P A N Ó P T I C A

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

"THE TANGLED COMPLEXITY OF THE EU CONSTITUTIONAL PROCESS" A SYMPOSIUM

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The contested 'Constitution' of the EU and the quest for ever-democratic constitutionalism

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1. Introduction

When Giuseppe Martinico published his piece 'The Tangled Complexity of the EU Constitutional Process' (Martinico, 2012), the Spanish *Revista de Estudios Políticos* honoured me asking me to write a short review of the book. In my review (Castillo, 2013), I called the book by the prolific Martinico an excellent piece of research. No doubt, it is so. However, at the end of the review I ventured some critical comments, and among them I suggested the idea that maybe European Union law scholars –including Martinico - had gone too far in taking for granted that the European Union has a 'Constitution'. When Prof. Martinico read my review, instead of complaining about my comment, he thanked me for my words and, in particular, he enthusiastically asked me to develop my critique in further detail. Soon after this I received an invitation by the journal *Panóptica* and STALS to write an article using Martinico's work as a starting point.

Given the nature of this invited contribution, the political character of the ideas I am to develop, and the limitations of space, I think that the most reasonable option is to slightly deviate from the usual style of academic writing. Instead of aiming at the drafting of neutralistic, positivist paper, I shall defend in the following pages an academic stance which is admittedly political, in the sense that is both politically and normatively motivated. This article starts with one premise and then develops two basic claims. The premise is that the word 'Constitution' should be defined in normative terms and with reference to core democratic values. The first claim of this article is that the European Union is at some point in its unfinished process of constitutionalization. The second claim is that, paradoxically, some critiques to the European integration process have boosted a deeper and more democratic constitutionalism for the Union.

To develop my argument, this article is structured as follows. Following this introduction (1), in the second section I will summarize Martinico's concept of 'EU constitutionalism' (2).

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Subsequently, I will analyze the relationship between democracy and the tradition of constitutionalism, and I will suggest that we should require legal systems to meet high democratic standards before calling them 'constitutional' (3). In this light, in the next section, I will engage with Martinico's approaches by analysing the EU legal system and re-assessing its constitutional nature (4). I will end by offering some brief conclusions in which I will suggest that some sceptic approaches to the EU 'constitution' should be taken seriously by anyone who wants the EU to become a fully-fledged constitutional system (5).

2. The concept of EU Constitution in the work of Martinico

Martinico is well aware of the implications of the debate over EU constitutionalism. Far from assuming EU constitutionalism as an implicit premise of the analysis, he makes explicit and justifies his choice at the very beginning of his book. In the most exhaustive definition of the concept that he provides, he relies on Claes' (2011:4) definition of a European Constitution as:

> the set of EU norms, rules and principles constituting the polity and its legal order, establishing the institutions, attributing competences to the EU and dividing them among its institutions, governing the relationship between the EU and its Member States, limiting the exercise of its competences and guaranteeing the rights of the individuals governed under it.

Against this background, Martinico (2012:9) finds that the European Constitution is composed of written and unwritten materials codified either in the treaties, in national constitutions or in the case law of the Court of Justice, thus suggesting the existence of a composite, multidimensional and pluralistic constitutional frame in which none of the two constitutional levels –the national and the European- has a clear predominance over the other (Martinico, 2012:8). Apart from Claes' reference to 'the rights of individuals' and 'limiting the exercise of power', which could be deemed as having a solid normative dimension, Martinico's definition of the EU Constitution seems very much concerned with the performance of two related practical functions: the organisation of the exercise of public power by the institutions of the EU, and the interconnection between the European and national 'constitutional' levels into a coherent narrative.

