constitutional architects were given the task of designing a constitutional edifice for Spain. With all the advances in academic constitutionalism available to them, they planned a complete, perfect, supreme, fissureless building: finished like a pyramid-shaped block of marble, with descending steps that made up a systematic, coherent order, with the Constitution at the head, followed by laws, regulations, administrative acts and judicial rulings.

Twenty-three years passed. This Constitution has been an unprecedented success in Spanish constitutional history. Nevertheless, the original rational project has been blemished. Those fissureless walls now have a large hole in them,[1] through which sovereignty floods out whilst an irrepressible mass of laws and rulings produced in Brussels and Luxembourg flows in. Moreover, some parts of the constitutional edifice, such as certain constitutional regulations on the economy, or on social and economic rights, seem to be abandoned or little used whilst other parts are overused (the Constitutional Court). Today a candid onlooker no longer perceives a perfect marble pyramid, rather a construction with ivy-covered walls (constitutional jurisprudence), in which some sections have been abandoned or are obsolete. Others are so developed that adjoining constitutional "edifices"—autonomic statutes, main organic laws—have had to be built. At the same time, the solitary, self-sufficient pyramid, finished with a proud supreme regulation admitting none above it, now finds itself among a group of fifteen national constitutional edifices, all under the span of the enormous constitutional dome of the European Treaties, or, for that matter, the future European Union (EU) Constitution or Fundamental Treaty.

The Spanish Constitution has indeed been a great success, but at the price of not always being faithful to its original design. The Spanish Constitution really enforceable today before a Court of law is rather a *package of norms or block of constitutionality* than a single document. It is made up (aside from the formal Constitution itself) of the European Treaties, the Spanish regional quasi-constitutions, the great constitutional and administrative laws, and above all, a number of Constitutional Court rulings.

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1. Article 93 of the Constitution, which seems to authorise unconditional transfers of competencies to the European Communities, reads: "By means of an organic law, authorisation may be given to make treaties attributing to an international organisation or institution the exercise of competencies derived from the Constitution."

The moral is clear: is it really worth drawing up ambitious constitutional designs that, over time, may come to be too rational, rigid, or detailed? If a constitution is successful, if it becomes a *living document*, its very life will dictate the responses to problems through successive processes of *trial and error*, often in a manner more empirical than logical. Experience shows that constitutions have always been starting points rather than arriving points.

Here, perhaps, it could be argued that the United States Constitution proves otherwise. I do not believe so. Firstly, because its constitutional edifice is also ivy-covered and altered to a certain extent; and, secondly, because the constitutional designers of 1787 were exceedingly modest, and drew up a realistic Constitution, which initially was little more than an international treaty, and did not even contain a Bill of Rights. Certainly, Americans quickly passed their Bill of Rights, and similarly we have produced the Charter of Rights of Nice. This is true, but one would venture to say that if the authors of the American Bill of Rights were informed that our Charter includes, amongst other things, the right of children to see their parents, they would find it hard to believe.

Upon considering all this, what I suggest here is a realistic, modest, and pragmatic constitutional design acceptable for all current Member States and for prospective members. But note that, judging by what has been obtained to this day, we should take into account that in several fields European integration is no longer a matter of minimums.

There are two well-known, well-differentiated constitutional traditions. Constitutions like the American one are somewhat "negative," in that they stress what governments cannot do, are neither codified nor statist, are incomplete (do not deal with every matter, nor is it their aim to do so) and open-ended.[2] Other constitutions, above all the continental, such as the Spanish or Portuguese ones, are "positive" in that they are codified, statist, complete (everything is regulated), and, as they are self-sufficient, are "closed."

Allow me, at this point, to give a personal anecdote: while I was teaching Spanish Constitutional Law in the William and Mary College (Williamsburg, Virginia) one of the students told me, "We do not read the Constitution before living our lives." By this he wished to highlight the contrast that he perceived between his constitutional architecture and ours. Some European Constitutions, such as the German and the Spanish, besides being exhaustive, comprise a positive set of values

2. The British Constitution is also *open-ended*, as is, amongst the modern ones, the Canadian, to which we will refer below.

intended to mould all walks of social life. One is tempted to deduce that good citizens should not start their day without asking what the Constitution decrees. Peter Häberle reminds us that, according to Article 139 of the old German Weimar Constitution, Sundays had to be devoted to rest and spiritual elevation,[3] thus giving instructions to those who wished to live their Sundays in line with the Constitution.

II. PRELIMINARY QUESTIONS

A. On the European People

With all due respect for the opinions of other authors, it is dubious that it is worth spending much time on this aspect of the discussion.[4] In practice, it seems to be more smoke than fire. There is no necessary relationship between "people" and "constitution." A political community based on a single, identifiable people (ethnic, historic, cultural, religious, or all of these) will need a constitution; another political community, which may be multi-ethnic and with little in common beyond the desire to live under a rule of law and without despotic powers, will also need one.

There is no European people, and it might well be unnecessary for us to aspire to become one; nor is it a condition *sine qua non* for a constitution. To become a people in the post-1789 sense, an overly uniform level of cultural and social homogenisation would have to be reached all over Europe. It is a statist reflex to think that just because there is a Union there has to be a people. There is no necessary reason why citizenship in the Union should presume, or produce, a people. For decades the Canadian passport said that a Canadian subject was a British subject, without this giving rise to the merging of the two peoples. The English and the Irish did not form one single people when they were part of the United Kingdom of Great Britain and Ireland. Not even amongst the most integrated members of the Commonwealth was there talk of a "Commonwealth people," rather of "English-speaking peoples." The formation of a single, homogeneous people for each political community

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3. PETER HÄBERLE, EL ESTADO CONSTITUCIONAL 285-86 (UNAM, México 2001). Häberle approves of constitutions dealing with those matters and he goes on at length studying public holidays in the constitutional State, *id.* at 280-85, considering Sundays to be both an "institutional guarantee" and a "mandate of protection" aimed at the State, *id.* at 285-86.

