

‘Our Philadelphia’?

On the Political and Intellectual History of the ‘European Constitution’

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The term ‘constitution’ is ambiguous, to say the least: it can refer to any persistent state of social affairs and, more precisely, a settled pattern of power relationships – or, alternatively, it can designate a set of written rules and principles which both create and constrain state institutions. The latter in turn can be seen primarily as settlements or treaties that emerged from interest-based bargains – they are merely the ‘autobiography of power’²; but in the eyes of many scholars (particularly in recent times) they are also an important, perhaps even crucial, source of political morality, as constitutions discipline and render power impersonal, confer rights on individuals (and, sometimes, groups), and often express wider normative aspirations. From this last perspective, constitutions might well be described as decisive instruments to further a moderate form of politics – or, if one prefers, civility.

The complex history of the idea of a ‘European constitution’ reflects many of these ambiguities. On the one hand, one could argue that the continent has seen a succession of ‘international constitutions’ in the informal sense: lasting distributions of checks and balances, ‘concerts’, conventions and international orders, even a common political civilization. On the other hand, there has been the desire to go beyond transient informal arrangements or a mere balance of power and actually use formal constitutional mechanisms to contain and ‘tame’ European states (and potential empires). Put differently: there is a history of the informal constitutions of European public orders (such as the Holy Alliance or the Geneva and Hague Conventions) which do not fundamentally question traditional notions of political sovereignty – and there is a somewhat more recent conception to make use of formal constitutions fundamentally to alter, perhaps even to abolish, sovereignty as it has come to be understood since the

² András Sajó quoting Herman Finer in *Limiting Government: An Introduction to Constitutionalism* (Budapest: CEU Press, 1999), 2.

seventeenth century – and thus also profoundly to transform inherited conceptions of what it means to be a state.³

If this distinction is accepted, then the history of attempts at European unification is not necessarily the same as the history of continent-wide constitutionalism: after all, some proposals for European unity have simply aimed at the creation of a large state that does not question a traditional notion of sovereignty, but simply transferred it to a supranational level.⁴ On the other hand, treaties and agreements that do not mention the ‘c-word’ would form part of the history of European constitutionalism – if and when certain provisions became so entrenched that they functioned as an effective constraint on traditional sovereignty, thereby making for significantly more civil interactions among states.⁵

Adopting this schema, I shall begin this article by saying a few words about constitutionalism in relation to attempts at European integration from the 1930s to the early 1990s. It is important to realize that the notion of a written constitution had no real importance either for the more or less idealistic leaders of the various pan-European movements or the various politicians and civil servants who actually took the decisive steps towards European integration in the 1950s. It was only in the 1990s that European politicians (and intellectuals) seriously came to call for a formal constitution for what by then was known as the European Union – and to invest major practical-political and normative hopes in a written European constitution. To understand the reasons behind this wish (or, in the eyes of some, wishful thinking), the second part of this essay will

³ James Sheehan, ‘What it Means to be a State: States and Violence in Twentieth-Century Europe’, in: *Journal of Modern European History* 1 (2003), 11-23.

⁴ See for instance Glyn Morgan, *The Idea of a European Superstate: Public Justification and European Integration* (Princeton: Princeton UP, 2005)

⁵ See the discussion of the European Court of Justice and its role in entrenching supranational law below.

reconstruct the particular problems that in the eyes of political leaders and intellectuals had come to afflict the EU by the end of the last century. Obviously such a brief overview cannot do justice to the complexity of an entity that is often considered the most important European institutional innovation since the invention of the democratic welfare state; but it hopefully will clarify to which problems a constitution increasingly appeared as a plausible answer. In a third part, I shall then offer an essentially Tocquevillian explanation of the apparent failure of the Constitutional Treaty that had been agreed by European leaders in 2004. In a further discussion of the causes of the abandonment of the Constitutional Treaty in 2007, I shall also reject two wide-spread interpretations of that failure, namely a technocratic and a ‘radical-democratic’ one. Needless to say, this is not the place to speculate about further developments in EU constitutionalism in the immediate or more distant future.

Constitutionalism without a Constitution?

In the years after 1918 Europe had, in the words of G. D. H. and Margaret Cole, ‘plunged into an orgy of constitution-making’⁶; ‘in that heady first post-war decade’, as Mark Mazower has put it, ‘the jurist was king’.⁷ The same period also witnessed the first serious attempts at a federal, non-imperial form of European integration – in the shape of an association of states that would ensure peace on the continent, while leaving the national distinctiveness of different countries intact. However, these two

⁶ G. D. H. and Margaret Cole, *The Intelligent Man’s Review of Europe Today* (New York: Alfred A. Knopf, 1934), 385.

⁷ Mark Mazower, *Dark Continent: Europe’s Twentieth Century* (London: Penguin, 1998), 5.

developments never quite came together. Constitutions were seen as instruments for constituting and containing power at the level of the nation-state; sometimes they were also considered essential in furthering development and modernization – but they were not deemed essential for the creation of a new supranational political order that would prevent further wars. Rather, leading pro-European thinkers like Jacques Maritain would appeal to Europe’s medieval federal heritage or claim that European unity would have to be based directly on its common Christian civilization. In other words: the source of political civility would ultimately have to be found in a shared culture, of which written rights and rules would then be derivative.⁸

The controversial founder of the Pan-European Movement, Richard Coudenhove-Kalergi, on the other hand, proposed an essentially voluntarist programme of European unity – it would come about if enough Europeans sincerely willed it; it did not, in the last instance, depend on a shared cultural background and was not primarily a matter of institutionalizing constraints on existing nation-states from on high. As he put it: ‘the only force that can achieve Pan-Europe is the will of Europeans’. Consequently, European union would have to be the outcome of a successful grassroots movement.

