The Constitutional Nature of an Erratic Informal Rule

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The Spitzenkandidaten Practice in the Spotlight

Ten years have lapsed since the first successful attempt to launch the Spitzenkandidaten practice (hereinafter, the SK practice) in 2014. With the European political parties midway through selecting their lead candidates once again, the upcoming European elections raise questions about the constitutional nature of this informal practice. The following comment aims to enquire what consequences, given the evolving dynamics of the practice, can be attached to a potential failure to designate a *Spitzenkandidat*. In particular, I argue that only if the SK process evolves into a constitutional customary rule, it is possible to conceive a duty upon the European Council to consider appointing the leading candidate from the party winning the elections of the European Parliament.

Unveiling hidden patterns

To demonstrate this, I take into account the existing theories concerning customs and conventions, deeming them applicable within the EU context (see Citino, 2022). I hereby use interchangeably the terms “convention of the constitution” and “constitutional customary rules”, without delving into the distinctive features of the British and continental doctrines, as this exceeds the scope of the discussion. In a nutshell, I argue that conventions of the constitution operate as flexible mechanisms for constitutions to accommodate evolving institutional needs. They function in different ways, either complementing existing gaps in constitutional provisions by seamlessly expanding or reducing the literal meaning, or offering interpretations that diverge from their wording (see the 2009 report of the Venice Commission on constitutional amendment).

The inception of the practice

In most theories on conventions, it is widely accepted that to become law and emerge from mere usages, unwritten customary rules (or conventions of the Constitution à la Jennings), require an established set of precedents (*repetitio/diuturnitas*), sufficient time (*vetustas*) and the “opinion of law” (*opinio iuris ac necessitatis*) by all relevant constitutional actors. The latter is an essential element meaning that the institutions must act based on the belief that the rule or the specific behaviour is constitutionally necessary and legally binding.

The lone precedent of the SK process dates back to 2014, following numerous calls to establish a more direct and democratic method for the investiture of the Commission (for prior steps, see van Hecke, Wolfs and De Groof, 2018). The legal backdrop was the one provided by the Lisbon Treaty modifying the Commission's designation mechanisms. The inclusion of the term "elected" in the treaty, indicating that the appointed individual should be chosen by a majority of European Parliament members, served as a catalyst for constitutional change.

The political context at the time was unique and quite favourable to the emergence of a claim from the EP and the EU parties, stretching the interpretation of Article 17.7 TEU with a demand – under threat of veto – for the designation of Jean Claude Juncker as future President of the Commission. While this constitutional experiment proved fruitful, the subsequent electoral cycle was going to be different.

The second round of *Spitzenkandidaten* game

Inevitably, political dissensus triggered by the rising trends in the EU political-constitutional sphere began to erode the resilience of the practice, leading the European Parliament to gradually lose its grip on its constitutional stronghold.

In 2016, then-President of the European Commission Jean Claude Juncker invoked the term "polycrisis", borrowing it from the French philosopher Edgar Morin. The Commission started to grapple with multiple challenges, unquestionably affecting the political landscape from that moment on.

As argued by Zeitlin and Nicoli (2020), the EU become "entangled" in a "multilevel political trap". The looming threat of a "destructive dissensus" corroding the EU from within (Hodson and Puetter, 2019) has been intensified by the persistent determination to further integration, along with the "ifs" and "buts" associated with the practice of consensual decision-making within the EU's intergovernmental settings (a true "consociational democracy", Lijphart, 1969).

This pattern resonates with the successful theory of "authoritarian equilibrium" proposed by Kelemen (*inter alia*, 2020) highlighting that far-right leaders shake hands and smile in Brussels while simultaneously disregarding the values and principles of the European Union within their own countries. Despite the initial presentation of the *Spitzenkandidaten* process as a remedy to potentially address the challenges posed by illiberal regimes and counter the idea of "constitutional weakness of the EU" (Jakab, 2023), it proved ineffective.

On February 23, 2018, the President of the European Council Donald Tusk issued a press release stating that there should be no "automaticity" in the process for the high-level appointment of the Commission, and that "the Treaty is very clear that it is the autonomous competence of the European Council to nominate the candidate while taking into account the

European elections, and having held appropriate consultations". If there was a convention of the constitution in the making, such a resolute interpretation rejecting EP's proposal and designating Ursula von der Leyen is sufficient to demonstrate the lack of a shared *opinio juris* among the institutions. In other words, a fundamental condition concerning the existence of a convention of the constitution was missing since its inception: the (erroneous) credence by all parties involved that the rule to be followed is necessary and legal.

More reasonably, the *Spitzenkandidaten* was perceived as only a momentaneous political achievement not to be easily repeated, thus validating Armstrong's analysis (2014). In the aftermath of the 2014 European election, Armstrong argued that granting the EP the self-determination to designate a *Spitzenkandidat* would have implied an "unlawful delegation of responsibilities". This originates from a strict interpretation of the Treaty.

In the author's view, if the obligation to appoint the Commission President based on the European Parliament's recommendation was established, it would have created an informal rule conflicting with the EU's Constitution (*consuetudo contra Constitutionem*).

Nevertheless, not only this conclusion is too extreme, given the ambiguous wording of Article 17.7 TEU (Citino and Lupo, 2024) but, from a political standpoint, it also fails to acknowledge the following. It is not advisable to be entirely indifferent to the EP's position, as the EP will ultimately have to approve the Commission (Delledonne, 2021). The European Council's unresponsiveness in 2019 was solely justified as the EP was not converging on a single frontrunner (Dawson, 2019).

