

Can Europe have a Constitution?

Or: how can the obstacles to a European Constitution be overcome in the different legal traditions?

By Mads Andenas *.

I. Introduction

1. Can Europe have a constitution? This question is in one way a silly one. Obviously Europe (i.e. the European Communities, and subsequently the European Union) can have a constitution, for it has had a constitution ever since it was constituted. The Treaty of Rome has set up a court, a parliament, an executive, and laid out the basic relations among them. In its subsequent work the European Court established the supremacy of Community law over the domestic law of member states in all fields of Community competence.

Like the United States Supreme Court in an earlier era, the court then gradually refined its own competence and that of the other Community institutions in ways that reflected not only the wording of the Treaty of Rome but also the principles supposedly underlying it. Various further treaties (the Single European Act, the treaties of Maastricht and Amsterdam, and the pending Nice treaty) amended the constitution. In due course, special procedures for amendment were instituted, just like in most other jurisdictions with written constitutions.((1)) That the law of the European Communities made up a distinct legal system soon became a proposition beyond argument. For it had all the trappings of such a system. And among those trappings it could not but have a constitution, the most basic trapping of all.

Some have thought that this European legal system somehow poses a challenge to the received wisdoms of legal thought. In particular, it has been asked, where is Austin's illimitable and indivisible sovereign, that awesome figure who loomed so large in modern jurisprudence? The obvious answer is that he always loomed larger than he should have done, for a legal system needed no such awesome character in order to be a legal system. But it did not take the arrival of the new European legal system to teach us this. Kelsen and Hart had already argued as much from other examples, showing that legal systems with an ultimate separation of powers (i.e. with divisible and limitable sovereignty) were still unproblematically legal systems. To these less rigid and more nuanced explanations of the nature of a legal system the European legal system conformed straightforwardly. It has its rules of recognition, change and adjudication. It has its officials who are directed to apply sanctions, and it has a basic norm - the supremacy of the Treaty of Rome - that those officials presuppose when they occupy their official capacities. These add up, of course, to the constitutional essentials of any legal system. What more could one ask for, in asking whether Europe could have a constitution? It is no objection that the question of supremacy has been settled in the European Court and yet is still often quibbled about in domestic courts. This only shows that, as in the US, Canada, and Australia, there are multiple overlapping legal systems to contend with here, and that the relations among them are always questions on which each of the overlapping systems must take a view. That these views are sometimes at odds and hence mutually checking-and-balancing is the essence, surely, of constitutionalism.

2. Yet something is still missing, or so we are told by many commentators. This may be a constitution, the story goes, but it is still not a capital-C Constitution. So what is it that is supposed to be lacking? One thought, occasionally gestured towards, is that in order to amount to a Constitution, the law created by the European treaties would need to say relatively more about the relations between the institutions and individual citizens, and relatively less about the relations among the institutions themselves. There are several things to say about this line of thought. Firstly, it is just not true that the Treaty of Rome is silent on the question of individual rights against public authorities. The doctrines of direct effect and direct applicability, derived from the Treaty text⁽²⁾ and elaborated by the European Court, add up to an elaborate doctrine of constitutional judicial review at the suit of, inter alia, private citizens. And this is to say nothing of specific rights (such as the right to equal pay⁽³⁾) the creation of which was envisaged from the outset. It is true that much of this came into sharper focus only later, through the activism of the court and amending treaties. But this brings us to the second point. The United States constitution contains a Bill of Rights only in its amended form, and that in turn became the citizens' bill of rights that we now take so much for granted mainly thanks to periods of sustained activism by the US Supreme Court. The United Kingdom constitution similarly exhibits an early preoccupation with the rights of parliamentarians, judges etc. in their official capacities, which only very lately came to be extended to include wide-ranging protection of individual citizens. Yet both the UK and the US are constitutional democracies, or at least constitutional "somethings". Even if some enthusiasts for written constitutions would deny the British constitution the status of capital-C Constitutional, none would presumably deny this status to the US constitution, even for the period between the Philadelphia Convention of 1787 and the adoption of the first ten amendments (the core of the Bill of Rights) in 1791. And note that the European Union's constitution is in this respect much closer to the US model, with a written treaty at its inception and complex amendments and judicial elaborations afterwards gradually bringing us closer to the contemporary popular idea of a Constitution as a kind of citizens' charter of rights.

