Challenges and possible Achievements of the Brussels Constitutional Convention

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Toward the constitutional determination of European law

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Summary

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In contrast with the classical relationship between the social and democratic state and the free marketeconomy, at the present time there is no political power to act as counterweight to international economic disorder; the internationalisation of economic relationships has freed capital from its links to state Law. The difficulties our states have to provide materially social rights and to guarantee fundamental liberties are just consequence of the new situation. Hegel (1799-1815) and Hermann Heller (1927) anticipated the subversion of our rule of law by means of a handful
of private rights and a feudal capitalism to which we have been exposed since the eighties; although they could not predict the extreme threat to fundamental rights exerted by present-day private economic power.

However, to the same extent that national politics abdicates in favour of the machinations of capital (Habermas, 1997), European citizens have growing expectations of raising the European Union as an alternative supranational political system where, in principle, the balance will not be excluded between public power and economic initiative and where fundamental rights will once again be guaranteed.

This challenge has been taken up since the Treaty of Rome (1957) by the Constitutions of our states. To achieve certain common aims, our states have opened up their national legal order (art.93 SC), thus contributing to the formation of suprastate public power. Now as a guarantee of its very identity (art.6.3 TEU), the defence of our Constitutions cannot help but consider the idea of submitting European law to the very same constitutional legitimising criteria. With the classical postulate of the self-determination of societies still in force in the historical awareness of these times, nobody can demand of us that we relinquish the makeup of a new political order on a European scale according to the accredited canons of the rule of law and representative democracy, however manifestly improvable they may be.

From such a perspective, I will attempt to put forward in this presentation a dogmatic strategy for a reform of the Treaties. In order to make it comprehensible, I shall need to make clear, first of all the methodological assumptions which make up my starting point. Secondly, I will describe the link between preserving our Constitutions and reforming the Treaties. Finally, I shall gather together out of the constitutional traditions common to the member states the final criteria for interpreting and applying the European Charter of rights.

1. Methodological assumptions

Nowadays, interests and conflicts manifest themselves more and more often within a suprastate framework. This imposes legal arrangements which transcend the scope of traditional sovereign states. In this situation only the emerging supranational European public power and a new order which reshapes institutions in a functional sense to guarantee fundamental rights, will be able to deal effectively with these present-day challenges. That is the internal logic that I observe in the Verfassungsverbund
thought up by Pernice and, at the same time, the framework for the reform of the treaties.

A progressive unification of national legal orders in the direction indicated by community institutions and the Luxembourg Tribunal seems irreversible. By means of simply being adopted as a general standard for interpretation, the criteria of the Tribunal of Justice also impinge on questions where community Law has not in principle to be involved; particularly, because the differentiation between national and community matters is increasingly less clear.

The sense of the constitutions and their binding force (normative Kraft) are, also, changed by community law. Functions which in classical theory gave material identity to the constitutions are only fulfilled by means of a new legal framework, in which community law occupies an extremely relevant place. This has already been made evident from one elementary consideration; whereas the Constitution aspires to regulating procedures and limits in the ordinary production of law, community law, an acquis which quantitatively and qualitatively is fundamental to the national legal order, is out of bounds to it. It is produced by means unregulated by the Constitution, and not only is it imposed on the discreional faculty of the national legislator to shape the law, neither is it subject to constitutional rules - at least in the same way as the rest of the national legal Order is.

The tasks of public powers and the law regulating citizens’ conduct do not merely derive from constitutional mandates or processes regulated by the Constitution; European rules and processes crisscross them in various relationships, often leaving to one side States’ own law.

Now, community jurisprudence in turn takes into account the criteria and principles prevailing in the different member states. European Law is shaped as a Code by jurisprudence and round general principles, these being collected precisely in a harmonising interpretation of constitutional traditions common to the member states (art 6.2 TUE) . Certainly, the different legal codes of member states are still as such alien to the other States; but they achieve unity through the jurisprudence of Luxembourg. We thus verify the objective need for constitutional and community law to be observed and applied from the standpoint of a reciprocally agreed interpretation (Hesse, 1999).

But, precisely when shaping this cooperation between Codes, one should not ignore the asymmetry between the venerable, solid tradition of constitutional law and the inexperienced and experimental nature of
European law. If it is a question of constituting public power and social order in Europe in accordance with the postulates of the rule of the Law, the classical theory of the Constitution brings with it a legacy which could well forge the new common law. The challenge would thus consist of understanding European law from the experience of constitutional law, and in this way making a fair analysis of the problems and trends in shaping common European law.

2. Reform of the Treaties, preservation of our Constitutions

Any reflection on a possible future reform of the Constitution following on from European integration must start from such methodological considerations. Indeed, art. 93 of the Spanish Constitution does not just mean the state’s opening up to European integration. At the same time, art. 93 of the Spanish Constitution opens up a kind of breach through which European law has an influence on our institutional functioning and our judicial code: European integration has meanwhile modified our Constitutions in ways different from those foreseen in the articles of the constitutional text devoted to constitutional reform. The principle of institutional autonomy is little more than a white lie to disguise the constituent scope of European integration. And what can we say about the prevalence of community freedoms and the principle of free competition which have left the state guarantee of fundamental rights as so much waste paper (Lassalle)! All in all, to the extent that economic freedoms and the fact that the Community determines State economic policy have affected the tasks of the State, they have given rise to constitutional mutations that are rather more than simple ones.

