ARTICLES

Postconstitutional Treaty

By Alexander Somek[*]

A. Debating the inevitable

As is well known, both the drafting and the anticipated ratification of the draft Constitutional Treaty were surrounded by a lively debate.[1] The communicative spectacle created by the "Convention on the Future of Europe" and its ambitious plan to draw up a European constitution served as the major attractors.[2] The debate was conducted, of course, in different settings and at several levels. What interests me here, though, is that the public and the academic debate emphasised different aspects of the overall project.

Inasmuch as the *political debate* concerned the draft Constitutional Treaty proper—and not the future of "Europe" in general—it seems to have focused on institutional reforms that promised to strengthen the Union's power of agency. This explains why it was important to highlight major innovations, such as the new two-and-a-

[*] University of Iowa College of Law. Fellow, Institute for Advanced Studies - Wissenschaftskolleg zu Berlin. Email: alexander.somek@WiKo-Berlin.de

[1] See, for example, the contributions to the Special Issue "Unity of the European Constitution: 2nd German-Polish Seminar on the Constitutional of the European Union", 6 GERMAN LAW JOURNAL 1433-1760 (2005), Guest Editors: Philipp Dann & Michal Rynkowski, available here: http://www.germanlawjournal.com/pdf/Vol06/pdf_Vol_06_No_11.pdf; see also the observations by the sitting judge responsible for EU Law on the German Federal Constitutional Court, Udo Di Fabio, *The European Constitutional Treaty: An Analysis*, 5 GERMAN LAW JOURNAL 945 (2004), available here: http://www.germanlawjournal.com/pdf/Vol05No08/PDF_Vol_05_No_08_945-956_EU_DiFabio.pdf.

[2] Johannes Jarlebring, *Taking Stock of the European Convention: What Added Value does the Convention bring to the process of treaty revision?*, 4 GERMAN LAW JOURNAL 785 (2003), available here: http://www.germanlawjournal.com/pdf/Vol04No08/PDF_Vol_04_No_08_785-799_european_Jarlebring.pdf; Alexandra Kemmerer, *Constitutional Law as a Work of Art: Experts' Eyes: Judges of the World Examine the Constitution of Europe*, 4 GERMAN LAW JOURNAL 859 (2003), available here: http://www.germanlawjournal.com/pdf/Vol04No08/PDF_Vol_04_No_08_859-862_legalcult_Kemmerer.pdf; for a most recent analysis, see Michal Krzyżanowski & Florian Oberhuber, (UN)DOING EUROPE: DISCOURSES AND PRACTICES OF NEGOTIATING THE EU CONSTITUTION (2007).

half year Presidency of the European Council, the office of the Foreign Minister, the reduction of the size of the Commission, the reallocation of votes in the Council, the reshuffling of seats in the Parliament and, not least, the consolidation of the Union into one coherent whole with legal personality. The background for these reforms was the attempt to fill the gaps that have been emerging at least since the conclusion of the Amsterdam Treaty.[3] This explains why they were introduced with an air of necessity. The "convention method" turned out to be able to deliver where two ordinary treaty revisions demonstrably fell short. Owing to this path-dependence, the reforms contained in the Constitutional Treaty were presented as though they did not admit of alternatives. In the relevant public spheres, hence, the decision over whether to endorse the Treaty was quickly transformed into a choice for or against Europe. Since it is part of the tremendous success of the Union to have taken the place of Europe and to sustain, in addition, an image of integration as an irreversible process, the choice for or against Europe is not really a choice at all. Europe is a necessity. Only unreasonable people would deny the Treaty their support.

