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The Emerging Constitutional Law of the European Union

German and Polish Perspectives

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Preface

On 15–20 September 2002, the German-Polish Seminar on Emerging Constitutional Law of the European Union was held in Kraków. The seminar was organised by the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, in co-operation with Warsaw University and the Jagiellonian University Kraków. It was intended as a first step to closer co-operation among young scholars of both nations. The seminar originated in a proposal by Professor Frowein, then Vice-President of the Max Planck Society, during his visit in Poland in 2001. The proposal was discussed with Professor Wyrzykowski, Warsaw, and Professor Lankosz, Kraków, and implemented by the editors of this volume.

The seminar's main goal was to enable young lawyers from different academic centres in Germany and Poland to discuss essential legal issues of the ongoing constitutional debate in the EU. The participants started from the assumption that Poland already is an EU Member State, in order to avoid another debate on how to organise accession, but rather to create a level playing field for a constitutional discourse. This assumption, however, left the potential difference in perspective untouched, as the articles on enhanced cooperation and the inclusion of "invocatio Dei" into a future European constitution exemplify.

The five days of presentations and discussions were structured in seven sessions, each dedicated to a specific theme, i.e. human rights, institutional design, current and future function of the EU, homogeneity and identity, security and defence policy, home policy and common values. Within this given structure the participants had discretion in choosing their specific topic.

Colleagues from the Department of Public International Law at the Jagiellonian University organised a social and cultural programme that gave everybody the opportunity to discover Kraków and supported the anticipated idea of contacts reaching far beyond the scholarly sphere.

The seminar was made possible by a generous grant of the Max Planck Society, Munich. The editors are also grateful to *Anthea Davey* for the English language revision of the manuscripts and *Angelika Schmidt* for

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Constitutionalization or *a* Constitution for the European Union?

Frank Schorkopf

I.

Since March 2002 a European Convention on the Future of the European Union has been convening in Brussels.[1] The Convention shall according to its mandate —which is based upon the *Laeken* Declaration by the European Council — "consider the key issues for the Union's future development and try to identify the various possible responses."

The Convention has to prepare the forthcoming Intergovernmental Conference 2004 by elaborating proposals for four major topics: (i) the definition and attribution of competences to the EU, (ii) the simplification of the Union's institutions and instruments, (iii) legitimacy in the

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[1] <http://european-convention.eu.int/>. The Convention consists of 105 Members: the Chairman and two Vice-Chairmen, 15 representatives of the Heads of State or Government of the Member States, 13 representatives of the Heads of State or Government of the candidate States, 30 representatives of the national parliaments of the Member States (two from each Member State), 26 representatives of the national parliaments of the candidate States (two from each candidate State), 16 members of the European Parliament, 2 representatives of the European Commission. The *Laeken* Declaration provides for the candidate States to take a full part in the proceedings. The additional precondition that they shall not be able to prevent any consensus which may emerge among the Member States has been dropped by the Convention, compare Hummer, 'Vom Grundrechte-Konvent zum Zukunfts-Konvent: semantische und andere Ungereimtheiten bei der Beschickung des "Konvents zur Zukunft Europas"', 33 *Zeitschrift für Parlamentsfragen* (2002) 2, 323.

sense of improving democracy, transparency and efficiency and (iv) the future role of the Charter of Fundamental Rights.

The Convention's agenda is centring around the main challenges of the European integration process that, in spite of the Treaties of Amsterdam and Nice,[2] have been left unsolved:

- the antagonism between the functional legitimacy of market integration and democratic legitimacy of national law, created by the extension of market integration into the national sphere — this question is linked to the critical voices that speak of an increasing democratic deficit;
- the lack of transparency and responsibility on the European level;
- the claims of further economic integration sparked by the newly minted euro-currency;
- the almost fifty years old institutional architecture that can barely cope with the demands of 15 and will paralyse an EU of 27 Member States;
- the missing European political entity counter-weighing the economic unity and reflecting a European identity and finally
- the conflict between national constitutional law and European primary law over the supremacy — is there a supreme law of the Union?[3]

