What Europe needs now: Constitutional Faith, a New Old Understanding of Freedom and a Constitutional Convention

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Constitutionalisation not only legalises the political order, but also creates identification. Neither the supranational Union nor the transnationalised democracies of the member states are directly tangible for the citizens of Europe. This is the *gap* that the "believed" self-identification with the European area of freedom or the constitutional structures of the member states overcomes; otherwise ideologues use it - inflated into a wedge in their echo chambers - to drive it into the European integration project or into the democratic and constitutional structures of the member states.

1. Constitutional identity is not a sentiment to the strains of the European anthem or the sublime wording of member states' constitutional preambles. Rather, it is about the "belief" in one's own self-determination - and this after the reopening of Notre Dame in Paris in a double sense: as a rational understanding of the normative Union organisation with its justiciable fundamental freedoms and also as an emotional-cultural self-identification with the European area of freedom, which is characterised by centuries of "constitutional traditions common to the Member States" (Art. 6 para. 3 TEU). The first variant of the meaning of rational comprehensibility of European legal normativity is readily recognisable. Therefore, I am more concerned with the second variant, which may seem too kitschy for "enlightened liberalism" (Höffe), but whose core is anything but maudlin: It is the "believed" self-identification that promotes anybody's inner alertness to the fact that there is no exclusive alternative between democracy and totalitarianism (cf. Arendt and Lefort). Almost 76 years after the promulgation of the German Basic Law the normative linking of liberal and democratic structural elements within the member states is regarded as such a self-evident *acquis commun* that totalitarianism appears to be an aliud to democracy. This is not true, though, and only due to a biased focus on the superordination between state power and civil liberties and a kind of ignorance against the self-efficacy within (political) communities. Yet the latter is precisely what matters! For the resilience of the crisis-ridden founding democracies in today's Union, it is crucial that the citizens of Europe "resonate" (Rosa) with their (historically grown) possibilities of self-determination. Particularly in modern mass democracies, especially with the anonymised brutalisation of the digitalised public sphere, the temptation to delegate personal responsibility is increasing. Nevertheless, the desire and burden to apply one's own will is the backbone of democracy. The inherent, perpetual conflict between competing policies needs an autonomous civil society as a counterpart. As soon as too many people shift their own responsibility onto a majority, a collective, a party or a church, or answers become ideologised and removed from the dispute, democracy runs the risk of totalitarian degeneration - no matter how eloquently and technically artfully the member states' constitutions have written down their guarantees.

Interestingly, the non-exclusivity also applies the other way round: just as democracies threaten to degenerate into totalitarianism without the enthusiasm of many for their self-determination, mass self-empowerment can open up democratic spaces in totalitarian oppression.

The erosive effect of Polish *Solidarność* on the former communist Eastern bloc is an impressive example of the effectiveness of "believed" self-determination. Its motto "No freedom without solidarity" (*Nie ma wolności bez Solidarności*) still accompanied Poland's transformation into a parliamentary democracy at the Round Table. At the same time, it reformulates an old narrative of freedom that is overlooked by the (liberal) *freedom-from* thinking (with its usual focus on state subordination): namely the understanding of freedom as freedom *for*. This is the subject of the following section of this article.

2. The inner identification with a constituted community that has just been articulated correlates with thinking freedom with an emphasis on the *for*. This emphasis, forgotten today, is ancient. Even in the first world-historical narrative of freedom from the fifth century BC - Herodotus' description of the conflict between Greeks and non-Greeks over naval supremacy in the Aegean, known as the Persian Wars - "freedom" *(ἐleuthería)* is linked to a "belonging to the people". In both the earliest Greek deciphered to date and in Latin (*līber*), the word stems trace back to the Indo-European **h1 leṷdʰ,* which means "belonging to the people". Such a communal reference of ancient adjectives for "free" is not a communitarian flash in the pan, neither a peculiarity of the Greek poleis nor a republican master narrative of the Roman Empire. Even the Old High German *liut* (plural *liuti "*people*"*), the Anglo-Saxon *lēod* or the Lithuanian *liáudis* carry on the Indo-European connection "free=belonging to the people". Also in Renaissance Italy, it was not about solipsistic egoism, but about the dialogic of human personality and constituted self-regulation - in short, about the dimension of the other. For the humanism of the *Quattrocento*, it is self-evident that the rights that enable to freedom are at the same time the limits of freedom, so that the new inner-worldly autonomy of man does not lead to the perplexity that the measuring one and the measure coincide.

