CHAPTER 25

CONCLUDING REMARKS: THE CONSTITUTIONAL TREATY IS DEAD, LONG LIVE EUROPEAN CONSTITUTIONALISM

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INTRODUCTION

The Constitutional Treaty died when the French and Dutch electorates voted 'no' to ratification in 2005. The death was formally announced by the Member States in June 2007 when it was decided to drop efforts to resuscitate the Constitution and instead negotiate another treaty called a Reform Treaty. Although the Reform Treaty will include most of the institutional innovations of the Constitutional Treaty all references to 'Constitution' have been dropped. So have references to symbols of constitutionalism.

The constitutionalist rhetoric had backfired. The rhetoric had made it sound as if the proposed treaty was more than it was. After all it was still a treaty among sovereign states. It was not a real constitution of a state. The Member States remained the 'masters of the treaty.' Had it been ratified future changes would still have required unanimity.

The term 'constitution' is not well-defined. It has different meanings in different time periods and in different countries. But normally it refers to the organisation of a government and it implies the existence of restraints upon that government. Such restraints can exist through a division of powers among legislative, executive and judicial authorities as advocated by Charles-Louis de Montesquieu. Restraints can also be introduced by a vertical division of powers between different levels of government as we find in federal states. The famous US checks-and-balances would be a good example of a constitutional arrangement. Stipulations about individual rights also put restraints on governments (Friedrich, 1968).

The moment we say 'government' we tend to think of 'states.' But the EU is not a state. It is an intergovernmental organisation of a special kind. By 'pooling' and 'delegating' certain powers to common institutions the Member States have created a governance system that is unique. Some decisions in the Council of Ministers can be made by a qualified majority vote (QMV). The Community institutions, first of all the Commission and the European Court of Justice (ECJ), have certain autonomy. EU institutions have supra-national powers, not found in other international organisations.

This *sui generis* nature of the EU makes it difficult to use the concepts when we study national governments or states. Still, the supra-national

aspects of the EU give it state-like features, and the EU has a system of governance with many built-in restraints. As such you can argue that it already has a constitution.

THE DEATH OF THE CONSTITUTIONAL TREATY

To answer the question why the Constitutional Treaty was abandoned we obviously have to study the reasons for the 'no' votes in France and the Netherlands. Different chapters in this book have done so. It becomes clear that the voters in France and the Netherlands who dealt the Constitutional Treaty the death-blow did so for various reasons including some that had little or nothing to do with the Treaty itself. In France an important reason for voting 'no' was the economic situation in the country, which at the time was experiencing high unemployment. In the Netherlands many voted 'no' because they felt that they knew too little about the Treaty. These and other reasons mentioned by people when asked why they voted 'no' suggest that the use of referenda for ratifying EU treaties is very problematic, to say the least.

The next question would then be why 10 countries decided that they wanted to use a referendum to authorise ratification of the Constitutional Treaty. Apart from the two countries that may have had a constitutional reason for a referendum, namely Ireland and Denmark, the other countries could have ratified the Treaty by a parliamentary vote. If we look at it historically the use of referenda has been relatively limited. The original six Member States of the European Communities (EC) ratified the founding Paris and Rome Treaties without referenda. The UK entered the EC in 1973 without a referendum, but had a referendum after an odd re-negotiation of membership in 1975. France had a referendum on the Maastricht Treaty in 1992 which ended with '*le petit oui*,' which should have been a warning for President Jacques Chirac, who nonetheless called for a referendum about the Constitutional Treaty in the summer of 2004. Before that Prime Minister Tony Blair had decided that the UK would have a referendum about the Constitutional Treaty, which was at odds with the British concept of parliamentary sovereignty and the lack of historical practice of using referenda, with the exception of the 1975 referendum. In the case of the Netherlands it was the first EU referendum ever and the event was clearly mishandled by the government.