Alternatively, proponents of a united Europe who did not seek to ground unity in culture or make an act of political will the basis of unity justified their vision by claiming that ‘Europe’ would be more ‘rational’ and ‘more universalist’ than the nation-state, as it was by itself less particular and less prone to dangerous political passions. Such a view was most prominently articulated by the French philosopher and moralist Julien Benda in his 1933 *Address to the European Nation*. In Benda’s

⁸ Mary Anne Perkins, *Christendom and European Identity: The Legacy of a Grand Narrative since 1789* (Berlin: de Gruyter, 2004), 98-112.

eyes, even if such a pure universalist Europe could not be achieved in the immediate future, every step in the right direction would yield a moral reward. As he put it

... even an impious Europe will necessarily be less impious than the nation. Because it calls for the devotion of man to a less precise group, less individualized, and consequently less humanly loved, less carnally embraced. The European will be less attached to Europe than the Frenchman to France or the German to Germany. He will feel much less defined by the soil, less faithful to the land. Even if you make Europe sovereign, the god of immaterialism will smile upon you'.⁹

The famous Briand Memorandum of 1929, on the other hand, was far removed from such high-minded rationalist aspirations – it sought to address Europe's economic crisis through political means, aiming at 'régime permanent de solidarité conventionnelle pour l'organisation rationnelle de l'Europe'.¹⁰ International lawyers in France in particular claimed that federal arrangements could be based on an already existing such European solidarity; and that the future lay not with the League of Nations, but with regional cooperation. By way of an institutional architecture to embody and further European solidarity they envisaged a conference, an executive council and a permanent secretariat.¹¹ The idea of a European constitution did not play a central role in their plans -- which, as is well known, came to nothing.

⁹ Julien Benda, *Discours à la nation européenne* (1933;Paris: Gallimard, 1993), 126-127.

¹⁰ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (Cambridge: Cambridge UP, 2001), 342.

¹¹ Ibid.

No doubt the widespread disenchantment with constitutionalism (and democracy) during the interwar period partly explains why pan-European ideals were neither implicitly nor explicitly couched in the language of constitutionalism. It is also worth noting that from the beginning the proponents of Pan-Europe tended to distance themselves from the United States, underlining the differences between their vision and the reality of the American federal state. To be sure, this was not anti-Americanism – Coudenhove-Kalergi, for instance, was adamant that his movement was not anti-American (and that, in fact, he did not want to create a federal state).¹² But it also implied that unity could not simply be created by a common constitution or a shared constitutional faith, as supposedly had been the case with the US.¹³

At first sight, these trends appeared to continue after the Second World War. There was another wave of democratization and constitution-making, though this time it came with significantly less optimism about the capacity of newly minted constitutions to provide long-term political stability. However, there was in fact one major institutional innovation which eventually turned out to be highly significant for the notion of a European constitution: the *constitutional court* -- which was not simply a copy of the American Supreme Court.¹⁴ The idea was not entirely new – the jurist and legal philosopher Hans Kelsen had included it in the Austrian constitution which he had crafted after the First World War (he himself had served on the court

¹² R. N. Coudenhove-Kalergi, *Panuropa ABC* (Leipzig: Paneuropa-Verlag, 1931), 13.

¹³ Though, to be fair, Coudenhove-Kalergi occasionally did speak of ‘the constitution of the United States of Europe, after the pattern of the United States of America’. For the American notion of the country being constituted by the constitution, so to speak, see Sanford Levinson, *Constitutional Faith* (Princeton: Princeton UP, 1988).

¹⁴ Pasquale Pasquino, ‘Constitutional Adjudication and Democracy: Comparative Perspectives – The United States, France and Italy’, in: Carol C. Gould and Pasquale Pasquino (eds.), *Cultural Identity and the Nation-State* (Lanham: Rowman & Littlefield, 2001).

until 1930).¹⁵ Austria had been only the third country to have such judicial review of constitutionality (after the US and Australia) – but also the first to centralize tests for constitutionality and task a specific, separate court with it. Kelsen’s original concern had been about conflicts over federalism; at the height of the Second World War, now in exile in the United States, he had re-affirmed his belief in centralized constitutional review, in contrast with the US system.¹⁶

After 1945, even in countries which had traditionally been highly suspicious of judicial review – such as France, with its aversion to the *gouvernement des juges* – the idea of testing for constitutionality was eventually accepted; and post-authoritarian countries such as Spain and Portugal followed suit with the establishment of ‘constitutional tribunals’ (in 1978 and 1983 respectively) as an integral part of the effort to consolidate democracy. Constitutional courts appeared to limit or even contradict traditional notions of popular sovereignty – but in a post-war age that was suspicious of the dangers of potentially totalitarian democracy and that still carried with it many nineteenth-century assumptions about mass psychology, having more checks and balances was precisely the point. It also fitted with Kelsen’s original scepticism about sovereignty from the 1920s¹⁷; like Jacques Maritain and other advocates of a European federation, he thought that the concept of nation-state ‘sovereignty’ was either useless or based on a (wrong) normative choice.¹⁸ He had

¹⁵ Theo Öhlinger, ‘The Genesis of the Austrian Model of Constitutional Review of Legislation’, in: 16 *Ratio Juris* (2003), 206-222.

¹⁶ Hans Kelsen, ‘Judicial Review of Legislation. A Comparative Study of the Austrian and the American Constitution’, in: *Journal of Politics* 4 (1942), 183-200.

