CASE-LOAD OF THE SPANISH CONSTITUTIONAL COURT AND CONCENTRATION ON THE ESSENTIALS

by

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A. Constitutional essentials without a European Constitutional Theory?

Underlying the question of "constitutional essentials", is a strategic decision, namely, how to continue with the EU constitutional process after the rejection by the French and the Dutch referenda of the Constitutional Treaty. If it has to be assumed that the Constitutional Treaty in its current form is not going to survive, and if one supports the idea that a formal text of constitutional quality is needed - because otherwise the entire European integration project could stall or even go into reverse - then one is obliged to go back to the constitutional essentials, to go back to basics.

It is understood that the "concentration on the essentials", under consideration of the Spanish constitutional case-load, the assignment that I took from *Ingolf Pernice*, is based on a number of assumptions that we may or may not share. Firstly, the assumption that a formal Constitution for the EU is required and an amended or a new version of the current Constitutional Treaty, limited to the basic elements of its First and Fourth current Parts, should continue to be viewed as the main solution to the legitimacy conflicts of the Union – which is something that the negative outcomes in France and the Netherlands would not necessarily support. Secondly, the assumption that it is possible to categorize the basic tenets of a generic Constitution, taking into account the very broad and different functions, historic contexts and variable conditions of space and time in which modern Constitutions tend to operate. Thirdly, the assumption that these basic criteria of a Constitution can then be applied to such a "rara avis" as the European Constitution in the making, i.e. a multilevel and reciprocal process of integration which takes place among the constitutionalized Member States and the complementary constitutional body of the European treaties. Fourthly, and finally, the assumption that the Spanish experience, based on its Constitution of 1978, in handling the difficulties associated with a rather open and complex constitutional structure, could be of some inspiration in the ongoing creation of a common European public space.

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Indeed, as *Peter Häberle* has pointed out, only a comprehensive view that takes all state functions into consideration can tell us something about the role of constitutional jurisdiction in a given country. But the same applies to the constitutional essentials, certainly in a national context, and even more if we attempt the rather Herculean task of defining the essentials of the European Constitution without previously having a clear determination of which are the ultimate objectives of the integration process itself. Can we neatly separate the typical competencies – the "essentials"- of national and supranational Constitutional courts from the constitutional essentials that the Constitution is called to perform? It may at first sight be possible to describe the basic functions of Constitutional courts, i.e. as guaranteeing the horizontal and vertical separation of powers by protecting fundamental and minority rights, protecting the individual against abuse of state power (and abuse of society power), guaranteeing the principle of pluralism, solving conflicts of competencies among the different constituents of the state, and the like. Obviously things become fuzzier if we also include such objectives as integration with regard to the *national* constitutional state and its citizens and groups, or if we consider that Constitutional courts should be in effect a "guarantee of a free political process" or should promote the basic consensus of a political community, the "public interest" or the general rules of public international law.

Something similar occurs when one attempts to analyze the typical functions of Constitutional courts by comparing their powers under positive law. By doing so, we may well identify such common competencies as the concrete norm review, the less frequent abstract or preventive judicial review, the constitutional complaint of the individual and the conflict of competencies between state organs. It would be more difficult to find common grounds for impeachment proceedings, the scrutiny of elections or for a generalization of the dissenting vote. Spanish constitutional law has integrated in its system the abstract and concrete norm reviews, the individual complaints, the conflict of competencies between state bodies (including not only conflicts among state bodies, and state bodies and Autonomous Communities, but also conflicts among Autonomous Communities), as well as the control of constitutionality of International Treaties. But here again, the comparison of similar functions cannot easily be carried out without a common constitutional theory. It may be debatable whether the *authentic* interpretation of the Constitution lies with the Constitutional courts or not, but less arguable is the fact that they continue to be identified as the ultimate day-to-day guardians of the Constitution. The question here is indeed whether constitutional essentials for the European courts and for the European Constitution can be determined without a complete theory of the European Constitution.

