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The Making of a European Constitution

Dynamics and Limits of the Convention Experience

VS VERLAG FÜR SOZIALWISSENSCHAFTEN

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Contents

European Constitutionalism at the Crossroads

Sonja Puntscher Riekmann and Wolfgang Wessels

1. Introduction: Writing a Book on European Constitutionalism in Times of Crisis

The European Constitution is declared dead by many. After the negative referendums in France and the Netherlands *The Economist* [1] reproduced on its frontpage Jacques-Louis David's picture of the French revolutionist and Montagnard Marat stabbed to death in his bath tub by the Girondiste Charlotte Corday. The symbolism of this picture is quite demanding in its sophistication as perhaps not many readers might recall that among other issues the row between Montagnards and Girondistes was one about centralisation and decentralisation, in terms of today's debate, about federalism and intergovernmentalism. Using Marat's death to signify the current crisis of the European Union appears to convey a rather clear message: It is not only the Constitution to have died, but with it the vision of a federal Europe. As a matter of course, *The Economist* welcomes this death despite its support for a European constitution in general[2].

Regardless of symbolisms, only few may be in doubt about the gravity of the French (54%) and Dutch (64%) Noes resulting from two plebiscites in spring 2005: Be they joyful detractors or dismayed promoters, both sides seem aware of a historic turning point. At the same time, though, both seem rather perplexed with regard to new perspectives. Both sides engage in a work of diverging interpretations about the true meaning of the Noes, while agreeing on the truism of an elite-people-divide. However, first-hand analyses of motivations have shown important differences within the two national constituencies concerned: The French No appears to be rooted in widespread anxieties about unemployment and a negative economic development under the constraints of global markets, whereas reasons

1 The Economist, June 4th-10th 2005 and Leader "The Europe that died. And the one that should live on", p.11-12.

2 Cf The Economist's own draft of a European Constitution published in 2000 26.10. in which it conceded only few but very strong competences to the EU in particular with regard to monetary and security issues while most policies would remain prerogatives of the Member States.

for the Dutch rejection of the Constitutional Treaty are to be found in a lack of information as well as in fears about a loss of national sovereignty[3]. Yet, when the referenda were conceived and announced a year earlier large majorities in these as in most other member states were in favour of the European Constitutional Treaty just as two thirds of European citizens had been professing a positive stance with regard to a European constitution in general.[4] Thus, something must have happened which a year earlier almost nobody believed would happen and, its inevitability becoming obvious, nobody could foreclose. How come that in two founding member states such large majorities in highly significant turnouts (almost 70% in France and 63% in the Netherlands) reject a Treaty apt to contitutionalise the European powers by enhancing democratic structures as well as their efficiency, while only few new competences were transferred onto the supranational polity? Why have these citizens rejected a constitution containing a Charter of Fundamental Rights and a more transparent structure of powers embedded in a system of checks and balances? Why have they turned down a text in which for the first time they explicitly appear as one source of legitimacy and they are granted the right of direct influence on European politics due the newly created "citizens' intitative"?[5]

The history of the European Union has been described as a tale of pendulum swings (Wallace 2000). Are the negative referendums just a swing back as we have repeatedly witnessed in the past or is it the sign of a more fundamental change? Claus Offe (2001) has argued the constitutionalisation of the European polity to be an improbable outcome, because in history the taming of power by constitution has always occurred in a (sometimes revolutionary) rejection of a political system that the subjects would consider detrimental to their freedoms and hence illegitimate. Thus, Offe continues, as nobody is feeling oppressed by the Union such revolution and subsequent constitutionalisation of power would simply not occur. However, could the current denial by French and Dutch majorities not also be interpreted in another vein, i.e. as a crypto-revolutionary attitude against the political system which is perceived, if not as illiberal, as intransparent and non-responsive? To put it differently: Europeans may perhaps not feel oppressed as in absolutist monarchies or in tyrannies, but they certainly criticise that they have little or no voice in the system and thus revoke their permissive loyalty by rejecting the Constitutional Treaty. We may therefore ask, whether we are witnessing a sort of "constitutional moment" by negation. And if this were true, what does it entail? The political forces advoca-