¹⁷ Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer Reinen Rechtslehre* (Tübingen: Mohr, 1920).

¹⁸ See Jacques Maritain, ‘The Concept of Sovereignty’, in: *American Political Science Review*, 44 (1950), 343-357, and Kelsen’s observation that ‘the dispute about the sovereignty of the state is, so far as it is purely theoretical in character, a dispute about preconceived ideas regarding the position of the

long advocated the primacy of international law over domestic law and held that a functioning international legal order was the best way to abolish war, ‘the greatest disgrace of our culture’ – one of his most influential writings from the 1940s was simply called *Peace through Law*.¹⁹

European integration was, if anything, another symptom of the new post-war ‘constitutionalist ethos’, and in particular the distrust of popular sovereignty (or, put differently, unrestricted parliamentary supremacy).²⁰ Countries sought to delegate powers to unelected institutions domestically and also to supranational bodies in order to ‘lock in’ liberal-democratic arrangements and to prevent a back-sliding towards authoritarianism.²¹

As is well-known, the architects of the European Community followed an indirect way of gaining legitimacy for their project: rather than having the peoples of the initial member states vote for supranational arrangements, they relied on technocratic and administrative measures agreed among elites to yield what Jean Monnet time and again called ‘concrete achievements’ – which were eventually to convince citizens that European integration was a good thing. Tellingly, advocates of a more direct approach to European unity had immediately after the War actually called for a European constitutional assembly to draft a European constitution.²² But

state in world of values, i.e., in a system of norms’. See Hans Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940-41* (Cambridge, Mass.: Harvard UP, 1942), 78

¹⁹ Hans Kelsen, *Peace Through Law* (Chapel Hill: The University of North Carolina Press, 1944), viii.

²⁰ Peter Lindseth, ‘The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920-1950s’, in: *Yale Law Journal* (2004), 1341-1415. Lindseth rightly emphasizes that the particular post-war ethos sought to combine curbs on parliaments, limits to delegation and a stress on the protection of individual rights.

²¹ See Andrew Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’, in: 54 *International Organization* (2000), 217-252.

²² For instance Eugen Kogon, whose pro-European writings are collected in *Europäische Visionen* (Weinheim: Quadriga, 1995).

almost all these advocates – many of whom had emerged from the Resistance -- were quickly sidelined after 1945.²³

From its beginning, then, European integration was a political end pursued by economic and administrative means – the exact reverse of what Briand had proposed in the late 1920s and early 1930s.²⁴ The idea of small (economic) steps and grand (political) effects was designed to bring about lasting peace and prosperity on a ravaged continent – or at least the Western half of it: low-level technocratic measures, initially hardly visible for the peoples in the founding countries, were supposed eventually to ‘spill over’ into high politics. The approach fitted well with the fashion for technocracy, the ‘end of ideology’, and the ‘politics of productivity’ in the 1950s²⁵; it was far removed from the voluntarist conception of grounding European unity in a collective political will; it did not even rely on common ‘values’, let alone a desire for international reconciliation. In retrospect, the process often appeared like integration by stealth.

What became known as ‘the European Community’ soon moved beyond a classic association of nation-states. Two fundamental decisions by the European Court of Justice in the early 1960s (*Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963; *Costa v. ENEL*, 1964) established that European Community law was to have supremacy over national laws and that it took direct effect in member states – that is, EC legislation could be claimed by individual citizens in national courts and enforced against Member States. The Court confidently announced that ‘by creating a Community of unlimited duration ... the Member States have limited their sovereign rights, albeit in limited fields, and thus created a body of law which binds both their

²³ See Frank Niess, *Die europäische Idee – aus dem Geist des Widerstands* (Frankfurt/Main: Suhrkamp, 2001).

²⁴ Koskenniemi, *The Gentle Civilizer*, 342.

²⁵ Charles S. Maier, *In Search of Stability: Explorations in Historical Political Economy* (Cambridge: Cambridge UP, 1987)

nationals and themselves'.²⁶ In 1969 the judges added the opinion that fundamental human rights were in fact 'enshrined in the general principles of Community law and protected by the Court' – when in fact the original treaties had made no mention of such rights.²⁷

Thus, in line with the general West European trend towards review by a special court, the European Court of Justice had more or less bootstrapped itself into a position of extraordinary judicial power -- and was, for the most part, accepted as possessing that power both by national courts and by national governments. Arguably, national governments would not have put up with the emergence of a transnational legal order that went considerably beyond international law if they had not de facto retained a veto power over legislation. The creation of 'hard' European law – or what has sometimes been called 'normative supranationalism' – and intergovernmentalism, which allowed individual states to promote and protect their interests, went hand in hand, rather than one being opposed to each other: 'integration through law' and high-level politics balanced out.²⁸ Both the Court and nation-states benefited from this arrangement; the Commission and advocates of a supranational executive saw themselves sidelined.

In particular, the Court itself explicitly kept promoting the view that the Community was not merely a matter of international treaties – but that the European treaties had become 'constitutionalized'; in a 1986 the Court even spoke of the founding treaties as the Community's 'Basic Constitutional Charter'²⁹. Put differently: over decades the European Community was slowly constitutionalized, but unlike with

²⁶ Costa v ENEL, Case 6/1964.

²⁷ Erich Stauder v City of Ulm, Sozialamt, Case 29/69.

²⁸ J. H. H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge: Cambridge UP, 1999) and Ulrich Haltern, *Europarecht: Dogmatik im Kontext* (Tübingen: Mohr Siebeck, 2006).

