The Living Constitution of the EU

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Among American (Gillman 1997; Winkler 2001; Rockford 2005) lawyers and political scientists, a subject of continuous debate is the following: according to what principle should the US constitution be interpreted? On the one hand are those who emphasise the original meaning of the basic text, at the time of its ratification. On the other are those who argue that the constitution is a living document: interpreting it requires taking not just the original intent into account, but later historical experiences as well. The abolition of slavery in the 19th century added new meaning to the original text, as did the extension of the suffrage to women, the policies of the New Deal, and the implementation of civil rights in the 20th. Proponents of this second view base their argument on more than just the pragmatic notion that some of the original formulations have grown politically unacceptable. They also believe the constitutional framers deliberately intended the text to be flexible enough to meet future needs. Indeed, according to this view, such flexibility is necessary if the constitution is to remain legitimate.

In the present context, I shall not go any further into the U.S. discussion. My purpose in mentioning the American debate is simply to stress that the corresponding European problem would benefit from being analyzed in terms of original intent and a living constitution. Only recently, in a seminal article from 2007, our Leiden colleague Jan Erk laid out the challenge of trying to grasp the real as distinct from the formal European constitution. Concluding an overview of federal structures in Austria, Belgium, Canada, Germany, and Switzerland, he pointed out

“that there is nothing terribly unique about the current constitutional crisis in the European Union. Evidence from comparative federalism shows that these types of crises frequently visit multinational unions. And quite often, such unions find a way out by concluding constitutional deals that implicitly recognize the competing political visions. Europe does not need an idealist formal constitution, it needs a workable arrangement that reflects its real constitution composed of multiple demos.” (Erk 2007: 647)

In my view, this distinction between the formal and the real constitution—a distinction well-known from our national contexts but nevertheless new in relation to the overall European
problem—offers a promising way to organise the main answers given to the normative problem of “what is wrong with the European Union and how to fix it” (Hix 2008).

**Life and history in the European constitution**

Let us try to summarise what gives life and history to the real European constitution. I would hypothetise that, in the main, there are two dimensions at work here. We might call the first the *horizontal* dimension, in reference to the tension between capitalism and democracy within each of the member states. All member states of the Union consider themselves to be “mixed economies” (or “welfare states”, should one prefer that phrase). Within each of these “mixed economies” or “welfare states”, the fundamental pattern of authority is basically the same. As voters, citizens decide who is to represent them in parliament and exercise legislative and executive powers on their behalf. As consumers of goods and services (including media services), they decide for themselves. As investors and trade-union members, citizens decide the distribution of market powers—a distribution which functions in a countervailing fashion vis-à-vis the preferences expressed in general elections based on universal suffrage and freedom of information.

The optimal “mix” between capitalism and democracy is neither written in the formal constitution nor laid down by God or History. It is the concrete result of the continuous struggle between different political forces. The real constitution is “living” in the sense that citizens are never entirely satisfied in any of their respective roles: not as voters, nor as consumers, nor as investors. They accept the actual outcome as something second-best; an *acceptable* balance, as they see it, has been struck. Citizens on the left do not find all their preferences fulfilled; nor do citizens on the right. They feel, however, that they can live for the time being with the equilibrium that has emerged. They accept the formal constitution as something given, and go on pushing for a different real balance, by lobbying and working for another result in the next election.

The second basic dimension of the living European constitution is what we might call the *vertical* one. This refers to the tension between the suprastatist principle of free movement for capital, goods, services, and labour on the one hand; and the principle of national self-determination on the other. In theory, the suprastatist principle has precedence; it could be used to trump every conceivable piece of national legislation and every single instance of fiscal redistribution. In practice, however, the European Union does not work that way.

It is true that most markets for capital and goods have been made European, in the sense set out in the formal constitution. The markets for services and labour, however, have not been treated in the same way at all. In practice, the suprastatist principle is applied to them only partially. This is because the markets for services and labour are much closer to the individual needs of citizens and families. The legislation promulgated by democracies is based on universal suffrage; accordingly, freedom of information and freedom of organisation cannot be “suppressed” by the free-trade doctrine as easily as regimes for capital and goods. In obvious defiance of the suprastatist free-trade regime, member states have license-financed public-service media, tax-subsidised public housing, tax-subsidised public and private hospitals, public selling of liquor and
pharmaceuticals, public control of rents, and national policies for the production of nuclear energy. The four freedoms have only been adopted up to a point; in areas where EG law is unable to reproduce its own legitimacy, they yield to other considerations.