However, as the aforementioned agenda items — legitimacy, organisational structure, the limitation of public power and creation of a European identity — address most of these problems, the Convention does not only embark on specific problem solution, but is also working on *fundamental questions of government* in the European Union. This is

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[2] Treaty of Amsterdam, OJ 1997 C 340/145; Treaty of Nice, OJ 2001 C 80/1, Pache/Schorkopf, 'Der Vertrag von Nizza', 54 *Neue Juristische Wochenschrift* (2001) 51, 1377; Dashwood, 'The Constitution of the European Union after Nice: law-making procedures', 26 *European law review* (2001) 3, 215; Yataganas, 'The Treaty of Nice: the sharing of power and the institutional balance in the European Union: a continental perspective', 7 *European law journal* 7 (2001) 3, 242; Schwarze, 'Constitutional Perspectives of the European Union with Regard to the Next Intergouvernmental Conference 2002', 8 *European Public Law* (2002) 2, 241.

[3] Maduro, 'Europe and the Constitution: What if this is As Good As It Gets?', *Constitutional Web Papers ConWEB No. 5/2000*, 4, <http://les1.man.ac.uk/conweb/>.

the reason why many voices are being heard in the general public and scientific debate that speak of a *Constitutional* Convention and the *making* of a Constitution for the European Union.

When the Heads of State or Government agreed at the Cologne European Council on 3/4 June 1999 upon the requirement to establish a Charter of Fundamental Rights, they decided to set up an *ad hoc* body composed of representatives of various constituent bodies in order to draw up the draft charter.[4] Presumably, only few of them have had visionary aspirations aiming to prepare the ground for a constitutional debate in the European Union. This debate was deliberately initiated by *Joseph Fischer*'s speech at the Humboldt-University on 12 May 2000. It rapidly gained weight by *Jacques Chirac*'s timely response in the German Bundestag on 27 June 2000 as well as by consecutive speeches and papers from Presidents, Prime Ministers and other representatives from EU Member States and Candidate Countries.[5]

To ascribe the European constitutionalism exclusively to this current debate would neglect the fact, that for many actors in the political and scientific field, who are concerned with EU-matters, the constitutional question has been, in principle, answered many years ago. For some authors, the Union's primary law of the Treaties, Judgements of the European Court of Justice as well as some basic pieces of secondary legislation are components of an already existing constitution. Thus, the European Union's legal foundations can be understood as a Constitutional Order.[6] This approach also embraces the alternative notion that the EU is part of a broader constitutional network, consisting of the Member States' Constitutions and the basic law of the Union itself

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[4] European Council of Cologne, the precise composition of this body was determined at the European Council in Tampere 15/16 October 1999.

[5] The overview on these contributions given on the EU internet site comprises 11 pages in printing: <http://europa.eu.int/futurum/congov_en.htm>.

[6] See for example Pernice, 'Elements and Structures of the European Constitution', *WHI-Paper 4/02*, available under <http://whi-berlin.de>; S. Douglas-Scott, *Constitutional Law of the European Union* (2002); J. H. H. Weiler, *The Constitution of Europe* (2000); P. Magnette (ed.), *La Constitution de l'Europe* (2000); Iglesias, 'Gedanken zum Entstehen einer Europäischen Rechtsordnung', 52 *Neue Juristische Wochenschrift* (1999) 1, at 2; Jacqué, 'La Constitution de la Communauté européenne', 7 *Revue universelle des droits de l'homme* (1995) 397, at 423; Opinion 1/91, *EEA I*, [1991] ECR 6102.

(*Verbundverfassung*).[7] From these perspectives, the ongoing debate — as prominently institutionalised in the Convention — has to be perceived rather as an ambitious constitutional *reform* project than as the *making* of "a Constitution". Hence, the answer to the question raised in the heading of this paper seems to be compelling: while having "a Constitution", it is too late for constitutionalization.

However, in that case the question follows, what the *Laeken* European Council meant, when it asked the Convention "as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union."

II.