²⁹ Les Verts-Parti Ecologiste v Parliament, Case 294/83.

traditional state constitutions, there was no single foundational -- or constitutional -- moment; and for sure there was no single *pouvoir constituant*. Rather, the process -- which remained very much out of sight for most Member State citizens and did not inspire much by way of anything resembling transnational intellectual debates -- appeared as a form of supranational and quasi-secret 'serial constitutionalism'.³⁰ Here the transnational rule of law was not an expression of popular sovereignty (or sovereignties), but a check on it -- with the long-term goal of a genuine 'change in political civilization' (François Duchêne) so as to civilize Europeans for good.³¹

However, as the Community expanded and then also entered a period of stagnation (or 'Euro-sclerosis'), anxieties about the Community's 'identity' and its legitimacy among citizens became more acute. As early as 1973, the then Community of nine issued an official 'Declaration on European Identity'.³² The 'Eurobarometer' surveys began regularly to measure the 'identification' of Europeans with their Community -- although it often appeared more like a Eurothermometer, checking whether the continental patient might not relapse into the fever of nationalism. The

³⁰ Gráinne de Burca, 'The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?', in: 61 *Washington and Lee Law Review* (2004), 555-; here 558.

³¹ This marks again a major difference with the US, where the rule of law is often considered precisely the expression of popular sovereignty. See Paul W. Kahn, 'American Exceptionalism, Popular Sovereignty, and the Rule of Law', in: Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton: Princeton UP, 2005), 198-222.

³² Declarations of identity have remained at a level where supposedly shared European values hardly differ from those propounded by the United Nations, or regional organizations elsewhere, for that matter. At Copenhagen in December 1973, for instance, the Nine could only declare very generally that 'the diversity of cultures within the framework of a common European civilization, the attachment to common values and principles, the increasing convergence of attitudes to life, the awareness of having specific interests in common and the determination to take part in the construction of a United Europe, all give the European Identity its originality and its own dynamism'. European specificity has remained elusive -- and claims for it have inevitably been shadowed by suspicions of Eurocentrism.

President of the European Commission acutely faced with ‘Euro-sclerosis’, Jacques Delors, initiated a range of ‘Community-building measures’ that appeared to be informed by the lessons of nineteenth-century nation-state-building: numerous efforts were made to sponsor and to write new ‘European histories’, conferences were convened to foster ‘European public spheres’ -- clearly, the thinking went along the lines: *Fatta l’Europa bisogna fare gli Europei*. More concretely, the Community’s institutional architecture was made more participatory: 1979 saw the first direct elections to what appeared as the first genuinely democratic supranational institution: the European Parliament.

For decades, then, the Community appeared to have enjoyed at least what political scientists call ‘diffuse’ support -- as opposed to specific, actively expressed support. Like the British with their Empire, Western Europeans seemed to have acquired a Community in moments of absent-mindedness – they did not think much about it, and, when they did, they generally went along with it. This began to change in the late 1980s and early 1990s.

Why an EU ‘constitutional text’?

In the late 1980s and, in particular, the early 1990s the process of European integration was gathering momentum again – and now also encountered genuine doubts and even outright resistance on the part of various populations. The Single European Act – at first sight another long catalogue of technocratic measures – had significantly increased instances of majority voting; consequently, the old quasi-constitutional balance between normative supranationalism and intergovernmentalism was upset. Executives (and

citizens) had to ask themselves whether they were really prepared to give what political scientists call ‘losers’ consent’; this in turn made the question about ‘European identity’ much more real: did majorities and minorities really share one single political space so that minorities (who in some national contexts might themselves be in the majority) would accept being outvoted?

This still appeared as a more theoretical issue; but with the negotiations of the Maastricht Treaty in late 1991, which introduced a common currency, and the completion of the Single European Market in 1992, ‘Europe’ also gathered unprecedented salience in national public debates. In June 1992 Denmark voted against the Maastricht Treaty; a few months later, French citizens only adopted it by the narrowest of margins, and the Irish rejected the Nice Treaty. In short, ‘Europe’ had come to the people or, rather, the peoples of the continent – but the peoples’ response was far from enthusiastic, as the referenda (and surveys) clearly demonstrated.

What was from 1993 known as the European *Union* had gained visibility not least because its *political* purposes had come more sharply into focus. Under Delors’ forceful leadership European integration had been extended to the project of a common currency, as well as a common Union citizenship (which, however, has remained based on citizenship in a Member State – and of which, according to some surveys, around two-thirds of ‘Euro-citizens’ remain entirely unaware). Such economic and political deepening of the Union then also came to be complemented -- or, rather, in the eyes of most observers, rivalled -- by the prospect of enlarging it to the newly democratized countries in Central and Eastern Europe. The picture was further complicated by the emergence of a ‘variable geometry’ in the Western half of the continent: EU countries were no longer marching in step to an ‘ever closer Union’; instead, some countries were forging ahead with ambitious plans like the Euro, while others reserved the right to ‘opt

out' of certain agreements. Yet, the new method of multiple speeds also multiplied the concerns about 'European identity' and the end-point of integration – what is often called 'Europe's *finalité*'. Consequently, what the lawyers had long described as Europe's de facto constitution increasingly seemed to fit Samuel Pufendorf's famous description of the Holy Roman Empire: *simile monstro* – that is, a monstrosity, incomprehensible to any ordinary citizen, and probably to quite a number of bureaucrats and politicians as well.

