

ARTICLES : SPECIAL ISSUE
CONFRONTING MEMORIES – CONSTITUTIONALIZATION
AFTER BITTER EXPERIENCES

Constitutional Identity and the Politics of Homogeneity

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The identity of the European Union has, for some years now, been the topic of many debates. The recent enlargement of the Union has stirred this debate and has not appeased it. There are various key topics that inspire the discussion, which included, for example, conceptions of citizenship. The following remarks will offer a sketch of some of the issues that come to the fore in this respect. Of particular interest here are the connections between the process of the constitutionalisation of Europe and the question of the desirability, or even necessity, of a homogenous European identity. I will first name some exemplary concrete problems that are connected with questions of politics of identity. I will then undertake a short illustrative look into the history of ideas to trace back some of the lines of thought that are relevant in the discussion. Finally, I want to suggest a possible normative perspective of how to proceed.

A. Some Issues at Stake

I. ...Legal...

One of the famous and much discussed examples of the relevance of ideas of identity and its connections to constitutional law is the Maastricht-decision of the German Federal Constitutional Court.¹ Here, the Court declared the participation of Germany in the European Union as constitutional on the one hand, but formulated much discussed and criticised reservations on the other.² The interesting issue in

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¹ *Entscheidungen des Bundesverfassungsgerichts* (Judgments of the Federal Constitutional Court), BVerfGE 89, 155.

² Cf., BVerfGE 89, 155 (174, 190). For a critique see Joseph Weiler, The state "über alles": Demos, telos and the German Maastricht decision (Badia Fiesolana, San Domenico (FI), 1995, EUI working papers : Robert Schuman Centre 95, 19).

the context pursued is the claim in the judgment that one of the preconditions for democratic rule is a minimum amount of homogeneity of the constituted community – in other words, a minimum amount of “existential common ground” (*existentielle Gemeinsamkeit*).³ This statement thus expresses scepticism about the prospects of European integration not on temporal political, but on principled grounds of constitutional theory. Interestingly, the thought is not limited to feeding a certain amount of scepticism about integration in the national sphere. The issue also reappears at supra-national level, whenever it is demanded that something similar to a substantial European identity has to be constructed. The same principle is then applied, but now within the parameters of a supra-national body. From this perspective, the way to proceed is not to challenge the assumption of the connection of a constituted democracy and an “existential common ground” but to create such common ground in the enlarged European Union. Whether this is the right concern for the Union or a waste of constitutional energy aimed to reproduce the false conceptions of nationalism on a supra-national level is one of the issues at stake.

II. ...Religious...

There are very concrete and important questions to be answered as to the religious identity of the Union. The discussion about the inclusion of a reference to God in the Preamble to the European Constitution is one of them. The Preamble is in legal terms, certainly not the most important part of the Constitution for Europe. It serves a rather symbolic function, and is not part of the core of hard legal rules. However, within this framework it does still matter. It signals a certain self-interpretation of the community that is constituted. Not one single event in the social, political or legal sphere can determine what this self-image consists of. The object of these struggles is shifting. It is often nothing but the construction of some agents of the public sphere – politicians, opinion-makers, scientists – who declare their particular visions, conceptions or misconceptions of the community as the understanding of the citizens. Collective identity – understood as a descriptive term – is, therefore, to be scrutinized with sober mistrust. At best, it is a useful abstraction from the many individuals and their interpretation of their lives, which, in the end, form the real substrate of communities.⁴ But such discussion does matter as it indicates the drift of a society, and the issues that are at stake. The role of religion is certainly a very important question in the European Union, especially after enlargement, in which some states, which have a rather clear religious profile,

³ *Id.*, 184.