Martinico discusses the question of the democratic legitimacy of the European legal edifice and of what he calls its 'Constitution'. Although he also devotes attention to the state of

substantive democracy in the EU and to the issue of the democratic deficit, Martinico is especially concerned with the debates about the democratic legitimacy of the *formal* process of constitution-making in the EU. He (2012:61) analyses the approach to constitutionalism according to which the constitution is the product of the will of a pre-existing people, which legitimizes the constitution and conceives it as the outcome of a democratic process. However, according to him, many European constitutions would not fit this 'revolutionary' model of constitutionalism (2012: 62) and, instead, he would propose the idea of 'evolutionary constitutionalism which renounces the idea of "constituent power"' (2012: 066). In his critique, Martinico seems to have in mind the famous –and often criticized- writing by Grimm (1995) in which the author held that there was no such a thing as an European *demos*, and that thus a European Constitution neither existed nor should be created. Martinico seems to be in line with MacCormick (1997), who responded to such assertions by pointing to the US example to show that not all Constitutions had to be created after a deliberate, concrete and explicit act of the *pouvoir constituant*. In my view, however, Grimm's account of the 'no-Constitution' thesis is not the only possible version of such idea, and other more interesting approaches to it could help us to fine-tune our debate about EU's constitutionalism.

3. Democracy as a constitutive element of the concept of 'Constitution'

In other to develop my former assertion that some sophisticated forms of the no-Constitution thesis should be taken seriously, it is necessary to enter into the debate whether the term 'Constitution' should have a merely technical meaning –i.e. a set of superior rules of the legal system- or rather a normative meaning: a set of superior rules which are democratic themselves and which organize a society in a democratic way. I would like to use a starting point the classical writing of Sartori (1962) 'Constitutionalism: a Preliminary Discussion'.

According to Sartori (1962:855) the defining feature of constitutionalism during its climax in the 19th Century was its *telos*, summarized in the idea of *garantisme*: the Constitution meant 'a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary government and ensure a "limited government"'. He quotes the paradigmatic example of the 1776 Constitution of Virginia according to which a Constitution should have two elements, a bill of rights and a plan of government (Sartori: 1962:856). Thus, for Sartori the words 'constitutionalism' and 'Constitution' meant much more than a set of rules which occupy the highest position in the hierarchy of a legal system: 'the

definition of constitution which has an objective worth is the one that appears to be the outcome of a long and painstaking process of trial-and-error concerned with the question: How can we be governed without being oppressed?' (Sartori, 1962: 858).

Of course, Sartori's conception of constitutionalism can be –and has been- criticized. More in general the rather liberal conceptions of freedom like the one he seems to defend have been contested from different angles: from republicanist to feminist, from deliberative to social conceptions of democracy and/or constitutionalism (see *inter alia* Pettit, 1997; Binion, 1991; Fabre, 2000; Habemas, 1995; Scheppele, 2004). However, all of these traditions share something in common with Sartori's original definition: their emphasis in freedom from oppression. While all of these traditions of thought point at the need to rise and further the sometimes thin democratic standards of liberal constitutionalism, I do not think that any of them would be content with the strategy of de-politicization that underlies to the transit from normative to merely technical definitions of a Constitution. As Sartori himself (1962:855) put it:

> legal terminology (…) tends to be abused and corrupted. (...) In our minds, constitution is a "good word". It has favourable emotive properties, like freedom, justice or democracy. Therefore, the word is retained, or adopted, even when the association between the utterance "constitution" and the behavioural response that it elicits (…) becomes entirely baseless.

Maybe this is why one of the striking elements in classic doctrinal articles about European Union law has been the willingness of scholars in calling the EU a 'constitutional' polity. The qualifications of the EU as a constitutional system can be found not only in more recent literature (see *inter alia* McCormick, 1997; Craig, 2001; Kumm, 2006), but even in the pre-Maastricht scholarship. It is not difficult to have the sensation that there has been an excessive hurry in using the term 'constitutional', especially as the history of European integration has showed how incomplete the European political edifice was at the time of such writings. One good example is Weiler. His 'The Transformation of Europe' piece was published in June 1991. At this time, the Maastricht Treaty was not only still not in force, but even the European Council which would draft it had not met –it would do so only some months later, in December that year. This meant that at that time the concept of 'European citizenship' had not been created and the Union lacked a written, positive catalogue of rights. And still, Weiler (1991:2407) did

not hesitate in asserting the constitutional nature of the EU law, as developed by the Court of Justice:

> On this reading [by the ECJ] the Treaties has been "constitutionalized" and the Community has become an entity whose closest structural model is no longer an international organization but a denser, yet nonunitary polity, principally the federal state. Put differently, the Community's "operating system" is no longer governed by general principles of public international law but by a specified interstate government structure defined by a constitutional charter and constitutional principles.

