

# EUROPEAN WAYS OF CONSTITUTIONALISM

**Joxerramon Bengoetxea**

**T**his paper deals with the constitutional process taking place in Europe (Part one) and suggests an important distinction between ‘constitution’ and ‘constitutionalism’, detecting different parallel constitutional threads in European constitutional discourse, different, silent, ways of doing constitutionalism in Europe (Part two). Some of the possible options arising from the current comatose state of the Treaty establishing a Constitution for Europe will be analysed. I will analyse in detail official statements made by the EU institutions and by some ‘national’ statespersons, heads of state or government. I shall also look at surveys and polls on citizens’ views on the EU. These materials will be analysed against a background of academic and political discussions on constitutionalism.

## **PART ONE: THE CONSTITUTIONAL WAYS**

To recall the process and the *life* of the Treaty establishing a Constitution for Europe it might be interesting to remember the present legal situation: the EU is currently a political and diplomatic compound with – arguably – no legal personality, and at the very best a contested one. Comparative constitutional and international lawyers discuss endlessly as to whether it does have personality in a formal legal sense beyond its undeniable, if somewhat feeble, political existence. Similar discussions will turn around whether the EU is a strong form of international organisation or a soft form of state, a meta-state, supra-state or quasi-state.

### **1. The visible constitutional process – the shortcomings of the Philadelphia model**

The Treaty on European Union was adopted in Maastricht in 1992 and entered into force at the end of 1993 after the second Danish referendum (Denmark obtained special opt-outs after its first rejection of the Treaty on European Union, and the Danes ratified the Treaty in the second referendum). This Treaty brings together the three pillars of the European Union combining diplomatic, intergovernmental, trans-national and supra-

statal features. The present version of the Treaty on EU and the European Community Treaty was adopted in the Nice Treaty in December 2000 but only entered into force two years later after the Irish changed their mind in the second referendum and ratified virtually the same text they had previously rejected. In this case, in contrast with the Danish case, the Irish obtained no special opt-outs.

This compound of Treaties periodically evolving in Intergovernmental Conferences (IGC) and covering ever more intense relations of integration is a very particular way of constitutionalism, based on neo-functionalist paradigms and incrementalist approaches (see Moravcsik 2006),<sup>1</sup> which we can call the European Way of constitutionalism. It is in stark contrast with the USA constitutional way creating a simple, compact, easy-to-read and quite solemn document adopted at the end of the 18th Century and subsequently amended on a few occasions. The European way combines an interesting mix of constitutional processes: the IGCs, the Convention method, the ratification processes leading to Treaties that are often amended, or at least have been in the past, the constitutional jurisprudence of the ECJ, some of the most important Strategies of Inter-institutional nature like the Delors Plan for the Internal Market, or the Lisbon Strategy and occasionally proposals from a single institution, namely the Commission, as the White Paper on Governance.

Exactly one year after adopting the Treaty of Nice, the European Council gathering the Heads of State or Government of the then 15 Member States met in Laeken, near Brussels, in December 2001 and called for a serious debate on the future of Europe. Before actually opening up the new IGC, it decided to establish a Convention on the Future of Europe which was to address what it itself identified as fundamental flaws or questions left unanswered or incorrectly answered at Nice.

It is surprising that such a blunt recognition should have been made considering that the Nice Treaty arrangements had just been agreed to and it had had no real chance to show its merits or demerits since it had not even entered into force yet. Europe now lives in this paradox: it is being governed by an institutional scheme, the Treaty of Nice, formally agreed to by the Heads of Government or State of the then 15 Member States but which, only one year later, they all, but few, publicly criticised. Obviously, something must have gone wrong. Otherwise the protagonist of those meetings would not have criticised the Nice result. Perhaps the reason was that some key players had

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<sup>1</sup> The argument is that constitutional reform had little legal or substantive justification, but the actual reforms agreed in the Constitutional Treaty were pragmatic and desirable adjustments to the existing EU constitutional structure. The whole enterprise was an exercise in public relations.

changed, and that the rotating Presidency of the EU does make a difference. France had held the presidency in Nice and Belgium held it in Laeken, one year later.