"Constitution building" is nothing new for the European integration process. It is rooted in the Draft Treaty for the Statute of the European Communities of 10 March 1953,[8] the European institutions. Thirty years later, the Stuttgart Solemn Declaration of 19 June 1983 and the consecutive so-called *Spinelli*-Draft by the European Parliament of 14 February 1984 were presented to the public.[9] Again the Parliament adopted a resolution on 11 July 1990 about guidelines for a draft constitution for the European Union.[10] Finally, the report of the institutional committee of the EP, known as *Herman*-Report, adopted on 9 February 1994, has to be mentioned.[11] Other examples from the academic community, political parties or individuals could be cited in this respect.[12]

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[7] Pernice, 'Europäisches und nationales Verfassungsrecht', *60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2001) 148, at 163.

[8] Genzer, 'Die Satzung der Europäischen Gemeinschaft – Zum Entwurf einer europäischen Verfassung', *Europa Archiv* (1953) 5633.

[9] OJ 1984 C 77/27.

[10] OJ 1990 C 231/91.

[11] OJ 1994 C 61/155.

[12] See for example the draft texts prepared by Mayer-Tasch/Contiades of 6 May 1951, in P. C. Meyer-Tasch *et al.* (eds.), *Die Verfassungen Europas* (1966); Imboden, in Juristische Fakultät der Universität Basel und vom Basler Juristenverein (ed.), *Festgabe zum Schweizer Juristentag* (1963) 127; Dorren, *La Constitution de l'Europe. Pour une démocratie efficace* (1977) 197 and the European

The constitutional movement within the European Union has continued into the present. It has to be seen in the context of systemic problems of the integration process and its institutions. In 1953 the idea of a sustainable peace in Europe and the need for a reconciliation process between France and Germany was still tantamount. The period from 1970 through the early 1980s were characterised by the so-called "Euro sclerosis", when the institutions were lost in bureaucracy and political impetus was lacking. As the deadlock was finally broken by the Single Market Initiative of 1985 the *Spinelli*-Draft purported a solution. The Draft Constitution of 1994, shortly after the Maastricht Treaty entered into force, was already prepared under the impression of the Union's massif enlargement to the countries of east and south-east Europe.

The political as well as the academic debate on a *European Constitution* is founded on its participants' diverging presuppositions of the term "European Constitution" and fuelled by different expectations about the role "a Constitution" should play in the Union.[13] While some expect that a constitution will solve identification problems of the people and support a political unity on the level of government, others oppose the notion of "a Constitution" for the European Union in principal, repeatedly by referring to theoretical arguments — paramount in this respect is the "no demos thesis" — or by associating the idea of a Constitution exclusively with the State.

In the opposite direction some pro-European observers are afraid that the Union could not be mature enough "to be constituted". They argue, that the static element of a constitution would interfere with the dynamic element of the integration process. Another group of persons stresses the argument of the necessary contractual element in the sense

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Constitutional Group 1993. A comprehensive summary on the chronology of Draft Constitutions provided by Schmidt-König, University of Trier: <http://www.uni-trier.de/~ievr/eu_verfassungen/entwurf.htm>; Hummer, 'Ursprünge, Stand und Perspektiven der Europäischen Verfassungsdiskussion', in S. Griller/W. Hummer (eds.), *Die EU nach Nizza* (2002) 335.

[13] A guide to the national debates is available under <http://europa.eu.int/futurum/debate_de.htm>. See also Pernice, 'Zur Verfassungsdiskussion in der europäischen Union', *WHI-Paper 2/01,* available under <http://whi-berlin.de>; Volkmann-Schluck, 'Die Debatte um eine europäische Verfassung' (2001), available under <http://www.cap.uni-muenchen.de> and detailed on the German debate with extensive references Nettesheim, 'Deutscher Bericht für die XX. FIDE-Tagung 2002, EU-Recht und nationales Verfassungsrecht' (2002), available with reports from other European countries under <http://www.fide2002. org/reportseulaw.htm>.

of *Rousseau*, that a written Constitution must meet the standards of the factual Constitution, i. e. that a European Constitution must have an equivalent in the pre-existing social situation. A group of federalists attempt to create a "European Federation" or even the long sought "United States of Europe" in order to finalise the peace project that began in 1951 by the foundation of the European Community on Coal and Steel.