4. Dominik Hanf also affirms that there is a European constitution without it being too important that there should be a European people or State, whilst Stefan Griller dwells upon the State and its three classic elements, suggesting that in certain aspects, the European Community already satisfies the requirements of a State. *Cf.* Dominik Hanf, *State and Future of the European Constitution*, GERMAN L.J. 2, no. 15, 15-IX-(2001); Stefan Griller, The Constitutional Architecture (Oct. 15-16, 2001) (paper presented at a Congress in Brussels, Belgium).

was an aspect of the State-building process after the French Revolution. Indeed, no "Spanish people" existed before that time, and there are some today who maintain that the Spanish State comprises more than one people.

B. On the State

This does not seem to be a very fruitful discussion either, albeit because the term "state" has a number of meanings. When people from Northern and Central Europe talk about the state, they may not mean the same thing as Southern Europeans. If a Spaniard says that he does not wish Europe to become a State, it is because, with the image of Spain in mind, he supposes that it will imply a high concentration of power, a certain deal of control over civil society, a monopoly on violence and on the creation and application of law, control of certain communication media, and even a ministry for culture and sport. If he says that he does not want the EU to be "like Spain" (in that sense) it is because he understands that, at a continental level, this concentration of power would be even less recommendable. On the contrary, if a Spaniard says that he wants the EU to become like Spain, he is probably accepting all those concentrations of power on a European scale.

Among those who promote European integration there are some, above all, but not exclusively, in Southern Europe, who unconsciously apply their statist schemes to the construction of Europe, such as the late Spinelli. This explains the obsession, of some, that Europe should have an army. It makes one feel a little nervous to read that amongst the things called for in a Draft Report on the Future of the Union[5] there is a legal basis for Community action in sport, the establishment of a common youth policy and the setting up of a European educational sector. Behind the ideal of "communitarising" matters such as these, which, I believe, should be mostly in the hands of the regions (not even in the Member States), is not there a statist vision of the future EU? For Europe to reach integration and be influential on a world scale, do we really need an educational sector and youth and sport policies? Is not the United States the first world power, both in military and cultural terms, without even having a homogeneous penal code?

I do not consider it necessary to discuss the State any further, and here I differ from a number of respected colleagues. State and

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5. Commission for Constitutional Matters of the European Parliament, Draft Report on the Future of the Union, Sept. 20, 2001, authored by Jo Leinen & Íñigo Méndez de Vigo, ref. PR/446178.doc, PE 304.286.

constitution do not have too much to do with each other;[6] the former is Hobbesian and the latter is Lockean. Nobody doubts that totalitarian states (those most opposed to constitutionalism) are true states. I am afraid that a reflection on the EU that has the State and statist International Law as points of reference[7] will not be of much assistance, and the same could be said of State-based integration theories.[8] When dealing with European integration, the very fact of omitting the concept of the State unburdens us of a conceptual restraint. It is preferable to employ terms such as *res publica*, "political community" or "polity," which are simpler and universal, since any political community that wishes to avoid despotism and enjoy liberties will have to come to a constitutional agreement. (This leads us to the question, which we will not deal with now, of when a community deserves the label "political").

C. Is There Already a European Constitution?

If we observe the reality of things (elections, parliament, freedoms), more than their form (there is no document referred to as the "constitution") there can be little doubt that it already exists. Thus the question of whether we have to draw up a European Constitution entirely *ex novo* would seem to be wrongly posed. What we will probably do in 2004 is to take a further, and more formal, step in this process of constitutionalisation that started in the 1960s. In a material sense, a European Community Constitution has existed for decades, and can be identified and described. It is rather like tracing the map of a region in which we live, but which we are not totally familiar with, or drawing a map without being able to go into the smallest detail. It is to be found in those articles of the Treaties which are *ratione materiae* constitutional, as well as in certain rulings of the European Court of Justice (ECJ). It should be noted that, as the Constitution of the European Community is not like those of States, it is also to be found in certain articles of the constitutions of some Member States, in some rulings of their highest

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6. *Cf.*, amongst others, C.J. FRIEDRICH, GOBIERNO CONSTITUCIONAL Y DEMOCRACIA (Spanish) (Madrid 1975), which emphasises the notion that "sovereignty," at its core, contradicts constitutionalism.

7. One of the problems of traditional International Law is that, as far as it is concerned, Portugal and France are as much States as Canada or the United States, which, for the purposes of the present work, hides more things than its sheds light upon.

8. Robert Bideleux, *Civil Association: The EU as a Supranational Liberal Legal Order*, *in* THE EDINBURGH COMPANION TO CONTEMPORARY LIBERALISM (Evans ed., Edinburgh 2001). The author writes that until now "integration theories . . . have failed to shed much light on the nature of the nascent supranational polity . . . . Such theorising has lately been going round in circles and repeating itself." *Id.*

courts, and in common constitutional principles and traditions. All this constitutional material does not constitute a coherent system,[9] but that is not necessary. U.S. law is not a coherent system either.

III. MAIN ASPECTS OF THE EUROPEAN CONSTITUTIONAL ARCHITECTURE IN ITS CURRENT STATE

(1) At present, we have a fragmentary Constitution that is incomplete (it does not regulate all that a Constitution can be expected to regulate) and dispersed (we need to search for it in Treaties, rulings, and other sources). Unlike the Spanish Constitution, for example, it does not consist of one single norm, it is not codified, it is not *norma normarum*, it does not regulate the production of all subsequent norms enforceable in the Union territory, and it does not establish an objective order of values (even though it may reflect the values shared by the different European cultures).[10] It is supreme, directly enforceable, binding for the authorities of the Union and of the Member States, and creates rights and obligations—in certain cases, even for private individuals.

