

T.M.C. ASSER INSTITUUT
The Hague

THE EU CONSTITUTION: THE BEST WAY FORWARD?

edited by

Deirdre Curtin
Alfred E. Kellermann
Steven Blockmans

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**THE EU CONSTITUTION:
THE BEST WAY FORWARD?**

**ASSER INSTITUTE COLLOQUIUM ON EUROPEAN LAW
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FOREWORD

I would like to compliment the Asser Institute on organising the 34th Session of the Colloquium on European Law, a major conference, during the Dutch Presidency of the European Union in 2004. It was a well-chosen moment to make a relevant and timely contribution to the ongoing debate about Europe's Constitution. This book brings together the work of scholars of exceptional calibre and high-ranking representatives of the European Union's institutions, national governments, legislatures, judiciaries and universities. It will no doubt become an authoritative reference work.

When so much knowledge and experience from Europe and beyond comes together in one place, it inevitably promotes lively and rewarding debate. And debate is precisely what Europe needs.

There is an anecdote about Georges Clemenceau, the French leader during World War One. The pre-war years saw a heated debate about the wealth of the Church. One wit, in a discussion with Clemenceau and others, was prompted to make the remark, 'I think there is a lot of money to be made from religion. I would like to start one of my own.' Once the laughter had died down, Clemenceau replied, 'it is not so difficult. All you need to do is be crucified and rise from the dead!'

Ironically, this is exactly what happened. Not to the wit in question, nor to Clemenceau, but to Europe. In the 20th century, Europe was indeed crucified. And it did rise from the dead. Not once, but twice. Partly, it should be said, because of the intransigence of Clemenceau himself. In the aftermath of '*la Grande Guerre*' he was determined to dictate harsh terms, and Europe was encumbered with the infamous Treaty of Versailles.

Europe's saviour was European integration. The European Union has succeeded in reconciling erstwhile archenemies France and Germany, and in uniting East and West. The internal market has brought us unprecedented riches. But we still lack true believers, true Europeans.

How can this be? The fatal flaw is that the EU lacks a cross-border political space, a European political arena, a transnational discourse. A place where European politics is made. This is why I say that Europe needs debate.

Debate across borders fosters a sense of a shared destiny. While the forum for debate is purely national, a shared sense of community will struggle to take root. Despite its great achievements, the Union has not made its people committed Europeans. 'We, the People of Europe' is a fiction. Nor will the Constitutional Treaty, as a symbol, engender a sense of community, just as the European flag and the European anthem failed to do in the past. But as a vehicle to bring Europe closer to the people, it has great potential. Even if the ratification process were to be derailed. As a catalyst for transnational debate, the Constitutional Treaty cannot fail to have an impact.

The Treaty forces us as Europeans to think about Europe and to express a view on its consequences. We will obtain a clearer picture of Europe in our minds. This does not mean that we will all become born-again Europeans. I, for one, would find that an alarming prospect. But greater engagement, be it positive or negative, is inevitable. And that is what we need.

As far as I am concerned, we will carry on being who we are: Irish, Poles, Greeks and so on. Twenty-five or more different nationalities with our own views, customs and characteristics. Yet, at the same time, we will feel more and more European. 'We, the Peoples of Europe.' That is an option.

So even before we know the outcome of the ratification process, one thing is clear. The Constitutional Treaty will bring us closer together as Europeans, regardless of whether we like what it says. However, that does not mean that I am indifferent as to the outcome; far from it. There are plenty of reasons why the Constitutional Treaty should rouse our enthusiasm.

The European Union has been carried forward on a tidal wave of change over the past fifteen years. The loose economic community of yesteryear has made way for a close-knit Union. A Union that plays a role in almost all areas of daily life, including those that used to be the exclusive preserve of the nation state, such as justice, external borders, foreign policy and monetary policy. At the same time, it has grown exponentially. Numbering twelve Member States when it came into being in 1992, it now has twenty-five and counting.

These tidal waves of change are testing the buoyancy of the Union to the limit. We need to stop and think about the future to prevent the vessel from capsizing, the crew from deserting or the passengers from being swept overboard. The European Convention on the future of the European Union was the unorthodox lifebelt that was thrown two and a half years ago.

At the Convention, for the first time ever, the discussion about the EU's principles, methods and objectives was left not to diplomats, but to representatives of national parliaments and the European institutions. This did not mean that the debate about the Union was entering calmer waters. At times, intergovernmentalists and supranationalists whipped up a real storm. But you will have realised by now that the rough seas of this kind of confrontation do not worry me. Especially since the debate was constructive. Despite their differences, the two sides were able to agree on a final text. And this text is no watered-down compromise, but a blueprint for a reformed Union. That is an impressive achievement.

The governments of the Member States were well aware of this. The outcome of the Convention put them under pressure to steer the Convention safely through the IGC. And although the voyage was again a stormy one, the ship sailed into port in June of this year.