⁴ Isaiah Berlin rightly warned against the dangers of de-personalized accounts of history; cf., ISAIAH BERLIN, *LIBERTY 98 et seq* (2002).

such as Poland, have joined the Union. In addition, the question of religion and the state is traditionally one of the central issues of modern constitutionalism. With the separation of the state and the church, the religious neutrality of the state is a cornerstone of statehood in the time of modernity. This holds not just from a secular point of view. It is also true from a religious perspective that understands the necessary differentiations of functions between the state that organises the mundane affairs of the citizens, and the task of religious communities that are not concerned with these matters, but with the interpretation of human existence, its position in the world, and the sense of the world in general, all this, in a framework of reference to a transcendental entity.⁵

The issue of the religious identity of Europe is not just present in the discussions about the Preamble. The presence of religious symbols in the public sphere is another case in point. The models of regulation of the question vary in the different member states. There is the laïcist solution of France banning even religious symbols worn by pupils, not just those worn by teachers or other public servants. At the other end of this axis, we find Britain, which allows the presence of religious symbols quite freely in the public sphere. There is a High Court judge who wears a turban because he is a Sikh. There are policewomen who wear headscarves as part of their uniform, to name just some examples which are deemed to be unacceptable in other countries. Germany follows a rather mixed middle course. After the Headscarf decision of the German Constitutional Court,⁶ the *Länder* are in charge of establishing the new legislation, which, according to the court, is necessary for a ban of headscarves. Some *Länder* intend to ban headscarves alone, and not Christian or Jewish symbols, some follow a laïcist line of banning all visible and ostentatious symbols, and some follow a liberal course deciding on a case-to-case basis.⁷

The issue is, without doubt, becoming a concern for all European countries. The European Commission has had to deal with it in the framework of recent European anti-discrimination law.⁸ The European Court of Human Rights also had to decide

⁵ Cf., on these matters, one of the most influential essays on questions of state and religion: JOHN LOCKE, LETTER ON TOLERATION (1996).

⁶ Bundesverfassungsgericht, 56 NEUE JURISTISCHE WOCHENSCHRIFT 3111 (2003).

⁷ Compare Matthias Mahlmann, *Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case*, 4 GERMAN LAW JOURNAL 1199 (2003), available at: <http://www.germanlawjournal.com/article.php?id=331>; Matthias Mahlmann, *Dienstrechtliche Konkretisierung staatlicher Neutralität*, 37 ZEITSCHRIFT FÜR RECHTSPOLITIK 123 (2004).

⁸ Cf., Council Directive 200/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OFFICIAL JOURNAL L 303, 2.12.2000, 16.

upon the matter.⁹ These cases raise the question of whether, in the specific context of religion, the identity of Europe is Christian or not. The accession of Turkey to the Union is, perhaps, the central political issue being discussed in the framework of politics of identity, or rather, to be more precise, in the framework of religious identity. And it is relevant in this context, too. For some, the accession should be based on the improvement of the Turkey's human rights record and other pragmatic considerations. Others take a principled stand and argue that the project of European integration has not just geographical boundaries, but cultural ones as well. These boundaries are taken to exclude the Islamic traditions of Turkey and express the clear message that Turkey cannot be part of the European Union regardless of whatever its internal policies are or may be and whatever democratic improvements it may carry out. There are some who take the argument even one step further, by arguing not only for difference, but – at least, by implication – also for the inferiority of other religious identities. This kind of view arises in the framework of determining the origin of the ultimate values which lie at the very foundation of European statehood (if not always in practice, at least in theory) such as human rights, democracy and the rule of law. There are some who argue that these values, which form a non-legal precondition of states, a cultural resource which they are able to draw from, although they themselves are not actually able to guarantee its existence (to apply a well-known formulation),¹⁰ are, in fact, derived from the Christian heritage of Europe. Taken to their conclusions, these kinds of argumentations lead to the consequence that Islam is not reconcilable with human rights, democracy and the rule of law – a rather disquieting perspective for the inter-religious relationships of the days to come.¹¹

III. ... and Political

The issues of identity are not solely, or even predominantly, of a religious kind. The question of Turkey cannot be understood only in the terms of the religious borders of communities. Political issues are also at stake here. One rather interesting example in which the identity of Europe is discussed concerns the position of some European governments and – given the polls – most of the European population towards the war currently taking place in Iraq. Kagan famously contrasted the

⁹ European Court of Human Rights, Case 42393/98, 15.2.2001, *Dahlab v. Switzerland*; Case 44774/98, 29 June 2004, *Sahin v. Turkey*.