The possibility cannot be disregarded that this deformed architecture is adequate for a compound political community such as the EU because it is not too rationalist nor geometrical and because, after all, it works or has worked until now.

(2) Up until now, the productive sources of the European Constitution have been, in unequal proportions, jurisprudence from Luxembourg, the Treaties, the European Convention on Human Rights, the constitutions of some Member States (and their jurisprudence), and legal principles, not to mention everyday political practice. Agreements are important constitutional sources, not only because Treaties are compacts, but also because in Europe there is more negotiation and agreement, government by consent, at least the consent of the governments, than in many Member State democracies. The result of this is a mixed, compound constitution (not like that of Polybius) that is made up of a number of political communities (some of those also being compound), governed by various *sui generis* bodies, amongst which there is not always a hierarchical relation either. If we wish to preserve this dispersion of power we will have to tolerate a certain amount of disorder, and accept that Europe could, perhaps, never come to have a conventional, statist constitution.

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9. According to Ingolf Pernice, The European Constitution (May 2001) (paper given to 16th Sinclair-House Talks in Bad Homburg, May 2001), it does form a coherent system.

10. The new Charter of Rights does appear to establish or create an objective order of values.

Similarly, constituent power is shared among the European Council, the Council of Ministers (i.e., the Member States), the ECJ, the Commission, Parliament, and, to a certain, limited degree, the peoples of the Member States. It is true that the solution sought to overcome Denmark's rejection was not particularly brilliant; nevertheless, it is not less true that the Danish and Irish peoples forced European powers to negotiate.[11]

(3) The matters which lie inside the competence of the European Constitution are, up to now, far fewer than in an ordinary constitution, although their number has been growing, since the 1960s and 1970s, at a fairly fast rate. In recent years there have been rapid developments in justice, domestic affairs, foreign policy, security, and defence. The number of regulated matters is not essential for constitutionalism, as there is no particular merit in constitutionalising sport, for example. Experience shows that the best written constitutions, such as the American, are not those which regulate most matters.

A. On Separation of Powers

As for separation of powers, the EU falls short of what could be expected. This is not so strange; the same could be said of Spain, and the EU is an edifice made up of bricks from Spain and other countries.

For now, concentration of power into a small number of hands is more unlikely in the Union than in its Member States, especially in the unitary or nonfederal Member States. Until Maastricht, the predominant defect was not concentrating power into the hands of a few, but governing without the people. It is true that the Communities are not democratic, but power within them is notably divided, and no single body has the opportunity to monopolise it. Dispersion of power within them is significantly greater than in Member States, for the same reason that there is more negotiation and less coercion than in statist political cultures. In this sense, the Community is not very democratic, but relatively liberal.

From the formal point of view, the Treaties do not guarantee separation of powers, not even in theory. They contain no more than a few indirect and insufficient references to separate attribution of some

11. The Maastricht Treaty, adopted in Maastricht on February 7, 1992, was first rejected by the Danes in a referendum (June 1992), and then, after concessions to Denmark, was approved by the Danish electorate in a second referendum (1993). It finally became effective on November 1, 1993.

functions.[12] It should be remembered that most State constitutions have their powers formally separated.

B. Jurisprudence of Member State Higher Courts

The jurisprudence of the Higher Courts of some Member States, especially Germany, has contributed to frame the European Constitution. Moreover, if the Luxembourg Court was able to expand the scant constitutional scope of the old Common Market, it was due to the consent, expressed or tacit, willingly or reluctantly, of national courts. This "constituent" function of national jurisprudence in the framing of the EU Constitution must carry on.

C. On Constitutional Principles

European legal and constitutional principles are particularly interesting, as they show the interdependence between the members' constitutions and that of the EU. Indeed, the fact that the EU is not a state, and that it may never become one, has to do with its constitutional law being so reliant upon general principles. At present the Community has no problem in drawing principles from the legal and constitutional traditions of its Member States. Drawing upon European principles has often taken two distinct steps: first, a legal or constitutional principle of one of the States (for example, the German principle of proportionality) passes into the European Community by way of the jurisprudence of Luxembourg; second, that principle, now converted into a European one, passes on to the rest of the Member States, and can now be invoked in Portugal or Spain.

IV. DO WE NEED A WRITTEN CONSTITUTION LIKE THOSE OF MEMBER STATES?

There already exists a European Constitution, although it does not fit with the conventional model. It remains to be seen whether it has to fit that model, even if European integration progresses. In the twenty-first century European constitutionalism will have to check European powers. The time of those crises such as "the empty chair" have passed; gone are the days of indiscriminately increasing Communitary powers. We no longer have before us a new-born creature whose very survival is in danger: we have a number of reasonably solid institutions working in

12. *E.g.*, *id.* art. 213 (independence of the Commission); *id.* art. 247.4 (independence of the Court of Auditors).

an environment that, in many States, indicates little distrust of government, nor suspicion of all concentrated power, even when the latter is not based on popular choice. This can be seen in Spain, where resistance to things labeled "European" is scant while the European argument is deafening, as *The Economist* pointed out on occasion. Comparison with nineteenth century United States speaks for itself.

In certain aspects, competencies of the Union will have to increase,[13] and part of the other two pillars will have to be "communitarised," not all, however, unless we would like to see a carbon copy of a state on a greater scale.[14] But there is no doubt that the European Community, as it stands, is already a true political community in its own way, a political community of political communities. It is endowed with a considerable degree of power, democratic or not, which will have to be checked, just as we have to check Spanish or Portuguese powers, democratic or not. If these powers are on a continental scale, the greater will be mistrust and resistance to them. This mistrust of power is itself a constitutional attitude, and this is the reason why Europe needs a constitution. It is the same reason why Member States need one: to check power; to defend their citizens' rights (and those of states, stateless nations, and regions); to protect the weak, never to legitimise the strong; to avoid monopolies and concentrations of power, even if placed in the hands of St. Francis of Assisi; to ensure that the legal systems of the Member States, their values, and their civil societies are never left at the mercy of the value jurisprudence of an unfettered European supreme court or constitutional court. To put it otherwise, we need a European constitution to ensure that there is not a European State (in the strongest sense). We need it, not to guarantee that all enforceable laws may be deduced from a European *norma normarum*, but to guarantee state and regional bodies of law a minimum of pluralism and independence. We need it, not to generate overwhelming majorities, but rather to protect minorities.