In this way, at the moment when the present European constituent process is taking place, the alternative is not between the reform and stability of our Constitutions, but between reform and passivity; that is, between the conscious exercising of reform and inertia in the face of mutations and suspensions to which European law still gives rise.

Now, in this event constitutional reform should not be a mere reaction. A constitutional policy which as a reaction on the constitutional text to political processes and judicial changes stemming from an area which is not that of the State and merely reduced to ad hoc modifications seeking to ensure the original constitutional principles jeopardised by European integration would not be enough. If we sincerely wish the European union to respect constitutional principles, little good will be served by restricting ourselves to formalising their guarantee in the Constitution.
The correct approach to these problems requires bearing in mind that the reforms of the Treaties entail alterations to the constitutions of our States. In that sense, the decisive question is, what reform of the Treaties would be most coherent with constitutional postulates? Simply because reform of the treaties is necessarily reform of the Constitution, the best way to preserve the Constitution in its principles is not to adapt our Constitution to the eventually haphazard and even subversive manner of the community law - we saw that in the nineties - but, rather, to urge the adoption by the European Union of the constitutional principles common to member States.

To the extent that community law has priority over constitutional Law, there will be no means of preserving the constitutional order of member states, of Germany, France or Spain specifically, except by projecting the constitutional principles themselves onto European law. Indeed, it is a question of drawing from the postulate of constitutional homogeneity (art 23 GG) among member states and the European Union, from our Verfassungsverbund its ultimate consequences: not only on the plane of constitutional interpretation but also on that of reform of the Treaties.

Interpreted in isolation all that I have just put forward, could lead to my audience falling into the error of regarding it as a disguised defence of yesterday’s nationalism. Nothing could be further away from my project for Europe: bearing in mind that any nationalist definition of the situation tends to be constructed on the negation of rights of those not belonging to the national community, no type of nationalism, neither Spanish nationalism nor German or Italian, can in my opinion lay claim to legitimacy. The preservation of our Constitutions against the subversion of neoliberalism which I am defending must be understood, rather, in close relation with the postulate of equal freedom for all which I shall now develop.

3. Sense and interpretation of the European charter of fundamental rights from the Constitutional traditions common to member states (Verfassungsverbund)

With the Charter of fundamental rights, we Europeans have awarded ourselves a noble instrument for recovering the use of reason which we had lost in the two decades of neoliberal hegemony. It is true that this text lacks for now ruling force (normative Kraft) and is going to meet fierce opposition to its binding nature from the British and Italian governments - who have a veto right over Treaty reform, let us not forget. Now, on the
one hand, the highly favourable welcome given by jurists, elites and citizens endows the Charter with a claim to legal force and broad possibilities of effectiveness; on the other, judicial activism which has historically characterised the Tribunal of Justice, would break with memorable precedents of its historical performance, if it passed up in vain the opportunities that will be given to it by a multitude of cases to give the Charter binding force.

Assuming as a working hypothesis either the incorporation of the Charter to the treaties, or its becoming binding via jurisprudence, like any legal text, it requires interpretation when it is applied. The interpretation is going to occur against a background of a preunderstanding (Vorverständnis) in which historical experience, doctrinal traditions and present day evaluations are linked together. However, such a preunderstanding must be, in a consolidated hermeneutic corpus (Hesse, 1980; Häberle, 1986; Rodríguez Iglesias, 1998), but one which European law has tended in the last decade to subvert, compared to the constitutional traditions common to member states (art. 6.2; TEU; arts. 72.2; 106 (3) GG; 9.2; 40.1; 138.1 SC; 3 IC) which appeal to a socially determined idea of freedom. Insofar as rights of the Charter are becoming a founding document for a new constitutionalism for Europe, the brand new European Federation of States resulting from the Intergovernmental Conference of 2003 will have this selfsame concept of liberty as a reference. Of the many interpretations open, there is one which corresponds to the European and global common good in tune with the times: in the best expression of the constitutional traditions common to member States, the ultimate sense of the Charter’s rights, and thus, of the European federation of nation states in the making is liberty understood to mean equal liberty for all.

Certainly, such a postulate requires shaping dogmatic precisions, and at the same time aims to serve the purposes of my comments today. So, this equal liberty for all must be understood as a counterpoint to the liberal concept of liberty underlying the economic freedoms of the Treaties - freedom of movement for people, goods, capital, services, freedom of residence, free competition (arts 23, 39-60; 81-86 TCE). For the liberal doctrinarism underlying the Treaties of Maastricht, Amsterdam and Nice, liberty is reduced to subjective rights vis-á-vis public authority, and freedom of initiative especially. And one understands that the liberalism of the last quarter of the century has concentrated its attack on equal liberty, by imposing the reduction of what is public to the State gendarme, guaranteeing the market in our countries: capital is aware that in a fragmented society, composed of just a numerical sum of individuals at the mercy of full-blooded competition, the domination of the strongest is
guaranteed. That is the logic of the profit motive, however much it may not be excluded among liberals themselves who, being more tolerant, may include within their idea of freedom, formal equality before the law, non-discrimination on the grounds of race, religion, condition, etc. and *equality of opportunity* - which is likewise enshrined in the Treaties.