The situation could have been barely more paradoxical. The most important political decision to be made by a people did not even require a substantive debate. It was a "done deal". National constituencies quickly sensed that their governments perceived the Constitutional Treaty as the epitome of the inevitable. Nothing could clash more harshly with national self-determination and, a fortiori, democracy than the need to succumb to necessity. It smacks of authoritarianism. Hence, the Treaty had to boast certain features that promised to make it appealing to its citizens, such as the incorporation of fundamental rights or the expansion of the scope of parliamentary co-decision. Apparently, the whole constitutional hubbub itself was an attempt to dress up surrendering to inevitability as an act of self-constitution. The Union must have sensed that a constitution—possibly via constitutional patriotism—might create loyality and cohesion.[4]

This situation explains why the question of whether or not to have a referendum has become so important. Referenda give citizens either an opportunity to reject even the inevitable or to transmute acquiescence into an act of reasonable self-

[3] Dominik Hanf, *State and Future of the European Constitution – Improvement or Radical Reform?*, 2 GERMAN LAW JOURNAL No. 15 (15 September 2001), available at: http://www.germanlawjournal.com/article.php?id=89

[4] See Dieter Grimm, *Integration by constitution*, 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 193 (2005); see also Neil Walker, *Europe's Constitutional Engagement*, 18 *Ratio Iuris* 387 (2005), at 388, 398 on "generating a deeper sense of political community".

determination. Peoples might act in a manner that governments believe to be irresponsible. Conversely, their approval would reconcile democracy with historical necessity.

When free peoples are confronted with the expectation to signal approval they are likely to react with recalcitrance. In combination with concerns about the looming constitutional entrenchment of neo-liberalism the expectation gave rise to an explosive mix of defiance. Viewed from that perspective, the rejection of the Constitutional Treaty in France and the Netherlands indicated that democracy was not yet dead in Europe.

The *academic debate* had a different theme, not least because its participants have long taken the inevitable for granted. Aside from exploring the tangled paths of vote allocation and voting rules, the discussion was more concerned with the significance of the alleged constitutionalisation of the EU.[5] One common theme was that the traditional constitutional clothes do not fit the supranational empire. Different conclusions were drawn from this. Whereas some thought that this indicates a new stage in the development of constitutional law, namely its transplantation to a transnational setting,[6] others were more sceptical and expressed their uneasiness with a treaty that purported to be a constitution. Where was the demos, where the *pouvoir constituant*?[7] In the eyes of some observers, there was something "false" and even disturbingly pretentious about the "Constitutional Treaty".[8]

---

[5] See, e.g., Mattias Kumm, *The Idea of Thick Constitutional Patriotism and Its Implications for the Role of and Structure of European Legal History*, 6 GERMAN LAW JOURNAL 619 (2005), available at: http://www.germanlawjournal.com/pdf/Vol06No02/PDF_Vol_06_No_02_319-355_Art_SI_Kumm.pdf; Peer Zumbansen & Morag Goodwin, American and European Constitutionalism Compared: A Report from the UNIDEM Conference in Göttingen, 23-24 May 2003, 4 German Law Journal 613 (2003), available at: http://www.germanlawjournal.com/pdf/Vol04No06/PDF_Vol_04_No_06_613-627_Legal_Goodwin_Zumbansen.pdf

[6] See Neil Walker, Postnational constitutionalism and the problem of translation, in: EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 27 (J.H.H. Weiler & M. Wind eds., 2003).

[7] For example, one scholar sensed that even though the European Union lacked constitutional authority it nevertheless tried to submit its operation to the authority of constitutional law. See Miguel Poiares Maduro, *The Importance of Being Called a Constitution: Constitutional authority and the authority of constitutionalism* 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 332 (2005), at 352.

[8] See J.H.H. Weiler, *A Constitution for Europe? Some of the Hard Choices,* 40 JOURNAL OF COMMON MARKET STUDIES 555 (2003).

B. The negative mix

It is time to merge both debates and to confront, on a theoretical level, the pragmatics of inevitability with the transformation of constitutional ideas. The constitutional treaty ostensibly purported to be both a Treaty and a constitution. We are inclined to accept its claim and to assume that had it been adopted it would have amounted to a mix of both, for example, a constitution which is based on an international agreement. But is it not conceivable that it would have amounted to neither and laid bare the absence of both?