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13. For example, faced with the new terrorism, which no state can fight alone. The Laeken Declaration makes this clear. *See* Laeken Declaration on the Future of the EU, Laeken (Belgium, Dec. 15, 2001).

14. After the Maastricht Treaty it became *de rigueur* to explain the EU as a classical Greek temple with three pillars: first, the European Community, the most Integrated or "communitarised" pillar; second, Common Foreign and Security Policy (art. 11 of the Treaty of European Union (TEU)); and third, Police and Judicial Cooperation in Criminal Matters (art. 29 of the TEU). Thus, "communitarising" the second and third pillars, or at least a part of them, means advancing the Integration process from an "International" towards a more "constitutional," "political," or "Internal" basis.

Instead of debating the existence of a European people and a European state, and whether it prevents the existence of a constitution or not; instead of debating whether it is necessary to draw up *ex novo* a European constitution; here we start from the premise that there is already a considerable "package" of constitutional materials or "block" of European constitutionality, as has been described previously,[15] and that not everything therein is bad. After remedying its ills, we may accept its pluralism in order to avoid "new totalities" and new "absolutisms," be they ethical values or legal provisions. A compound European constitution of this type, made up of the Treaties (clarified and consolidated into one single document), or a new Treaty, the constitutions of the Member States, and the principles, will prevent monopolies, as it will be in the hands of many actors, thus resolving the problem of how to increase constitutionalism without increasing centralism. If the European constitution takes this form, the ECJ will have the *leading*, but not the *only*, interpretative role, and it will not even have the *leading* role regarding the constitutions of Member States. The Member States, their peoples, parliaments, and higher jurisdictions, will conserve a certain degree of constituent and amending power, to the extent that they retain competence over certain elements of this pluralist European Constitution. Not all judiciaries or parliaments in the Member States will prove to be equally active, since this has not been the case up to now; but this approach would give them back some degree of constitutional leadership in the European scenario.

To the question with which this section began, should a codified, statist, sovereign, *norma normarum*, omni-comprehensive, self-sufficient, monistic European Constitution be drawn up, one that is a compendium of an objective set of values to be imposed from top to bottom, a pyramid constitution such as the Spanish Constitution of 1978 aimed to be, the reply would be "no." It remains to be seen whether even Member States need constitutions of that kind. Surpassing statism and entering into a multiconstitutional, multigovernmental and post-sovereignty landscape, we have just left this type of constitution behind. It is good, and in line with constitutionalism, that constituent power should not be in one single hand, and that the capacity to interpret the constitution should be shared, at least among the ECJ, the national higher courts, and the parliaments, including sub-state parliaments.

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15. Antonio-Carlos Pereira-Menaut, *La Constitución Europea* (Santiago de Compostela, 2000); *Convite ao estudo da Constituição da União Europeia*, 6 REVISTA JURÍDICA DA UNIVERSIDADE PORTUCALENSE 9-44 (2001).

There is no need for a European *magna carta* to regulate the entire social life of the peoples of the Member States, or to control all sources of legislation; even less so is there a need to establish a continental interpretative monopoly of such a constitution. Personally, I would not approve of this for national constitutions either. Eberhard Schmidt-Assman, in a distinguished article on the Rule of Law in the current German constitution, considers that one must not fall into a "new totality" or a new "normative absolutism of values" (*Wertabsolutismus normative*). However constitutional a political community may be, life should never be *Verfassungsvollzug* (application or execution of the constitution).[16] Are we not running this risk when we envision the Constitution as a set of values pervading the whole society? These are platitudes that for traditional Anglo-American constitutionalism have always been clear. It should be noted that the wording of the new Charter of Rights could give occasion for an activist judge to try to interpret our lives as "execution of the Charter," for example, in family law.

We need to progress towards a post-sovereign and pluralist European constitution. To increase the separation of powers, the rule of law, and the rights of the people, a constitutional codification is unnecessary. The EU constitutional phenomenon is also giving back some credit to "negative" constitutionalism, placing more emphasis on checking power, and protecting rights than on ordering the production of norms, "constituting" social life or arranging people's lives. Setting up an objective order of values in a Treaty, or Treaties, which already has primacy and direct effect, and entrusting it to a monopolist Court could give rise to a hitherto unseen accumulation of power. Values should carry on flowing from bottom to top, and their sources should continue to be the history, culture, religion, and morality of European civil societies. All constitutions reflect values, but (with the exception of specific political ones) they should not produce them, even less impose them, for this could result in interfering in personal lives and consciences of citizens. The very least that a value Constitution will produce will be a value jurisprudence.[17] Suffice it to apply one of the two golden rules of

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16. Eberhard Schmidt-Assman, *Der Rechtsstaat*, *in* J. ISENSEE & P. KIRCHHOF, HANDBUCH DER STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, t. I, at 987-1043 (Müller ed., Heidelberg 1987). He refers to Germany. For the whole of Europe it would be even less advisable.

17. An example of values that are planned from above, particularly in the legal system: the Spanish Constitutional Court ruled that the Constitution is a legal norm, but qualitatively different from all others, as it incorporates the essential system of values that has to pervade the entire legal order. So the Constitution becomes a norm both fundamental and founding of the

constitutionalism: that power, legitimacy, jurisdiction, and control should flow from bottom to top *always* (not only when passing the constitution), and that, legitimated or not, they should never concentrate. Thus, the European Constitution can also be conceived as a compact, and if central powers act beyond the terms of the agreement, it will become legitimate for Member States and citizens to disobey EU laws.