In other words, what we have is a two-dimensional living European constitution, within which actors try continuously to strike a reasonable balance between capitalism and democracy on the hand; and between national self-determination and a constitutionalised free-trade regime for capital, goods, services, and labour, on the other.

Accept or re-structure?

Two questions can and should be asked in relation to this. The first is about the double mix. What does it look like in different policy sectors? The second bears on the corresponding normative issue. Is this (more or less) stable equilibrium in two dimensions something that we can and ought to accept? Or are there strong arguments for trying to re-structure the living European constitution?

I shall refrain from any extensive analysis of the empirical aspect. For the sake of my argument, I take the actual workings of the living European constitution for granted. It is ruled by a two-dimensional constitutional balance of terror. In the horizontal dimension, market agents are well-aware that they can easily destroy the democratic order. Likewise, politically responsible politicians know they can destroy capitalism perfectly easily, by legislating in such a way as to drive private enterprise out of the country. Correspondingly, in the vertical dimension, the European Court of Justice understands that it can easily destroy citizens’ trust in the living European constitution by applying too rigorously the principle of the precedence of EG law. The electorates of the member states, and hence their governments, can only be expected to remain loyal to the suprastatist regime as long as that regime respects the principle of national self-determination in areas of the common market which are more sensitive politically. According to the standard view, EG law on the four freedoms is not and should not be implemented within a larger sphere than that within which it can reproduce its own legitimacy. In the vertical dimension too, moreover, this notion of political sensitivity as to the legal aspect has resulted in a fundamentally living and unclear constitution. European lawyers and political scientists agree on the empirical fact of a living European constitution in two dimensions: one characterised by monetary union without fiscal union, and by double asymmetry. Neither democratic accountability nor social legislation has been centralised to the same extent as the power to regulate free trade (Gustavsson 2006).

But it is the normative side of the matter that is more interesting and controversial. Many scholars take the same empirical view on the questions adumbrated above. To a striking degree, however, their views diverge when it comes time for evaluation and practical recommendation. The question put by Simon Hix (2008)—“what is wrong with the European Union and how to fix it?”—has prompted a good many different answers.

Three main positions
In the great debate on the future of the living constitution of the European Union, there are essentially three positions. The manner in which their champions have engaged each other in debate, moreover, is very promising from the standpoint of further clarification. The core assumptions of these three schools of thought can be presented schematically in the following way:

- Our founding fathers made a historical mistake, which can be gradually repaired through deliberate politicisation in terms of left and right (Hix 2008).

- Our founding fathers created something historically admirable, and there is nothing to worry about (Laffan, O’Donnell & Smith 1999; Majone 2005; Moravcsik 2008).

- Our founding fathers made a historical mistake; the appropriate response, however, is extreme constitutional caution, which is necessary if devastating outbreaks of right-wing populism are to be avoided (Bartolini 2005; Scharpf 2007).

**Deliberate politicisation in terms of left and right**

Among advocates of the first view, we meet those who argue that the practical consequences of this lack of clarity in the vertical dimension can only be handled through deliberate politicisation in terms of left and right. Due to the weak political contours of the European level, no one knows for sure where EG law applies; nor is it clear where member states can decide for themselves. Unless EG legislation is adopted after a regular confrontation and deliberation along party lines at the European level—in the same way as is now done nationally—citizens will be unable to trust it. Thinking in terms of left and right is suppressed at present, but under the political surface it does indeed exist. It should be brought out into the open.

In his 2008 book, Simon Hix presents a program for encouraging “limited democratic politics” at the Union level. His main points include a “winner-takes-more” model in the European Parliament: this implies a president of the Parliament chosen on a full-time basis for five years, and the replacement of the purely proportional system for allocating committee chairs with a system giving larger political groups a greater number of chairs. Correspondingly, the European Council should be re-structured into a proper and fully transparent legislature. Thus there should be an open contest for the Commission presidency, with candidates having declared their political affiliation in terms of left and right. Taken together, Hix argues, these changes will have a dynamic effect, and be followed by long-term development in the direction of a totally politicised European Union. If the “life” component of its living constitution comes to resemble that of national-level politics more closely, the system as a whole will work much better.

