



Webpapers on
Constitutionalism & Governance
beyond the State

Year 2000 | No 3

An Excursus on Constitutionalization

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ISSN: 1756-7556

conWEB – webpapers on Constitutionalism and Governance beyond the State

www.bath.ac.uk/esml/conWEB

An Excursus on Constitutionalization

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A basic presumption of this text has been that the EU at this stage in its development neither needs, nor is prepared for a full-scale constitutionalization of its polity. The timing is simply wrong. In the absence of revolution, coup d'état, liberation from foreign occupation, defeat or victory in international war, armed conflict between domestic opponents, sustained mobilization of urban populations against the *ancien regime* and/or major economic collapse, virtually none of its member states have been able to find the “political opportunity space” for a major overhaul of their ruling institutions.¹ The fact that they all (with one exception) have written constitutions and that this is a presumptive *sine qua non* for enduring democracy indicates that at some time this issue will have to be tackled -- if the EU is ever to be democratized definitively -- but not now!

Which is not to say that nothing can or should be done in the near future. Certainly, many different drafts of a potential Euro-constitution have been produced, circulated and promoted. The reason, however, that these efforts have had so little effect may be due less to the quality of the politico-legal talent that went into assembling these impressive documents than to the way in which they were discussed and drafted.

The reigning assumption seems to have been that anything as important as constitutionalizing Europe must be treated as a momentous and concentrated **event** -- not a gradual and fitful **process**. Above all, it must be accomplished by experts (constitutional lawyers, for the most part) and protected from the pleading of special interests and the scrutiny of mass publics. Only these

specialists can be trusted to produce a coherent and consistent draft that will not reflect the self-serving aims of politicians and their surrounding clientele.²

In my view, this *au-dessus-de-la-melee* strategy may have worked relatively well in the above-noted past circumstances when some type of national emergency or founding moment provided the context for deliberation and choice. It will not produce the same beneficial result in the case of the EU where there is no foreseeable emergency and the founding moment has occurred more than forty years ago.³ What is needed is an entirely new strategy that adopts a much longer timeframe and seeks deliberately to involve special interests and mass publics at various stages of the process. Only by deliberately politicizing the issues involved at the level of Europe as a whole and by gradually building up expectations concerning a more definitive set of rules with regard to citizenship, representation and decision-making can one imagine a successful constitutionalization of the EU. Admittedly, this is not the way the member-states went about accomplishing this task, but as we have already seen above the EU is not a mere repetition of previous nation, state and regime-building processes and it may well be leading to an outcome that is unprecedented.

The starting point would be to acknowledge that it is by no means clear whether the EU should be constitutionalized now and, if so, how this should be accomplished. Constitutional lawyers and “federalists” obviously are trained to think that such a “signed, sealed and ratified” document is essential for the promotion of an orderly political process, and the sooner this is done the better. But the EU has not been functioning so badly with its *pastiche* of treaties converted into a quasi-constitution.⁴ Moreover, as the circulated drafts testify, these specialists are not in agreement. Each has his or her preferred format based on perceptions of previous performance at the national level in Europe and North America. These range from a loosely linked confederation to a tightly coordinated federation – and include all the intermediate points along this continuum. But as a scholarly collectivity, they have no reason to be confident that any of these formats will have the same (presumably beneficial) impact when applied to the supra-national level. The massive shift in scale, the greater heterogeneity of identities and interests, the wider range of development levels and, most of all, the unprecedented process of gradual and voluntary polity-formation all conspire to make the contemporary outcome of a constitutionalized Euro-polity much less predictable than the earlier

national efforts.

AN INITIAL REFERENDUM

Once one admits the intrinsic uncertainty and unpredictability involved in the effort to constitutionalize the EU, the answer becomes obvious: turn to the citizens of Europe in their collective wisdom and try to ascertain what their expectations and assumptions may be. This is **not** a populist appeal that presumes that “the people” (there is no such thing in Europe) are united, know what they want and can be counted upon to produce their own constitution by some process of massive deliberation. It is simply a prudential observation that, especially when experts manifestly do not know what their clients want or what to do in order to satisfy those desires, it makes good political sense not to move too far ahead of them and to initiate a gradual effort aimed at getting Euro-citizens to think about the meta-rules that should eventually govern the accountability of their rulers – **before** a crisis emerges that will force them to act more hurriedly and less reflexively. No doubt that the first returns from such a popular consultation will be confused and very disparate from one country/region to another, but considered as a process that might take twelve to fifteen years the effort may well be worth while. Moreover, if it is done in a specifically “open-ended” fashion, the information gathered should be invaluable in crafting a flexible and asymmetric institutional format that fits the emerging Euro-polity much better than the more classic federal or confederal ones.