It could be that September 11th 2001 changed our world view; it could be that new priorities were on the agenda; it could be that the economy had drastically changed with the *dot-com* bubble vanishing and globalisation threatening to delocalise not only the economy but also politics. It could be a sincere recognition that a given method of deciding crucial issues at European conclaves was not working to the satisfaction of everyone. It could be that the Belgian presidency was really trying to push forward a constitutional agenda with a distinctly Flemish accent. In any case, it seemed very odd, from the standpoint of representative democracy and political legitimacy, that Germany with 80 million citizens should have ended up in Nice with the same number of Council votes, 40, as the UK, Italy or France with approximately 55–60 million and, just a couple more votes than Spain or Poland with half its population. What is clear is that a new method was launched for the revision of the Treaties, that of the Convention.

A Convention on the Charter of Fundamental Rights had already been tested two years before and it had delivered the Charter which managed to assemble impressive support and was adopted at Nice at the same time as the EU Treaty, but separate from it and deprived of legal force. This new process of adopting important constitutional texts was probably seen as a clear contribution to the legitimacy of the process of European integration, and sufficient reason to repeat the experience. The classical method for deciding Treaty amendments was, and still is, the Intergovernmental Conference, a typical diplomatic instrument with technocratic notes, whereas with the Convention method, the process becomes more inclusive in the sense that not only central governments but also Parliaments and EU institutions (European Commission and European Parliament) participate and MEPs can then foster debate in their own constituencies.

The Convention on the Future of Europe was set up in February 2002 under the chairmanship of former French president Valéry Giscard d'Estaing, who liked to compare it to the Philadelphia Convention which led to the US Constitution, although it had not been convened for that concrete purpose.<sup>2</sup> If the charge of elitism of the process of treaty making in European integration has any weight, much of it may come from the technocratic/diplomatic approach of Intergovernmental Conferences, but some of it may come also from this Convention on the Future of Europe. It can be argued that the process was reserved to the political elites. In fact mainstream parties were

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<sup>2</sup> It had been convened to revise the Articles of Confederation adopted ten years earlier which had entered into force in 1781.

represented. The only institution that seems to have voiced any view other than majority party views or major opposition party views is the European Parliament with the European Free Alliance group and the green parties. To be fair, the Convention was clearly an improvement compared to the exclusive and select IGC meeting behind closed doors. In a sense the Convention brought the European way of constitutionalism closer to the American, USA model.<sup>3</sup> Some authors have advocated a return to the traditional, elite driven politics of European integration alleging that EU issues are lacking in salience.<sup>4</sup>

The Convention brought together representatives from the governments and parliaments of the Member States and of the Accession Countries, and representatives of the EU institutions (Commission and Parliament) and some observers from the Committee of the Regions and the Economic and Social Committee. The meetings were held in the Parliament and most of its documents were accessible to the public in the Convention's Futurum webpage. It was theoretically open to contributions from civil society although contributors were never actually told by the Convention secretariat or the Presidium what, if any, use had been made of their contributions. True, the contributions were accessible on the web; however, it ceased its operation when the Convention presented the Constitutional Treaty to the Intergovernmental Conference. The debate on the Future of Europe was over!

The Convention followed a peculiar methodology decided by its President and its Presidium: it debated and reflected for a long time, it split into several working groups and after 16 months of relative calm, it suddenly started discussing drafts of Constitutional Treaty projects. Heavyweights or prominent political figures from Member State governments joined in the discussion replacing more junior EU advisors originally appointed by Governments and by the spring of 2003 there was a proposal on the table of the Presidium of the Convention, which was hurried through the Plenum debates. In the European Council summit at Thessaloniki in the summer of 2003 a triumphant Giscard d'Estaing presented the draft Treaty establishing a Constitution for

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<sup>3</sup> The analogy stops there. The US Constitution was adopted by the Constitutional Convention in Philadelphia, Pennsylvania, in September 17, 1787, and was later ratified by special conventions in each state. When nine states of the then thirteen states had ratified the document it marked the creation of a union of (formerly) sovereign states, and a federal government was set up to operate that union. It replaced the weaker, less well-defined union that existed under the Articles of Confederation, and took effect on March 4, 1789.