But Weiler had not been the first example. Mainstream literature in European Community law had been asserting the constitutional character of the integration process at least from 1981, when Eric Stein published his 'Lawyers, Judges, and the Making of a Transnational Constitution'. At that time, in addition to the democratic deficiencies mentioned above, the powers of the European Parliament were severely limited. However, for Stein it was clear that the European experiment was a constitutional one, as the very title of his article clearly suggests. In the famous opening paragraph to his article, Stein (1981:1) considered that:

> the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe. From its inception a mere quarter of century ago, the Court has constructed the European Community Treaties in a constitutional mode rather than employing international law methodology.

It is easy to see how similar these two passages are. First, they emphasise the role of the Court in the development of EC law, which no-one can neglect at this stage. But secondly, they seem to suggest that as the European Community was moving away from international law, it was becoming some sort of constitutional, federal-like polity. And this second idea is questionable, not only because still nowadays it is not clear that the European Union is something different from a creature of international law (De Witte, 2012), but also because even if one accepted that premise for the sake of argumentation, it would not automatically transform the European Union into a 'constitutional' polity. To continue with the reasoning made above, a 'Constitution' is not just something negative –for instance, the opposite of international law- but something positive –a set of institutional arrangements intended at ensuring freedom and limited government. Many States remain in the world that, without being mere creatures of international law, cannot be called 'constitutional' in a normative sense, as they lack the most basic guarantees against political oppression.

Recently, Schütze (2009:1096) tried to summarize some of the critiques of the idea that the European Union has a Constitution. According to him:

> Under the doctrine of popular sovereignty, only a "people" can formally "constitute" itself into a legal sovereign. A constitution is regarded as a unilateral act of the "pouvoir constituant". Thus, "it is inherent in a constitution in the full sense of the term that it goes back to an act taken by or at least attributed to the people, in which they attribute political capacity to themselves". This normative – or better: democratic – notion of constitutionalism is said to have emerged with the American and French Revolution and to have, since then, become the exclusive meaning of the concept.

Quoting –again- mainly the work by Grimm (1995), Schütze depicts the 'no-Constitution' thesis as an idea according to which the European Union has no Constitution because there is not such a thing as a European 'people', with European Union law remaining dependent on Member States. If in the future there were a European 'people' to bestow on the Union competence to decide on competences, then the European Union would have a Constitution. But, according to the author, in that case the European Union would cease being a supranational entity to become a Federal State. The problem with this critique by Schütze is that, in my view, it oversimplifies the no-Constitution thesis by pushing it towards either the no-demos thesis or to the statist conception of sovereignty. Both poles are however troubling: the no-demos thesis because it is close to nationalist, ethnic conceptions of the demos as a culturally homogeneous and nation-bounded set of individuals, and the statist conception of sovereignty because it would fail to understand the superseding of the Westphalian paradigm and the need to update our concepts and theories to the new era of globalization (and thus the no-constitution thesis would be something of old-fashioned).

However, I can think of a no-Constitution thesis which is based neither in ethnic conceptions of the demos nor in state-centered conceptions of democracy, but simply on a strong conception of democracy and on a normative, not merely nominal, conception of constitutionalism. This thesis could not only concede but rather celebrate McCormick's (1997:341) proposal that the *demos* could be conceived in civic rather than cultural terms, but it would be quite more cautious than him in calling the EU a 'constitutional system'. Following Habermas (1992), such thesis would assert the de-coupling of democracy from its ethnic and statist elements. But at the same time, it would preserve what I see as the most precious element of classical constitutional theory: its commitment to human emancipation through law, to solid

democratic standards. Understood in this way, the 'no-Constitution' thesis is actually, then, a tool for the achievement of a fully democratic and constitutional European Union

4. Is European Union law constitutional?

If our premise is that democracy and human emancipation are the defining elements of constitutionalism, then the whole reflection on the 'EU Constitution' must be dramatically rethought. In order to assess whether the European Union has a 'Constitution' or not we must not ask –at least not only- 'is EU law supreme over national law?', or even less 'has EU law elements resembling those of a State Constitution?', and the so. The questions we should be asking resemble more to this: 'has European Union law met or raised the democratic standards of Member States' constitutionalism?'.