The result of the deliberations is not a genuine constitution, nor is it an ordinary treaty. It is a Constitutional Treaty. Just like a constitution, the Treaty sets out the relative powers of the European Council, the European Commission and the European Parliament. It also includes a comprehensive catalogue of fundamental rights that binds the Union to the rule of law. But, unlike a constitution,

the Treaty cannot be amended by a qualified majority of votes in parliament. It remains an agreement between independent states. And that is the hallmark of a treaty.

So while the term Constitutional Treaty may suggest an inherent contradiction, it does describe exactly how the Union is governed. The citizen and the state take turns at the helm of the Union, according to the policy area in question. Some decisions are taken by a qualified majority, others by unanimity.

This is not a sign of weakness. On the contrary, the duality in the system of the EU perfectly reflects the divided loyalty of its citizens which I mentioned earlier. Sometimes they consider their interests best represented at the national level, and sometimes at the European level. The success of the EU in the future will depend to a large extent on its ability to manage this duality. And the Constitutional Treaty is an excellent instrument for doing so.

Supranationalists see the Union as a community of citizens. Intergovernmentalists see it as a union of states. But in reality, the Union is both. And the Constitutional Treaty conveys this essential idea with remarkable clarity.

If we look at its potential to stimulate debate, its refreshingly unconventional origins and its appropriate duality, the Constitutional Treaty squares the circle. But, ultimately, it must prove its worth in practice. The key question is the following: will it help us to build a more prosperous, more democratic and more secure Europe? And despite its flaws and blemishes, my answer is an unqualified 'Yes, it will!'

The Union was created in a democratic vacuum. At the very least, the people were scarcely involved, if at all, in the establishment of the European Community. It is not in fact inconceivable that if they had been, the baby would have been smothered at birth. At any rate, it is to be feared that the deep-rooted anti-German sentiment that long prevailed across much of Europe would have seen to this.

However, although the democratic deficit initially helped breathe life into the European idea, as time went by it gradually became ever more stifling. The creation of the European Parliament in 1979 was an attempt to provide much-needed oxygen. Yet in subsequent years the air became even thinner, certainly after 1992, when the Community was transformed into the Union by the Treaty of Maastricht. The fact that the Treaty of Maastricht granted people EU citizenship, alongside their existing citizenship, entirely escaped most people's notice. And many of those that did take note dismissed it as a sop. Now Europe really was struggling for air.

Having said this, the Constitutional Treaty opens the window and lets the fresh air flood in. It truly makes the Union more democratic. First, it greatly extends the powers of the European Parliament. The main rule is that the European Parliament will have co-decision-making powers when it comes to the adoption of laws and framework laws. These powers may be extended without amending the Constitutional Treaty. In addition, the European Parliament will be given a full say over the annual budget. The Constitutional Treaty will also introduce an early warning system. Every new law conceived by Brussels will be submitted to

national parliaments. If one-third of them believe that the EU is exceeding its powers with the new law, the Commission must go back to the drawing board. This will give national members of parliament an active role in patrolling the external boundaries of Brussels' power.

The Treaty also provides for a citizens' initiative. One million signatures from different Member States are enough to ask the Commission to initiate a law. In doing so the Treaty goes further than what is customary in many Member States. And the Union shows that it is open to other forms of democracy.

Finally, the Constitutional Treaty takes pioneering steps in the area of the protection of fundamental rights. It includes the full text of the Charter of Fundamental Rights of the European Union. This means that the rights and principles enshrined in the Charter will become legally binding. The Treaty also extends the jurisdiction of the Court of Justice, giving citizens a greater opportunity to bring appeals.

The Union is the result of changes made in fits and starts, as you can see in the treaties on which it is based. The complex pillar structure that we currently have is a good example of this. The Constitutional Treaty creates order out of the chaos. It makes the Union more transparent.

Some of you may well remember that a unitary structure was the goal of the Dutch EU Presidency in the run-up to the Treaty of Maastricht. What was swept from the table on that black Monday, 30 September 1991, has proved to be acceptable to all Member States thirteen years down the line. The Constitutional Treaty draws a line under the maze of treaty law consisting of the EU Treaty, the EC Treaty and an endless series of treaties making amendments.

And the Constitution not only tidies up the treaties. It also sweeps away the difficult distinction between Union and Community, thereby stimulating the integration of policy. For example, the Constitutional Treaty facilitates the strategic use of funds that are currently all too often tied to the individual pillars. Do we want to control migration flows and do we need third countries to help us to do so? One possible approach could soon be to combine internal market concessions with foreign policy pressure. This would be difficult to organise under the current treaties.

The Union will also gain greater internal cohesion. Because of the pillar structure, the Commission has had a tendency to view the Union's policy mainly from the perspective of the EU Treaty, under which it has primacy. Under the unitary structure it will automatically broaden its perspective, taking in justice, home affairs and external issues.

The unitary structure will also sweep away the current jumble of legal instruments. Six will remain, namely laws, framework laws, regulations, decisions, recommendations and opinions. That is quite sufficient.