<sup>4</sup> See the forum in *Notre Europe*, What Can We Learn from the Collapse of the European Constitutional Project? By Andrew Moravcsik and the responses by critics: <http://www.notre-europe.eu/fr/axes/visions-deurope/travaux/publication/legitimer-lue-par-la-participation-et-la-deliberation/>.

Europe to the Heads of Government and/or State of the EU. The Intergovernmental Conference would then work on this draft behind closed doors and produce a year later, thanks to the tactful diplomacy of EU president Taoiseach Bertie Ahern and in spite of EU president Silvio Berlusconi's apathy, the new Treaty establishing a Constitution for Europe. This was signed in October 2004 in Rome and it was to be in force by November 2006 according to the Treaty itself. Turkey was invited to the signature, together with Romania and Bulgaria.

This Treaty, agreed to and signed by all Governments of the 25 Member States, was then ready for ratification by each according to their constitutional procedures: some would ratify by parliamentary vote, others by referendum, yet others by a mixed process. The debate is thus placed in the political arena of the Member States. Spain and Luxembourg ratified through a referendum and two of the six original founding Member States, France and the Netherlands, rejected the Treaty in referendum and witnessed the presence of a protest movement with a European dimension. Other Member States, such as the Czech Republic, Sweden, Denmark, Portugal, Ireland and the UK, have either put the ratification process on hold or, like Poland, suggested to call it off. The rest have ratified.<sup>5</sup>

On the 16th and 17th June 2005, the Heads of State or of Government of the Member States of the EU, meeting in the Council in Brussels, held a wide-ranging review of the process of ratification of the Treaty establishing a Constitution for Europe.<sup>6</sup> This document is particularly telling as regards the particular way of constitutionalism in Europe and the difficulties which the European formal and idealist legal culture (see Gessner et al. 1996; Gessner and Nelken 2007) encounters when dealing with *Realpolitik*.<sup>7</sup> The crucial paragraphs state the following:

To date, 10 Member States have successfully concluded ratification procedures, thereby expressing their commitment to the Constitutional Treaty. We have noted the outcome of the referendums in France and the Netherlands. We consider that these results do not call into question citizens' attachment to the construction of Europe. Citizens have

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<sup>5</sup> The German president is holding the signature until the Federal Constitutional Court decides an action brought against the ratification on the basis of an alleged incompatibility with the *Grundgesetz*.

<sup>6</sup> Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe (European Council, 16 and 17 June 2005, SN 117/05).

<sup>7</sup> See also Kaarlo Tuori's contribution to this issue.

nevertheless expressed concerns and worries which need to be taken into account. Hence the need for us to reflect together on this situation.

This period of reflection will be used to enable a broad debate to take place in each of our countries involving citizens, civil society, social partners, national parliaments and political parties. [...]

The recent developments do not call into question the validity of continuing with the ratification process. We are agreed that the timetable for ratification in different Member States will be altered if necessary in response to these developments [...]. [An overall assessment of the national debates would be made in the first half of 2006 and the heads of state or government will agree on how to proceed.]

Indeed, in June 2006, the European Council met again and decided to postpone any decision on the matter until at least 2008, but perhaps even as long as 2009 when the new EP and Commission will be formed. The heads of state and/or government have requested the German Presidency of the first half of 2007 to make suggestions on the way forward.<sup>8</sup> On 14 December 2006, the European Council met again and stated as follows:

As agreed by the European Council at its meeting in June 2006, the Union has followed a two-track approach. It has focussed on making best use of the possibilities offered by the existing treaties to deliver concrete results while preparing the ground for continuing the reform process. The [Finnish] Presidency provided the European Council with an assessment of its consultations with Member States regarding the Constitutional Treaty. The outcome of these consultations will be passed to the incoming German Presidency as part of its preparations for the report to be presented during the first half of 2007. The European Council reaffirms the importance of commemorating the 50th anniversary of the Treaties of Rome in order to confirm the values of the European integration process.<sup>9</sup>

These two texts will be analysed in detail. *First* of all, an imprecision must be signalled: it was *not 10 but 9* Member States that had concluded ratification at the date of the

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<sup>8</sup> At the end of April 2007, the German Presidency has launched consultations with the Member States governments on how to handle the current Constitutional Treaty stalemate. The other important contribution from the German Presidency has been the Declaration of the 50th anniversary of the EC which stresses the importance of values in the process of integration, see at [http://www.eu2007.de/de/News/download\\_docs/Maerz/0324-RAA/English.pdf](http://www.eu2007.de/de/News/download_docs/Maerz/0324-RAA/English.pdf).