The common vocabulary used in the debate is deceptive because it suggests that the project is based on a theoretical level playing field. In fact, the analytical and prescriptive contributions — that are being published for discussion — deviate from each other in respect of their theoretical approach. These contributions to European Constitutional Law are influenced by different strands of constitutional thinking. This threatens to turn the constitutional discourse into a quagmire, creating false expectations and limiting the debate's intellectual capacity.[14]

III.

What "a Constitution" is or should be, can be theoretically distinguished by the number of normative elements:

First, a Constitution is characterised as a set of rules, that creates an entity, organises and regulates its institutions, structure and competences. In this sense any organisation — be it private like a company of association — or be it public — like a State or an international organisation — does have a Constitution.[15] For this approach it is irrelevant whether the Constitution, as organisation of government in a broad sense, is embodied in a written document or unwritten rule.

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[14] Compare Shaw, 'Process, Responsibility and Inclusion in EU Constitutionalism: the challenge for the Convention on the Future of the Union' (June 2002), at 2, available under <http://www.fedtrust.co.uk/Media/Shaw_Hallstein.pdf>.

[15] This notion is close to Raz' understanding of a "thin" Constitution, in L. Alexander (ed.), *Constitutionalism* (1998), 154; see also Craig, 'Constitutions, Constitutionalism and the European Union', 7 *European Law Journal* (2001) 2, 126 and A. Peters' factual-descriptive category, *Elemente einer Theorie der Verfassung Europas* (2001) 67. For the history of terminology see Mohnhaupt, Verfassung I, in O. Brunner *et al.* (eds.), *Geschichtliche Grundbegriffe, Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 6 (1990) 833.

Secondly, a Constitution may, in addition to the aforementioned features, include the reference to substantial (*materielle*) categories, such as legitimacy of public power, the status and protection of individuals, the separation of power, i. e. expressing normative-qualified elements of the constituted entity. This notion has strong affiliation to public organisation, but is not exclusively attributed to the State.

Thirdly, a Constitution — again in addition to the elements mentioned before — might be characterised by formal features: the Constitution is the superior law in the sense that it stands on top of a hierarchy of norms under which the simple law has to be compatible with the provisions on the constitutional level. Moreover, the constitutional law is entrenched, because its amendment depends on a special procedure; it is enshrined in one or very few written documents that regularly had been adopted in a ceremonial procedure.[16] In general, the formal characteristics are contingent upon the substantive part.

Fourthly, a Constitution might be understood as the fundamental law of a State. As such, the Constitution prescribes how the sovereign power that has been conferred by the people or the nation on the State and its organs beforehand is being executed. The common ground for this notion is the historic constitutionalism. It has been shaped foremost in west European countries by a political movement of the late 18th and 19th century for a specific, liberal form of the State that mirrors the ideal of Article 16 of the French Declaration of Human Rights: "Toute société dans laquelle la garantie des droits n'est pas assurée ni la séparation des pouvoirs déterminée, n'a point de Constitution".

This idea has carried forward to modern times and was adapted to new challenges, so that some scholars argue on the basis of a post-national constitutional terminology. But the historic experience is still responsible for the fact, that modern forms of constitutionalism always carry on

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[16] In Raz' terminology this would be the "thick" sense of Constitution. It has seven features of importance: the constitution (i) *constitutes* the main organ of government and its powers, (ii) it is a *stable* framework and (iii) enshrined in one or very few *written documents*, (iv) is the *superior law* of the land, (v) and a constitution is *justiciable*, i. e. they provide for a judicial procedure under which the compatibility of the simple law with the constitutional provisions can be tested, (vi) it is *entrenched*, because its amendment depends on a special procedure and finally (vii) a "thick" constitution expresses a *common ideology*, Raz, *supra* note 15, at 152, 154.