So much for the supposed absence of the individual citizen from the centre of the European constitutional stage. A quite contrasting line of thought alights on the relationship of the European Union to its member states as the oddity that denies it the status of capital-C Constitutional. For as long as it has the relationship that it has with its member states, the story goes, it is not itself a state. So its legal system, and therefore its constitution, is anomalous in not being coextensive with any kind of statehood.

Again this thought prompts various reactions. First, and simplest, one might concede that while a legal system comes into being with the creation of institutions that talk law, such as courts and legislatures, a state comes into being only with the creation of other institutions that deal in brute force, such as armies, or deal in money, such as state banks. This is, of course, a much simplified set of contrasts but it might nevertheless reveal something puzzling about the European Union, namely that one normally expects the legal system to grow out of other aspects of state power, whereas in the case of the European Union, things seem to have happened in reverse. The legal order has been a leading force in developing these other functions. What can we learn from this? It takes us to a second point, sometimes stressed, namely the thought that the European Union somehow defies the contractual paradigm for the emergence of a state regime. To this one might reply that it has a more contractual foundation than many state regimes, in that it was the creation of a treaty signed by all and only the sovereign states that go to make it up. Yet still there is a worry that somehow this is the wrong kind of contract, that in the creation of other regimes – authentic

state regimes – there was some other contract, a social contract among the people, which was missing from the inception of the European Union. This idea of a popular will lying at the inception of the nation state obviously has a mythological aspect.

One might respond to it by observing that it is time to abandon the myth and with it the romantic idea of the nation-state as the paradigm level of social organisation. In our times of mass mobility and migration, it may be said, the nation state can no longer be the paradigm of statehood. The European Union has challenged (or at any rate will challenge once equipped with its rapid reaction force) the last vestiges of the idea that a state is paradigmatically a nation state. It leaves us with a constitutional legal order at the level of a state, with the proviso that this state is not a nation state.

Even more strongly, one might say that the paradigm of the nation state was always mythological. The US only came to be thought of as a nation state after long years of fighting among its constituent nations, each pleading its own sovereign statehood. That is why it is one state (in international law and in its own federal law) that is also a group of fifty united states (with their own state laws). The idea of a state of states is not only not paradoxical; it is not even very newfangled.

3. These remarks may eradicate, so far as I can see and if I can put it this rashly, the main conceptual objections to the idea of a European Constitution. At the same time they may heighten certain pragmatic or moral anxieties which turn out to dominate the thinking of many contributors to the discussion. The myth of the popular contract may be a myth. The question is if it still is a necessary myth. Can we citizens of a new Europe thrive without the belief that we were brought together first, and then developed our legal system later? Will it be a Europe of moral substance, a Europe of stability, and a Europe worth inhabiting? The political as well as the scholarly debate shows that these are the issues still dogging the very idea of a European Union. Is there a European people, a *volk*? Is there a European society, a European culture? The questions have an inevitably romantic flavour about them, and yet they turn out to be the questions on the mind of even the most cerebral and even the most pragmatic. Those who have spent time in the United States may, after a while, ask themselves the same question there. What does a Californian share with an inhabitant of New Hampshire? Is it merely a matter of language? If so what about Canada, or indeed the United Kingdom at its inception, or (to take another challenge to the paradigm of culturally homogeneous nation-statehood) Switzerland? And yet one must concede that the idea of being an American comes more naturally to Californians and New Hampshire-inhabitants alike than the idea of being a European comes to the British in common with the Greeks. Is it just a matter of time? The United States is still young, but the European Union is younger. On the other hand, the states of the United States are also young, whereas those of Europe are several of them ancient. Does it make a difference? For many contributors to the discussion it makes a deep difference. In this sense one can certainly ask whether Europe can have a Constitution. The answer requires a further analysis of the obstacles. It is necessary to revisit the concepts of statehood and constitution. The application of these concepts both at a national and at a European level has to be analysed further.

4. A discourse about a European constitution at a European level is in particular need of a broader and also comparative analysis. Those who participate do so under strong influence of the concepts of statehood and constitution of their national tradition. This applies also to those constitutionalists whose primary area of research is at the European level. They may

regard the primary basis for the constitutional law as residing in either the European Union or the European Convention of Human Rights. The purpose of this paper is to contribute to a discussion about which direction this comparative analysis should take.

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1) Maastricht articles N and O.

2) Art 189, now Art 249 EC.

3) Art 119, now Art 141 EC.