<sup>9</sup> The text can be found in the Presidency Conclusions of the Brussels European Council, 14-15 December 2006.

statement: Austria, Greece, Hungary, Italy, Latvia, Lithuania, Slovakia, Slovenia and Spain. In Germany both the *Bundestag* and the *Bundesrat* had ratified the Treaty but President Koehler had not signed the ratification instrument waiting for the ruling by the *Bundesverfassungsgericht*.

*Second*, very revealingly, the text does not inform us of the outcome of the referenda in France and in the Netherlands; not once is there any recognition that the majority of the voters in these States have said 'no' to ratification. Instead, the Heads note the 'outcome', consider the 'results' or talk of the 'developments' or of the 'situation'. Reality is eluded as a strategy as though it would be too painful to acknowledge. Facts are considered so awkward that they are ignored. On the other hand the interpretation of the un-stated facts seems plain: although citizens have expressed worries and concerns about the Constitutional Treaty, they do not really question their attachment to the construction of Europe. Is this wise marketing and spinning move?

The statement of the European Council is not quite in line with Declaration Nr 30 of the Treaty Establishing a Constitution for Europe according to which the European Council will examine the issue after 20 Member States have ratified in case there are difficulties in some Member States. Arguably, if this Declaration was to be taken at all seriously, the ratification process should have gone on untroubled and the European Council should not have examined the issue until 20 Member States had ratified. This is at least what the signatories of the Treaty committed themselves to do. Joakim Nergelius has suggested that this attitude of postponing or suspending the process in the UK, Sweden, Poland, or in the two Member States that have had referendum ratification difficulties before, like Denmark and Ireland, is somewhat legitimate: 'in the wake of a negative result in two of the founding Member States [France and The Netherlands], the reaction from those states could hardly be said to be exaggerated' (Nergelius 2005, 423).

The argument for this justification is the very Declaration by the European Council of 17 June 2005, which foresees a period of reflection, after which the Council intends to address the issue again in the spring of 2006. But this justification seems quite circular: you cannot criticise those Member States for postponing or suspending ratification because the European Council, i.e., the totality of the Member States themselves, has postponed the process! The fact remains that the Member States and the European Council have completely disregarded Declaration Nr 30, which they had all agreed to. Perhaps it is the Declaration that is the problem, but it is possible then to ask oneself why it should have been adopted in the first place, why should it say that the ratification process had to go on. On the other hand, the answer is quite obvious: *pacta sunt servanda*: if a State signs a Treaty, there is a normative expectation in

international law that it will do its best to actually ratify it. Otherwise, there would be no point in Treaty-making.

This could be a mere legalistic or formalistic query. A political scientist will probably see it as normal that the heads should react to a crisis, and the French and Dutch 'nos' are a crisis, because they are unexpected. But the lawyer and normative philosopher might want to reply: if the declaration says 20 ratifications and difficulties in up to 5 Member States, then the Heads will discuss the issue. A possible, and sensible, interpretation of this declaration is that the Heads can discuss the issue whenever they wish, but they will have to discuss the issue whether they want to or not if the conditions of the Declaration Nr 30 are fulfilled.

But this rather formalistic discussion does tell us something about European legal culture around the current situation of the Constitutional Treaty. For a formalistic lawyer, it simply does not enter into force until and unless all Member States ratify. In the meantime, there is no legal void; the Treaty of Nice still applies; therefore, for a lawyer there is no crisis. The machinery works, the ECJ produces judgments, the Commission adopts regulations by delegation and even directives, the Council and Parliament co-decide directives and regulations whenever there is a qualified majority voting mechanism. By contrast, for a political scientist and for a social scientist there is obviously a crisis, it is political and institutional; the system is not working and even the elites are acknowledging this. As Kaarlo Tuori elegantly states in this volume, constitutional culture combines elements of both legal and political culture. The interpretation of the current situation would need to draw from the two approaches. Hence, it makes perfect sense to speak of *constitutional crisis*.

