

Constitutionalising Multilevel Democracy: Dynamics, Formalities and Ideals

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Introduction

Is this a good moment to study the Constitutionalisation of the European Union? The Laeken process which promised a genuine European constitutional moment is a shambles. Even if under the guidance of the German Presidency initiatives will be taken in the forthcoming months to get the process afloat again, much of the initial ambitions and enthusiasm is gone. Instead of a genuine constitutional moment, the question seems to have become a far more practical one: how do we get the necessary reforms through and how do we bring this difficult process to an end? Thus the ratification problems have led to the scaling down of ambitions. Notably, we find prominent politicians (Sarkozy in France; Bot in the Netherlands) advocating the slimming-down of the document to the most essential reforms and to delete the 'Constitution'-label.

A first objective of this Work Package is to examine the lessons to be learned from the problems encountered in the Laeken process. Central in this respect is the paradox that a project that was set up to bring Europe closer to its people stranded on the rejection by those very people. Ultimately this experience raises the question whether indeed the European Union allows for a constitutional moment in the sense of a democratic act of political self-proclamation or if political cooperation in Europe is instead bound to proceed in a pragmatic and piecemeal fashion beyond the purview of the people (cf. Moravcsik, 2006). If the latter is the case, then the follow-up question is whether European politics can indeed afford to keep its distance from the citizens and to what extent this necessarily limits the scope of cooperation: given the present extent of cooperation in Europe, is not the demand for democratic control bound to return sooner or later with a vengeance? If, on the contrary, one maintains that, given the scope of European cooperation, it sooner or later requires an act of democratic self-proclamation, the question becomes under what conditions such an act becomes feasible, conditions that apparently fell short for the Laeken process?

The second objective of this Work Package concerns the linking of the concept of European constitutionalisation with that of Europeanisation, i.e. the ways in which European cooperation affects the member states' domestic structures in turn (Börzel & Risse, 2000; Featherstone & Radaelli, 2003).¹ Such a linking suggests that the Constitutionalisation of the EU is not a process that can be limited to supranational arrangements, like a (Constitutional) European Treaty, but that it inherently also involves the domestic constitutional structures. To focus exclusively on a supranational constitutional settlement is to misunderstand the multilevel

¹ Besides the two objectives identified in the text, a third objective of this Work Package is to compare the EU Constitutionalisation process with that having taken place in Canada in the 1980s and 1990s.

nature of the European Union; the European level is inherently entangled with the domestic level. Generally, domestic constitutional arrangements have only accommodated slowly and in a distinctively piecemeal fashion to European cooperation. What is more, arrangements and adaptability at the domestic level are very uneven among member states. However, one may wonder whether a constitutional moment at the European level can be genuinely successful if it has to be built on such a poorly accommodated substructure.

Our understanding of the failure of the Laeken process and of the relations between European constitutionalisation and domestic constitutional structures is bound to benefit from an interdisciplinary approach (as proposed in WP2) in which lawyers and political scientists (and philosophers) cooperate closely. In the remainder of the paper I first want to pick up on some conceptual distinctions that may be helpful in analysing processes of constitutionalisation and that have initially been developed in legal philosophy. I then want to indicate how these distinctions can help us to understand the constitutional choices the EU faces and also how they can instruct us in analysing the various ways in which national constitutional orders accommodate to European integration.

Unpacking Constitutionalisation

A classical distinction among constitutionalists is the one between the formal and the material constitution. All organisations can be said to have a constitution in the material sense, which are basically the ‘rules of the game’ that determine what goals are to be pursued, which decisions can be taken, how these are to be taken, and who has what authority in preparing, making and administering the decisions thus taken. Thus in this sense, to use the words of former British former minister Jack Straw (2002) ‘even golfclubs have constitutions’, as does the Labour Party and, indeed, even the United Kingdom and the European Union. Also it is in this sense that we speak in the WP-proposal about the ‘constitutionalisation’ of the European Union as the process in which its basic rules of decision-making are drawn up and evolve.

However, while all organisations can be said to have a constitution in the material sense, they do not necessarily have a constitution in the formal sense. A constitution in the formal sense requires a single document in which the basic rules of the game are codified, that is itself protected from (simple amendment by) the basic decision-making process that it defines, and that indeed carries the title of ‘Constitution’.² In the formal sense then the United Kingdom has no constitution. Nor can the European Union be said to have a formal constitution. What is more, even in countries that have a formal constitution, one may well find that the material constitution diverges from it. The formal codification process does not always keep pace with the actual development of the rules of the game in practice. The chances of such a divergence increase the older the formal constitution and the more demanding the amendment process.