Of course such rights are important; but such acts of recognition are not enough. Experience shows that capitalism is a system with an extraordinary productive capacity; it only fails in distribution, to the extent of inexorably condemning vast groups of the population to discrimination and poverty.

The fact is that in accordance with *equality of opportunity*, the proclamation of subjective rights is not accompanied by the guarantee of universal access to the conditions necessary for a decent life, and especially, the right to work. Thus, many jurists cannot forget the mercantilist root of *equality of opportunity*; that is the idea of the Darwinian struggle to maximise selfishness and profit as a savage Utopia of human happiness (Adam Smith). When all is said and done, *equality of opportunity* (Tony Blair, *New Labour Government*, Giddens) is at best the equality to compete, when we know only too well the order of servitude produced by competition in the market. Breaking with a compensatory policy of redistribution of resources, as suggested by neoliberalism, is pure historical regression. With only that freedom, the majority of Europeans will never be truly and really free. That explains our interpretation as opposed to such a liberal, economics-based idea of freedom; like no other freedom, the right to economic initiative and economic freedom to compete cannot be legitimately used to destroy or make a mockery of others’ genuine rights, nor to impose despotic domination of a few on labour and on other’s awareness – building process - *a liberty-law never entails the domination of other free beings* (Kirchhoff, 1989). Otherwise, the *social contract*, a reciprocal guarantee of freedoms, would lack meaning.

Therefore, we will never accept that in Europe universal access to essential goods for a life of dignity shall be forced to rely upon the competitive struggle in the market; no-one can claim any legitimate title for a regime which deprives others of what is essential for living as people. *Real freedom* for everyone requires not only having subjective rights of defence against the State and the Civil Administration, but what is more, from the emancipation of power that private money exercises over social and political life. Faced with such an *economic idea of liberty*, we Europeans can also take on board an *egalitarian idea of liberty*, which would take into consideration the needs of human beings; as an alternative to that proposed by liberals in our idea of freedom solidarity and cooperation are possible
and by means of State assistance the material conditions for existence can be created, and this rather than the principle of free market competition, build up a cohesive territory and society. In this manner, we will meet the requirement of law to submit economic logic, the free play of the market and the instrumental nature of technology to universal reason, understood as the autonomy of individual moral conscience and the achievement of oppression-free coexistence. (L. Gómez Llorente, 2001)

Thus, only by means of public protection of rights and the State monitoring of the market (arts. 72.2; 106 (3) GG; 9.2; 39-52; 138.1 SC; 3 IC) will it be possible to achieve \textit{real freedom for all}. That is \textit{real liberty}. Fortunately, in Europe, memory refers us to a tradition to aggiornare of public power as a market regulator and redistributor of the revenue produced; the not-too-distant memory documents the beneficial accomplishment of a power over public expenditure which has maintained until the eighties universal services in health, education and culture, judicial protection, public transport, communication, social security, housing and the environment.

But let nobody be deceived: on the one hand, the Welfare State is a historical phenomenon associated with fordist – taylorist production, social-democracy and Keynesian policies, all of which belong to the past, and nobody can turn back the historical clock. The present-day economic phase, characterised by freedom of movement of capital, short-term maximising of profits, deregulation and technology designed to achieve its maximum productivity on a world scale, is keen to have division and rationalisation of labour, political groups, policies to maintain demand and regulation of the market and the responsibilities of private economic power which can scarcely be glimpsed. The problem of the universalising of public services as material conditions for the exercising of freedom starts with their financial endowment. Let us see. Have all the possibilities of tax powers been exhausted? Obviously not, when transnationals’ tax evasion can be seen in the face of government impotence So? Only the European Union has the capacity to negotiate company taxation with the United States and Japan in the heart of the World Trade Organisation (WTO). As a logical corollary to such an approach, taxation powers for such a purpose will have to be transferred to the European Parliament. That means setting up a European financial - constitution and abandoning the 1.27% of GDP ceiling for each state as a contribution to Union funds. That European financial - constitution is also the \textit{place} for the reform of the Common Agricultural Policy and of the distribution of structural funds as well as for financing the costs of expansion eastwards.
In complimentary fashion, the present – day economic model has no less a need of a new definition of solidarity: and this can only begin with individual responsibility vis-á-vis national, continental and global communities - for the birth rate, ongoing education, entrepreneurial initiative, job creation, respect for the environment, via empathy, tolerance and hospitality towards others and the private and public exercise of virtue up to paying taxes, aiding the development of poor countries and maintaining peace.

It remains for the open society of interpreters (Häberle, 1977) of the Charter to apply it in terms of equal freedom for all; as a postulate for institutional reform of the Treaties which, whilst preserving our Constitutions, will give birth at the same time to a Federation able to respond to the challenges of our time.

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