The fact that this opinion is not very favourable to codified, statist constitutionalism does not mean that all is well as it is. There certainly is a need to draw up a formal, written European Constitution, call it Fundamental Treaty, or whatever one wishes to call it. However, "written," in the sense of the U.S. Constitution, means not "codified" or "monistic" like the Spanish constitution, nor the "'positivisation' of an objective order of values" as in the German one. The Constituent Convention should bear in mind that all lasting constitutions undergo a *praeter legem* or *praeter constitutionem* development in the form of laws, judicial rulings, customs, and principles, that may end up disfiguring the original design, and there is nothing wrong or unconstitutional in this. It would be a bad sign if, for example, a fifty-year-old constitution still consisted only of the original document; it would mean that the building designed by the constitutional architects had not been greatly used afterwards.

V. CONCLUSION: SOME SUGGESTIONS FOR THE CONVENTION AND THE CONSTITUTIONAL FRAMERS OF 2004

Personally, I do not have too much faith in rationalist constitutional engineering. We do not have a *tabula rasa* before us but rather a reasonable amount of European constitutional experience, rulings, laws, institutions, elections, and parties behind us. So I will limit myself to formulating a few suggestions.

A. First: Put the Edifice of the Current European Constitution in Order

The first step should be to take the EU Constitution just as it is today, and order it to see how much of a Constitution already exists, and what it is like. Apart from it being sensible to be aware of the basis from which we start, a good number of people would be surprised to see just how many constitutional materials already exist, although spread out amongst Treaties, Luxembourg jurisprudence, some national constitu-

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entire legal system. The fact that the Constitution is a norm of such a nature gives rise to the need to interpret all Spanish Law as flowing from it. *See* decision 9/1981.

tions, etc. Before writing a new Treaty, or a fresh Constitution, the practical thing would be to clarify and summarise all these materials into one document. Far from being merely a literary exercise, the summarising and clarifying of the Treaties will force us to deal with serious, deep issues, particularly when we face the sort of rambling articles which can be reduced to one normal paragraph without great difficulty.

B. Second: On the Relationships Between National Constitutions and That of the EU

As Ingolf Pernice writes, each revision of the Treaties has indirectly resulted in an alteration of national constitutions,[18] whether formally recognised or not. The fact that some constitutions, such as the Spanish one, seem to ignore the alteration makes little difference. Pre-Maastricht expansions in Communitary competencies, carried out without formally revising the Treaties, also implied material changes in Member State constitutions. For Spain, merely joining the Community in 1986 resulted in substantial constitutional alterations, with little notice at that moment, it must be said. The same is going to happen to current candidates for entry into the EU. Suffice it to say that the bare principles of primacy and direct effect, which Spain never questioned, altered its Constitution, as did policies such as State aids.

Within this interdependence between State constitutions and that of the EU, it should be noted that national constitutions have not been enacted under the legitimacy provided by the European constitution. Indeed, to the contrary. Up until now, the European Constitution has not "constituted" Europe, or its Member States, or their constitutions, and neither should it aim to do so in the future.[19] As Rainer Arnold states, there is an "interdependence between the constitutions of the Member States, on one hand, and that of the European Communities, on the other"[20]. This interdependence has no precedent inside most States, but it is conducive to freedom and constitutional democracy. We should not

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18. Pernice, *supra* note 9.

19. In reality, most constitutions do not "constitute" much more than political institutions. "A political constitution must ordinarily content itself by and large with just providing a framework constituting the State and the government thereof, taking the social constitution as given." ROBERT E. GOODIN, *Designing Constitutions*, XLIV POLITICAL STUDIES 635-46 (1996). The Spanish Constitution of 1978 did not "constitute" the Spanish State, which had been founded centuries before, just as the United States Constitution did not constitute the States which already existed.

20. RAINER ARNOLD, LA UNIFICACIÓN ALEMANA ESTUDIOS SOBRE DERECHO ALEMÁN Y EUROPEO 115 (Civitas, Madrid 1993).

consider State constitutions as enemies of the European Constitution, but rather as its basis, since to a certain degree the constitutions of the Member States, and especially the German one, have "constituted" or contributed to constitute the EU one.[21]

Thus a number of articles of some national constitutions actually are a part of this European Constitution. The ECJ has deliberately gone to national constitutions in search of constitutional material. This is really not so strange. Even a statist constitution, such as the Spanish one, accepts that *estatutos de autonomía* make part of the Spanish "constitutionality block."[22] Needless to say, not all national constitutions have played such a role. In the relationship between State constitutions and that of the EU, three distinct attitudes can be made out. Some of them wrestle with Brussels, and when they accept integration, leave their mark on the European Constitution. Others take a more passive stance. When changes in Europe force them to do it, they reform their texts, but they do not seriously influence the constitutional configuration of the Community. Lastly, others neither influence the formation of the new European Constitution nor notice the important changes imposed by European integration in the wording of their articles. An example of the first type would be Germany, which energetically leaves its imprint on the constitutionalisation of Europe; examples of the second type are

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21. Two examples: in *Hauer v. Nordrhein-Pfalz* (1979) ECR 3727, the Court based its argument on the articles of the German Constitution and mentioned articles from the Italian and Irish ones. The reformed German Constitution (articles 23.1 and 88) talks of shaping the EU, almost as if it were "giving orders" to Europe:

> Art. 23.1:
> To realize a unified Europe, Germany participates in the development of the European Union which is bound to democratic, rule of law, social, and federal principles as well as the principle of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution. The federation can, for this purpose and with the consent of the Senate, delegate sovereign powers. Articles 79 II & III are applicable for the foundation of the European Union as well as for changes in its contractual bases and comparable regulations by which the content of the Constitution is changed or amended or by which such changes or amendments are authorized.
> Art. 88:
> The Federation establishes a note-issuing and currency bank as the Federal Bank. Its tasks and powers can, in the context of the European Union, be transferred to the European Central Bank which is independent and primarily bound by the purpose of securing stability of prices.

