Reflexive Constitutionalism in the European Union

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Does Europe have a constitution? How can this question be approached? The purpose of this paper is twofold: first to dispose of erroneous ways of framing and responding to the constitutional question, and second, to suggest a model, 'reflexive constitutionalism', which facilitates a better understanding of the kind of constitution that is *emerging* in Europe.

Analysis of European integration in constitutional terms usually proceeds by adopting either one of two models of constitutionalism, which I label 'foundational' and 'freestanding'. According to foundational constitutionalism, a constitution depends for its authority on its link to a political foundation, usually understood as the collective unity of 'the people' or 'the state'. In the absence of such a political foundation, there can be no real European Constitution and the discourse of European constitutionalism is dismissed as misleading at best and destructive of authentic political community at worst. Only the nation-state constitution is a fully-fledged (if imperfect) representation of collective self-rule. According to freestanding constitutionalism, a constitution depends for its authority on its approximation to or replication of ideals of political morality, usually understood as those protecting the rights of the individual through the rule of law. From this perspective there is already a fully-fledged (if imperfect) European constitution and the discourse of European constitutionalism is but the logical continuation of an Enlightenment rationality that is potentially universal and cosmopolitan in scope.

I argue that foundational and freestanding constitutionalism present a false dichotomy. Constitutionalism is dynamic, contingent, relational and based on the human condition of plurality. To account for these features I propose a model of 're-flexive constitutionalism'. Drawing on Hannah Arendt, reflexive constitutionalism captures the sense in which even our most fundamental law is not absolute but 'relational', framing a public sphere in which, ideally, we can relate to others as co-equals, contest and negotiate our political differences. Reflexive constitutionalism models the relationship between law and politics as bidirectional, thoroughly interconnected and developing in a dialectical process that draws on Martin Loughlin's reworking of *droit politique*. Reflexivity captures the 'bootstrapping' aspect of constitutionalism: constitutional discourse and practice are mutually self-reinforcing. Constitutionalism supposes a reflexive identity, that 'we, the people' is both 'constituent' and 'constituted' power in the negotiation of the constitutional settlement. But reflexivity also suggest that constitutionalism runs up against a certain limit, which is grasped by Herman Heller's concern for the prospect of 'social homogeneity' between rulers and ruled within the polity.

Finally I return to the process of European integration with this new model in mind. In the EU, *droit politique* seems to a large degree suppressed, which threatens the dynamic evolution of law and politics: Europe, it is said, has a strong legal but weak political constitution. This problem is exacerbated by the economic focus of European integration, which has tended towards a neo-liberal bias and the eclipse of the 'public sphere'. These are genuine concerns (as much within the domestic sphere of the nation-sate as the supranational sphere of the European Union). It will be concluded however, that, according to the reflexive model, *droit politique* is not dead but only buried. The task then, is to uncover (or recover) the principles of *droit politique* - the ideas and ideals of European integration - that animate the evolving constitution of the European Union.