² These are just a selection of what I consider the most pertinent characteristics of a formal Constitution. Lawyers may argue about what features are exactly required. One may for instance add the requirements of the presence of a state and/or some sort of sovereignty.

Beyond the distinction between a material and a formal constitution Agustin Menéndez (2004), drawing on the work of Bruce Ackerman (2001), has proposed a third conception of a constitution, namely the constitution in a normative sense. This third conception speaks to the assumption underlying democratic politics that the rules of the game are to guarantee that any political decision taken can eventually be justified to the members of the polity. In other words, a normative constitution is the means by which a democratic people ascertain the legitimacy of political decision-making. This normative conception finds its classical expression in the grand historical moments in which the act of adopting a constitution represented an expression of the appropriation of political power by the people: the American and the French revolutions of the late 18th century, but also the acts of independence of the former colonies in the 20th century and the constitution-making in the former Communist bloc in the 1990s. A constitution in the normative sense thus involves a constitution that has been actively embraced by the people, and indeed of which the people can regard themselves as co-authors.

One can expect normative constitutional moments to coincide with moments of formal constitution-making or constitution-amendment. Notably, however, not all acts of formal constitution-making necessarily involve a normative constitutional moment, even if formal constitutional change may be regarded as an invitation for democratic engagement which is indeed often recognised in the procedures required for it (additional elections; referendums etc.). That need not be problematic when it involves for instance mere technical amendments or the codification of material practices that have already been widely accepted in practice. One may however wonder whether when it comes to the act of the formal, first-time establishment, such an act makes sense from a democratic point of view if it does not coincide with a normative moment in which the people are actively engaged so as to give their consent, at least implicitly.

From a normative point of view, and indeed also from the viewpoint of efficiency and sustainability, the thesis is commonly suggested that ideally the three conceptions of the constitution should coincide. The value of legal certainty (and transparency) would require the formal constitution to be kept up-to-date as to reflect the material constitution. In turn, the value of popular sovereignty would suggest that any formal constitutional change in the absence of public democratic engagement may be criticised from the normative democratic premise that political decision-making eventually has to appeal to the consent of the people involved. Furthermore, also from the perspective of efficient government one may question the sustainability of (formal and material) constitutional change in the absence of public, democratic consent.

The stalled Laeken process can be read as an attempt to bring the three constitutional conceptions together: a moment in which a formal EU Constitution would be declared that would fully reflect/codify the material practices as they operate within the EU and that by invoking the democratic approval of the European peoples would bring Europe “closer to its citizens” (European Council, 2000). However, with the Laeken process stalled the way it is, it appears as an attempt to formally establish a European Constitution that is stranded on its failure to gather the necessary normative momentum among the public.

In turn what we see is that, at the European level, there is a fair chance that the three processes will be disconnected from each other:

- *Material* constitutional change still proceeds, even if slowed down: new policies (energy); expansion of existing policies (JHA); new, informal arrangements outside the EU Treaty-framework (e.g. the Prüm- declaration).
- Pressure for *formal* constitutional change persists, but ambitions are limited: necessary arrangements for new member states; codifying emerging practices.
- *Normative* constitutional change is resisted by most; if any formal projects will go ahead, one widespread concern is to design it in such a way to bypass the people, in particular to avoid referenda.

The question then is whether such a disconnection can be justified and sustained in light of the nature of the EU-polity or whether this breaking of the conventional constitutional norm is bound to lead to normative and practical anomalies.

Divergence in the Europeanisation of national constitutions

However, as indicated in the introduction, there is more to European constitutionalisation than the initiatives taken at the European level. Indeed, one lesson that can be gleaned from the Laeken process is that EU constitutional changes are likely to fail if they are insufficiently accommodated at the domestic level. An EU Constitution cannot simply be superimposed on the existing structures at the domestic level.