THE BASIC LAW (GRUNDGESETZ): THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (Axel Tschentscher trans., Jurisprudentia, Würzburg 2002) [hereinafter THE BASIC LAW].

22. See article 28.1. of the Organic Law of the Constitutional Court, which provides that when reviewing the constitutionality of statutes, the Estatutos de Autonomía (the quasi-constitutions of the regions) shall also be considered.

Portugal[23] and France,[24] which reform their texts, but do not mark out a path for the Union to follow, and the third is exemplified by Spain.[25]

To define the relations between the Constitution of the EU and those of the Member States, we can look at the Canadian Constitution for inspiration. Article 52.2 of the Constitution Act 1982, Schedule B, states:

> "The Constitution of Canada includes:
>
> (a) the Canada Act 1982, including this Act;
> (b) the Acts and orders referred to in the Schedule; and
> (c) any amendment to any Act or order referred to in paragraphs (a) or (b)."

If one verifies the content of that Schedule, one will find therein a list of thirty varied legal documents, from the Westminster Statute of 1931 to the British North America Act of 1867, including the constitutional documents of six provinces.

Similarly, an article could be added to the EU Treaty stating that the Constitution of the EU also consists of the constitutions of the Member States *as interpreted by their highest courts*. Apart from guaranteeing judicial pluralism and open-endedness, such an article would decrease the risks of interpretational monopoly, would force the highest constitutional interpreter of the Union to exchange ideas with national constitutional interpreters, and thus would guarantee a role to the national constitutions in the fabric of the European Constitution.

Whether the Canadian solution should be precisely imitated or not, the essential thing is to guarantee that Member States constitutions should carry on their existence and keep some degree of influence in Europe. We may propose two criteria: firstly, that the national constitutions should never become mere appendices that only survive due to the benevolence of the Luxembourg Court,[26] that at least they should be similar to the Union with Scotland Act of 1707 with respect to the British Constitution or the Constitution of Quebec with respect to the Canadian one; and, secondly, that national constitutions (and regional ones, where appropriate) should retain a certain amount of "hard cores" for

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23. *See* PORTUGUESE CONST. arts. 7.6, 15.4-5; 102.

24. *See* FRENCH CONST. arts. 88-1 to 88-4.

25. Formal changes in the Spanish Constitution out of European integration until now boil down to the words "y pasivo" (and passive), added to article 13.2, to recognise the right of nonnationals to vote and to be elected in municipal elections.

26. An extreme case: in 1999 the Mexican Supreme Court declared a number of articles from the Constitution of the State of Tamaulipas to be unconstitutional, thus treating it, to practical effects, as an ordinary law.

themselves, along the lines of the renowned article 79.3 of the German *Grundgesetz*.[27]

There is no need to go as far as forming a true, fully coherent legal and constitutional system or a fundamental legal order, as this would surely generate monism and an overly hierarchical relationship, exacerbated by its continental scale.

C. Third: On the Function of National Parliaments in European Architecture

I regret not to be very optimistic on this point.[28] In general terms, this is not the golden age of national parliaments, and some of them never had such an age. The majority of them do not carry out their legislative functions satisfactorily (it is the executive which overtly legislates), nor do they satisfactorily fulfil the functions control or representation. They are subject to the authority of political parties, and are far removed from the citizens, above all in those countries in which blocked lists are voted for. The idea that inspired Declaration 23[29] is a good one; nevertheless, it is debatable whether it is the national parliaments who should put it into practice (at least, Parliaments like the Spanish one and others comparable). Yet half a loaf is better than none, and one has to admit that it is not easy to find other national bodies suitable for this function.

We suggest giving a role in European constitutional architecture to the highest national courts. Recognising the constitutional value of State constitutions *as understood by their respective interpreters*, would force all interpreters of last resort, including Luxembourg, to deliberate. They could also be regarded as guardians of subsidiarity, though not the only ones.

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27. "Amendments of this Constitution affecting the division of the Federation into States, the participation on principle of the States in legislation, or the basic principles laid down in Articles 1 and 20 are inadmissible." THE BASIC LAW, *supra* note 21.

28. Neither is Hanf, *supra* note 4. He believes that the result would overload the institutional machinery, which will be as unnecessary as it is futile. He stresses that it is the political culture within Member States that is not working. Pernice, in his turn, seems to have more faith in the participation of national parliaments. Pernice, *supra* note 9.

29. Declaration 23. "A Declaration on the Future of the Union to be included in the final act of the Conference" was adopted by the European Council meeting in Nice in December 2001. It dealt with the role of national parliaments in paragraph 5, stating that EU Integration at its present stage should deal, in particular, with the function of national parliaments in European architecture.

D. Fourth: On Subsidiarity

The idea of setting up a "guardian of subsidiarity" is making inroads in European public opinion lately.[30] All is well and good, but what institution or which officials are to be entrusted with such task? It probably should be made up of institutions having three features: first, a territorial dimension, second, institutions that have something to lose from undue expansion of EU competencies, and, third, institutions lacking any other way to influence Brussels. National governments, for example, have the Councils of Ministers; and the European Parliament, in its turn, represents people, not territories, and has always been an integrationist force, so it would be naïve to entrust to it the protection of subsidiarity. With all this in mind, the body keeping watch over subsidiarity could be taken from the Committee of Regions, national courts, and upper houses of national parliaments. This guardian of subsidiarity should participate in the law making process whenever bills have territorial pertinence, similarly to the *Zustimmungsgesetze*,[31] and could lodge appeals with the Court.

