



Dieter Grimm*

The Prospects of Constitutionalism in Europe**

1.

As a German speaker on the occasion of Professor Lanchester's 70th birthday and retirement, I want to emphasize his deep interest in and knowledge of German constitutional law theory, both in history and present times. What I particularly admire is that Fulco Lanchester did not content himself with studying the writings of great German authorities. He rather sought direct access to them. So, he visited and interviewed Carl Schmitt and Gerhard Leibholz, two figures of immense influence, but opposite careers.

Schmitt's career started already during the German Empire and culminated in the Weimar Republic. Leibholz, 13 years younger than Schmitt, began to publish in the 1920s, yet, his career culminated in post-World War II Germany. Carl Schmitt's writings contributed to the destruction of the Weimar Republic and he actively advocated national socialism afterwards. Leibholz tried to stabilize Weimar, but was forced to emigrate when Hitler took over in 1933.

Schmitt was marginalized after 1945 in Plettenberg, although he continued to publish, had influential followers and was present in the public discourse. Leibholz became one of the most impressive judges of the Federal Constitutional Court where he served from its beginning in 1951 until 1971. Carl Schmitt, in turn, was among the severest critiques of this Court's jurisprudence, especially its value-based approach to fundamental rights.

Because of their involvement in the fate of German constitutionalism in the 20th century, both scholars are related to today's subject, the prospects of constitutionalism in Europe, as one of them had helped undermine constitutionalism before World War II, the other had helped to reconstruct it after the War. If we now turn to the current situation of constitutionalism in Europe, we have to distinguish between the national level, the European states, and the supranational level, the European Union itself.

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2.

In the second half of the 20th century, it looked as if constitutionalism had established itself almost universally as the adequate form of organizing and legitimating political rule. After the seminal changes of 1989, no European state remained without a liberal-democratic constitution. In addition, most of the states had adopted judicial review and established constitutional courts, some of them with considerable impact on their countries' further development.

Today the constitutional world looks different. In many countries, liberal-democratic constitutions are under political pressure - the subject of Fulco Lanchester's book of 2020. In two member states of the European Union, liberal-democratic constitutionalism is already a matter of the past, in Hungary and Poland. In both countries, political parties took over which are at odds with liberal democracy and favor authoritarian systems. However, there are important differences between the two countries.

In Hungary, the Fidesz Party got a two thirds majority in free elections and can undertake the system transformation legally and frame the constitution so that the party rule is perpetuated. This makes it extremely difficult for the opposition to win a majority. Should it nevertheless return to power, it would rule under the conditions set by Fidesz unless it would itself obtain a two thirds majority in the election and then model the constitution according to its own ideas, to the detriment of its function as common basis of competitors.

In Poland, the PiS Party obtained an absolute, but not a two thirds majority, which is not sufficient for a legal transformation of the political system. This party, therefore, had to resort to open violations of the constitution in order to reach its aims. Apparently, this constitution had not sufficient support in the population to stop the party from pursuing its illegal aims. Like the Fidesz Party in Hungary, PiS started by bringing the constitutional court on government lines.

The European Union that is based on the values underlying liberal-democratic constitutionalism, does not dispose of sufficient means to discipline member states that leave the European consensus. Nobody had expected this development when the Lisbon Treaty was concluded, and it is unlikely that the necessary means could be added now by way of treaty amendment, because this requires unanimity among the member states.

Because of this experience, the question arises as to whether liberal-democratic constitutions can protect themselves against populist majorities and their attempt to free themselves from all constitutional bonds. The most effective means would, of course, be to prevent populist parties from emerging and capturing the organs of the state. One possibility is a ban of such parties.

However, a ban is difficult in the early stages because frequently parties reveal their true intentions only after having obtained a majority. Once they possess a majority, a ban will meet strong resistance and is likely to fail. In general, one would not want to make a party ban too easy because it is a severe interference with the democratic process and prone to abuse by the competitors of the impugned party.

Another starting point could be the electoral system. It seems noteworthy that the Hungarian Fidesz Party's two thirds majority was based on 53% and the Polish PiS Party's absolute majority on 36% of the votes. There may be good reasons for such a surplus for the winner, but only as long as the competing parties share the belief in liberal-democratic constitutionalism. Once a populist party took profit from the electoral system and gained the necessary strength to transform the system or to disregard the constitution, little remains for the constitution to do.

3.

As regards constitutionalism in the European Union itself, the Union does not have a constitution in the strict sense of the term. Its legal basis is an international treaty concluded by sovereign states. However, this treaty fulfills certain functions of a constitution, definitely so after it had been constitutionalized by the seminal judgments of the European Court of Justice in 1963 and 1964 that established the supremacy of European law over national law, even national constitutional law.

This constitutionalization was instrumental for establishing the common market, but it created a legitimacy problem. Since the treaty was not intended as a constitution, but as an instrument of international law, it does not follow the distinction between constitutional and ordinary law, which is crucial for constitutionalism. Rather, the treaty is full of rules that would be ordinary law in every member states. Consequently, these rules can be abolished or amended with a simple majority vote. In the European Union, all these rules participate in the constitutionalization of the treaties. The EU is not only constitutionalized, it is overconstitutionalized.

The consequences are serious. Everything that has been regulated on the constitutional level is thereby withdrawn from the democratic process. The consequence is a power shift from the democratically legitimated and accountable organs to the judiciary. The member states and the European Parliament are not only excluded from decisions in the constitutionalized field, they are also unable to change them. Elections do not matter. This is one of the least noticed, but most important sources of the democratic deficit of the European Union.

The question whether the European treaties should be transformed into a constitution in the strict sense, is actually again on the table. The Conference on the Future of Europe that deliberated for a full year has proposed to summon a Constitutional Convention, and the European Parliament has turned this proposal into a formal request, so that the question arises whether a constitution in the strict sense would be desirable or not.

What would be necessary to reach this aim? One would have to add the element that distinguishes a constitution from the treaties, namely self-determination of a political entity about the purposes and forms of its political and social order. Consequently, the member states would have to give up the constituent power over the EU in a last international treaty and hand it over to the EU, which would, from that moment on, be a self-supporting entity.

This would, however, also be the end of the member states as sovereign states, because it would inevitably turn the EU into a state. Germany is barred from participating in such a

transformation by its own constitution. But apart from this obstacle, the question arises whether a transformation of the EU into a state would fix the democracy problem or aggravate it, because it is difficult to imagine where the legitimacy resources for the self-supporting entity that can no longer rely on the legitimacy transfer of the member states should come from.

In questi mesi sono state seguite con attenzione le elezioni francesi (prima le presidenziali, poi quelle dell'Assemblea nazionale) attraverso due incontri loro dedicate, cui hanno partecipato esperti italiani e stranieri. Queste mie osservazioni conclusive si fondano sull'andamento del dibattito e, soprattutto, sull'idea che la Francia si stia *italianizzando* e che l'Italia continui ad aspirare ad una *francesizzazione* delle sue istituzioni politiche. La mia tesi è che i mutamenti del sistema partitico francese possano essere contenuti, sempre che la situazione geopolitica non precipiti, mentre il mutamento italiano rischia di non passare per Parigi, ma per una delle capitali dell'Europa centro-orientale.