Following that, I am convinced that, regardless of the fact that the SK practice may one day evolve in a convention of the Constitution, the European Council shall at least consider the designation of the candidate from the winning party, if only for political fairness. It would not be constitutionally "fair" for the Council to leave the EP proposal completely unheard (a thesis that echoes Santi Romano's notion of "constitutional fairness", which in some cases can even bear legal consequences). This is all the more true given that Article 17.7 TEU requires taking into account the outcome of the European elections. On the other side, it would be equally inappropriate if the Parliament repeatedly vetoed a designated President by the European Council to stage a mad tug-of-war.

Towards a third round: the evolving constitutional nature of the SK practice

The *Spitzenkandidaten* practice is now entering its third round and, as observed, has potential room to evolve. Can we expect a consolidation of the rule into a convention of the Constitution in the near future? The answer changes based on the theoretical underpinnings surrounding the concept of binding conventions, as there is no consensus on whether a single precedent could suffice to establish such a rule. While some scholars posit that a

convention of the constitution can emerge even from a single instance, others argue that it requires a long-standing practice over time. Furthermore, national systems vary as to the criteria used for identifying conventions.

According to Kotanidis (2023, 47), the future of the lead candidate process may unfold in two possible directions. Either it is further strengthened in its practical, informal dimension, towards a full-fledged convention of the constitution, supported by a shared constitutional rationale, or it conflates into an interinstitutional agreement aimed at enhancing cooperation. However, this latter option, while maintaining the informal nature of the rule, raises doubts about its feasibility, as Article 295 TFEU excludes the European Council from the dynamics of such agreements. It goes without saying that it is still possible that the practice will be ignored again.

From a political standpoint, bids for the 2024 electoral cycle are now being placed in a context not so different from the previous cycle. While it may be premature to draw definitive conclusions, recent developments warrant attention. Notably, Ursula von der Leyen seeks to bolster her popular legitimacy by running for a second mandate, this time as a full-fledged *Spitzenkandidatin* for the EPP. This move appears to be an implicit attempt to repair her image following the narrow majority she secured in the 2019 vote. On the opposite end of the spectrum, the socialists have elected Nicolas Schmit, a figure of prestige that would not portend a radical shift from the current Commission, but rather continuity, serving as the European Commissioner for Jobs and Social Rights.

The EPP's anticipated victory – a "catch-all" party according to polls (see POLITICO's Poll of Polls on the 2024 European elections) – may facilitate the endorsement of their *Spitzenkandidatin* and the re-emergence of the practice. However, formidable opposition remains in the form of French President Emmanuel Macron, a vocal critic of the SK process.

Macron contends that the Commission's leader should not be a direct emanation of the European Parliament. Instead, he or she would only require the endorsement of the Assembly, as the choice only pertains to the European Council. He also voices concerns regarding the politicization of the Commission and the temporary failure to establish transnational electoral lists, the absence of which, he argues, distorts the representative nature of the *Spitzenkandidaten* mechanism (Wolf, 2023).

Despite Macron's straightforward opposition, the liberal area designated three *Spitzenkandidaten*, one for ALDE (Marie-Agnes Strack-Zimmermann), one for the European Democratic Party (Sandro Gozi), and one for Renaissance (Valérie Hayer) all campaigning around the common platform "Renew Europe Now". Furthermore, other EU parties are also in the process of selecting their lead candidates: the European left elected Walter Baier in a closed-doors assembly in Slovenia, while the far-right Identity and Democracy Group (ID) selected Anders Vistisen as their representative, from the Danish People's Party. Additionally, delegates from all European Green parties recently elected at their congress in

Lyon Terry Reintke and Bas Eickhout to spearhead the Green campaign for the EU elections. This further suggests that as far as the SK practice can be criticized (and resisted), the selection of a lead candidate is still evidently significant in reality to confer visibility to the electoral campaign.

Conclusion: bids are placed, who will win?

Despite the European Parliament's commitment to champion the *Spitzenkandidaten* process (as evidenced once more by the EP's legislative Resolution of 3 May 2022), the nature of this practice is not a customary rule or a convention of the Constitution, as it does not give rise to any legal obligation. It is, by the time being, an erratic informal rule unilaterally acknowledged by soft law instruments (besides the many EP Resolutions, see also the 2018 Code of Conduct for the Members of the European Commission and, in particular, Recital 3 and Article 10).

Not surprisingly, the advocacy for a compelling *Spitzenkandidaten* selection relies on a claim that is divergent from legal reality. Interpreting a norm should consider both sides, what the norm states, and what it does not. While the Treaty explicitly grants the European Council the prerogative to appoint the Commission President, it does not empower the Parliament with prior authority to nominate them. Furthermore, no *opinio juris* has crystallized until now regarding the constitutional need to adhere to the EP's majoritarian SK, as this would necessitate at least providing reasons for rejection. Kotadinis (2023) categorizes it as a "political process", while scholars accurately refer to it as an attempted or *in fieri* convention of the constitution (Lupo, 2020).

To sum up, the significance of the 2014 precedent should not be understated by the comparison with the 2019 outcome. Incentives for the democratization of European elections are more than necessary, but the SK procedure must be understood differently than propagating the (mischievous) notion of a "European President elected by European citizens". Once the bids are placed, there is a precondition for success. Notwithstanding who will win the *Spitzenkandidaten* game, the inherent challenges in reforming entrenched institutional frameworks are on the table, reminding us that true change often requires more than just political will.

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