Consider for instance the widespread concerns about the EU's competence creep by which it slowly but steadily expands the scope and intensity of EU competences without encountering any hard limits. Typically initiatives to address this concern have been suggested at the European level: fundamental legal principles like the principles of conferral, proportionality and, most notably subsidiarity have been proclaimed and re-asserted, competences have been categorised, and some have called for a European competence catalogue (cf. Herzog & Gerken, 2007). However, one may wonder whether the European level is the level most suited to protect against EU competence expansion. Key institutions like the Commission and the European Court of Justice have, given their supranational character, at least an ambiguous position in acting as neutral guardians of the balance of competences. Instead, it can be suggested that, if nation-states are concerned about EU competence creep, it is much more logical that they seek to address these concerns through their own constitutional arrangements. Indeed, among the member states one can find various arrangements that fulfil such a function, but in most cases these operate more by coincidence (often they originate from domestic constitutional arrangements to maintain checks and balances between different powers or levels of government) than by design with a view to European integration.

When theorising the relationship between EU constitutional law and domestic constitutional structures, we have to recognise that EU law, more particularly EU constitutional law, is not absolute and complete. Sovereignty in Europe has not, and will not, come to be embodied exclusively in Brussels. Instead it has come to be dispersed between the European

arrangements and the individual member states. This insight lies at the basis of the popular characterisation in public administration and political science of the European Union as a ‘system of Multilevel governance’, which is lacking in hierarchy and thus allows each level a certain autonomy (Marks & Hooghe, 2001; Jachtenfuchs & Kohler Koch, 2005).

Constitutional lawyers in turn have come to conceive of the EU in terms of ‘constitutional pluralism’ in which a supranational order has emerged alongside the existing national orders rather than superimposing itself upon them. Thus we find in Europe “a plurality of institutional normative orders”, where “each of which is acknowledged valid (...) while none asserts or acknowledges constitutional superiority over the other” (MacCormick, 1999: 104; cf. Weiler, 2001). Notably, instead of seeking to define the relations between the various constitutional orders in terms of hierarchy, the concept of ‘constitutional dialogue’ has been proposed (Walker, 2002; cf. Tully, 1995). The notions of constitutional dialogue and pluralism have in particular been inspired by the 1992 judgement of the German *Bundesverfassungsgericht* on the Treaty of Maastricht in which the court explicitly asserted its autonomy in guarding the rights and powers enshrined in the German Basic Law. Similar assertions have been made by the Italian Constitutional Court.

The distinction between material, formal and normative constitutionalisation is also a helpful starting-point in looking at how national constitutions adopt to the EU constitutional order. We can recognise the Maastricht-Urteil as an example of a highly publicised formal adjustment. Notably, such adjustments are comparatively rare. For sure, material adjustments of domestic constitution structures are ubiquitous across all EU member states. Formal adjustments are rarer and mostly concentrated at moments of formal Treaty change. Notably, mostly these are treated as mere technical affairs and passed unnoticeably to the public. The *Bundensverfassungsgericht* plays a remarkable role in being able to bring formal adjustments to the broader, national public.

Looking further, and moving beyond the merely legal domain, we can also recognise normative moments in the adjustment of domestic constitutional structures to EU constitutionalisation. These are most notable in accession negotiations that rarely have remained an elite issue but generally have involved the public at large, especially when the decision to join has been put before the public in a referendum. Note, however, that the six founding states have never had such an accession debate and thus, by implication, never a public, normative moment endorsing EU-membership.

Indeed, popular referendums have become the most notable means by which national constitutional adjustments have become the object of normative debates. In many EU states national politicians can use referenda opportunistically by invoking them as a means to increase their pressure on Brussels or when they feel weakly legitimated in going along with an EU decision. In contrast, in Ireland and Denmark the requirement of a referendum has come to be constitutionally enshrined as a way to normatively register the domestic adjustments to EU constitutionalisation. Notably, in both Denmark and Ireland the requirement of a referendum is premised on constitutional relevance: the delegation of competences, the affecting of national

sovereignty. Thus, referendums in many ways embody the most normative way of allowing for constitutional change.

To sum up then, relying on the distinction between material, formal and normative constitutionalisation, we can outline ‘a ladder of domestic responses to European constitutionalisation’, starting from material adjustments that are ubiquitous, via formal adjustments that may attain more or less public visibility, to normative adjustments that engage the (national) public at large and that so far have tended to be triggered by referendums. An all too teleological reading of this ladder, in which member states would somehow be bound to move up along it, should be resisted. Instead it seems more appropriate to observe that positions on the ladder are mostly determined by domestic conditions and that dynamics along the ladder have been low. Most of the member states have tended to concentrate on material and formal adjustments, keeping public visibility low. Overall, the Europeanisation of national constitutions has tended to be slow, reactive, *ad hoc* and uncoordinated.