¹⁰ Ernst-Wolfgang Böckenförde, *Die Entstehung des Staates als Vorgang der Säkularisation*, in: STAAT, GESELLSCHAFT, FREIHEIT 60 (1976).

¹¹ The main political actors voicing scepticism about the accession raise the issue of European Identity avoid, however, such far reaching conclusions in their public statements, cf. e.g. the parliamentary motion of the German Conservative Party, CDU, Deutscher Bundestag, Drucksache 15/3949, 19 October 2004.

American attitude towards war with the European attitude.¹² In his opinion, the former embodied a Hobbesian consciousness of the evil of the world and the need for clear and determined power politics which establish security as its principal aim. Europe, in contrast, follows, in his view, a Kantian idea of perpetual peace through co-operation, which seems not to fit very well into Kagan's perception of the world. This position raises rather interesting questions, not so much theoretically or philosophically, but politically, for example, as to the apparent contempt in some circles of contemporary thought for such ideas as international co-operation, which Kant embodied in a rather impressive way in his essay on perpetual peace¹³ (which is, by the way, founded on very sceptical perspectives of the political actions of human beings and not on some lofty dreams about the angelic nature of the human species).¹⁴ One might wonder, too, whether the war in Iraq as a case study has produced any improvement in world security. The question that is of interest here is, however, a different one: namely, whether such descriptions are taken seriously and are considered as more than a rhetorical part of a political battle. If the former is the case, the consequences can be serious. Given the state of affairs of international relations and the crisis of public international law through its being disregarded by important actors in recent years, the idea that deeply seated national or (in the case of Europe) transnational, but still essentialistic differences between the one super-power, the USA, and one of the other secondary power centres of the world exist could be extremely harmful. Where essential differences – supposedly seated in deep cultural differences – are found, the building of bridges of understanding becomes difficult. The gap between the US and Europe widens and not on transitory grounds. The reason for the difference of policies gains a completely new quality. It is no longer the difference of tactics or strategy between different governments and the particular forces behind them. It is something that will, in consequence, not change because of the change of government or redrawn power relations between the states concerned. It is certainly not simply a matter of the persons in charge of the decisions and affairs.¹⁵

¹² Robert Kagan, *Power and Weakness*, 113 POLICY REVIEW (2002), <http://www.policyreview.org/JUN02/>. See the contributions to the Special Issue of the German Law Journal, dedicated to the Kagan Thesis: "The Kagan Phenomenon and the New Transatlantic Tensions", 4 GERMAN LAW JOURNAL No. 9 (1 September 2003), with contributions by Smith, Bratspies, Miller, Dilling, Buckel & Wissel, Harrington, Afsah, Paulus, Wrangle and Lotherington (all available at: http://www.germanlawjournal.com/past_issues_archive.php?show=9&volume=4).

¹³ IMMANUEL KANT, ZUM EWIGEN FRIEDEN (Akademie Ausgabe, vol. VIII) 341.

¹⁴ Cf., *id.*, 366.

¹⁵ Kagan 10 (note 10): "The reasons of the transatlantic divide are deep, long in development, and likely to endure. When it comes to setting national priorities, determining threats, defining challenges, and fashioning and implementing foreign and defence policies, the United States and Europe have parted ways." Cf., ROBERT KAGAN, OF PARADISE AND POWER (2003).

It is something deeper, forged by time, connected to the very core of a culture nourished through the hidden wells that form it. Both sides of the Atlantic would be very ill-advised to follow this vision. It is a good and warning example of how an essentialistic vision of the identities of political entities can serve ideological ends and remove policy issues from an agenda of rational political deliberation which is not concerned with deep cultural differences but only with the hard and sometimes unattractive facts of political choices.

At a different level, the political forces of Euro-scepticism that had considerable success in the 2004 European election formulate the question of identity from a populist point of view, which is once again directed from a nationalist perspective against the very supra-national ideas of the European Union.