It is intriguing, indeed, to perceive the matter not from the angle of dual participation but rather from one of a twofold deprivation. Arguably, the Constitutional Treaty would have been unlike a constitution, for it its point would not have been to establish collective self-government. Instead, its aim would have been to invest the Union with the functional prerequisites for enlargement. Moreover, the Union is about facilitating the integration of markets rather than subjecting economic processes to political control.[9] The Constitutional Treaty would not have been a typical Treaty either, since it rested upon pre-existing highly integrated supranational legal structures which are atypical for relations among states. In a similar vein, Joseph Weiler pointed out that the seemingly oxymoronic designation "constitutional treaty" revealed more about what the Treaty was not than what it truly was. The constitutional treaty was a treaty masquerading as a constitution. Instead of being 'court et obscure'[10], it was far too long and detailed to pass as a constitution. It also would have been adopted by those whom we do not traditionally regard as the author of a constitution, namely, High Contracting Parties. At the same time, with regard to its substance the draft treaty would have been a constitution—and not a treaty—with all that it set out to clarify and to regulate.[11]

---

[9] Consider, for a moment, in which sense the constitutional treaty, despite all its symbolic rattle, could have not been a constitution. It could have not been in the manner in which an oligarchy does not reach up to the level of an aristocracy, for although all the prerequisites are in place (wealth, an upper class) the decisive orientation towards the public good is missing. No direct comparison can be made with the EU. What mattes, however, is the experience of falling short. The functional remains, the aspirational disappears. The functional predominates and the constitution of power to control one's destiny is no longer in place.

[10] Generally attributed to Napoleon Bonaparte with reference to the 1804 Code Civil. See Günter Frankenberg, *Comparing Constitutions: ideas, ideals and ideology – toward a layered narrative*, 4 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 439 (2006), note 2

[11] See J.H.H. Weiler, *On the Power of the Word: Europe's constitutional iconography* 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 173 (2005), at 181-182.

Against this backdrop, I would like to suggest the adoption of a negative Aristotelian perspective. Aristotle thought that a constitution is truly mixed when it combines so many elements of two different constitutions that it is impossible to tell whether it is one rather than the other. This is a positive conception of a mixed constitution. But every mixture consists of both the presence and the absence of elements. In the case of a positive mix the absence of certain elements is caused by, and compensated with, the presence of others. In the case of a negative mix one is confronted only with absence. I think the Reform Treaty is an instance of a negative mix. Moreover, it reveals what the Constitutional Treaty truly was.

C. A Treaty stripped of ornamentation

Substantially, the Reform Treaty is not altogether different from its failed predecessor. The most salient difference is the deliberate expunction of all constitutional symbolism. The semantic spectacle introducing the Constitutional Treaty—with the invocation of the peoples of Europe—has altogether disappeared. For example, Article I-1 of the draft constitutional treaty has been dropped. The Reform Treaty no longer claims to reflect "the will of the citizens and States of Europe to build a common future". The Reform Treaty merely reflects the will of States. Obvious stepping stones have been removed, such as the primacy clause of Article I-9, which would have amounted to unconditional and comprehensive supremacy of Union law. Only a few traces remain of the first part that was supposed to be the "people's" or "everyman's" constitution, among them the entering paragraphs (Article 2 to 8 new EU Treaty) and the paragraphs introducing the institutions in Articles 9 to 9e. Article 3 spells out the (problematic) commitment to a social market economy.[12] Article 4 pays due respect to the identity of the Member States and their interest in maintaining certain aspects of statehood in the Union. Article 5 highlights the limits set for the exercise of EU competence. The fundamental rights chapter has disappeared and been replaced with a reference to the Fundamental Rights Charter (Article 6).