In short, the legitimacy and precise identity of European integration came to be increasingly contested. Both those sympathetic to integration and those opposed to the process of achieving 'ever closer union' argued that the limits of the so-called *méthode Monnet*, that is, integration by stealth, had been reached; apparently, what Founding Fathers of the Community such as Robert Schuman had described as 'de facto solidarity' was no longer enough.³³ The same went for the hope of Walter Hallstein, the first President of the European Commission, that something he called *Sachlogik* [literally the 'logic inherent in things themselves'] would lead to a 'psychological chain reaction of integration'.³⁴ No wonder, then, that the apocryphal words 'If I had to do it all again, I would start with culture' came to be attributed to one of the 'Founding Fathers' of the Community, Jean Monnet.

Against the background of such concerns the idea of a European constitution was born. Lawyers would keep insisting that the Union had now long had a constitution in the formal and functional sense. But what had been lacking was anything resembling a single, unified statement enumerating (and limiting) the competences of the Union, and

³³ See the Schuman Declaration at http://europa.eu/abc/symbols/9-may/decl_en.htm [last accessed September 24th 2007]

³⁴ Walter Hallstein, with Hans Herbert Götz and Karl-Heinz Narjes, *Der unvollendete Bundesstaat: Europäische Erfahrungen und Erkenntnisse* (Düsseldorf: Econ, 1969), 20-25.

laying out the rights of EU citizens -- what some came to call an ‘emphatic constitution’, that is, a constitution enacted by ‘we, the people’ (or peoples), clearly based on liberal-democratic principles, sufficiently comprehensible to citizens, and fixed in time as a distinct ‘constitutional moment’.³⁵ Moreover, an emphatic constitution seemed just the right instrument to clarify the question of *finalité*: this was the main point of Joschka Fischer’s famous speech at Humboldt University in May 2000 – the first time when a major European politician made serious mention of an EU constitution.³⁶ And Fischer’s contribution did indeed catalyze a debate about fundamentals: the question what ‘ever closer Union’ would actually mean and, ultimately, the desirability of a federal European state.

From the beginning different and potentially conflicting goals were associated with an emphatic constitution: for many proponents, the constitution was to be an instrument to gain legitimacy, to ‘bring Europe closer to the people’ – even if, in form, the constitution would turn out to be yet another treaty among Member States. For the seekers of legitimacy, clarity and comprehensibility mattered above all, on the understanding, it seemed, that once the Union’s doings had become clearer to citizens, they would endorse it. Alternatively – and less naïvely, perhaps – some proponents of a constitution as a means of gaining legitimacy claimed that support for the EU would not be generated by a single document, but by the process of debating and contesting EU constitutionalism itself: quasi-secret serial constitutionalism had to be brought out into

³⁵ Mattias Kumm, ‘Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called’, in: 54 *American Journal of Comparative Law* (2006), 505-530.

³⁶ de Búrca, ‘The Drafting’, 558. This is to leave aside various futile initiatives by the European Parliament, the most important of which was probably Altiero Spinelli’s 1984 ‘Draft Treaty establishing the European Union’.

the open.³⁷ Here the wager was that a sufficiently wide and deep European debate could be kick-started by the prospect of a final constitutional settlement.

In the eyes of other supporters, the paramount concern was to increase the efficiency of the Union and to make it workable for a much enlarged group of Member States – or at the very least clarify, simplify and codify some of the practices that the EU had developed over decades. In particular, after the chaotic December 2000 Nice Summit they felt that another Intergovernmental Conference would not be able to put into effect the necessary streamlining: such conferences would always be a matter of backroom deals, late-night horse-trading, etc. – an impression which Nice had done much to re-enforce. A process of constitution-making, on the other hand, was expected to be more public, more dignified and thus perhaps a better way to ready the Union for the arrival of the new Members in 2004. Importantly, however, it was not necessarily to create any new goals for the Union, or enhance the powers of Brussels – thus British Foreign Secretary Jack Straw could famously argue that the adoption of the EU constitution was no more significant than the enactment of a constitution by a golf club.³⁸

Third, there was the more ambitious goal of increasing the EU's capacity to act on the global stage – in particular through an EU foreign minister, an EU diplomatic service and streamlined voting on foreign affairs. The EU had long been considered a 'civilian power' – 'short on weapons but long on economic power' and spreading civility through soft, non-military means.³⁹ Now power was to become 'harder' through a more coordinated approach and by adding a military dimension. These aims were not obviously related to a constitution-making process – but at least indirectly the perception

³⁷ de Búrca, 'The Drafting'.

³⁸ 'Straw calls for EU constitution', in: *The Guardian*, 27th August 2002.

³⁹ The concept of Europe as a civilian power had been coined by François Duchêne in the early 1970s.

of the EU as a single actor might be strengthened if the Union was officially constituted as a united political community – and explicitly given its own legal personality.⁴⁰

Those seeking a united EU as a counterweight to the US were also likely to stress this aspect of the constitution – or even claim that the Iraq War (or, rather, the US's turn to unilateralism) in fact signalled a constitutional moment for the EU.⁴¹

Finally, and much less importantly, there were those who from the beginning saw the constitution as a matter of consolidating what was already there – but also as a celebration of what had already been achieved: lasting peace and, with the prospect of the accession of ten new Members in 2004, the historic reuniting of the European continent. Consequently, some scholars came to speak of an ‘achievement constitution’.⁴²

Thus, already with many of these potentially conflicting goals in mind, the politicians at the Laeken summit of December 2001 established a ‘Convention on the Future of Europe’ (that is, *not* overtly a constitutional convention). The Laeken Declaration, after calling for more transparency for the EU and a simplification of the treaties, stated rather tentatively:

The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a

⁴⁰ De Búrca, ‘The Drafting’, 568.

⁴¹ The notion of the EU as a counterweight to the US was famously articulated in Jacques Derrida and Jürgen Habermas, ‘Nach dem Krieg: Die Wiedergeburt Europas’, in: *Frankfurter Allgemeine Zeitung*, 31st May 2003.