3 Cf Flash Eurobarometer 171 and 172.

4 Flash Eurobarometer 159, 21

5 Art. I-1 and Art. I-47, 4.

ting the No have not presented an alternative plan, unless proposals of re-nationalisation of European politics by left and right *souverainistes* are to be deemed as alternative. How then should the incumbent political elites react? As of now, these elites seem quite at a loss, their crisis management being void of a clear will. The summit of 16-17 June 2005 produced no more than a period of reflection and a continuation of the ratification process, whereas for the time being a revision of the Constitution at hand is not envisaged[6]. In their press conference after the summit the presidents of the three main EU-institutions, European Council, Commission and Parliament, evoked what they called a "plan D" wherein the D was to signify Democracy, Dialogue and Debate as their reading of the results of the referendums was that the French and Dutch Noes were not meant as a rejection of the text of the constitution but of the context in which it was negotiated. In his speech to the European Parliament on 23 June 2005, the British Prime Minister and soon-to-be Council President Tony Blair argued in a similar vein, when speaking about the need of a "reality check" and a re-orientation of European policy-making towards the citizens' worries about "globalisation, job security, pensions and living standards". In his analysis Blair did not, however, spot a crisis of political institutions, but a "crisis of political leadership". He then presented a policy-oriented programme of the British presidency without ever mentioning the Constitutional Treaty again or, for that matter, without sketching further steps to overcome the constitutional stalemate[7]. The Austrian presidency of the first half year 2006 emphasized the importance of the constitutional question but also renounced any concrete proposals for its future. However, the lack of leadership being widely complained in the media[8], doubts about the perspective of this strategy loom large. Moreover, until now it remains quite unclear what is to be understood by "change of context", let alone how a consensus among 25 member states might be reached on relevant issues such as European policies improving job creation, social security or living standards. The difficulties in implementing the "Lisbon strategy", advocated by Blair in his speech, tell an impressive story about the limits of the Open Method of Coordination among member states. The European Parliament on the other hand seems much more aware of the need to tackle the constitutional impasse. On 19 January 2006 the European Parliament adopted a resolution on the period of reflection proposing some very concret

6 European Council, Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe, Brussels, 16 and 17 June 2005, SN 117/05.

7 Full Text of Tony Blair's speech to the European Parliament on 23 June 2005, http://www.number-10.gov.uk/output/Page7714.asp, 2005-10-24.

8 Peter Sutherland, Financial Times, June 16, 2005.

measures to overcome the constitutional stalemate as well as a timetable for ratification of the new Constitutional Treaty which should enter into force in 2009. In particular the EP stresses the need for a "European dialogue" to be held together with national parliaments in so-called parliamentary forums. These forums "should be conducted and coordinated across the Union, structured by common themes and in realistic stages accorded to an agreed framework for evaluation, and designed to lead to decisive political choices". The EP should play a leading role by publishing "European Papers" on important issues which may be used as "a common European template for national debates". The first Parliamentary Forum should take place in Spring 2006 on a number of priority questions such as the goal and finalité as well as the social model and the finances of European Union. The Parliamentary Forums should be complemented by "Citizens Forums" to be organised by parties and civil society organisations. (European Parliament 2006)

The introduction at hand is being written in the shadow of this crisis. Obviously, the pendulum has swung back to pessimism. Analysing the reasons of the rejection of the Constitution is all but easy, the reasons being rather diverse as were the proponents of the No. While the left in France (composed of far-left and of social-democratic forces) advocated rejection on the grounds of anti-globalism and the detrimental socio-economic consequences for the French social model which is deemed as *the* model for the Union, the French far-right exposed her well-known anti-European nationalistic obsessions. Nationalism appeared to be one important feature of the Dutch No as well, whereas counter-intuitively the will to sanction the incumbent government was of greater importance in the Netherlands than in France. Moreover, in both member states the promoters of the Constitutional Treaty entered the arena of public debate rather late and half-heartedly proposed arguments which were far less forceful than those of the opponents. Thus, the electorate must have doubted the seriousness of national elites about the issue. On both sides the fear card was played: While Chirac invoked a Yes because rejecting the constitution would bring damage to the position of France in Europe, the No advocates pictured the Union and the constitution as a means to usher in neo-liberalism into the French system thus jeopardising the welfare achievements of the post-war period. Interestingly, Chirac's advocacy of Turkish membership allegedly adding to the euro-scepticism of the French citizens and fears about undermining the principle of *laicité* played a minor role. Remarkably though, in 2005 the French constitution was amended by a provision stating that future enlargements have generally to be ratified by referendum (Article 88/5).