The strategy is clearly defensive. The treaty is more audacious only where it claims to clarify the limits set for EU action. Without further constitutional adornment, however, it preserves the inevitable: a reduction in the size of the Commission, a shift to a dual majority voting system (even though deferred until 2014), a foreign policy representative combining the role of the Commissioner and the High Representative, and the new Presidency. Even here the Treaty avoids creating any

[12] See Christian Joerges & Florian Rödl, 'The "Social Market Economy" as Europe's Social Model?' EUI WORKING PAPER LAW 2004/8, www.iue.it/PUB/law04-8.pdf.

semblance to a constitution. The former "Foreign Minister" is now the "High Representative of the Union for Foreign Affairs and Security Policy".

It is more obvious now than it had been before that the constitutional pomp and glamour served as a public relations strategy. As soon as it turned out that the constitutional decoration had not done its job of "generating a deeper sense of political community" *for the sake of* enhancing "Europe's political capacity"[13] it quickly became dropped. Indeed, European political leaders seem to have realised that the strategy of "identification by constitution" backfired. The constitutional language must have mislead Europeans into assuming that more is at stake than a Treaty reform. The constitutional project is now presented as if had been an illusion. In the world of European integration nothing more important could ever be at stake than necessary institutional adjustments. Even the substantive policy additions speak to the inevitable. The Union needs to have more power to combat terrorism (Article 65 new EC Treaty).

Viewed from this angle, the Reform Treaty is quite obviously a postconstitutional treaty. The Constitutional Treaty is dead! Long live the ordinary treaty which it has been all along!

D. A postconstitutional instrument: processing disagreement

The substance of the prior constitutional settlement is more or less preserved, but it becomes stripped of higher aspirations. It seems as though the Germanic celebration of the constitution as an integrating commitment to common values is abandoned in favour of a more Kelsenian conception. The Reform Treaty is a constitution with a small "c". It amends the rules of the political game, which are part of the supreme law of the land in Europe. The conception is minimalist. The constitution is a procedural norm. It already exists. It has existed ever since the ECJ introduced the doctrines of supremacy and direct effect.

However, one should not prematurely attribute to (primary) European Union law the quality of constitutional law in a Kelsenian sense. There are certain qualities that a constitution even in the minimalist Kelsenian sense would have to exhibit. They are not clearly exhibited by Europe's supreme law of the land.

A constitution *clarifies* matters. X has the power to do Y. Such a clarification is possible on the basis of a decision. A postconstitutional ordering, by contrast,

[13] See Walker, *supra* note 4 at 388.

cannot settle contested issues, for it cannot find sufficient support for a clear solution. A postconstitutional norm does not speak with one voice. It is a document recording the adjournment of an ongoing debate. Maybe this is addressed by those talking about the Union's alleged lack of a *pouvoir constituant*. Ideally, a constitution is about channelling political dealings, not about postponing their resolution.

In more than one way, the absence of one voice is reflected in the Reform Treaty. An instructive example is the disappearance of Article I-6 of the draft constitutional treaty. The latter would have, arguably, settled the supremacy question once and for all, even if to the detriment of the Member States. The Reform Treaty leaves things as they are. So it seems, as any rate, until one discovers the "Declaration concerning primacy", which is annexed to the Reform Treaty. Paradoxically, the declaration contains a citation from the ECJ's case law where the Court refers to primacy as "a cornerstone" of Community law, without, however, even broaching the subject of potential limitations. The question is left open in the text. For that reason alone, the normative import of this descriptive Declaration is unclear. It can be read either as a concealed claim to full supremacy or as a mere reassertion of the case law that is of no avail for answering the question, anyway. Undoubtedly, leaving the matter undecided reflects the post-Westphalian, multijurisdictional, pluralist and heterarchical nature of the European legal system whose viability depends on the readiness of actors to tolerate and to accommodate the demands made by others.[14] But this also explains why a postconstitutional ordering is not a constitution in a Kelsenian sense. It reveals what we may find troubling about it. When essential relationships between and among authorities are subject to the discipline of legal norms the postconstitutional ordering is also pre-constitutional.[15] Power begets power.