⁴² I owe this expression to Neil Walker who, drawing on the work of Costantino Mortati, has argued that ‘achievement constitutions’ have mostly been associated with socialist states. See Neil Walker, ‘Post-Constituent Constitutionalism? The Case of the European Union’, in: Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (New York: Oxford UP, 2007).

constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?

But the Declaration also invoked the ideas of institutional consolidation and an achievement constitution, when it claimed that ‘at long last, Europe is on its way to becoming one big family, without bloodshed, a real transformation clearly calling for a different approach from fifty years ago, when six countries first took the lead’.⁴³

The Convention – modelled on the convention that had drafted a non-binding European Charter of Fundamental Rights in 2000 – was significantly more inclusive, diverse and deliberative than an intergovernmental conference; its operating principle was ‘consensus’, rather than unanimity or majority voting.⁴⁴ It was this body which drafted the first ‘Constitutional Treaty’ (a term apparently suggested by its Chairman, former French President Valéry Giscard d’Estaing). The draft was then in rather undignified manner haggled over by European leaders in December 2003; it was signed in March 2004 in Rome; and then finally submitted for ratification by parliaments and, less frequently, electorates. And it was this document that failed to win the assent of a majority of French and Dutch voters in the early summer of 2005.

Explaining Constitutional Failure

⁴³ See http://ec.europa.eu/governance/impact/docs/key_docs/laeken_concl_en.pdf [last accessed 24th September 2007]

⁴⁴ Thomas König and Jonathan B. Slapin, ‘From Unanimity to Consensus: An Analysis of the Negotiations of the EU’s Constitutional Convention’, in: 58 *World Politics* (2006), 413-445.

Arguably one of the major aspirations of the constitution-makers – a written, unified constitution as an instrument of creating legitimacy in an emphatic constitutional moment – also explains why the first efforts to enact a European constitution failed. In fact, one might have seen at work what could be called a classic Tocquevillian mechanism: European elites wanted finally something explicitly called a constitution – rather than another treaty, as had been the custom before, even if the constitution still actually had to take the form of a treaty. There seemed to be an almost a superstitious belief in the magic of the very word ‘constitution’, as if dignifying policy goals and the distribution of competences with all the symbolic paraphernalia of constitution-making would automatically generate citizen support. Arguably some European leaders had taken this ‘lesson’ from a historical crib of the post-war West German experience, where ‘constitutional patriotism’ appeared to have emerged in the absence of a traditional nation-state.⁴⁵

Consequently, what in the end amounted to a comparatively modest revision of existing treaties and the adoption of the Charter of Fundamental Rights were designated as ‘our Philadelphia’, in the words of Giscard d’Estaing, thereby conjuring up the vision of a foundation document on a par with that of the USA. Constitutionalization was about the Union acquiring a kind of public dignity or even ‘patina’ that men and women would recognize from their national experiences of self-government under a constitution; it was approached, for the most part, as a very sophisticated form of *euro-publicité*, or, less polemically put: a form of Euro-pedagogy.⁴⁶

⁴⁵ Compare my ‘On the Origins of Constitutional Patriotism’, in: 5 *Contemporary Political Theory* (2006), 278-296.

⁴⁶ Ulrich Haltern, ‘Pathos and Patina: The Failure and Promise of Constitutionalism in the European

To be fair, the Treaty on which European leaders had eventually agreed in 2004 contained important new elements for popular participation and accountability. If they managed to collect a million signatures in a significant number of member states, citizens could ask the European Commission to propose new policies; more powers were confirmed for the European Parliament, the only EU institution directly elected. At the same time, national parliaments were strengthened in their role as ‘watchdogs’ to check that competences reserved for the Member States were not silently ‘creeping’ upwards to the Union. And finally, there was the requirement to make high-level political deliberations public – arguably the most important achievement for those who see the Union as fundamentally lacking in transparency, and, therefore, also in accountability.⁴⁷

Now, conceptually, state and constitution can be separated; in fact, many academic observers see the de facto ‘stateless’ federal constitution of the EU as its most distinctive feature. But this is not how many politicians framed the issues. It seemed that they wanted only the traditional symbols (such as the flag, the anthem and the ‘national day’), not the reality of a federal state. Nobody – least of all the smaller Member States – saw themselves as part of a project to construct a ‘United States of Europe’ along the model of the US. And yet federalist rhetoric came to colour much of the debates about the proposed Constitutional Treaty, as if a real voluntarist constitution of the EU – embodying the ‘will’ of its constituent peoples - had finally been at stake.

Like the *ancien régime*, then, European elites were creating expectations that they were neither able nor willing to fulfil. Popular discontent erupted at just the

Imagination’, in: *European Law Journal* 9 (2003), 14-44.

⁴⁷ See <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML> [last accessed 24th September 2007]

moment when European elites were trying to improve things at least somewhat by having more mechanisms of participation and contestation. But a series of referenda in some nation-states to ratify the constitution brought out the worst demagoguery in some national politicians who consciously portrayed the Treaty as something that it was not. Thus sceptics could feel confirmed in their belief that the prospects for a full-fledged, electoral Euro-democracy that is animated by sophisticated cross-border debates among an informed Euro-citizenry remain very poor indeed.