the unreflected conventions and traditions of the past. It tentatively make us believe that there is a right form of *a constitution*.[17]

There is little doubt that the existing legal order of the EU is a "thin", factual-descriptive and material Constitution. And it is also clear that the Union's legal order possesses some of the more pertinent constitutional features, that have been mentioned above. Nevertheless, particularly the two major texts, adopted by the European Parliament in 1984 and 1994, clearly reveal a specific theoretical alignment in the process of European constitution-building. These projects were based on the idea that "a Constitution" should be a formal, i. e. single written document that has been officially adopted under this name with the involvement of the European Parliament or national Parliaments. And although the draft texts deviate from each other to a remarkable extent, they share the notion that a Constitution necessarily includes a number of substantial elements such as described above.

Recent contributions by major actors to the constitutional debate confirmed the impression that the Union shall "design a written Constitution for the people and communities of Europe",[18] in other words a formal Constitution as it has been the endeavour, for many decades, by groups of actors. Some even support the view that this Constitution ought to be confirmed by a Europe wide referendum in order to confer a higher degree of legitimacy on the EU, but also to match as closely as possible the constitutional ideal familiar to us from the nation state. Therefore, it seems that a majority does not question *if* the EU needs a formal Constitution, but only discusses *how* it will look.[19]

IV.

While for many the question in the title of this paper has been answered in favour of "the Constitution" the following part of the paper will be devoted to some thoughts on an alternative option for the European Constitutional Order?

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[17] Maduro, *supra* note 3, at 2; Shaw, 'Postnational Constitutionalism in the European Union', 6 *Journal of European Public Policy* (1999) 591.

[18] See most recently Straw, Strength in Europe Begins at Home, speech of 27 August 2002, <http://www.fco.gov.uk/>.

[19] Compare Nettesheim, *supra* note 13, at 98, with further references.

There are doubts whether "a Constitution" — in the formal sense — is the adequate tool at this stage of European integration in order to find solutions for the perceived insufficiencies. Three arguments can be brought in favour of this stance:

The *first* argument is based on the fact that a European Constitution raises political expectations that have no equivalent on the normative level. The unity of the polity and the governed territory, once forcefully symbolised by the State and later diluted if not lost in the process of internationalisation, cannot be regained on the EU level. Whilst the constituted nation State organised, legitimised and limited the exercise of public power on the territory that was identical with the political entity, European integration has compartmentalised this unity into issue sectors — most prominently represented by the sectors of security, international trade, human right and environmental protection. These sectors are governed by regimes consisting of players from different bodies of different political entities.[20] Some proponents of a formal Constitution believe, that this gap can be bridged by transferring the classical idea of the constituted State (*Verfassungsstaat*) of the Union. This approach has been criticised in the past on philosophical grounds, as — in opposition to the nation State — the preconditions for Constitution building are not (yet) fulfilled, since no European Constitutional Demos exists.

With a view of the debate in progress, the majority of decision makers does not regard this argument as an obstacle to adopting a European Constitution. However, it is highly questionable if a European Constitution is able to fulfil this task. European integration itself is embedded into "globalisation", understood as process under which, in relatively short time, the structural linkage between law and policy has disintegrated.[21] Hence, the Union itself has to cope with the phenomenon of this process, i. e. the insufficient attribution of responsibility for the execution of public power and the erosion of competences, that is so

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[20] See Walter, 'Die Folgen der Globalisierung für die europäische Verfassungsdiskussion', 115 *Deutsches Verwaltungsblatt* (2000) 1, 7 and Frowein, 'Die Europäische Union im Zeichen der Globalisierung: Einbindung und Status der Europäischen Union im Verfassungssystem der Staatengemeinschaft', *WHI-Symposium* (1998), <http://www.rewi.hu-berlin.de/tagung98/frowein/frowein.htm>.

[21] For these thoughts on "globalisation" I am indebted to the members of the reading and discussion circle "Constitutionalization" at the Max-Planck-Institute.