The outcome of the rush to organise referenda was that two countries out of 27 ended up holding the EU hostage. Is that what democracy is about? The question is legitimate because the advocates of referenda claim that it is the most democratic way of making important decisions, which at least would presuppose that people vote about the question formulated for the

vote and do not try to punish an unpopular government or are ignorant about the issues. It clearly looks as if the premises of the rush to use referenda were faulty.

The alternative to direct democracy, including the use of referenda, is indirect or representative democracy. We elect members to Parliaments so that they can put in the work it takes to become familiar with the issues and then decide on our behalf. Why not continue to do it that way in the EU too?

The defeat of the Constitutional Treaty is a defeat of direct democracy. The fall-back position, representative democracy and ratification of treaty reforms by parliamentary votes, is now confirmed by the new strategy of the Reform Treaty. Dropping all the constitutionalist rhetoric and symbols should make it possible for most Member States to ratify that treaty by parliamentary votes.

Trying to create greater legitimacy through the Convention method did not work, we now have to conclude. The wider participation in the Convention allowed more Members of national Parliaments (MPs) and Members of the European Parliament (MEPs) to take part and this may have affected some of the content of the Draft Constitutional Treaty which emerged from the Convention in the summer of 2003. But efforts to have a much wider debate starting from the post-Nice agenda had limited success. The Constitutional Treaty was negotiated by political elites, whether we look at the Convention or the IGC. The Convention could not have drafted a treaty without the leadership by the Praesidium. Deliberation may have framed some issues and created constraints on the governments, but where governments saw important national interests at stake they bargained hard in the IGC. It took the leadership of the Irish Presidency to pull through an agreement in June 2004.

The problem then was ratification. Here too political leadership was needed. But such leadership was not forthcoming in France and the Netherlands. The two governments failed dismally. Lack of information or misinformation contributed to the ‘no’ votes.

So deliberation, highly celebrated by advocates of deliberative democracy, did not produce more legitimacy. All the calls for more deliberation, dialogue and debate did not in the end create greater common identity, institutional trust or political legitimacy (Moravcsik, 2006).

Two German scholars seem to disagree with that conclusion. Despite the doubts one can have about the Convention method, Thomas Risse and Mareike Kleine have maintained that the method increased the legitimacy of EU constitutionalisation considerably. The argument was based on the theory that more accountability (input legitimacy), increased transparency (throughput legitimacy) and enhanced problem-solving capacity (output legitimacy) should produce more legitimacy (Risse and Kleine, 2007). The argument stayed theoretical, however, and no comparative measurements of

legitimacy were presented. The Convention should not be blamed for the ratification failure, the authors maintain, because the failure was due to the large gap between elite consensus and skepticism among many citizens. But, we may ask, should more legitimacy not mean less skepticism among citizens?

THE EU AS A PROCESS OF CONSTITUTIONALISATION

The treaties founding the EC/EU are formally speaking treaties concluded between sovereign states. Changes in these treaties require the consent of all Member States. But these treaties have created a system that is different from classical intergovernmental organisations. There has been a certain delegation and pooling of sovereignty (Moravcsik, 1998). The Commission and ECJ have what has been called 'supra-national' powers and they can make decisions that are binding on the Member States. Also, an increasing number of decisions in the Council of Ministers can be taken by a qualified majority vote (QMV). Other scholars talk about 'supra-national governance' (e.g., Sandholtz and Sweet, 1998). This, it could be argued, has taken the EC/EU in the direction of a federal system, especially because of the interpretation given by the ECJ of the treaties.

The treaties have a strong constitutional character—even Moravcsik talks about "quasi-constitutional institutions" (Moravcsik, 1998, 2). They define vertical and horizontal divisions of powers and include various checks-and-balances. Treaty reforms have changed the institutional balance somewhat over time, and the functional scope of the EC/EU institutions has increased gradually. The EP has increased its powers and the use of QMV has expanded.