I propose that the European citizenry on the occasion of a referendum attached to one of its regular elections for the European Parliament be asked the following tripartite question:⁵

Should the deputies chosen on ... (not the present but the forthcoming) election to the European Parliament form a constituent assembly to draft a democratic constitution for the European Union?

Choose one from the three alternatives below:

No, the existing institutions of the EU should only be modified by treaties that have been negotiated and ratified unanimously by its sovereign member states.

Yes, but the constituent assembly should devote its primary effort to limiting the

powers of the EU and to ensuring the continued sovereignty of its member states.

[] Yes, and the constituent assembly should produce a draft designed to make the institutions of the EU capable of acting effectively in the interests of Europe as a whole, even if that means reducing the sovereignty of its member states.

The wording is a bit rough, but the reader will have grasped the intent. Euro-citizens would be offered a genuine meta-policy choice the outcome of which, as far as I can judge, would be quite uncertain. It might even have to be repeated several times before a clear majority preferred the latter two, positive options. Until such a relative consensus exists in the public at large, however, I am convinced that all efforts at constitutionalization by select groups of politicians or experts will be fruitless. What is especially important is that Euro-citizens be made aware sufficiently in advance (i.e. five years before its convocation) that such a possibility exists and that it be made clear to them that the constitutionalizing process will be a genuinely open and competitive one. This means overcoming the intrinsic bias in “normal” Euro-elections to produce an assembly whose preferences are considerably more “federal” than those of the population at large. Admittedly the low (and declining) turnout for Euro-elections does present a problem of self-selectivity; nevertheless, one could legitimately expect that the prospect of a constituent assembly based on rival conceptions of the future Euro-polity would be a sufficient incentive to convince Euro-sceptics and even Euro-phobes to participate. The result should be an assembly of representatives that better reflects the full range of citizen preferences – and, incidentally, will have contributed significantly to the creation of a distinctive “European Public Sphere” in the course of its convocation.

The decision rule in response to this “non-binding” referendum would naturally have to be complex and layered (and would have to be clarified in advance). I propose the following guidelines:

- (1) No official activity involving the drafting of a Euro-constitution would take place until a substantial proportion of the voting electorate in a majority of member states approved either Item 2 or 3.

- (2) If, as seems likely, the voting public turns out to be divided between a “confederal”

- option limiting EU powers and a “federal” option expanding them, then the subsequent drafting process would have to involve **two parallel constituent assemblies** – both obviously in contact with each other and sharing substantial portions of the text (say, on issues of basic rights), but intending to produce alternative texts.
- (3) The elected deputies would be expected (but not compelled) to follow initially the expressed “mandate” of their respective national or regional constituency, i.e. they would participate in either the confederal or the federal deliberative process depending on how the vote went.⁶ (Presumably, deputies from constituencies that chose the first option would initially abstain from participation in either assembly);
 - (4) However, once the drafting process had started and deputies had gained a better understanding of the issues at stake, they would be permitted to “cross the aisle,” but would be individually responsible for doing so and for justifying their behavior to their constituents. (Deputies from “no” constituencies could likewise change their minds and join one of the drafting parties).
 - (5) Leaving aside the marginal possibility that the two rival assemblies might converge upon a single text, the intermediate product of this, no doubt, lengthy and contentious process would be two versions of a Euro-constitution for subsequent debate and eventual ratification.
 - (6) The Council of Ministers would have to agree unanimously to go ahead with the rival texts – without necessarily indicating its preference for one or the other. (Presumably with this power to put a halt to the entire process, the Council would be in a position to influence the deliberations of the European Parliament’s two drafting assemblies and this should contribute to a more even-handed treatment of institutional checks and balances than if it were left exclusively in the hands of parliamentarians).
 - (7) National (and, in some countries, sub-national) parliaments would be called upon to

discuss the respective texts and to approve their submission (without amendment) to the citizenry for definitive ratification. (Presumably, individual deputies and parties would use this occasion to promote one or the other version – or to convince their followers to reject both).

