

Briefing paper for the Constitutional Affairs

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Panel Constitutionalism without Constitution

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the final paper will be delivered after the symposium**

1. The ratification of the Constitution has stalled. Is it your view that it should be salvaged? If so, how and when?

In spite of the negative referendums in France and the Netherlands the ratification process should continue in that a process of voting should not be interrupted only because two out of twenty-five peoples have said no. Bringing ratification to an end is necessary in terms of good democratic practice, while it would allow answering the question whether and how large a majority in favour of it really is. Moreover, in the frame of ratification first public debates about the constitutional future of the Union could be launched. Such approach though does not imply that the Treaty establishing a Constitution for Europe (TCE) at hand can be if at all easily salvaged. As a matter of fact, it seems impossible to go back to the French and Dutch people and ask them to accept the TCE without further much ado. Moreover, compared to the Danish or Irish No in past referendums it is difficult to see what kind of concrete changes or opt-out clauses could satisfy the two electorates this time. First-hand analyses of the key motifs spurring the negative vote point to concerns about detrimental socio-economic developments (France) and about a further eroding of national sovereignty (Netherlands). However, only more in-depth analysis can shed light on the behaviour of national communities who since long have ended the permissive consensus on European integration. While it is a truism that the elitist project is no longer viable, it is much more difficult to envisage practicable forms of involving the citizens in the constitutional debate.

However, we tend to forget that all processes of constitutionalisation of polities have been complex elite-driven endeavours. Most national constitutions in Europe and elsewhere have been the outcome of (sometimes post-revolutionary) deliberations and negotiations among very small groups of political leaders. While every past experience is to be valued in its own context and with its own cultural-political as well as socio-economic specificities it is important to re-call that considerable problems of legitimacy and acceptance have been part and parcel of constitutionalising numbers of modern states, France, Switzerland, Germany, the USA being important cases in point. The political philosopher Hannah Arendt has coined the term “epidemics of constitutions” in particular with respect to nineteenth century Europe. As to the USA the unity of the state could only be secured after a disastrous civil war, while

some states ratified the first amendments only in the wake of the World War II! Switzerland, on the other hand, became a federal state with some cantons accepting the Constitution at a much later point in history.

The problem with the TCE though is to a degree different in that it is a further step in the process of constitutionalising the unity of full-fledged member states which remain “the arbiters of the treaties”. The weight of national governments in revising the treaties through the IGC is decisive in spite of the new approach chosen this time by establishing the Convention in which parliamentarians, national and European, held the majority. Although openness and transparency was utterly improved compared to the IGCs, real involvement of the broader public did not and in my opinion could not occur. As long as national representatives are unable or unwilling to use their party apparatuses and their national media to organise and structure Europe-wide debates on the TCE citizens will hardly grasp the salience of the constitutional reform at stake.

Thus, my answer to the first question is twofold: completion of the ratification process and opening the debate immediately, launched by national parties not only in the member states which still have to ratify the TCE but also in those who have already done so. The debates should however be organised in a concerted form, i.e. according to a common frame so that outcomes can be analysed systematically. The TCE should then be redrafted taking into account the main stream of criticisms and could be put to referendums (according to national rules, which implies that in member states void of such provisions the referendum would be of a consultative nature). Ideally, these referendums could be held together with the next EP-election in 2009.

2. If there were to be renegotiation of the Constitution what should be its main features? Recalling the need for consensus, what provisions, in particular would you change?

Considering the difficult task carried out by the Convention in terms of finding a consensus between national and supranational actors, representatives of parliaments as well as governments, the TCE should be the starting point. It is not necessary to re-invent the wheel. The problems leading up the current treaty revision and the establishment of the Convention have not changed: the need for stronger democratic rules and enhanced efficiency in an enlarged Union as well as further integration in important policy fields such as CFSP and justice and home affairs are as relevant as they were in 2000 when the heads of state and government at the IGC of Nice decided to continue the constitutional debate in a near future. However, the Convention and the following IGC underestimated or even neglected the concerns which then surfaced in the ratification processes: Concerns relating to socio-economic issues and to deepening integration while enlarging the Union to a another ten member states, most of them undergoing a difficult transition in political and economic terms. At the same time governments started to envisage the next enlargement round, Turkey representing the most contested issue.

Socio-economic concerns are hardly addressed in the TCE, certainly not in terms of classical welfare policy. The Convention’s working group on social issues did not gain momentum during negotiations, its meagre outcomes had no impact on the final draft. The relevant provisions in the Charter of Fundamental Rights as well as the chapters on employment, social policy, social, economic and territorial cohesion most obviously did not convince the leftist strand of the French opponents. On the contrary the socio-economic provisions were

largely and simplistically interpreted as tools for liberalisation and globalisation which would destroy the fabric of national welfare systems. These concerns have to be discussed and tackled in a new TCE at least in providing the EU organs with instruments to further the development of common minimum standards and social inclusion.