As if the negative constitutional referendums were not enough, the highly controversial negotiations of the next European budget were broken off at the summit of 16-17 June 2005 as the "budget barons"[9] were unable to find an agreement on

the CAP under the conditions of the latest enlargement and the British rebate. However, an intergovernmental compromise was reached at the summit of Brussels in December 2005 to be approved by the European Parliament which at the beginning of 2006 voiced a series a diverging interests.[10] Future enlargements by Bulgaria and Romania in the foreseeable future, and eventually by Turkey and Croatia – ambitious enterprises at the best of times – seem highly problematic under these circumstances. An overstretch of European integration at this time could put the whole European project at risk.

When this book was conceived as a result of a larger project on constitutional strands in Europe, the Union was in the midst of a new Treaty reform. In spite of the usual difficulties to reach a compromise in the IGC, optimism was justified after the generally positive experience with the Convention which in June 2003 had managed to propose a new and coherent Treaty Establishing a Constitution for Europe. The Treaty offers new institutional provisions, integrates the Charta of Fundamental rights elaborated by a previous Convention in 2000, formalises some para-constitutional principles such as the supremacy of European law with regard to national law and spells out the Union's competences as well as those of Member States with greater clarity than in the past. However, since its conclusion and subsequent adoption by the European Council in Rome 2004 as well as a series of positive ratifications by national parliaments and a positive plebiscite in Spain (74%) the future of the Treaty has become rather gloomy again. Even the positive referendum in Luxemburg (56,5%), which occurred under compulsory participation and after the negative votes in France and the Netherlands on 10 of July 2005, could not change the general mood in Europe.

By this introductory chapter, we will pursue two aims: We will, *first*, present an analysis of the constitutional treaty under ratification regardless of further developments. Being a book on more general features of European constitutionalism in which we look at traditions as well as future perspectives such analysis may be justified by the desire to deliver instruments of understanding of the ongoing controversies as well as of the continuities and discontinuities enshrined in the document. It is, for that matter, important to recall that the *Treaty establishing a Constitution for Europe* (TCE) is not and never has been intended to be a totally new draft. To a great extent the TCE has been designed in line with the evolutionary character of past treaty revisions however extending the powers of organs, adding some new institutions, re-shaping and reducing procedures, and melting the three pillars into one (Puntscher Riekmann 2005).

9 George Parker, Financial Times, June 16, 2005, p.11.

10 Cf. Agence Europe, January, 16, 2006.

We will, *second*, interpret the results in the vein of two theoretical approaches focusing on the question how far these sustain the theories of fusion and of federalism. With regard to fusion theory the thesis presented here is that the ambiguities inherent in the TEC continue the fundamental pattern of EU construction based on two seemingly divergent, but in reality dialectical strategies of increasing the efficiency of EU institutions and of preserving a high degree of national participation. From this dialectics, we argue, emerges the living constitution in which actors are likely to set further initiatives that foster the integration process and that will be incorporated into the treaty at the next revision (Wessels 2005). Moreover, this process as in the past may add to the federal structure of the European Union even if European federalism remains ways from constituting a stable *finalité* (Follesdal 2005) as recent challenges to Monetary Union and the Stability and Growth Pact have demonstrated (McKay 2005).

2. Old Treaties, New Constitution?

Our starting point is that the *Treaty establishing a Constitution for Europe* is a twofold endeavour: While building on the existing Treaties, it operates with the term "Constitution" and thus opens up for new interpretations of the nature of the European polity as it refers to a terminology commonly associated with state formation. However, this connotation does not reflect the reality of the European Union, which up to now is not a full-fledged state and perhaps never will be at least in the sense of the nation state as we have come to know it since the 19th century. It does though pay tribute to the fact, that the Union has a specific legal nature resulting from a continuous process of integration and administrative fusion (Wessels 2005) which in more than fifty years has generated a polity displaying in some respects state-like characteristics. It is this reality which justifies the calls for a constitution. Yet, the combination of the terms "Constitution" and "Treaty" indicates the persisting double nature of the Union as a polity in its own right and at the same time as a construction "at the mercy" of the member states as masters of the treaties. Thus, the new text continues to be an example of oscillations between supranationalism and intergovernmentalism, although the latter in some respects appears in new clothes giving reasons for new theoretical terminology such as "supranational intergovernmentalism" (Griller 2003). In particular with regard to the re-design of the European Council and its presidency to be held by a person without national position for two and a half years may buttress this approach. Moreover, given the broad and long-term political resistance against the use of the term "constitution" for the European Union it is no exaggeration to attribute special importance to its incorporation in the

Treaty. Yet, speculations about whether a Treaty establishing a Constitution for Europe ceases to be a classical international treaty in the very moment the Constitution is established still belong to the realm of hermeneutic fantasies. They are contradicted by the articles reiterating the power of the member states.