E. Fifth: On Democracy

On the one hand, the habitual images of the EC, a den of furiously antidemocratic technocrats, and of the Member States, wonderful constitutional democracies, are false. Spain can be considered as a model for nonviolent transition, political stability, and economic adaptation, but surely no impartial observer will consider her the paradigm of constitutional democracy. On the other hand, given the size and complexity of the European Union, we cannot really hope for a great deal of true democracy within it. The Union is doomed to be more "liberal and minimal" (although admittedly not minimal in everything) than "statist and maximal." As Robert Bideleux[32] states, the EU is more liberal than democratic, which is not necessarily a bad thing. It cannot be denied that democracy in Europe has to increase. Nevertheless, taking into account its size, its population, the number of Member States and their diversity, it will not be easy to increase the democratic dimensions beyond a threshold that will be reached in a relatively short space of time. We would have to concentrate our efforts within Member States,

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30. *See*, among others, Pernice, *supra* note 9. The first written contribution to the Convention, made by the French Senate in March 2002, also says that subsidiarity will not be respected unless there does exist a specific body to control its application.

31. This term refers to "consent statutes," that is, those statutes which must be consented to by the Länder via the German Senate (Bundesrat).

32. Bideleux, *supra* note 9.

all of which have much to improve. If internally there existed true democracy, *ipso facto* democracy in the EU would increase. If within the states there were true territorial separation of powers, centralism would also decrease on a European scale. It would then be somewhat easier to increase the liberal dimension (rights and liberties, control of government, separation of powers, and submission to rule of law).

This can be seen more clearly if we think of the EU as being more like an empire[33] than a state,[34] since empires, as such, can never be democratised. The greatest EU democratic shortfall is the one to be found inside Member States, in none of which is there a quite satisfactory democracy.[35] We should strive for more liberalism in the EU (more accountability, control, and dispersion of power) and for more democracy within Member States, regions, and cities. It thus would be possible to make significant improvements with less effort and these improvements would have immediate effects on European democracy in general. By dint of repeating how antidemocratic the European Community is and how democratic the States are, we fail to pay due attention to how the constitutional culture of many a State is really faring. If the bricks are not fully democratic, small wonder that the whole building is not very strong in this regard. Experience shows that a state having a strong parliament, strong Courts, or strong territories, significantly enriches the constitutional life of the Community.

To put it in a nutshell, "democracy in the States and regions, liberalism, accountability, dispersion of powers, balance and control in Brussels."

F. Sixth: On the Functions of the Court of Justice

The ECJ has played an important role in European integration. However, in the words of Tushnet, we are now on the point of taking the Constitution out of the hands of the Courts.[36] To do so, the task of appraising the constitutionality of laws would have to be given to a new,

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33. A number of powers, territories and peoples; no true sovereignty; minimal centralisation, indirect government over kingdoms and territories more than over their inhabitants.

34. One power, one territory, one people, one sovereignty; maximum centralisation; direct government over citizens as there are not intermediate territories between central power and individuals.

35. Robert Bideleux insists on this. He quotes R. Dahl, "[D]isappointed democrats should look for solace in the deliberation and participation at regional and state levels." Bideleux, *supra* note 9 (quoting R. Dahl, *A Democratic Dilemma*, 109 POL. SCI. Q. 23-35 (1994)).

36. M. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE HANDS OF THE COURTS (Princeton 1999); *cf.* R. Stith, *The Rule of Law vs. the Rule of Judges: A Plea for Legal Pluralism*, 3 POLITICAL THOUGHT 31-55 (UKRAINIAN POL. SCI. J.) (Kiev 1997); L. FISHER & N. DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW (St. Paul, West 1996).

non-judicial body, that could be appointed by the Council, the Commission, and the Parliaments at the European, national and regional level.

As for solving disputes on competencies, ascertaining who is entitled to do what, this task could also be given to another nonjudicial body, selected in equal proportions by the Council, the Commission, the European Parliament, the national parliaments, and the Committee of the Regions.

Neither of these collegial bodies should have their offices in Brussels, and they would only be convened when necessary to solve conflicts.[37]

The rationale of these proposals is to remove political decisions from the judiciary, to avoid monopolies, and to give a say to those affected by EU laws or those that have a claim to exercise the competence under discussion.

G. Seventh: On Communitary Competencies

What are the purposes of the EU? More or less the following:
—to avoid war, ensure peace, freedom and safety,
—to improve standards of living,
—to carry out what the Member States cannot carry out (e.g. controlling terrorism, immigration),
—to take part as a governmental entity in important world issues,
—to carry out actions affecting more than one State, and
—to guarantee a free, single market, monetary union, and free movement without borders.

If this is basically correct, we already have a criterion for pronouncing on the desirable extent of integration, the powers that Brussels should have, and the type of constitution that we need. If its aims are of that type, the

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37. *Cf.* STITH & WEILER, *Dos Visiones Norteamericanas de la Jurisdicción de la UE* 63-64 (Santiago de Compostela 2000).

> I do not think there has been a more severe critic of the [European] Court of Justice in, for example, its dismal failure to be an effective federal policeman and protect what, in the United States, we would call State Rights. I was not surprised to see Justice Breyer of the U.S. Supreme Court relying on the ECJ in justifying the far reach of federal law in the United States. I have gone so far as suggesting the creation of a new Constitutional Tribunal, composed of sitting judges of the highest Courts in each of the Member States (sitting only ad-hoc so they do not become socialized into a Community ethos) which would decide Issues of division of competences between the EU and its Member States and to take that job away from the European Court of Justice!

In Germany, the offices of the high courts are dispersed in several cities.

EU will not need to regulate the slaughter of pigs in rural Galicia; Departments of Education, Culture and Sport will be unnecessary, and a constitutional document much more detailed, encompassing, or demanding than the U.S. model would not be required.