Peace as a constitutional goal and the complementary freedom for become "lost" in the logic of the voluntaristic justification of state founding. The mathematisation of ethics as a replacement for the theological truths that had become "murderous" in the religious wars led to the contract theories of the 17th century. For their "social economics" of the rational pursuit of advantage, law "functions" as the command of a single will of the highest leviathanic authority (Hobbes) both in conflict and in cooperation. Thereby, freedom rights become directed towards state interaction, a perspective even deepened by the constitutional jurisdiction's emergence.

3. If the communal context of freedom has thus been "lost", the points of reference for constitutional formation "the people" or "the nation" remain necessarily only imaginary. This can be demonstrated by constitutional history: The initial wording of the American constitutional text of 1787 refers to the people as constitution-makers ("We the people do thereby declare"), without any American people being existent within the federation process of the 13 colonies. And the French Declaration 1789 and the September Constitution of 1791 claim their origin in the national sovereignty (« Toute souveraineté réside essentiellement dans la nation »), without the nation having been yet established as a political entity. Before 1793, the nation combined the people and the monarch, whereas three-sevenths of all Frenchmen and women were excluded due to poverty. Even the natural law universalism of "all people" after 1945 is ultimately just a imagined, an imagined point of reference. Therefore, an active emotional-cultural identification with the legitimisation basis of constitutional formation is necessary, which this article postulates as a "believed" self-determination.

Another important aspect is linked to the "faith dimension" of constitutional identity, namely the vigilance of the individual about the fact that the people or nation are only "imaginary" identifiers. Any real identification of civil society with the state-organisationally abstract reference values of constitutional sovereignty would require a totality of social unity - namely through the elimination of any kind of other ("enemies of the people" under National Socialism, "counter-revolutionaries" under Stalinism, "dissidents" under socialism or other "deviants" of all kinds). This is why the addition of the dimension of the other in the derivation of the original community context of freedom *as* freedom *for* is so important. Every sacralisation of the nation, state and fatherland (be it through *great again* fantasies, racist exaggerations or illiberal exclusivity) must therefore be parried by a critical civil society. The continued existence of democratic institutions is otherwise deceptive; the

seductive power of simple answers is too great, as the dictatorship of reason of the French welfare committee at the end of the 18th century was already able to lure with.

4. Our knowledge of historical constitutional deliberations and practical political experience with the European integration project provide sufficient evidence that an initiative for a European constitutional convention would revitalise the accentuations described above, which are now required. Even if a first attempt in 2005 failed in the French "Non" and the Dutch "Nee", the challenges facing the Union on the world stage today are different. Even a new failure to draw up a European constitution would be better than no attempt at all; the disputes over the future organisational structure of the Union and the federal balancing of majority decisions on climate, war and migration cannot be postponed anyway in the face of international challenges. The common struggle for civil liberties *for* the organisation of a "newly constituted" European area of freedom could draw on the Charter of Fundamental Rights and other preliminary work (e.g. www.jeder-mensch.eu). The discussions of a European constitutional convention (reported in detail and commented on with high quality in the public spheres of the member states) would already institutionalise a forum for the contentious struggle for a common vision of Europe. Given the "believed" constitutional identity argued for in this contribution, it is not enough for a reliable, self-confident and solidary Europe to be perceived with what its population does not want. Rather, Europe needs a concrete orientation towards common intentions for the future: an environment worth living in for future generations, discourse standards of mutual respect (including the verifiability of transparent algorithms and the prohibition of digital manipulation of political content) and a fair and humane migration strategy.

Constitution-making corresponds to the dispute inherent in constitutional democracies, albeit with a different legitimisation and institutionalised on a different stage. Sceptical readers should be advised that, as citizens of Europe, they can only fully exploit the self-determined potential of their reasonable freedom if they constantly and critically reassure themselves of the legitimacy of the system of rule in which they live. As Union sovereignty is neither dogmatically nor theoretically justified, it is timely to sound out in a contentious manner whether the further integration history heads for the direction of the United States of Europe or a federation of free European states. It would be careless to sit out the lack of resonance Europe has with its citizens; the erosive effect of any lack of "believed" constitutional identity with the European area of freedom can already be seen in the rise of extreme parties in the parliaments of the member states. Europe therefore needs a new constitutional convention!