Although the list could be prolonged to illustrate that ideas of identity matter, these examples should suffice. They have been very important at national level ever since the dawn of nationalism and will continue to haunt any body politic for the foreseeable future to come.

B. Some Remarks on Tradition

I. From Kantian Liberalism to Hegelian Constitutionnal Substantialism

The history of thought is heterogeneous and shows clear lines of development mainly in the reconstructions by historians of ideas but not in its more complex reality. This also holds for the question of the connection of constitutions and some kind of cultural homogeneity. This connection is certainly not prevalent in the context of early liberalism. There are many voices that formulate a rather sober view of statehood that is not connected to the idea of a substantial identity of the united citizens.

Kant, for example, separated the legal order and the moral domain with great clarity. Consequently, an ethical community (*ethisches gemeinsames Wesen*) cannot be established by law.¹⁶ In addition, morality embodied in the three versions of the categorical imperative has nothing to do with the *ethos* of a particular community. It is a morality of universalistic practical reason, not of culturally determined traditions. In Kant's view, there are various factors with which nature helps to bring human beings together in communities and helps them to overcome their considerable egoism and selfishness.¹⁷ The central normative reason for the creation of legal statehood is, however, an ethical one: there is a moral duty to enter an

¹⁶ IMMANUEL KANT, DIE RELIGION INNERHALB DER GRENZEN DER BLOßEN VERNUNFT (Akademie Ausgabe, vol. VI) 98.

¹⁷ KANT (note 11), 360.

association that enables people to realise the principle of law of universalizable freedom.¹⁸ With these moves, the legal order is separated from any contingent cultural determination and, through the content of Kant's concept of law, materially bound to universal practical reason, which is independent and transcends the traditions of concrete communities.

Another interesting example is the classical text of the young von Humboldt,¹⁹ which is a cornerstone of early liberal theory and a central reference point of Mill's seminal essay *On Liberty*.²⁰ Von Humboldt's aim in this essay is to find the proper fields of state action. His method is mainly negative – he considers various areas of activity that traditionally formed part of state activity and decides whether or not they should be part of the concerns of the state. The result is a state whose main aim is to provide security for its citizens and which is not concerned with morals, the religion, or the positive well-being of society. His aim is, however, not a liberal atomism. On the contrary, he wants to increase the social bonds, which are not to be imposed by state power but to be organically grown from below. The aim of human existence is individual development, the unfolding in any individual of his or her potentials to a proportional whole. The humanity of each human being is not to be sacrificed to his or her citizenship – the humanity has primacy over the membership in the community. For this development, von Humboldt names two preconditions: freedom and variety of situations.

There is no doubt that von Humboldt's 'nightwatchman state' (*Nachtwächterstaat*) will not be able to serve as an example for the modern state with its many functions and duties to preserve modern complex societies, especially its social function. There is, however, one lesson to be learned from this early, and in some aspects certainly outdated, liberalism of the Enlightenment – namely, the sober assessment of the functions of the state in the light of community-orientated individualism and – by implication – an assessment of the content of the constitution that creates it.

With romanticism, the ideas of nationalism gained new momentum and differentiated intellectual sources. Against this background, albeit in a different theoretical framework, Hegel developed a concept of constitution and identity that was very distinct from Kantian liberalism. For Hegel, the very idea that human beings construct and create both states and their constitutions meant a deep misunderstanding of the real nature of human state building. States embody the 'Objective Spirit' of Hegel's metaphysics, an ethical (*sittliche*) entity beyond the

¹⁸ IMMANUEL KANT, DIE METAPHYSIK DER SITTEN (Akademie Ausgabe, vol. VI) 312.

¹⁹ WILHELM VON HUMBOLDT, IDEEN ZU EINEM VERSUCH, DIE GRÄNZEN DER WIRKSAMKEIT DES STAATES ZU BESTIMMEN (2002).