All what we can aspire to however is a fragmented Theory of European Constitution, "elements", or "traces" in Walter Benjamin's sense, of a post-modern logos, of which the European Constitution is a projection. But is this not the real nature of the European integration process? Is it not inherent in the very notion of integration that

the process has to remain open and therefore a constitutional document will always be something temporary, that the European Constitution will remain an unpublished Constitution or "Constitución inédita", as Pedro Cruz Villalón has phrased this strange phenomenon, "eine verborgene Verfassung", *Constitutio abscondita*? We cannot have a full constitutional theory of the European public space for the same reasons as Member States' Constitutions are only partial Constitutions, *Teilverfassungen;* because the emerging European public space is in itself an open process, a consequence of its extreme pluralism. As the debates on the Constitutional Treaty in France and the Netherlands and in other countries, particularly Great Britain, have demonstrated, there is a extreme diversity of public opinion throughout Europe. There exists a clear asymmetry between the European constitutional process and any European constitutional moment. The absent Constitution will have to be wrought through the daily practices of multilevel constitutionalism.

Here is where the experience with an open-ended Constitution, such as the Spanish Constitution of 1978, can contribute with some useful examples. The Spanish experience has been fraught with tensions and potential conflicts, but some innovative ideas have arisen, such as the concept of "constitutional compound" or "constitutional block" ("bloque constitucional") for the composite make up of the Spanish Constitution and the Regional Statutes (Estatutos de Autonomía) as well as other legislation of a constitutional nature. In a sense, the weak constitutionalism of the Autonomous Communities could be used as a paradigm for the relationship between the European Constitution and the national Constitutions. In both cases the quality of the weak constitutionalisation of the European Constitution or, respectively, of the Autonomous Communities, is dependant on the strong constitutionalisation of the national Constitutions and on their mutual interaction at many levels.

At least two sources of conflict should be mentioned with regard to "hard" Spanish case law at this stage. One relates to the open struggle for judicial competencies between the Supreme Court and the Constitutional Court, which from the Spanish perspective makes it more difficult to obtain a closed definition of constitutional essentials. The other refers to the stubbornness with which the Spanish Constitutional Court refuses to include European constitutionalism as part of the "constitutional block"; and it has even in the past classified the European Union's primary and secondary norms as "infra-constitutional", or more recently, as "not relevant under a (Spanish) constitutional perspective".

B. The constitutional essentials of the European Constitution.

There is no doubt that the constitutional essentials applied to the European Constitution imply substantial conceptual problems.

To take an example, in a paper of some time ago, the organization of the Young European Federalists identified five essentials for a European Constitution. It was assumed that by promoting these essentials, Europe "could be made understood to its citizens, it could take up a stronger role in solving global problems, while at the same time respecting the diversity of the cultures and traditions in Europe". These constitutional essentials would include the values and key principles of the Union; European democracy, with an explanation on how the institutions of the EU work; an understandable division of competences; and, finally, simple procedures, "so the citizens are able to follow how legislation is decided". The European Constitution should be easily comprehensible, but still precise, and contain a preamble, the Charter of Fundamental Rights, basic provisions (such as principles and objectives of the Union), a distribution of competencies, legal procedures (how the legislation is decided and what kind of legal instruments exists), and the institutional framework. All additional provisions about policies of the Union, procedures, and additional regulations should be stated by simple law. The values identified as common values of the European public space are democracy, peace, solidarity, freedom, equality, the dignity of mankind, respect of human rights and respect for the rule of law, social justice, and sustainability; a somewhat broader catalogue than Article I-2 of the Constitutional Treaty, with only implicit references to the rights of minorities, non-discrimination, tolerance and pluralism, which arguably may have been overemphasized in the final text of that Treaty. As more than two years of intense work carried out by the Convention and the IGC illustrate, achieving consensus even on apparently basic matters is indeed a far more complex exercise than functional comparatism may be able to demonstrate. There are certainly a significant number of reasons for this, and I will just indicate two of them.