As to the concerns about further integration in policy fields crucial to national sovereignty it has become obvious that the debate about the *finalité* of the Union can no longer be wiped under the carpet. Looking at the history of European unification it has become clear since Maastricht that integration by stealth is no longer an option. Moreover, European policy-making as a tool to implement unpopular measures while at the same time scape-goating “Brussels” is a strategy doomed to fail. If the renaissance of nationalism is to be avoided, political actors have to address the question about what the Union shall become. This certainly is the most difficult part of the European debate ahead of us. However, given the contradictory feelings of European citizens who are critical about the Union but still believe in strong co-operation they must be convinced that they cannot have both: a strong Union and sovereign nation states. Yet, they must have a voice in the debate about what the Union shall be and do and they can be given the voice only in the frame of well-functioning democracy. This implies again the involvement of political parties and parliaments at the national and the supranational level.

It goes without saying, that consensus is particularly difficult when it comes to these two questions. However, until now it has hardly been tried to work out where the limits to consensus really lie. More often than not actors tend to circumvent or postpone relevant questions hoping that there will be a more appropriate time or a different logic of situation to address them. But nothing is more difficult in politics than defining the right moment or situation. In an historical view it is save to say that no political actor has ever had all the necessary information giving him or her the certitude that specific actions were the only alternative, let alone that they would lead to success. Transforming the American Confederation into a federal republic was neither in the mandate of the Convention of Philadelphia nor was it uncontested thereafter. Yet the founding fathers undertook this endeavour in a crisis in which greater unity and central government were deemed as the solution in order to assure independence and eventually transform the former colonies into a world player. In times of globalisation such effort by Europeans becomes all the more urgent if the slogan of Europe as a superpower uttered e.g. by Tony Blair in his speech in Warsaw in 2000 or the ambitious Lisbon strategy to become the most prosperous region of the world is not to remain pure rhetoric. It is this striking difference between words and deeds which cause so much disappointment in Europe. The subjects of discussion I propose here will certainly lead to contestation, but that is what democracy is about.

3. If there is not to be a renegotiation of the Constitution, what institutional or policy reforms should be prioritised – and how?

As aforementioned a renegotiation of the TCE is in my view absolutely necessary as the problems will stay on. Moreover, burying the whole enterprise of constitutionalisation is also problematic in terms of symbolism. As a matter of fact, the exasperating debate on European identity can only be filled with more substance if it will be possible to address not only the symptoms but above all the causes of the crisis induced by the rejection of the TCE in the referendums. If the European elites dropped the project altogether it would denigrate the whole idea of constitutionalising the powers wielded by the Union’s institutions in a more democratic manner.

However, with regard to issues relating to democracy some improvements could be reached also on the ground of the existing treaties such as:

- the ratification of the Charter of Fundamental Rights, which should become the overture to the treaties;
- the establishment of the Citizens' initiative by adopting a Council decision on the basis of Article 308. The introduction of modes of direct democracy in the Union could in analogy to the Swiss case strengthen the identification of the citizens with the new supranational polity as well as open ways for transnational arrangements between peoples and thus prevent them from the re-emerging nationalist attitudes apt to destroy the very idea of European unification;
- the adoption of interinstitutional agreements in order to strengthen the European Parliament. Albeit this highly complex instrument will hardly increase transparency, it will give a voice to the citizens' directly elected representatives in policy areas they are otherwise excluded from;
- the operationalisation of the subsidiarity principle in order to involve the national parliaments which, however, have to improve or utilize their powers of control vis-à-vis their governments when acting at the European level;
- the introduction of common rules for the European elections; as to these elections the elaboration of European platforms of the party families addressing European issues and thus preventing the national parties from campaigning often almost exclusively on national topics could be done quite easily without any treaty change;
- the latter point could also serve as a means to discuss salient topics such as social and economic policies in a European vein thus preparing the ground for further integration in these areas.

4. What should the EU do to reconnect with the citizens?

In the three preceding points I have mentioned time and again the need for a better connection with the citizens and proposed several options, in particular the duty of national parliaments and the parties therein to work as a transmission belt between the European and the national as well as sub-national level. National parliamentarians and party officials should elaborate together with their European counterparts forums of discussion on a regular basis. Many national political actors tend to simply ignore the European policy-making level and avoid controlling with regard to their governments.

Moreover, I should like to stress the role of the media which either do not inform or misinform the public. National TV-broadcasters are particularly reluctant in transmitting news about the Union and do so only occasionally or when something scandalous has happened. The latter leads to a perception of the Union as a remote and arcane world populated with actors that are almost exclusively associated with a huge bureaucracy incapable of understanding the needs and concerns of the citizens, prone to corruption or at least inefficiency. There is little knowledge about the day-to-day workings of the Union's organs and less so about channels of participation. It is no exaggeration to hold that the European citizens live in a "limbus" between a national polity which appears to be less and less powerful and a European decision-making level they ignore or fear.

The European Parliament could launch an initiative inviting the information directors of all national public broadcasters to address this problem and to elaborate strategies to overcome the information deficit by envisaging a minimum time space for European information every evening in the prime time of their news programmes. It worked with news from stock-markets which were a novelty in many countries until quite recently. With high probability other broadcasters as well as newspapers will follow if only for reasons of competition. Such initiative does not need to result in legislative action but could first raise their awareness, second convince them of the need to put down their parochial lenses, and third, eventually conceive of programme schemes focusing on the Union.