Soon after the no-votes in 2005 two major interpretations of the initial failure of the constitution – which compete with the Tocquevillian account -- began to take hold: on the one hand, what one might call a technocratic reading of the rejection of the Constitution; on the other, a ‘radical-democratic’ one.⁴⁸ The technocrats essentially argued that as complex a matter as the construction of the European Union should never have been subjected to popular vote anyway. In fact, there also had been no need for a European Constitution in the first place, because the problem to which the Constitution was to respond – a lack of democracy or more generally legitimacy in the EU – had been a pseudo-problem invented by academics and aspiring Madisons. According to Andrew Moravcsik, by far the most sophisticated defender of the thesis that there is in fact no democratic deficit, the EU simply is not the kind of bureaucratic Leviathan which British Euroskeptics in particular love to hate: it employs fewer civil servants than a medium-sized European city; it cannot enforce its decisions, but depends on the Member States to translate them into national law; and its budget is well below two percent of European GDP. Most importantly, its institutions are subject to numerous checks and balances, constraining

⁴⁸ For a wide-ranging and subtle overview of different ways to read the ‘double-no’ see Neil Walker, ‘A Constitutional Reckoning’, in: *Constellations*, Vol. 13 (2006), 140-150, and Paul Magnette, *Au nom des peuples: Le malentendu constitutionnel européen* (Paris: Cerf, 2006).

EU institutions in a way that many citizens accept as a litmus test for legitimacy in their own nation-states.⁴⁹

One can take this argument a step further and claim that the very fact that EU decision-makers are insulated from many popular (or populist) pressures has often made for successful and sophisticated policies – a claim that chimes with the post-war distrust of popular sovereignty which, as I have argued above, did inspire some of the Founding Fathers. And indeed there is evidence that, rather than EU regulations always ending up being based on the lowest common denominator, experts, for instance when deliberating on health and safety standards, have actually raced to the top.⁵⁰

And yet: EU power is not simply a question which fiscal resources Brussels has or has not; nor is it reducible to the issue whether the Union commands the means of physical coercion. There is another dimension of power, namely the power to regulate (and deregulate, and reregulate, for that matter).⁵¹ One can find many conflicting claims about how strong that power nowadays is – but it is not entirely fanciful when some national interior ministries in Europe claim that fifty percent of the laws they are dealing with originate beyond the borders of their country; in the same vein, it is clear that both national bureaucracies and national legislatures find it

⁴⁹ Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', in: *Journal of Common Market Studies*, Vol. 40 (2002), 603-24. The other major proponent of the legitimacy of delegation is Giandomenico Majone; see for instance his *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford: Oxford UP, 2005).

⁵⁰ See for instance Christian Joerges, 'Deliberative Political Processes Revisited: What have We Learnt about the Legitimacy of Supranational Decision-Making', in: *Journal of Common Market Studies*, Vol. 44 (2006), 779-802.

⁵¹ Michael Zürn and Stephan Leibfried, 'Reconfiguring the National Constellation', in: *European Review*. 13, Supp. No. 1 (2005), 1-36.

increasingly difficult to translate EU decisions adequately into national laws.⁵²

Moreover, it is not obvious that non-democratic institutions that are viewed as legitimate in a national context are automatically legitimate at a supranational level – no matter to how many checks and balances they are subject. Without a shared political culture, a basic sense of what political institutions should generally be expected to accomplish, and, above all, a sense of *trust*, even rather successful technocratic arrangements can easily appear as an alien imposition. Put differently: delegation to institutions that are not directly accountable to an electorate, or what some theorists call depoliticization, is indeed not automatically illegitimate – but depoliticization depends itself on a certain kind of background politics.⁵³ It is arguably for this reason that survey after survey shows Europeans less and less satisfied with the EU and doubting its legitimacy. And it is for the same reason that pro-European intellectuals like Jürgen Habermas have been stressing ever more often that what is missing among Europeans is not an attachment to the Union as such, or even a European constitutional patriotism – but simple mutual trust.⁵⁴

If the technocratic reading of the EU's crisis is off the mark, the burst of radical democratic enthusiasm about what happened in the spring of 2005 seems even more misguided. Some observers jumped to the conclusion that the double no was a kind of 'democratic big bang'; ordinary citizens sent a clear message to the elites that they not only wanted to be consulted more often, but that they were finally ready for a full-fledged Euro-democracy.

⁵² Michael Zürn, 'Die Zukunft des Nationalstaates', in: *Frankfurter Allgemeine Zeitung*, 19 July 2005.

⁵³ Philip Pettit, 'Depoliticizing Democracy', in: *Ratio Juris*, 17 (2004), 52-65.

⁵⁴ Jürgen Habermas, 'Europa ist uns über die Köpfe hinweggerollt', in: *Süddeutsche Zeitung*, 6th June 2005.

Yet the no's that won were hardly the tell-tale signs of a great democratic insurgency; they were the result of debates and a distribution of information that had been profoundly shaped by national, rather than European concerns, and in particular what are often referred to as 'Franco-French' – *franco-française* -- questions. Families and friends split over the vote, many driven by what they saw as their only chance in years to register discontent. And the more elites dramatized the vote – allegedly the entire future of Europe was at stake – the more citizens were tempted to spite them.