**Status quo works wonderfully**

Hix is critical of those who defend the constitutional status quo. Its defenders, however, are of two different kinds. These two groups justify their defence of present-day constitutional arrangements—marked as they are by double asymmetry, monetary union without fiscal union, and a constitutional balance of terror—in very different ways, and in opposite political moods. According to Brigid Laffan, Giandomenico Majone, and Andrew Moravcsik, we should
emphasise the fact that, historically speaking, Europe has been highly innovative. In the course of one-hundred years, Europe has produced two political innovations of great historical importance. The one is the mixed economy, in the horizontal dimension; the other is the mixed polity, in the vertical one. The mixed economy enabled us to avoid totalitarianism, and the mixed polity made it possible to combine a truly free market with democratic arrangements in respect of social legislation and fiscal redistribution within each member state. From the standpoint of market liberalism, namely, the Europe-wide constitutionalization of the free market is a far better solution than the risky business of a mixed economy country by country.

In other words, double asymmetry, monetary union without fiscal union, and a constitutional balance of terror should not be considered problematic. Those who do so consider them show their democratic and federalist bias. Instead, we should be happy we have found such a well-functioning constitutional settlement. The only thing that seems risky over the long run is the tendency of European intellectuals and politicians to discuss the issue in terms of a democratic deficit. The status quo works wonderfully, and it should not be disturbed by philosophical considerations of that kind. We should concentrate rather on understanding our own system, with an eye to making it work even better and to demonstrating its advantages to the rest of the world.

The status quo is less bad than its alternatives

When Stefano Bartolini and Fritz Scharpf, by contrast, defend the constitutional status quo, they do so on the basis of a diametrically opposed analysis. The combination of double asymmetry, monetary union without fiscal union, and a constitutional balance of terror does not fill them with enthusiasm. However, they see no feasible alternative to the status quo. Nothing else is available which is better or as good. These scholars argue in a way familiar from environmental policy. That is, they plead a precautionary principle of a sort designed for vertical politics. We cannot think in terms just of costs and benefits. We must also keep a worst-case scenario in mind.

In the horizontally living constitution, left and right measure their powers against each other. In practice, both sides benefit from an element of mutual trust which is self-reinforcing within the historically given constitution and the historically given borders. But, Bartolini and Scharpf caution us, a politicisation of the vertical dimension will not work in that way. As soon as Union questions lose their Pareto-optimal status, citizens will start asking a politically sensitive and potentially explosive question: why, and on what basis, are people living in other countries entitled to legislate on “our” behalf?

Politicians find it hard to give a good answer to that question. If is for this reason that European legislation and European adjudication should remain apolitical. Horizontally speaking, citizens can accept majority rule, because the minority has been active in the preceding preparations and can imagine becoming a majority after the next election. Vertically, citizens cannot be active in the preparation of legislation in the same way. Since the most important legislative issues—especially the trumping principle of free movement—are constitutional ones, citizens will not as easily consider majority decisions to be legitimate.

This is why Bartolini and Scharpf are so afraid that a system of European majority rule will
provoke outbreaks of devastating right-wing populism in the electorate. Such tendencies will arise, in their view, if the suprastate goes too far towards legislating and adjudicating in a way detrimental to feelings of national self-respect. It is therefore critical, in connection with vertical European legislation and adjudication, that we never lose contact with the underlying informal principle that vertical loyalty upwards is bought at the price of respect for national self-determination downwards.

**Our understanding benefits from considering two dimensions**

The debate between these three schools of thought serves to illustrate two main observations. One is how our understanding of the living constitution of the European Union is furthered if we interpret the question in two-dimensional terms. Considering the elements of life and history in the constitution both vertically and horizontally enables us to see the main options in the debate more clearly than does an exclusive focus on the question of left and right.