²⁰ John Stuart Mill, *On Liberty*, in: ON LIBERTY AND OTHER ESSAYS (1991).

subjective commands of the 'ought' of practical reason.²¹ They are the expression of deep historical movements, which have a distinct identity that cannot be peacefully associated in cosmopolitan associations as Kant somewhat desperately hoped for, but have to solve their conflicts of irreconcilable difference by armed struggle. This is the core of Hegel's *Metaphysics of war*.²² This Hegelian notion of the necessary connection between organised statehood in a constitution and substantial community has been extremely influential and has even seen a renaissance in the moral and political thought of today.

II. Theories of the 20th Century - from Collective Identities to Constitutional Patriotism

In the 20th century, many contributions to this topic were made. On the philosophical side, Heidegger is of great importance not only for the German debate but also through his reception in post-modern thought for the contemporary discussion as well. For him, in his early period of *Sein und Zeit*, human beings (or '*Dasein*' in his idiosyncratic language) are necessarily bound to the fate of a concrete community.²³ This is part of the existence of human beings in the world, a necessary condition of what it means to be human and thus an ontological "existential". It is the duty of human beings to understand and accept this fact and abandon themselves to this state of affairs.

This situation of human beings in concrete communities is echoed or developed in other theories as well. To take a rather interesting example from a philosophical tradition that is very remote from Heidegger, Rawls embedded his theory of justice in a kind of cultural relativism, a notion of community that explicitly draws inspiration from Hegel and his ideas in this respect.²⁴ Thus, the prime thinker of the last decades of liberalism is rather far from Kant's conceptions of the universalistic foundations of the state and the law, which, for Rawls, form such a central reference point in other contexts.

For the German legal tradition, Carl Schmitt was of some importance as he embodied a line of thought that was part of the current that made the catastrophe of the Third Reich possible. For Schmitt, the last questions of political communities

²¹ Cf., GEORG WILHELM FRIEDRICH HEGEL, *GRUNDLINIEN DER PHILOSOPHIE DES RECHTS* 258, 271 (1986).

²² *Id.*, 334.

²³ MARTIN HEIDEGGER, *SEIN UND ZEIT* 384 (1984). Cf., Matthias Mahlmann, *Heidegger's political philosophy and the theory of the liberal state*, 14 *LAW AND CRITIQUE* 229 (2003).

²⁴ Cf., JOHN RAWLS, *LECTURES ON THE HISTORY OF MORAL PHILOSOPHY* 365 (2000).

are not answered by reason as in Kant's view, but by the intrinsically and necessarily irrational existential decisions of groups. These decisions lead to distinctions between friend and foe, marked – in Schmitt's bellicose jargon – by the willingness to kill and die for the preservation of differences.²⁵ The concept of a constitution can in his view only be disconnected from such decisions when it is misunderstood in superficial legalistic terms. The material concept of a constitution, however, is intrinsically related to such decisions.²⁶

Another author who was very important for the German discussion is Rudolf Smend, who developed a theory of integration through constitution – one of the most influential conceptions of constitutional law in post-war Germany.²⁷ In the process of integration, the underlying normative vision takes precedent before the written norms of the constitution – and, given that the latter have to be interpreted in the light of the substantial values established in the process of integration, the legal norms are not a threshold or frame for this process, but the object of its formative powers. It comes as no surprise that this concept was forcefully attacked by Kelsen, as sacrificing clear normative rules to the vague notions of the integrative process.²⁸ Thus, the connection of a substantial cultural identity and a constitution is found in influential contemporary legal thinking as well.

However, a different famous approach is formulated by Habermas' constitutional patriotism. Here, it is not a substantive concept of identity that is in the foreground but the identification with the procedures that generate substantial outcomes – although, in the last instance, the *Lebenswelt* in which its concept is embedded is itself the cultural tradition of modernity, which is fragile and dependent on the preservation of its content by the citizens through their choice.²⁹

C. Prospects of Inclusive Identity

This historical review, impressionistic as it is, offers some illustrations for the options given. One can, first, argue that any community, especially when bound by the dense legal framework of a constitution is predicated on the existence of a substantial identity, be it cultural, religious or something else. Second, one might

²⁵ CARL SCHMITT, *DER BEGRIFF DES POLITISCHEN* (1963).

²⁶ CARL SCHMITT, *VERFASSUNGSLEHRE* (1928).