What will be crucial to the success of this “constitutionalizing process” is sustaining over a considerable period of time an exchange with the Euro-citizenry (or, better, with those segments of it that evince a concern with how the EU is to be governed). A model for this that would be well worth studying is the recent experience of South Africa. Its constituent assembly met over an entire year in a particularly open and public fashion. Extensive hearings were held; individuals and groups were invited to contact the drafting group by electronic means; a regular newsletter was published and widely circulated; the entire proceedings were extensively covered in the mass media; the ensuing draft was made available (in more than a dozen languages) to all citizens; special efforts were made to use language intelligible to the average person; the final version was ratified only after an intensive process of public justification and debate. If it follows the process proposed above, the EU will have an additional advantage. In the high likelihood that two rival versions of the Euro-constitution will be drafted simultaneously within the same constituent assembly, the flow of information and, hence, interest in the debate should be enhanced. Citizens and their parties, associations and movements will be offered competitive projects with which they can identify – and are more likely to feel that their efforts can make a difference.

A SECOND REFERENDUM

The definitive ratification of the Euro-constitution would involve a second Europe-wide referendum – to be held simultaneously and identically in all member states – at which Euro-citizens would be asked to choose between the two texts (or, to reject both).

At this point, a very complex situation could arise and it is precisely this prospect that may

encourage greater cooperation (not to say, collusion) among the drafters. The Euro-electorate could reject both the confederal and federal texts, although this seems (to me) unlikely given both the previous consultation at the initiation of the process and the institutional investment subsequently involved. A clear majority of the citizenry in virtually all member states could approve one or the other of the texts. This seems much less likely to me -- barring some unforeseeable convergence of opinion among national and sub-national publics that have, so far, expressed quite divergent preferences with regard to EU institutions (as well as policies). So, we are led to the (tentative) conclusion that the “confederal” version will prevail in some countries and the “federal” one in others – perhaps, with some even opting for no constitution at all! Confusing as it may sound, such an outcome would be an accurate reflection of the “diversity in unity” that is such a major element in Europe’s political reality.

The question is what to do “constitutionally” in the face of this divided outcome. Giving up altogether would make a mockery of all the preceding effort; going ahead by installing the version that gathered the most support would over-ride a (presumably) sizeable minority.⁷

The unorthodox, but nonetheless appropriate response might well be to go ahead with both. No doubt a horrifying thought to juridical purists, but perhaps a viable concession to the diversity embedded in European society. Suppose for a minute that both constitutions would share two elements: (1) a joint definition of accountability in terms of basic democratic principles; and (2) a minimum common denominator in terms of substantive policies. These would constitute a dual *acquis communautaire* that all present and future members of the EU agree to respect. They would then be free to differ primarily along the following lines:

- (1) **Irrevocability:** The “federal” version in order to be credible would have to commit its member-states (and their sub-units) to a permanent arrangement without any foreseeable dissolution; whereas, the “confederal” charter is likely to contain the explicit right to independent withdrawal.
- (2) **Competences:** In the weaker document, the “subsidiary” powers of the central government would be explicitly limited to a pre-determined list and all remaining powers

would be exclusively assigned to the member states or their sub-units; in the stronger version, not only would the list of exclusive federal competences be more extensive, but it would also be easier to extend it should the functional necessity arise. Both documents might contain provisions for so-called “shared” or “overlapping” powers, as well as for the establishment of independent regulatory commissions. The former is more characteristic of “cooperative federalism;” the latter of a more centralized version.

- (3) **Decision rules:** Presumably, the federal version would rely more extensively on weighted or simple majority principles; the confederal one would stress the need for higher thresholds, even for unanimity on certain issues. Needless to say, the respective roles of the Council of Ministers, the Commission and the Parliament (or their successors) could be expected to differ considerably – although both versions would contain more-or-less the same institutions and rules for admission to them. Both are also likely to share an emphasis on the participation of governments of member-states (as in Germany and Switzerland), rather than individual citizens grouped according to territorial constituencies (as in the United States).
- (4) **Asymmetries:** Should the stronger draft follow the classic federalist formula, the emphasis would be on the uniformity of rights and obligations for all participating individuals and collectivities; the weaker version might well include provisions for differential (as well as deferred) forms of participation.