The multiplicity of voices is manifest throughout the Treaty. Art 4(2) EU Treaty merrily promises and underscores that national security would remain the preserve of the Member States. A few articles further below, a whole section details the obligations of Member States with regard to the common security policy. Part IV of title VII of the new Treaty on the Functioning of the EU re-introduces the solidarity clause.

---

[14] On constitutional tolerance, see J.H.H. Weiler, *In defence of the status quo: Europe's constitutional* Sonderweg, in: Weiler & Wind eds., *supra* note 2, at 7-23.

[15] For perceptive observations, see Nico Krisch, *Europe's Constitutional Monstrosity*, 25 OXFORD JOURNAL OF LEGAL STUDIES 321 (2005), at 332-333.

In the field of competence allocation, the Treaty repeatedly tries to outline the limits that are set to Union legislation (for example in the new Article 308 EC Treaty). At the same time, Protocol No. 6 on the Internal Market explains that the internal market includes a system in which competition is undistorted and underscores the Union's right to use every available legal base to attain this objective. Whoever has studied competence allocation in the European Union is aware that competence allocation is rendered spurious by such a power for the simple reason that any difference of national regulation can give rise to a distortion that triggers harmonisation competence.[16] At any rate, the Treaty affirms limits of competence along with the means to transgress these limits.

As regards fundamental rights, the muddle created by Article I-9 Constitutional Treaty remains unresolved (Article 6 EU Treaty). In fact, it is exacerbated by the fact that the Charter now remains outside the ambit of the main document. An annexed protocol explains (in its Article 1[1]) that the Charter does not extend the jurisdiction of the ECJ or any other court to find Poland or the United Kingdom in violation of Charter rights. It remains to be seen how the ECJ will be able to distinguish extensions of the already existing fundamental rights *acquis* to new situations from applications of new Charter rights proper, in particular when one considers that it has always been the claim of the Fundamental Rights Charter to make already existing fundamental rights merely more visible Evidently, the uncertainty results from the Treaty's attempt to accommodate disagreements. It lends its voice to those who do not speak with one voice. It is a postconstitutional ordering analogous to the manner in which postmodernity is a departure from modernity. Reason becomes dispersed into conflicting "reasons" and meaning scattered in processes of dissemination.

The impression of inevitability offers one key to understanding this development. When everyone needs to participate there needs to be an outlet for protest. This has been the European story from the Luxembourg to the Ioannina compromise. The provisions on Judicial Cooperation in Criminal Matters open the door for the creation of enhanced co-operation among a group of at least nine states that do not wish to be held back by the resistance of laggards (Article 69e[3] new EC Treaty). Generally, enhanced co-operation appears to be key to progress (Article 10 new EU Treaty and Articles 280a-280i new EC Treaty).

A constitution used to be an attempt to clarify and thereby also to simplify the structure of government. When matters become convoluted and confusing those

---

[16] For a critical analysis, see Mattias Kumm, *Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union* 12 EUROPEAN LAW JOURNAL 503 (2006).

will benefit who know how to exploit legal expertise in their favour. A postconstitutional ordering, by contrast, is characterised by persistent and recurring fragmentation. It is a template for the creation of differential relationships among different Member States in different sectors of public policy. Its meaning is subject to determination and renegotiation on a case-by-case basis. Only the insiders are capable of making educated guesses about what one or the other provision might mean in practice.

E. A postconstitutional instrument: concealment and idealisation

The Reform Treaty is ostensibly postconstitutional in that it does not consolidate the authoritative legal texts—two treaties and a number of protocols—into one integrated whole. What appears almost like an act of revenge for the rejection of the Constitutional Treaty is also indicative of the nature of a constitutional arrangement. It is easier to hide inconsistencies and tensions when provisions are spread over several documents.

Modern constitutions employed norms in order to identify power relations and to render them transparent. This strategy is all the more remarkable because it is simple. First, norms are addressed to those who already exercised power in a certain setting. Second, this power is reconstituted by those norms and reallocated so that agents can be submitted to control.

It is possible, however, to give this operation of norms a cunning twist. Norms can be used to conceal matters. The Reform Treaty provides ample evidence for this.