In other words, it is *not* to be taken for granted that the juxtaposition of free trade and national self-determination is of the same kind as the traditional confrontation between left and right within each member state. The horizontal dimension bears on the tension between capitalism and democracy—a matter over which a balance can easily be struck without the losers becoming negative to the system as such. The vertical conflict, on the other hand, refers to the tension between national self-determination and the suprastatist regime of free movement for capital, goods, services, and labour. The losers in this conflict might easily, as Bartolini and Scharpf argue, turn their opposition to particular outcomes into opposition to the system as such.

**There is a tendency towards non-classical opposition**

That leads me to my second main observation: namely, that the concept of opposition has a different meaning in the living constitution of the European Union from what it has in the American context. Due to the fact that the United States is a symmetric federation, opposition at the state level has the same within-the-system confrontatory meaning as it has at the federal level. The fight between left and right proceeds on both levels at the same time, and is considered legitimate on both levels. By contrast, our European system of suprastatism, which is only applied partially, leaves us with a living constitution based on the principles of monetary union without fiscal union, and of double asymmetry. Consequently, the prospects for instituting democratic accountability in the vertical dimension are not as good as they are in the horizontal dimension—within each nation-state or full-fledged federation.

Horizontally and within each contrary, opposition is *classical*, in the sense described long ago by Otto Kirchheimer: as being the legitimate “right of the defeated group to publicly maintain its principles after they were rejected by the majority to be the foundation of the opposition’s functioning”, provided that “the participants in the political game consist of moderate elements” (Kirchheimer 1957: 128f). Vertically, the debate between Hix on the one hand and Bartolini and Scharpf on the other—about the legitimacy of federal rulings by the institutions of the European Union—calls into question the classical premises that Hix takes for granted. Instead, Bartolini and Scharpf warn us, politicisation in the vertical dimension will bring about Kirchheimer’s two
alternative concepts of opposition (Kirchheimer 1957: 134ff): opposition of principle, which will in turn call into being cartel arrangements aiming at the waning of opposition.

Put differently, Laffan, Moravcsik, and Majone see no difference between controversy and flexibility in the vertical dimension and what takes place in the horizontal dimension within each country. A mixed polity is basically the same thing as a mixed economy. Hix concedes there is a difference. He believes, however, that it can be overcome by European party politics. If left-right controversies are let loose in the vertical dimension as well, he argues, confrontatory activities of a moderate kind will flourish.

Bartolini and Scharpf take an entirely different view. Instead of pointing to the possibility of neglecting or overcoming the difference, they emphasise the difference between, on the one hand, classical opposition, discourse, and power struggle in the horizontal dimension within each country; and, on the other, what it likely to result if the vertical dimension is politicised. Within each country, they argue, parties and people can fight each other in a moderate way, because their opposition is considered legitimate, and it takes place within the same borders and in accordance with the same national constitution. Vertically, however, it is a question not just of politics but of constitutional politics. People of differing views have to answer a more difficult question: namely, “why should people living in other countries be entitled to legislate in our country?” When the living constitution is flexible and unclear (as it is in the vertical dimension), striking a reasonable balance is likely to be trickier and more explosive than it is when the task is to balance political forces within a single mixed economy or welfare state.

**Why are EU affairs outsourced from national politics?**

This leaves us with the puzzling question with which Peter Mair confronted us in his 2007 article on political opposition in the European Union. Why are EU affairs outsourced from national politics into special referenda and elections to the European Parliament? Why is it these matters are not part—as ideally they should be—of the regular public debate and regular national election campaigns in any of the member states?

The explanation, as Mair sees it, is that national politicians think intuitively along the same lines as Bartolini and Scharpf. It is too explosive to let constitutional politics loose in national politics. Laffan, Moravcsik, and Majone, for their part, would say there is no need for outsourcing. There is nothing to fear, they would probably argue, from mixing regular politics with constitutional politics. Hix would probably give a similar answer. He believes very strongly in the ability of European political parties not only to overcome the tension between left and right in domestic politics, but also to overcome the tension between national self-determination and the principle of free trade. Indeed, he seems to believe such tensions could be overcome even when the policy is implemented from above, and no room is left for legitimate opposition or disobedience.

**References**