More democracy and a simpler structure will undeniably help make the Union more effective in increasing Europe's prosperity and security. But the Constitutional Treaty will also promote progress in other ways. People in the EU may have reservations about Brussels, but when asked they often favour a European approach that goes even further than what their governments advocate. A

common foreign and security policy is a case in point. The Constitutional Treaty contains major innovations in precisely this area.

The most striking of these is the creation of the office of Union Minister for Foreign Affairs. This person will be a member of both the Commission and the Council. This brings to an end the current situation, in which responsibility for foreign policy is shared by Commissioner Chris Patten and the High Representative of the Council, Javier Solana. Of course, combining these two posts does not mean that Europe will suddenly have a common foreign policy. But in my view it is beyond doubt that this construction will encourage Europe to speak with one voice.

People also expect Europe to act decisively when it comes to combating the negative effects of the free movement of people, goods and services, because they feel these effects just as keenly as the positive ones. A side-effect of the lifting of internal borders has been an upsurge in cross-border crime. Added to this, since the attacks in Madrid, is the real danger of terrorism.

Moreover, the end of the Cold War has triggered mass migrations of people seeking a better life. For many, Europe is the destination. Some obtain permission to stay here. But many do not. The lack of a strong common policy often condemns them to an exhausting odyssey through Europe. A journey that is doomed to end in failure.

The Constitutional Treaty, far more so than the current treaties, enables us – through the Union – to tackle these shared problems together, for example, by making qualified-majority voting the norm. This cannot fail to make Europe more effective in this area.

When the European Convention met for the first time, plenty of comparisons were drawn with the Constitutional Convention that drafted the American Constitution in 1787. Was this a new Philadelphia? If you make the effort to compare the text of the Constitutional Treaty with that of the American Constitution, there can be only one conclusion: Philadelphia was unique. The European text entirely lacks the conciseness, elegance and eloquence of the work of Alexander Hamilton, Benjamin Franklin and James Madison. After more than two hundred years, the words ‘We, the People of the United States’ have lost none of their force. But it would be a mistake to conclude from this that our Convention has failed. The Constitutional Treaty is not an end in itself. It is a means to an end. Just like the American Constitution, it draws the contours of future cooperation. How they will be shaded remains to be seen. Yet it seems certain that the spectrum will be broader and the colours more vivid.

There is no reason why Europeans have to be downcast. A little more American optimism would be justified. Because, on at least one crucial point, the Constitutional Treaty crosses a line from which its American counterpart shrank back: the right to withdraw from the Union. The Constitutional Treaty explicitly grants such a right, while its absence is the essence of the American Constitution. Who is showing more courage here?

The right to withdraw firmly establishes the EU as a federal union, rather than a federal state. It emphasises that the people of Europe have come together

of their own free will. And it ensures that they must continually reaffirm their ties with Europe. This is an unprecedented sign of confidence that marks the Constitutional Treaty as unique and places the people in its debt. Europe has come of age!

Clemenceau once said, 'In order to act, you must be somewhat insane. A reasonable man is satisfied with thinking.' If this is the case, I am all for a little insanity in Europe. We have done the thinking. Now is the time to act. The Constitutional Treaty gives us every opportunity to do so.

In December last year, we saw tens of thousands of Ukrainian protesters camping out for weeks on Independence Square, in a peaceful campaign for democracy. Like the Serbs and Georgians before them, they were inspired by the European Union. Their campaign for democracy was a struggle to become European. But within the European Union, the idea of being European does not generate a lot of excitement. People are expressing more and more uncertainty about the Union. Is Brussels not becoming too powerful? Has enlargement not gone too far? Is there not too much disagreement within the EU? And are the Member States really living up to their promises?

Some call this criticism unacceptable. They point out that when the allies liberated Europe sixty years ago, they found a beat-up, burnt-out, run-down continent. It is because European countries decided to work together closely, without sacrificing their identities, that Europe rose again. I do not argue with that. Europe has changed from an arena of warlike nations to a place where war is inconceivable. Cruel dictatorships have become reliable democracies. A continent that was on the verge of bankruptcy has become a beacon of prosperity.

However, our admiration for the role of the Union as a catalyst of peace, freedom and prosperity must never degenerate into blind adoration. That would be most un-European. Criticism is a sign of maturity. For decades, it has proved impossible to sell the European Union to the public with flyers, a flag, a holiday or an anthem. Real commitment begins with real choices.

At this moment the peoples of the EU are faced with a very real choice: will they accept the Constitutional Treaty, yes or no. The people of France will vote in their referendum on this question on 29 May. On 1 June, the Netherlands will hold its first national referendum in almost 200 years on the same topic. The Union is not perfect. Nor will the Constitutional Treaty suddenly make it perfect. But I am perfectly sure the Constitutional Treaty is a clear improvement on the current treaties. I hope the peoples of Europe will agree.

ATZO NICOLAI
Minister for European Affairs of the Kingdom of the Netherlands

The Hague, 20 May 2005

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