These do not seem (to me) to be radically divergent principles and they should be compatible within the same polity. One sub-set of members – those in which the confederal alternative prevailed – would be bound by a different, less constraining, set of rules than would those whose citizenries had chosen the federal one. Europe would find itself with a “core area” that was prepared to move ahead further and faster toward political integration and a “periphery” that accepted a common *acquis communautaire*, but was unwilling to extend for the foreseeable future.⁸ Needless to say, the latter countries would have the right – once they had experienced the consequences of peripheral status – to join the former – but only once they had gone through all the formalities of intergovernmental negotiation and ratification via popular referendum. Those countries (and their populations) that initially chose the federal option could, however, change their political status only under quite

exceptional conditions.

I admit that designing a polity whose members would be subject to two different constitutions (even if the one were to be firmly embedded within the other) does not sound like an ideal state of affairs. Some parallels do exist (e.g. the status of self-governing Native American tribes within the United States, that of the so-called “historical regions” in Spain or that claimed by Quebec within the Canadian Federation) and both systems would be inserted with the same over-riding judicial procedure for resolving eventual conflicts (presuming the comprehensive justiciability of the ECJ). Nevertheless, the best one could claim is that such a flexible formula does correspond to the reality of contemporary Europe (and even more to an EU that has expanded to more than twenty members) and that it might just prove to be a temporary expedient.

ENDNOTES: EXCURSUS ON CONSTITUTIONALIZATION

1. I can only think of one clear case: Switzerland in the early 1870s. It would be interesting to explore this exception, although the fact that this country had a “one-party-dominant-system” (*Freisinnige/Radical*) at the time must have been an important factor -- and, not one that can be repeated at the EU-level.

2. The fact that several of these constitutional drafts have come out of the European Parliament and that one of their most manifest objectives was to increase the powers of that very same institution suggests that “institutional” -- if not “personal” -- self-interest cannot be ruled out of the process.

3. The various and sundry “crises” that are likely to be generated by Eastern enlargement, as well as by politicization at the national level and implementation deficits at the European level, are better addressed by episodic inter-governmental negotiations and the sort of “modest reforms” of existing institutions that were discussed above in Chapters Three to Five.

⁴ Weiler, MANCINI

⁵ A minor problem involves the fact that one country, Great Britain, continues to use a first-past-the-post, simple majoritarian system for electing its Euro-deputies. Nothing could be less appropriate for a constituent assembly where it is especially important that the widest possible range of political preferences be included in the deliberations. The ideal system (as was discussed briefly above in Chapter Three) would be proportional representation based on closed lists (to improve the prospects for intra-party discipline) for sub-national constituencies – at least, in the larger countries and in those with significant regional disparities or identities.

⁶ One possible objection to this “assignment principle” could well be that the results across constituencies within the same country will tend to differ **within** and not just **between** existing political parties. Indeed, given the internal divisions that can already be observed over much less significant issues, one can imagine that Euro-deputies are quite likely to be elected under the same party label by voters who have revealed their preference for quite different types of Euro-polity – or even for no constitutionalized Euro-polity at all. Much as this might make national party politicians wary of offering their followers such a potentially divisive opportunity, it does offer a splendid opportunity for the structuration of a genuinely European party system. The two drafting committees – the confederals and the federals – could well be the prototypes of future bi-polarized competition at the supra-national level.

⁷ As the example of the Basque response to the 1975 Spanish constitution demonstrates, even a minority within a minority region can use its rejection of a constitution that was otherwise massively approved by the electorate to question the legitimacy of the document and even to justify armed resistance to the regime it empowers.

⁸ The viability of such a “dual” polity would depend to some degree on **where** and not just **whether** such a center-periphery split developed. Hopefully, the federalists would be concentrated in a contiguous core area – more-or-less coincident with the original Six – and the confederalists would find themselves on the Northern, Southern and Eastern frontiers. Gradually and voluntarily, the outer layers could be expected to join the core (with the likely exception of Switzerland which, for the foreseeable future, will retain its status as “the hole in the European doughnut.”)