We must know what we want the EU to be in the future. But as it is very difficult to reach agreement on maximums, minimums will have to be aimed for, like the U.S. Framers did in 1787. Having an idea of the model desired gives us a norm for deciding the extent of the competencies that the EU must assume (or perhaps return to the Member States). With this in mind, the EU will have to assume new responsibilities in certain fields (e.g., terrorism, asylum, and immigration); nevertheless, it should not regulate aspects not essential for European integration, or areas that States can do for themselves. It should not regulate the essentials of education, culture, youth, or public order; it should not have a monopoly on legal violence; it should not have autonomous tax raising powers, nor should it control *all* external relations or *all* aspects of security.

Certainly we need clearer lists of competencies. But, besides the difficulty (and uselessness?) of writing down a formally perfect list, experience shows that no list has been able to prevent ever-growing central powers; federalism is very vulnerable to the lack of a federal culture or *Bundestreue*. As no list is an unassailable guarantee for States, we suggest adding to the lists certain general principles:

A. Many policies will be carried out by two, three, or four layers of government, from the EU to municipalities. European central powers should always avoid micro-management, even in matters in which decisions are exclusive to the EC (which should be very few in number). Micro-management should be reserved for those governments closest to the citizens, normally regional, except in small or homogenous States.

B. The EU should not intervene when States can do things by themselves, even though the latter may do them badly, as G.K. Chesterton says in his classic *Orthodoxy*;[38] Nor should the EU intervene in internal State matters (e.g., nonborder regions).

C. The EU should only act when it is necessary to reach a given aim, which leads us back to the need to define our future model (e.g., how many legs office chairs should have does not seem to be relevant to the international standing of the EU).

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38. *Ortodoxia* (Spanish version), *in* 1 OBRAS COMPLETAS at 541-42 (Barcelona 1967).

D. In the prospective Constitutional or Fundamental Treaty, subsidiarity must be separated from efficiency[39] and applied to all communitary competencies, including exclusive ones (except for article 6 of the TEC, which gives the European Central Bank exclusive right to authorize the issuance of banknotes). The Protocol on subsidiarity, paragraphs 2 and 3, should be reformed in order to limit the expansiveness of European powers, instead of limiting the scope of subsidiarity, as it now does.[40]

E. States will have to maintain some power over substantive decisions, as was pronounced in the German decision on Maastricht (although defining "substantive" may prove difficult).[41]

F. The principle of universal competence must be abolished. The States have already lost it, but this is no reason for it to be assumed by the EU. This would imply reforming article 6.4 of the Treaty of the European Union (TEU) and article 308 of the TEC, so that in the future

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39. Article 5 of the Treaty of the European Community (TEC) mixes up both in a way that benefits efficiency:

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

40. Article 6(2) provides:

> The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty, particularly as regards the maintaining in full of the *acquis communautaire* and the Institutional balance; it shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law, and it should take into account Article 6(4) of the Treaty on European Union, according to which 'the Union shall provide itself with the means necessary to attain its objectives and carry through its policies.'

Article 6(3) provides:

> The principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice. The criteria referred to in the second paragraph of Article 5 of the Treaty shall relate to areas for which the Community does not have exclusive competence. The principle of subsidiarity provides a guide as to how those powers are to be exercised at the Community level. Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.

41. As is well known, the *Maastricht* or *Brunner* decision of the German Constitutional Court (BVerfGE 89,155) emphatically defended the states.

the Community can not acquire new decisional powers without the consent of the Member States.[42]

H. Eighth: On the Charter of Rights

Having a Charter of Rights integrated into the Treaties, or, for that matter, a future Constitutional Treaty is excellent; but perhaps not this Charter, or not in its present form.[43] Apart from lacking legal enforceability at present, the Charter contains no right that can really be considered new. It includes some not very serious provisions,[44] and others which simply repeat articles from the Treaties or the European Charter of Human Rights (ECHR).[45] But the Charter is already being invoked (e.g., by the Spanish Constitutional Court) and possesses by itself a notably "constitutionalising" symbolism. If the Commission and the Parliament treat it as law, it will only grow in importance. Nevertheless, the effective protection of rights could not substantially increase. If Courts take up its enforcement, it could bring about a barrage of jurisprudence of values and could increase the powers of judges, even over private lives of families and individuals.

Besides not providing any more greater protection, it has the drawback of regulating everything. There is almost no sphere of social life (or even family or personal life) in which the Charter (and accordingly the Courts that would apply it) does not have something to say. Thus the Courts would have matters within their charge that not even Member States should deal with, but rather should be vested in the regions or civil societies. As the Charter is brimming with values and these, in the hands of an activist judiciary, could be a powerful standardising instrument, the day could come when we might find ourselves with a particular model for parent-children relationships, or a specific view of homosexuality, with the effect of homogenising cultures,

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42. Article 6.4 of the TEU provides: "The Union shall provide itself with the means necessary to attain its objectives and carry through its policies."

Article 308 of the TEC provides:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

43. Several writers do not deem the integration of the Charter into the Treaties to be urgent; for example, Hanf, *supra* note 4.

44. Freedom *to look for* employment (ECHR art. 15); right of minors to maintain direct contact with their parents (ECHR art. 25).

45. E.g., the prohibition of unjust discrimination, TEC art. 13.

and even penetrating into the personal domains of our lives, such as our cultural habits, and moral and religious beliefs.

Rights in the Charter are phrased in a rather "positive" fashion, more as embodiments of values than as guarantees. So, good European citizens should live their lives according to the Charter as interpreted by the Luxembourg Court. But, as Robert Bideleux writes, the role of the judiciary is "not to ascertain, reflect or defend the wishes of a *demos*"[46] nor, we could add, to create, interpret, or impose values upon the European peoples.

46. Bideleux, *supra* note 9.