



# **Constituent Subject and the Constitution-making process in the E.U.**

Papastylianos Christos

# Properties of a E.U. Constitution (1)

- ⇒ A post-statal, post-national constitution
- ⇒ E.U. will be a constitutional order of constitutional orders
- ⇒ Ethnos cannot formulate the constituent subject in a way similar to the formation of the constituent subject within the framework of the nation state

## Properties of a E.U. Constitution (2)

- ⇒ Constitution-making process in the E.U. should not violate the internal constitutional order of the member states



Does the emergence of a constituent subject of a EU's constitution confront with popular sovereignty of member states?

- ⇒ Nation had a homogenizing function necessary for the unity of the state. Statal structure presupposes such a unity in territorial and functional terms



Does the EU presuppose such a unity?

# The Aporia of the Constituent subject (1)

- ⇒ Does the constituent subject exist prior to a constituent decision?
- ⇒ Does the decision create the constituent subject?
- ⇒ Derrida's and Lyotard's response, the distinction between performative and constative speech acts
- ⇒ The subject does not exist before the decision
- ⇒ The decision disguises the heterogeneity of the constituent subject
- ⇒ A constituent decision is arbitrary under the prior state of affairs

# The Aporia of the Constituent subject (2)

- ⇒ Arendt's response: "the setting of a new beginning through action always fall into an already existing web where the immediate consequences can be felt"
- ⇒ A new beginning is an action that takes place in the public domain, creating new meanings and bonds
- ⇒ A new beginning is a reflexive act, it is a speech act addressed to others, presupposing their acceptance in order to have a result (the issue of ratification)
- ⇒ A new beginning is a matter of common practices and principles that this action entails

# Forms of constitution-making (1)

- ⇒ Constitutional convention (U.S.A) v. Sovereign Constituent Assembly (France)
- ⇒ Constitutional Convention presupposes what the Constituent Assembly creates (formal equality of citizens)
- ⇒ In the model of Constituent Assembly no previous forms of organization and legality are allowed to limit the constituent power. The fiction of people fills the vacuum

## Forms of constitution-making (2)

- ⇒ In the model of Constitutional Convention previous forms of organization and legality based on common practices limit the procedure. People are not a fiction
- ⇒ Model of Constituent Convention fits better to E.U. as an entity that consists of other constitutional orders, the rules of which cannot be ignored

# The Spanish Model (1)

- ⇒ Plurality of the constituent subject does not preclude unity
- ⇒ Gradual Transformation of Political Identity (peaceful transition instead of violent overthrow of the previous regime)
- ⇒ Principal features of such transformation include
  1. Lack of violence concerning the process
  2. Lack of break in legality
  3. Presence of a common interest to reach a negotiated agreement

## The Spanish model (2)

- ⇒ Constitution making process relies on public deliberation and not on the decision of a convention or assembly
- ⇒ It includes different steps of decision-making process in which the decision making subject of each step is gradually broader and broader (committee of experts, parliament, public)
- ⇒ Transformation of political identity reformulates the relation between state and nation

# The Spanish model and the French-American: comparison

- ⇒ The Spanish model does not fit to the French one
- ⇒ According to the Spanish model equal citizenship does not exclude group affiliation
- ⇒ The Spanish model does not fit to the American one
- ⇒ It curved out a new identity designed to mediate among antagonistic visions of the nation
- ⇒ A new identity designed to preserve the polity's unity

# Constitutional moment of the E.U. (1)

- ⇒ Constitution-making process is a dualist process in terms of the content of the decision and the outcome of the process
- ⇒ Decision-making process refers to the content of the new Constitution and its ratification process
- ⇒ Both decisions should be subjected to public deliberation

# Constitutional moment of the E.U. (2)

- ⇒ The content of a new Constitution refers to the future of the constituent subject (how people are going to live within the framework of the new constitutional order)
- ⇒ The ratification process refers to the past and the present of the constituent subject (what changes should people accept in order to live within a new constitutional order)
- ⇒ Transformation of political identity does not imply a break of legal continuity

# Concluding remarks (1)

- ⇒ The Constitutional Treaty and the question of the constituent subject
- ⇒ Constitutional results are prefigured in the method of the constitution-making
- ⇒ Constitution-making process should create a new political identity

## Concluding remarks (2)

- ⇒ The choice of delegates should reflect the new political identity which is under construction
- ⇒ The content of the Constitution should also reflect the new political identity
- ⇒ The ratification process should reflect the new political identity too



## Concluding remarks (3)

- ⇒ The Constitutional Treaty crossed the Rubicon marginally as far as the choice of delegates and the content are concerned
- ⇒ It failed in respect to the ratification process (failure as far as the method of ratification is concerned and not the result of non-ratification by two member states)