The ECJ has, as mentioned, made important contributions to this process of constitution-building in the EC/EU. Early in the 1960s the ECJ made decisions about direct effect—the so-called *Van Gend en Loos v. Nederlandse Administratie der Belastingen* case in 1963—and the supremacy of Community law—the so-called *Costa v. ENEL* case in 1964. Various ECJ rulings contributed to the consolidation of the internal market, thus driving economic integration forward. The treaties create entities that have state-like properties. Thus, the EC has formal powers to make treaties with third parties and internally the Member States must adapt national rules to the requirements of EC rules (Hix, 2005, 121-126). The constitutional character of the EC treaties was noticed by legal scholars early on, including for instance Eric Stein (1981), and in 1986 the ECJ described the founding treaties as a 'constitutional charter' (Hix, 2005, 121). Later on Joseph Weiler and other legal scholars have contributed to this debate (e.g., Weiler, 1999).

Constitutionalisation is more than legal integration spurred by the ECJ. It

is also about fundamental rights, separation of powers and democracy (Rittberger and Schimmelfennig, 2007). It is thus also about the role of Parliaments. Constitutionalisation has been defined by Alec Stone as:

> [T]he process by which the EC treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within [the sphere of application of EC law] (quoted in Weiler, 1997, 97).

Concerning fundamental rights the ECJ has recognised these as part of the EC legal system since 1969 (Rittberger and Schimmelfennig, 2007, 213). The Single European Act (SEA) for the first time referred to these in the preamble, where the Member States declared that they were:

> [d]etermined to work together to promote democracy on the basis of fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice (Treaties, 1987, 1009).

When the Maastricht Treaty added references to citizenship of the Union (Article 8) and fundamental human rights were mentioned in a specific article (Article F) this process of constitutionalisation clearly continued (Council of the EC, 1992). The Amsterdam Treaty added: "The Union is founded on the principles of liberty, democracy, respect for human freedoms, and the rule of law, principles which are common to the Member States" (Article 6) (European Union, 1997). Thus, the EU Charter of Fundamental Rights incorporated in the Constitutional Treaty was a logical extension of this development.

But should the EU have a (real) constitution? This question was formulated officially by the Laeken Summit in 2001 in the Declaration adopted then, which stated:

> The question ultimately arises as to whether … simplification and reorganisation might not lead in the long run to the adoption of a 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 (Belgium, EU Presidency 2001).

The Draft Treaty subsequently developed by the European Convention was entitled Draft Treaty Establishing a Constitution for Europe, a title retained by the IGC which concluded the negotiations (European Convention, 2003; Council of the European Union, 2004). This Draft Treaty was still a treaty,

but it could be seen as a step in the process of constitutionalisation without creating a 'real' constitution.

In 1999 Weiler had asked the question "does Europe really need a constitution?" He expressed some skepticism, saying inter alia that "A formal constitution would rob Europe of its most important constitutional innovation: the principle of Constitutional Tolerance" (Weiler, 2000, 223). His argument was that the Treaty of Rome talked about "an ever closer union among the peoples of Europe"—in plural. Thus, he said, Europe has rejected the 'One Nation' ideal, and the alien has been accorded human dignity.

It could be argued that the founding fathers of the European Communities were inspired by federalist ideas. Jean Monnet mentioned the "negative experience of international co-operation, whose institutions were incapable of decision-making." He therefore proposed "a joint sovereign authority" for the first European Community, the European Coal and Steel Community (ECSC) in 1950 (Monnet, 1978, 295). He also wanted to "abandon the unanimity rule in favour of a new system in which, to everybody's advantage, the idea of the common interest would replace that of the national interest" (*ibid.*, 353). Monnet inspired the French Foreign Minister Robert Schuman to propose the European Coal and Steel Community (ECSC) in 1950. In the Schuman Declaration which started it all functional sector integration was seen as a step towards a European federation. The Declaration argued that:

> By pooling basic production and by creating a new high authority whose decisions will be binding on France, Germany and the other countries who may subsequently join, this proposal will create the first concrete foundation for a European federation which is so indispensable for the preservation of peace (Schuman, 1950, 49).