3. Values, Norms and Identities

In spite of legal scepticism as to the "constitutional lyrics" of preambles it is worth mentioning how the founding fathers and mothers in the Convention have phrased the norms and values on which the Union shall be based. These norms and values do indeed recall strategies of identity-building which were professed by the nation-states during their integration processes throughout the last two centuries. It is all the more important to point to them as, for instance, the question whether the preamble should or should not contain a reference to god or Christendom has for quite some time puzzled the Europeans within and without the Convention. The final decision to refer to the "cultural, religious and humanist inheritance of Europe" (Preamble, Para 5) instead might be taken as evidence for the convergence of the Conventionalists towards a more neutral stance in this respect. Other parts of the preamble reiterate the aforementioned dialectics of Europeanism and nationalism: "remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny." Interestingly, the constitution relegates the principle of "ever closer union" to the preamble, whereas the existing TEU mentions it in Article 1. In the new Article I-1, while constituting a double source of legitimacy residing in the will of the citizens and of the European states, the states are indeed the important actors which "confer competences to attain objectives they have in common". In a previous version of the draft the Article mentioned the term "in a federal way" which was replaced by "on a community basis". Thus, there seems to be consensus that the "common destiny" is not (yet) to be associated with the explicit idea of federalism. The vision of the common destiny, though, goes hand in hand with ambitious, if pathetic missions: "Europe offers (…) the best chance of pursuing (…) in awareness of their responsibilities towards future generations and the Earth, the great venture which makes it a special area of hope" (Preamble, Para 4)[11]. Such wording airs the pathos of discourses resembling the "creeds" of nation states. In particular, the idea of Europe as "a special area of hope" does to an extent recall the

11 This mission is taken up in the Preamble of the Charter of Fundamental Rights (Part II TEC) and recurs as a principle for "external action" in Art. III-292 (1).

famous "pursuit of happiness" appearing in the American Declaration of Independence of 1776. Whether this and the following catalogue of values suits the identity building process European leaders profess to envisage remains an open question. Confronted with the reality of criticism and disappointment the citizens articulate in opinion polls and, for that matter, in referenda scepticism looms large in particular with regard to the emergence of a habermasian "constitutional patriotism" (Habermas 1992). For the time being the idea of an ever stronger "transfer of loyalty" which for Haas (1958) is part and parcel of a successful integration process seems questioned even by the elites, let alone the European public.

The will to construct stronger bonds between the Union and its citizens surfaces also in articles dealing with the "Symbols of the Union" (Art. I-8) as well as in the frequent references to the notion of solidarity which appears no less than 30 times throughout the text of the TCE. As European politics has been conceived in the light of solidarity since the ECSC one could argue that strategies of constructing a supranational "imagined community" have existed from the very beginning of the integration process.

It seems, however, that the articles stating the principles of and organising the democratic life of the Union might deliver more powerful instruments for such goal. Strengthening the European Parliament as the only directly elected institution at the European level as well as empowering national parliaments to intervene in the supranational policy-making process according to the principle of subsidiarity could become a tool to foster the "imagined community" as much as the new "citizens' initiative". The relevant provisions seem inspired by a growing awareness of European elites, that the Union will hardly enter the imagination of the citizens without involving them into in some ways into its workings. To which degree such involvement is feasible and desirable is another question. Expectedly, it is far from definite answers. Whether the right answer lies in Swiss style modes of direct democracy by "radicalising Art. I, 47 (4)" (Papadopoulos 2005) or in promoting supranational parties is to be discussed. The TCE offers provisions for both although the operational details have still to be spelled out in a European law.

In terms of norms and values the Charter of Fundamental Rights incorporated in the TCE as Part II is of utmost importance. In spite of the fact that also in the past the Union had to respect such rights and was therein controlled by the European Court of Justice, to spell out these rights in a special document elaborated by a Convention is in its own a value-driven achievement. It does indeed recall numbers of national constitutions that starting from the French Revolution had put a special emphasis on fundamental rights. It was, moreover, a special exercise for those member states representatives who did not have anything similar in their national constitutions. In particular Title I on human dignity pays tribute to the Ger-

man "Grundgesetz" as it takes up exactly the same formula: "Human dignity is inviolable. It must be respected and protected" (Art. II-61)**.** The Charter thus summarizes a variety of rights enshrined in national constitutional documents as well as in the European Convention of Human Rights, but also goes beyond them as in the case of some social rights or the rights of individuals in view of biotechnological engineering such as the prohibition of eugenic practices or of the reproductive cloning of human beings (Art. II-63).