First, as if in a convex glass, the seeming extravagance of European constitutionalism is evident in its treatment of such constructs of traditional constitutional theory as pouvoir constituant, the power of amendment of the Constitution or the constitutional subject (*demos*) as if they were unavoidably "hard" cases. However functional a comparison might be, many of the more significant notions of democratic constitutional theory translate with difficulty into the multilayered practice of European constitutionalism. To show at least some of the ambiguities of classical constitutional concepts, we just need to look a bit more closely at the referendum. Can we sustain that it has proven to be a suitable instrument to democratically express public opinion on European matters of substance? Was it really Europe and the Constitutional Treaty which were at the grounds of the "no" votes of a majority of French and Dutch citizens? But on the other hand, should the Heads of State and Heads of Government decide at some point that referenda on a new or an amended Constitutional Treaty ought to be preferably avoided, if constitutionally possible, would this decision not mean a rather serious blow to our understanding of democratic participation?

Secondly, but most importantly, as in many other occasions when dealing with the European Constitution, function converts very easily into form and form into substance. Even if we could limit our consideration of the constitutional essentials to an exercise in comparative constitutional law, requiring an attempt to distillate common functions, we could not prevent the emergence of the substantial issue of counter-limits and the primacy question.

With all these caveats in mind, let me try then to elaborate a set of (non-functional) criteria for the constitutional essentials of a European Constitution.

First, there would be a cluster of "traditional" essentials, such as protection of rights, distribution of competencies, separation of powers (vertical and horizontal), democracy and citizenship. Take the example of the Spanish Constitutional Court case-load. Albeit without any explicit reference to the idea of constitutional essentials, the Court has since its inception deemed a consistent set of concepts to be the basic tenets of the Spanish Constitution, namely: the Social and Democratic State; the rule of law and the principles of normative hierarchy and supremacy of the Constitution; the protection of human rights; the protection of freedom, justice, equality and political, linguistic and cultural pluralism; the principle of proportionality (as an effect of the constitutional value of "justice"); the principle of "rationalized" parliamentary monarchy; the recognition of political and administrative autonomy for the regions;. Obviously, any of these would have to be redefined in the European constitutional context, which has developed its own concept of horizontal separation of powers based on institutional balance, but also its own interpretation of dual citizenship and of deliberative and participatory democracy, not to mention - against all formal expressions to the contrary – the still unresolved question of the relationship between the national protection of fundamental rights and the Union's own catalogue of basic rights. The Constitutional Treaty was set out to find a solution to this problem, but it is likely that this is one of the minefields which would have started to explode very soon after the Treaty had come into force.

In defining the second group of essentials in the European context we should take into consideration the unique elements of the European Constitution. Of relevance here are enquiries into the geographic limits of Europe, the different options of configuration of European geometry (the various scenarios based on a hard core, concentric circles, enforced cooperation, multi-speed integration), the discussion about how much of the internal market rules and norms relating to the socio-economic model should be constitutionalized in a material and/or formal way, and the definition of European identity. Can we assume that the European constitutional essentials are to be abstracted from the specificities of the political construction of the Continent? Is there any evidence that would justify relying on any kind of *habermasian* constitutional patriotism in order to achieve a solid legitimacy for the constitutional essentials? Again, the outcome of the ratification process of the Constitutional Treaty seems to counsel a more cautious consideration of such ambivalent notions as

historical and cultural identity, social cohesion, political culture, and so on. It is expected however that they will play a bigger role in future discussions on a European Constitution.

The third category of criteria would refer to the singularity - the autonomy - of the national Constitutions and the European Constitution, as well as to the – in the words of Pedro Cruz Villalón - *reciprocal metaconstitutionality* of both. Here all the problems linked with the definition given to the "national identity" of Member States in Art. I-5.1 of the Constitutional Treaty and prior to that in Art. 6.3. of the Maastricht Treaty come to the fore. These counter-limits can also be regarded as constitutional essentials of the national Constitutions and therefore also as constitutional essentials of the European Constitution. And even if they have been in the case of the Constitutional Treaty too narrowly drafted, they provide a good example of reciprocal metaconstitutionality: the counter-limits have been constitutionalized at the European level, while at the same time they are enshrined in the national Constitutions and they are dependant on national (and supranational) courts for their interpretation. An intrinsic part of the common European constitutional identity is the relative resistance of the national Constitutions to adjusting to the dynamics of the European Constitution. The integrative role of the European Constitution – and by extension, the harmonizing function of the common constitutional essentials - do however not allow the pursuit of a common idea of "national identity".