However, there may be room for some dynamics. For one thing, countries that have joined the EU more recently and which have engaged in a normative accession debate can generally be expected to adopt a more assertive stance towards the domestication of EU constitutionalisation. The CEEC-states are particularly interesting cases in this respect. Furthermore, it remains to be seen what effect the failed ratification process of the EU Constitutional Treaty will have for the ways member states domesticate EU constitutional reforms. On the one hand, the public and political pressure to ratify Treaty changes by referendums has certainly increased. At the same time, there are obvious practical problems in the spread of ratification as it threatens to prohibit any formal Treaty change. Politicians may thus be led to consider alternative ways to domesticate EU constitutionalisation. One obvious option is to try to limit accommodation to material and, at most, formal adjustments. However, if that turns out to be difficult, alternative ways to accommodate EU constitutionalisation domestically may need to be found.

Conclusion

This paper has taken up the distinction between three conceptions of constitutionalisation to reflect upon two central objectives of this Work Package on the Constitutionalisation of the EU. With respect to the European level, it was argued that the Laeken process aspired to merge material, formal and normative constitution-making in a single constitutional moment. However, with this process having come to a standstill, the three strands now tend to be uncoupled again with material constitutionalisation proceeding informally, formal constitutionalisation being significantly scaled down, and normative constitutionalisation being ignored or even avoided.

Turning to the domestication of the process of EU Constitutionalisation, it was concluded that constitutional accommodation efforts have been distinctively reactive and *ad hoc*. Furthermore, a first taxonomy of accommodation strategies was proposed ranging from mere technocratic material accommodation via widely-publicised formal accommodation (exemplified

by the BVerf Maastricht-Urteil) to systematic normative-democratic accommodation (constitutionally inspired (instead of politically expedient) referendums in Ireland and Denmark).

	EU-level	Member states
	Different speeds	Divergent responses
Material	Proceeding, even if slowed down	Technocratic accommodation (F, NL)
Formal	To be limited to the necessary	Formal confrontations (D)
Normative	To be avoided	Popularising EU Constitutional change (DK, IRL)

References

- Ackerman, B. (1991), *We The People 1. Foundations*, Cambridge (Mass.): The Belknap Press of Harvard University Press.
- Börzel Tanja A. & Thomas Risse (2000), 'When Europe Hits Home: Europeanization and Domestic Change ', *European Integration online Papers (EIoP)*, 4(15).
<http://eiop.or.at/eiop/texte/2000-015a.htm>.
- European Council (2001) *The Future of the EU: Declaration of Laeken*. SN 273/01, 15 December 2001.
- Featherstone, K. and Radaelli, C.M. (eds.) (2003) *The Politics of Europeanization*, Oxford: Oxford University Press.
- Herzog, R. & L. Gerken (2007), 'Die Europäische Union gefährdet die parlamentarische Demokratie in Deutschland', *Welt am Sonntag*, 14 Januar: S.8 Heft 2.
- Jachtenfuchs, M. & B. Kohler-Koch (2004), 'Governance and Institutional Development'; Thomas Diez & Antje Wiener (eds.), *European Integration Theory*, Oxford: Oxford University Press, pp. 97-115.
- MacCormick, N. (1999), *Questioning Sovereignty*, Oxford: Oxford University Press.
- Marks, G. & L. Hooghe (2001), *Multi-level Governance and European Integration*, Boulder, Co: Rowman & Littlefield.
- Menéndez, Agustín José (2004), 'Three Conceptions of the European Constitution', in E.O. Eriksen, J.E. Fossum & A.J. Menéndez (eds.), *Developing a Constitution for Europe*, London: Routledge, 109-128.
- Moravcsik, A. (2006), 'What Can We Learn from the Collapse of the European Constitutional Project?', *Politische Vierteljahresschrift* 74(2): pp. 219-41.
- Straw, J. (2002), 'Reforming Europe: New Era, New Questions', Speech in The Hague, 21 February.
- Tully, James (1995), *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge: Cambridge University Press.
- Walker, N. (2002), 'The Idea of Constitutional Pluralism', in *Modern Law Review*, Vol. 65, No. 3 (May), pp. 317-359.

Weiler, J. (2001), 'Federalism without Constitutionalism: Europe's *Sonderweg*', in K. Nicolaidis & R. Howse (eds), *The Federal Vision*, Oxford: Oxford University Press.