First, the Reform Treaty deflects attention. It will be remembered that the Constitutional Treaty pushed already existing provisions into the foreground, which suddenly became controversial, such as free movement, the clauses on the flag and the anthem etc. The Reform Treaty leaves them buried in the existing treaty framework. The controversial issues are thus made invisible.

Second, it is more than merely open to debate whether the Reform Treaty has made any progress where social rights are concerned. Aside from the conditional clauses contained in the Charter and aside from the reservation made by Poland and England, the Charter never claimed to do more than render explicit already existing rights.

Third, outside the purview of the Treaty remains the plethora of arrangements associated with "new governance". From a constitutional perspective, it is to be regretted that the Treaty that could have been a constitution does not address a

method of co-ordination that appears to elude classification according to the distinction between hard and soft law. Generally, addressing the "hybridity" of social policy would have reintroduced an issue that is evidently on the hearts and minds of Europeans who treasure the "European social model" (whatever that may be).

Fourth, what is most remarkable about the postconstitutional ordering is the ease with which it uses legal texts in order to idealise realities (the old crit slogan of "law as ideology" comes to mind here). When matters cannot be changed they can still be cast in different light through the use of norms. It may be remembered, from Kelsen, that norms serve as a scheme of interpretation. They invest events and structures with a certain significance. Therefore, norms can be used to idealise realities and thus to render social facts expressive of ideals.

Just like the Constitutional Treaty that preceded it, the Reform Treaty allows the Union to claim to have resolved the democratic deficit. Article 8a (the Article I-46 of the Draft Constitutional Treaty) proclaims that the functioning of the Union is "founded on representative democracy" (section 1) and that citizens are "directly represented" in the European Parliament (section 2). Not that this is evidently untrue. But it is not a plain truth either. Accepting this claim presupposes a very minimalist conception of democracy.

Similarly, the European Parliament is always mentioned before the Council when addressing legislative proceedings. This is a nice symbolic gesture. But it also conceals that the European Parliament definitely does not occupy the driving seat of European legislation. Never mind that it is inconsistent with the representation of citizens of the European Union by the European Union to have national parliaments in charge of exercising the subsidiarity early warning mechanism (laid down in a separate Protocol and mentioned in Article 8c(b) of the new EU Treaty). Why not, for heaven's sake, the representatives of the Member States, that is, the members of the Council? Why not the Members of the European Parliament? It shows that there is a deep-seated disconnect between representative democracy and the European Union. When push comes to shove the true representatives, who have always been the losers of the integration process, are let in again. And never mind that the new people's initiative disenfranchises citizens from merely one or two Member States from "inviting" the Commission to submit a proposal for an Union Act (Article 8c) even when Community law, for example, as divined by the European Court of Justice, impacts on their national traditions. This is the democratic life of the European Union.

F. The negative mix

The Reform Treaty highlights the functional. It is the Treaty of *Sachzwänge* or, objective constraints concerned with evidently transnational challenges, such as crime, terrorism and illegal immigration.

One might say that the above observations merely confirm the well-known intergovernmental nature of the European Union. Hence, it might be concluded that Treaty is plainly and simply an international agreement. But this is not the case. Tensions and concealment reveal the unease on the part of the Member States to succumb to necessity. This is clearly the case, and it might be observable for many international agreements. What makes the Reform Treaty different from any other international agreement with broad formulas is that the Member States no longer have the power to control how much they are bound by their arrangements and to determine how they go about their implementation. As has been pointed out by Weiler, EU law is adjudicated as if it were a constitution. Upon closer inspection, however, it turns out that not even that is the case. The ECJ's insatiable appetite for innovation, its penchant to leap from Treaty provisions to far-fetched "implications" does not warrant a description in constitutional terms. The Court's jurisprudence is driven by the desire to respond to what Justice Holmes would have called the felt necessities of the time.

EU law is neither international law nor constitutional law. As a postconstitutional ordering it is a mix of the absence of both.