Among scholars in the 1950s at least one American political scientist, Carl Friedrich, started talking about a 'federal trend' in Europe. He saw federalism a "the process by which a number of separate political organizations, be they states or any other kind of associations, enter into arrangements for making joint decisions on joint problems." In a federal arrangement "unity is combined with diversity in such fashion that there coexist spheres of autonomy for the inclusive community and exclusive community" (Friedrich, 1954 [1962]). Writing at the end of the 1960s Friedrich maintained that a federalising process was taking place in Europe (Friedrich, 1969). And federalism, according to Friedrich, was a kind of constitutionalism (Friedrich, 1968).

At the early stages of European integration many scholars insisted on the *sui generis* nature of the institutional set-up. Ernst Haas, for instance saw "a

symbiosis of inter-ministerial and federal procedures" (1958, 526). In the early 1980s William Wallace argued that the EU is more than an international regime (or international organisation), but less than a federal state (Wallace, 1983). Writing about the EC in 1991 Robert Keohane and Stanley Hoffmann echoed this. According to them:

1. The EC is best characterised as neither an international regime nor an emerging state but as a network involving the pooling of sovereignty.
2. The political process of the EC is well described by the term 'supranationality' as used by Ernst Haas in the 1960s (although not as often used subsequently) (Keohane and Hoffmann, 1991, 10).

William Riker gave a formal, yet rather broad definition of federalism. As far as Riker was concerned, a constitution is federal, if

1. two levels of government rule the same land and people;
2. each level has at least one area in which it is autonomous; and
3. there is some guarantee (even though merely a statement in the constitution) of the autonomy of each government in its own sphere (Riker, 1964, 11).

If we use this definition the EU is already federal in some areas. In the first pillar, the European Community, the EU has a fair amount of autonomy. The Union has exclusive competences at least in commercial policy and—among those members which have adopted the euro—monetary policy.

The main deficiency of the EU from a federalist perspective is the pillar structure of the Union. The second pillar (CFSP) and the third pillar (JHA) remain intergovernmental. The Union has no real autonomy in these areas. But the transfer of a number of areas from the third pillar to the first pillar by the Amsterdam Treaty can be seen as part of a federalising process. This transfer was set to continue with the Draft Constitutional Treaty. But even with the Constitutional Treaty CFSP would have remained intergovernmental.

Seen *in toto* the EU is not a state. Indeed, if we take Max Weber's classic definition of a state as an organisation having a monopoly of the legitimate use of force, then the EU is clearly not a state. In the EU only the Member States have armies and police forces. Whatever federalism there is in the EU, it is largely economic federalism.

If we look at existing federal states the minimum scope normally includes:

1. A single market;
2. A common commercial policy;
3. A single currency;
4. A certain minimum federal budget (fiscal federalism);

5. A common foreign and security policy; and
6. A common army.

As we move down this list the EU starts looking less and less federal. The EU budget of little more than one per cent of the Union's Gross Domestic Product (GDP) remains very small compared with existing federal states. The common foreign and security policy (CFSP), although discussed much in connection with recent treaty reforms, has not changed fundamentally. The rapid reaction force now being created as part of the so-called European Defence and Security Policy (ESDP), after the war in Kosovo, and confirmed by the Treaty of Nice, is still limited to the so-called 'Petersberg Tasks' of peacekeeping, peace creation and conflict management. The Constitutional Treaty would have extended these tasks slightly, but it would not have extended federalisation to the 'high politics' areas of foreign, security and defence policy. These areas would remain intergovernmental and unanimity would remain the normal decision mode.

HAS A CONSTITUTIONAL EQUILIBRIUM BEEN REACHED?