²⁷ Rudolf Smend, *Verfassung und Verfassungsrecht*, in: *STAATSRECHTLICHE ABHANDLUNGEN* 119 (1968).

²⁸ HANS KELSEN, *DER STAAT ALS INTEGRATION* (1930).

²⁹ JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG* 632 (1992); *DIE ZUKUNFT DER MENSCHLICHEN NATUR* 124 (2004).

opt for a procedural universalism that makes the procedures of generating political decisions the core of the identity of a community. Third, one might find a substantive normative universalism convincing. From this perspective, a core of material norms of universalistic status is the rational backbone of questions of political identity, nothing more and nothing less.

The problem of the first option is that collective identities of a substantial kind tend to be ideological constructions without real content. The history of nationalism provides many samples for this. The same seems true for today as well. The reality of societies is formed by individuals who are heterogeneous and pursue very different projects of life. They do not unite along the line of nations or other forms of contingent geographical organisations of human beings, leaving superficial common cultural patterns aside. An investment banker in the City of London tends to have more in common with his or her colleague in Frankfurt or Hong Kong than with an anti-globalisation activist of these respective cities. Accordingly, the descriptions of what the substantive identities consist of are, more often than not, rather unconvincing, or concern the politically irrelevant habits of some cultures. There are real dangers connected with ideas of substantial identity. They can become an outlet for feelings that are less than attractive, for example, of the superiority of some communities. The concern about substantial identity might distract from the more important issues that are at stake for a community. And issues of identity might serve as a neat cover-up for political issues that are, as a consequence, not addressed. Again, the history of nationalism provides ample examples of all of this.

The second paradigm seems more attractive but rather thin, and shares the problem of all proceduralist accounts, namely, of leaving the non-procedural preconditions of proceduralism unexplained. Thus, the third option seems to be the way to proceed. It holds that the only identity that is relevant on the political and legal level of deliberation is centred on the substantial normative contents of a universalistic outlook. Today, the content of this outlook is embodied in a culture of human dignity and rights, and institutionalised in democracy under the rule of law, and buttressed by social solidarity. The thesis behind this concept is that the political identity that is worth having as an individual and as an association in a body politic is one that potentially excludes nobody. It is a major idea of many expositions of the problem that identity is formed in contrast to some 'Other' and thus that identity is necessarily exclusive. The concept of identity proposed here does not follow this line of thought in its result. There is no reason why many political entities, states or supranational forms of governance should not embody the same normative identity in the sense outlined. This would be nothing new, given, for example, the old idea expressed, for example, in Kant, that all states should have a republican form of government as a precondition of lasting peace.

Clearly, the republican form of government is a central element of the identity of such states. However, it is not clear why sharing this form of government with other states could challenge the identity of the states. The point of a constitution is not, from this point of view, to frame legally a community with a unique substantive identity, but to constitute, at least in the territory that it governs, the principles of human rights, democracy, rule of law and social solidarity, and to engage its citizens in this normative project of civilisation.

This sober sense of constitutionalism, it seems, also formulates the task for the constitutionalization of Europe. The construction of a substantive identity beyond this normative task is not the problem of the day. The problem is how to make human rights, democracy, the rule of law and social solidarity a reality in the enlarged Union in every day life. If other bodies politic follow the same path (or are even ahead on it), this creates no problem of identity at all. The normative identity of the European Union is not challenged by the fact that other communities share its main aspirations: on the contrary, these aspirations are strengthened in this case. Nor is the idea of active and participatory citizenship weakened by a normative identity that is potentially or in reality shared by other bodies politic. The preconditions of citizenship are the possibilities of participating, the mechanisms of rights and social enabling facts, and not that the project being pursued is intrinsically different from the project of the neighbouring states. Thus, the normative, substantial, universalistic concept of identity envisions not a Hegelian plurality of substantively different communities, but associations that autonomously follow the normative aims outlined as a project which is potentially shared with others, which is being achieved, however, in geographically and institutionally different frameworks of states or supranational communities. Within these frameworks, individual human heterogeneity can find its safe and unimpeded growth.