It is true that at least in France the Left decisively tipped the vote, animated by a desire to have a 'more social Europe', as well as a desire to preserve 'public services' and other traditional elements of the Western European welfare state. But no less crucial was a vote essentially driven by xenophobia, and concerns about the accession of Turkey in particular. In other words, the 'no-camp' did not coherently propose a different vision of Europe -- there was no alternative government, in which Laurent Fabius, the leading no-campaigner of the socialists, and the far-right populist Jean-Marie Le Pen were to form a different kind of European Commission.⁵⁵

Finally, mention should be made of a third strand of interpretation: what, for shorthand, one might call a postmodern one. Those who have long advocated the EU as a completely new kind of polity – a post-national, post-statist and postmodern one, distinct not just in degree but in kind from traditional states – might initially have felt vindicated by the outcome. After all, if elites had not oversold the EU as a large state -- *une grande France*, as it was often put in the French debates -- but explained its

⁵⁵ For an analysis of the heterogeneous forces behind the No-vote see Gilles Ivaldi, 'Beyond France's 2005 Referendum on the European Constitutional Treaty: Second-Order Model, Anti-Establishment Attitudes and the End of the Alternative European Utopia', in: *West European Politics* 29 (2006), 47-69.

real nature as a federal entity without a state, devoted to recognizing and preserving difference and diversity, then things might have turned out differently. Joseph Weiler is probably the most eloquent proponent of such a Europe devoted not to constitutional uniformity, but to ‘constitutional tolerance’ as the principle value holding together a ‘Community of Others’, both real and imagined.⁵⁶ It is the ultimate vision of a civil and civilizing Europe – united in its citizens’ mutual recognition and respect for each other.

Yet it is far from obvious that such a postmodern vision of Europe would have been ‘bought’ by citizens, even had it been properly explained, promoted or ‘sold’. After all, the referenda also revealed a profound clash between what one might call modern and postmodern logics of conflict. French working class and lower middle class anxieties were most effectively stoked by the spectre of the ‘Polish plumber’ who would steal over from Poland to fix bidets for a pittance and destroy fine French plumbing craftsmanship.⁵⁷ And the problem clearly was not that the French did not want to recognize the plumber in all his Polishness -- but who was going to get the work? In the face of such anxieties, talk of celebrating diversity and recognizing each other in all one’s difference would seem at best irrelevant; worse, it could be the kind

⁵⁶ J. H. H. Weiler, ‘Federalism Without Constitutionalism: Europe’s *Sonderweg*’, in: Kalypso Nicolaïdis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford UP, 2001), 54-70; see also Ulrich Beck and Edgar Grande, *Das kosmopolitische Europa* (Frankfurt/Main: Suhrkamp, 2004). Many observers have since affirmed such a vision and explained the failure of the Constitutional Treaty, because it paid insufficient attention to difference and diversity. See for instance Vito Breda, ‘A European Constitution in a Multinational Europe or a Multinational Constitution for Europe’, in: *European Law Journal* 12 (2006), 330-44.

⁵⁷ Martin Arnold, ‘Polish plumber symbolic of all French fear about constitution’, in: *Financial Times*, 28th May 2005.

of insults that ruthless cosmopolitans consciously or unconsciously have for those who are forced to stay put.

Nevertheless, in the aftermath of the double-no a justification of the EU as an entity that recognizes or at least tolerates difference became a kind of default option – in the rhetoric of European leaders no less than in academic discourse. Angela Merkel declared ‘tolerance’ to be ‘Europe’s soul’ in January 2007; many scholars of the EU continued to insist that the Union would remain a persistent plurality of peoples devoted to dealing with each other’s differences in a civil manner – rather than striving to become one people under one constitution of a federal state.⁵⁸ In a curious way, civility as a specifically European virtue came to substitute for a written unified constitution as a symbol of the achievements of the EU. But it remained an open question whether an invocation of common values such as tolerance was really an effective response to the politicization of the EU since the late 1980s, or, put differently, whether common identity – even if based on the recognition of difference – was sufficient to contain conflicts over power.

Conclusion

Clearly the EU has long had a constitution in at least two of the senses specified at the beginning of this essay: there has been a persistent arrangement of political relations, practices and even habits (some might even say: a common political culture). But there has also been a set of written (and unwritten) rules and laws that constrain

⁵⁸ Merkel specifically declared: ‘Europe’s soul is tolerance. Europe is the continent of tolerance.’ See http://www.eu2007.de/en/News/Speeches_Interviews/January/Rede_Bundeskanzlerin2.html [last accessed 24 September 2007].

political and economic actors, channel claims emanating from civil society and generate individual rights. The attempt to codify all this in a single, symbolically charged document at the beginning of the twenty-first century was inspired by a number of different and often competing goals: gaining legitimacy for the EU by making it more comprehensible and by extending possibilities for national institutions and individual citizens to participate in its decision-making processes; celebrating and consolidating the EU's achievements; but also increasing efficiency, streamlining its decision-making processes and strengthening its capacity for action on the global stage.

In the end the proponents of the Constitutional Treaty got the worst of both worlds: by speaking of 'our Philadelphia', by promoting symbols associated with the nation-state such as a flag and an anthem, they conjured up the spectre of a 'European superstate'. But by only offering relatively modest substance, they disappointed all those who, for whatever reason, expect more from the EU. Tellingly enough, the symbols that invoked statehood – flag and anthem -- were abandoned at the June 2007 European summit; but much of the substance agreed in 2004 was to be preserved in a slimmed-down 'Reform Treaty'. So the patina of formal and explicit constitutionalism had finally been scraped off. What resulted from years of debating an EU constitution was yet another treaty over which state leaders had bargained behind closed doors in Brussels. Meanwhile, sizeable majorities in a majority of European countries remained in favour of re-negotiating a treaty that would still be dignified with the 'c-word'.⁵⁹ Yet it seemed that they would have to wait for another, possibly quite different constitutional moment in the future. In the meantime, it

⁵⁹ Christine Landfried, 'EU ohne Bürger', in: *Blätter für deutsche und internationale Politik*, no. 8 (2007), 913-916, citing a number of European surveys.

seemed, the absence of an emphatic EU constitution would not necessarily diminish the civility of European affairs.