Andrew Moravcsik has argued that a constitutional equilibrium has been reached by the EU (Moravcsik, 2005, 2006, 2007). According to him, "The Treaty of Rome has long provided the EU with a de facto constitution" (Moravcsik, 2007, 33). Although the EU's constitutional structure has federal elements it is essentially confederal, and the "EU does not (with a few exceptions) enjoy the power to coerce, administer, or tax." Constitutional change requires unanimity but "[s]uch a system is deeply resistant to any fundamental transformation without consensus among a wide variety of actors." So, despite some features of federalism, many of its most important elements are missing. Thus, "the EU has no police, no army, no significant intelligence capacity—and no realistic prospect of obtaining any of them" (*ibid.*, 34-35). And he argued that the Constitutional Treaty was not in fact a revolutionary document:

> Recent constitutional deliberations underscored the stability of existing constraints on political, coercive, fiscal, and administrative capacity. Notwithstanding its high-minded Philadelphian rhetoric, the proposed draft consolidated, rather than fundamentally reformed, the 'European constitutional settlement.' Few in recent constitutional debates called the EU's essentially confederal structure into question (*ibid.*, 36).

So the proposed reforms were incremental as earlier reforms of the Treaty of Rome had been.

The main reason why people do not take more part in EU debates is the

fact that most salient political issues such as health care, pensions, taxation and education remain overwhelmingly national. What the EU can do about another issue that people care about—namely unemployment—is also limited because fiscal, labour market and education policies remain largely national. It is this problem of saliency of the issues dealt with at the EU level which also explains the low turn-out in elections for the European Parliament. Further institutional changes will not be able to get citizens to become more involved. As Moravcsik argues:

> Forcing the issue onto the agenda via a constitutional convention and referendum is counterproductive. This is the deepest lesson of the constitutional episode: from the very beginning with the Laeken Declaration—not simply at the end in a set of mismanaged referenda—the constitution utterly failed to inspire, engage, and educate European publics (*ibid.*, 43).

IMPLICATIONS FOR EU SCHOLARSHIP

The final question we raise here is whether what Moravcsik calls "the constitutional episode" also has implications for EU scholarship, especially our theoretical debates. Not all scholars will agree with Moravcsik's analysis. Neo-functionalists and historical institutionalists may predict further processes of spill-over and a certain path-dependent trajectory of developments. Over time the functional scope of European integration has expanded, the powers of the European Parliament have increased and so has the use of QMV in the Council. Also membership has expanded over time. Although these changes may slow down now and in the future it seems that the potential for change is still there. There are still European countries that want to join the EU. As well, exogenous challenges, like threats of terrorism and environmental catastrophes, may put pressure on the EU Member States to pool and delegate sovereignty to a great extent than they do now. But Moravcsik's prediction that we should not expect fundamental change may well turn out to be correct.

Debates about the EU's democratic deficit will probably keep popping up. But, as the European Parliament becomes a real legislator on par with the Council this debate will start sounding hollower. Delegation is normal in democracies. The philosophical ideal of a high degree of deliberation is not attained in most national political systems.

If any theories or approaches to EU integration studies have suffered by the constitutional incident it seems to be some of the more social constructivist approaches, those inspired by theories of deliberative democracy. The constitutional debacle can be explained by rational theories of politics but it is difficult to see how social constructivism can explain the abandonment of the Constitutional Treaty.

It is beyond the job of this concluding chapter to try to explain the emerging Reform Treaty. But dare we surmise that liberal intergovernmentalism will do a good job, when we can analyse that next step in European treaty reforms? The exception will be the continuing empowerment of the European Parliament, where social constructivism seems to have a comparative advantage in explaining the developments. Further, we cannot ignore the role of political leadership. On leadership both liberal intergovernmentalism and social constructivism are weak.

Without knowing the final fate of the Reform Treaty we expect it to continue the trajectory of constitutionalisation of the European Union, simply because the Union needs a constitutional arrangement to create reliable commitments and legitimate governance. Will the politicians get it right this time? Will a return to a Jean Monnet-type gradualism help the EU to keep advancing? It seems that results—like jobs—are more important than symbols and rhetoric.

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