Those reading the TCE as a document "imagining the new community" may be counter-vailed by others supporting an intergovernmental reading. The latter might point to the fact that the "peoples" still appear in plural, thus ruling out at least for the present the formula of "We the people…". As aforementioned, the document repeatedly refers to the member states in their role as "Masters of Treaty"[12] and as principals of integration (see Art. I-1(1); cf. Pollack 1997, Moravcsik 1998, Kassim and Menon 2002). Article I-5 (1) underlines the need to "respect … national identities of the member states and … their essential State functions…." Moreover and in spite of some procedural changes, the power to revise the treaty still lies in the hands of member states (Art. IV-443 and 445). Last but not least the new Article I-60 regulating the "voluntary withdrawal from the Union" is an important case in point for an intergovernmental interpretation.

The truth is perhaps to be found in a reading reckoning the dialectics between supranationalism and intergovernmentalism: Article I-5 (2) reiterates the principle of "sincere cooperation" between member states which "shall refrain from any measures which could jeopardise the attainment of the Union's objectives", whereas treaty revisions are the prerogative of the member states. Moreover, with the distinction between ordinary and simplified revision procedures (IV-443-444) come new provisions introducing the Convention (IV-443 (2)) and participatory rights for the EP as well as the national parliaments. Two further provisions enhance such reading: *first*, Article IV-443 (4) states that "if two years after the signature of the treaty amending this Treaty four fifth of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council"; *second*, the possibility to change the treaty in specific policies without IGC (Art. I-18) and, *third*, to change the decision making procedure from unanimity to Qualified Majority Voting by an unanimous decision of the Council[13].

12 This definition was formulated by the German Bundesverfassungsgericht in its Maastricht Judgment 1994.

13 General provision: Art IV-444, social policy: Art. III-210, Environment: Art. III-234, Family Law: Art. III-269; CFSP: Art. I-40 and III-300.

These provisions have of course to be tested in the future, provided the Treaty is eventually ratified. But taken together with the normative parts they reflect fundamental attitudes that will influence the future use of given opportunities and frame preferences affecting interpretations of the Treaty by national and EU institutions, in particular by the European Court of Justice.

4. The Union's Competences: Expanding Tasks towards a State-like Agenda

The question about the "nature of the beast" called European Union (Risse-Kappen 1996) is first and foremost a question about what the Union is allowed to do. In the last instance it is not a question about values and norms, nor even about the institutional set-up, but about competences. The litmus test for the power of a political centre is whether it has the competence to transfer competences, i.e. the so-called "Kompetenzkompetenz". In this respect the TCE offers constitutional continuity not only in the aforementioned Article I-1 (1), but by reaffirming the principles of subsidiarity (Art. I-11 (3)) and proportionality (Art. I-11 (4). In order to foreclose potential spill over dynamics the TCE creates an "early warning system" which endows national parliaments with the right to "ensure the compliance with that principle" (Articles I-11 (3) and (4) and Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality, Art. 6). How this system will work in practice is to be seen in the future. The provisions spelled out in Article 7 of the Protocol according to which a minimum of one third of national parliaments is needed to call for a revision of the legislative draft might represent a serious hindrance to the use of this right. Until now and for various reasons the large majority of national parliaments have little experience with the complexity of the supranational decision-making process and even less so with inter-parliamentary coordination.

As to the catalogue of competences proposed by the TCE the clear-cut enumeration of different kinds of competences is novel: there are "areas of exclusive competences" (Art. I-13 (1)), of "shared competences" (Art. I-14 (2)) and of "supporting, coordinating or complementary action" (Art. I-17) as well as those covered by the "coordination of economic and employment policies" (Art. I-15) and the "common foreign and security policy" (Art. I-16). If we add up all policies mentioned in these different categories it becomes obvious that almost no field of statal activities is left untouched by the Union. However, the TCE offers a better and more transparent classification of competences rather than creating new ones. This allows for interpretations of European integration in the vein of the state building thesis. In particular, recalling the history of the Union since 1951 and the