C. Primacy and the paradoxical case-load of the Spanish Constitutional Court

Similar questions arise in the context of the primacy problem. The absence of a hierarchical principle in favour of a constructive dialogue and interaction between national Constitutional Courts and the European Courts does not mean that the question of 'who decides who decides' has been superseded. Does this imply that the European Constitution has to be seen as a consequence of Kelsen plus Schmitt and, as Joseph Weiler already proposed years ago, a new European Constitutional Court should be established in order to resolve expected conflicts between national and Union courts?

Take again here the paradoxes of the Spanish constitutional jurisprudence on European law. Since its first decisions (from the *General Electorate System* case to *Apesco* and then to *Fogasa*, and to *Ahmed* and *Martínez*), the Constitutional Court has established the axiomatic premise that the interpretation and application of Community law is a matter of ordinary legality, which is left to the ordinary courts. The fact however that – as research has shown - most Constitutional courts simply disregard Community law in their day-to-day operations has very specific repercussions for ordinary people. In *Martínez*, a Spanish citizen who had worked both in Spain and Germany, applied to the Spanish administrative authorities for an

invalidity allowance. Since this was denied, he then went to the Spanish courts and filed the same petition. All the instances of the ordinary courts rejected Martínez´s claim. He then returned to the Constitutional Court. Martínez´s main argument was that the ordinary courts had not taken into account a number of documents provided as evidence of his disability. Before the Constitutional Court he claimed the application of EC Regulation 1408/71, which imposed upon the judicial organs of Member States the obligation not only to accept documents drafted in one of the languages of the Member States that have been submitted as evidence, but also the obligation to order their translation *sua sponte* if necessary. However, the Constitutional Court chose to apply the Spanish Procedural Code, according to which the onus of translating documents submitted as evidence in proceedings falls on the parties, not the courts.

The consequences of this approach are that, ultimately, the Spanish Constitutional Court applies national law, even when it contradicts Community norms vested with both supremacy and direct effect, such as regulations. And, as one of the Members of the Court argued in his dissenting vote, looking into the substance of the case, Martínez did indeed have the right to receive benefits from the Spanish administrative authorities because of his disability. That this approach of dispensing of the application of Community law by trying to disregard it as ordinary legality or as "infra-constitutional" law very soon runs into significant self-imposed contradictions is demonstrated by the Opinion given by the Court in December 2004 when called by the Government to examine whether the ratification of the Constitutional Treaty would require the prior amendment of the Spanish Constitution. Here the Court fell into a theoretical confusion between "primacy" and "supremacy" (*Vorrang* versus *Vorherrschaft*) and upheld the dubious argument that the Community and the national constitutional legal orders continue to be independent and each ruled by the "primacy" of its own system of norms, while "supremacy" as an attribute of the hierarchical structure of the national constitutional legal order remains.

In fact, what the primacy question paradoxically reveals is that the idea of constitutional essentials is another way of saying multilevel constitutionalism, a constitutionalism of at least four different levels of constitutional *fragments* and their reciprocal metaconstitutionality: the national, sub-national or regional, supranational or European, and transnational levels.

Thus, we come to a fourth and final set of criteria for the European constitutional essentials. Constitutional jurisdiction can also assist in the promotion of a basic consensus of a political community, a task of particular relevance in a political community in the making. Here the Constitution, and the constitutional essentials, are indeed "norm and duty", and represent a core instrument for the integration of the State and their citizens, and in the framework of the European Constitution, an essential tool for the *integration* of the national constitutional orders.

Integration. The *genius loci* of today's Berlin appears to be closer to Smend and his emphasis on the integrative nature of constitutional life than to Kelsen and Schmitt. And this is certainly also the case for the European Union.