The question of the democratic standards of the so-called 'Constitution of the European Union' can be approached from a double perspective: from the perspective of the democratic legitimacy of the formal process of constitution-making, and from the perspective of the democratic legitimacy of its substantive content. As we said above, both these two dimensions are present in the work of Martinico to different extents.

- *The democratic standards met by the process of "constitution-making*". Classical constitutionalism, especially in contractualist theories, conceived the legitimacy of the legal-political edifice in terms of the consent of the governed (Rosenfeld, 2001:1311). De Raadt (2009) admits that in contemporary research there is a widespread idea that popular involvement and inclusiveness in the process of constitution-making is essential to foster legitimacy, even if he shows that this is not always the case in empirically observed constitution-making processes. The author refers to Juan Linz and Alfred Stepan's (1996:83) 'optimal' constitution-making model in which a Constitution drafted by a democratic constituent assembly is approved in a popular referendum. Assessing European Union law against this background raises two important critiques.

a. The first is that, if we compare it with constitutionalism in the Member States, European Union law has substantially lowered the democratic standards in 'constitution-making'. Treaty-making processes are the most similar scenarios to constitution-making processes that the European Union knows, and however they are far from complying with the requirements of Linz and Stepan's 'optimal model'. Although there is usually parliamentary ratification of the treaties in the Member States, these are not drafted by a constituent assembly deliberately

elected with the goal of constitution-making in mind, but actually by executives. In addition, referendums on EU Treaties in Member States are not a common practice. In fact, these are sometimes deliberately avoided, and when they take place and show a negative outcome they might be repeated until the preference of political elites is satisfied, as the Irish case shows. A further critique, treaty-making in the European Union is many times marked by scarce public awareness and debate. It is true that a good number of European constitutions do not comply with the requirements of the 'optimum model' either (see De Raadt, 2009:328), but the European Union deviates from such model to a larger extent than most of them, at a time in history in which a higher democratic input in constitution-making is technically feasible and socially expectable.

b. The second is the rejection by the very European citizens, when they had the chance to do so, of the proposal of Constitutional Treaty. MacCormick (1997:335) said that although a 'whole compendious measure had not been put to the European people as such' democratic assent had been 'achieved State-by-State' in processes of Treaty ratification. Some years later, however, the Constitutional Treaty was submitted to referendum, not of the whole European people, but at least of some of the peoples of Europe. And France and the Netherlands rejected the Treaty. The question is then not only whether we can accept as a Constitution a set of rules which have not been submitted to the consent of the people, but also whether we can accept them as a Constitution when they actually have been submitted to popular vote and deliberately rejected (in some instances). It is important to note that, in saying that the closest thing that we have to a popular consultation about the EU Constitution was the rejection of the Constitutional Treaty, we are not saying that we should congratulate ourselves for that outcome, but simply that we have to acknowledge the implications of such rejection.

- *The democratic standards met by the substantive content of the "Constitution*". Regarding its substantive content, the higher laws of the EU have undergone an important evolution since the beginning of integration, which seems to have accelerated in the last decades. There is, however, ongoing debate regarding the democratic credentials of the EU.

a. Fundamental Rights. The field of fundamental rights is probably that in which the EU has registered a greatest improvement. While insufficient protection of fundamental rights has been often criticized by academics and legal operators –see specially the rulings of the German Federal Constitutional Court-, after the process of ratification of the Lisbon Treaty the situation seems to have radically changed. The new Art.6 TUE gives treaty status to the Charter of

Fundamental Rights of the European Union, states that the EU shall accede the ECHR, and recalls that fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to Member States constitute general principles of EU law. While the relations between all these systems for the protection of rights are complex and have given rise to abundant literature (*inter alia* Weiß, 2011; Eeckhout, 2013), it seems clear that the standard of rights protection in the EU is at the moment at least similar to that of most Member States.

b. Democratic legitimacy of decision-making. There has been also significant improvement in the ways in which EU citizens can participate in the life of the Union. Although the Lisbon Treaty does not explicitly provided for this, the 2014 elections are the first in which the major groupings of political parties in the European Parliament presented a candidate for the Presidency of the Commission, which should increase clarity and democratic accountability. This could potentially solve one of the most important deficiencies suggested by the critical literature (Hix and Follesdal, 2004). In this regard, the EU could be finally reaching, or at least coming sufficiently close to, the democratic standards of most Member States. However, some deficiencies remain. To recall some important ones, the Parliament lacks a general right of legislative initiative and its approval is not required in some significant policy areas; it lacks authority to censor or exercise control over the Council and cannot dismiss individual Commission members (Sieberson, 2007: 455-456).

c. Separation of powers and limited government. Although there has been some improvement in this area in the last decades, 'the EU's unusual blend of legislative and executive functions' did not 'meaningfully change under the Lisbon Treaty' (Sieberson, 2007: 450). The traditional distinction between Executive-Legislative-Judicial branches of government is not always clear in Member States either, but in the EU it is deeply blurred. The Commission acts as the executive of the Union but it also enjoys a quasi-monopoly of legislative initiative, the democratically elected Parliament has no general legislative initiative and its vote is unnecessary in some policy areas, and the Council –composed by members of MS executives and with a rather remote democratic legitimacy- acts as a legislative chamber, and secrecy and lack of transparency govern the life of many of these organs (see Sieberson, 2007). The institutional design of the EU seems more focused on ensuring an institutional balance between supranational and inter-State elements of the EU than on creating an effective and transparent system of check and balances that can be scrutinized by citizens.

5. Conclusions. ***Apocalittici e integrati***

All in all, the EU seems to be immersed in an unfinished process of 'constitutionalization', of transition towards some form of constitutionalism. I think Martinico would agree with this. This process has surely accelerated in the last decades through the improvement of some of the democratic elements of its higher law. However, at present time the EU has not only not raised the democratic standards of old 20th Century State-based constitutionalism, but unfortunately in many regards falls short from them.

If we accept the premise that 'Constitution' and 'constitutionalism' should be defined with reference to a set of democratic, emancipating rules and institutional arrangements, then the perspective of the debate radically changes. Of course, even accepting the former premise the question of which should be the concrete threshold at which a political system can be called constitutional is open to discussion. What can be enough for some might be insufficient for many, as paradoxically a democratic society accepts different views of how democracy and constitutionalism should be understood.

The process of integration is probably at some point of its evolution in which controversy about its current degree of 'constitutionalisation' is reasonable from the viewpoint of many of the different existing conceptions on democracy. *Integrati*[2] those who are optimist regarding the constitutional nature of EU law, might argue that criticisms regarding the EU's democratic deficit could make sense some decades ago, but not any longer, after intense transformations in the last years. But things are not so easy. *Apocalittici*, those who are not satisfied with the democratic standards met by the EU, could counter-argue that their rivals were already asserting the constitutional nature of the European political edifice, precisely, many decades ago, when the democratic deficiencies of the EU were still overwhelming. Furthermore, they could speculate with the idea that it has been precisely the existence of a critical narrative regarding integration which has fueled some of the improvements which allow *integrati* to develop now a renewed discourse on EU constitutionalism. In his piece, Sartori (1962) considered that concepts such as 'Constitution' should be constructed from historical experience. In the European Union, what history tells us is that it is dissatisfaction, much more than complacency, the engine of constitutionalization.

[2] I am borrowing here the terminology of Eco's (1964) suggestive piece on theory of mass culture.

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