*Third*, the Heads 'consider that these results do not call into question citizens' attachment to the construction of Europe'. One wonders on what basis the Heads may be capable of interpreting the results in this way; no information is given about this, but at any rate, the Heads and the Union institutions seem to have been reading the Commission's Flash Eurobarometer of 15 June 2005 which states, in self-referential manner, that 'citizens do not basically disagree with European integration'.<sup>10</sup> One does not need to be an acute political scientist to realise that this can mean practically anything. Another reading of these Eurobarometers (2005 qualitative study on

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<sup>10</sup> Technical details; France: Flash Eurobarometer conducted by phone by EOS Gallup Europe / TNS Sofres on 30 and 31 May 2005 on a sample of 2015 people on electoral rolls. The Netherlands: Flash Eurobarometer conducted by phone by EOS Gallup Europe / TNS NIPO from 2 to 4 June 2005 on a sample of 2000 people on electoral rolls. The full reports are available on the Eurobarometer website: [http://europa.eu.int/comm/public\\_opinion/index\\_en.htm](http://europa.eu.int/comm/public_opinion/index_en.htm).



perceptions of the EU)<sup>11</sup> could tell us that the feeling of *Europeanness* has diluted in many Member States, that even those citizens who have some technical knowledge about the EU fail to understand its principles and most see it as impenetrable, or that most Europeans have virtually no awareness of the positive effects of European competition policy for them as consumers; all they notice is price increases. The 2005 survey carried out by TNS Sofre shows 52% of the French consider the Euro is a bad thing for France.<sup>12</sup>

In any case, this implicit distinction between the *Constitutional Treaty*, which carries less attachment, and the *construction of Europe* which, according to the Heads, commands more legitimacy, may be an interesting strategy. Does this mean that, in the view of the Heads, the construction of Europe has to change focus abandoning the path of the Constitutional Treaty, abandoning the American constitutional way to recover the subtle, ongoing, web-like European way? This may be right, but it certainly drives a coach and horses through the whole constitutional project of the Treaty.

*The fourth* observation is that according to the European Council ‘the recent developments do not call into question the validity of continuing with the ratification process’. If this statement is analysed from a purely formal point of view, it is impeccable: since all Member States have to ratify, until the 25th, or rather the 27th, Member State has deposited its instrument of ratification, the process of ratification of the Constitutional Treaty will be valid. But from a political point of view, the ratification process seems mortally wounded by the double ‘no’. Obviously from a formal point of view all Member States will need to take a legal position on ratification, as is the case with all international treaties. But whereas some international treaties come into force when a given number of ratification instruments is registered, as with the Treaty establishing the Statute of the International Criminal Court, or when, as with the Kyoto protocol, a certain percentage of world CO<sub>2</sub> emissions is reached by those ratifications, this *special Constitutional Treaty* goes much further in that it requires ratification by all the Member States. Instead, why not go for a double majority to ratify it: e.g., 4/5 of the Member States and absolute majority of the European citizens’ vote? It would have been a very different ratification process if the Constitutional Treaty had provided for a different method of adoption and entry into force like a double majority of States and population.

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<sup>11</sup> See Goux and Maurin 2005: ‘En 1992, le clivage était essentiellement entre les non diplômés et les autres, en 2005 le clivage s’est déplacé et se situe davantage entre les très diplômés et les autres’.

<sup>12</sup> Le Monde, 26 December 2006.

But if ratification is failing, how can it be revived? According to the Heads, the process just needs a break! The Heads acknowledge that citizens have expressed concerns and worries that need to be taken into account by the Heads themselves; 'hence the need for us to reflect together'. Six months later, in the December 2005 European Council summit, there was no official news as to whether this reflecting together had been taking place at all.<sup>13</sup>

The first response from the European Council came in October 2005, with a special summit on globalisation held in London under the British Presidency of the EU with no debate on the Constitution. The message seemed to be that the EU leaders were addressing the real issues, the Constitution was not important. Only a month earlier, the President of the European Commission had expressed his views in some of the major European newspapers on the leadership of the EU in a global world: Europe must face the challenge of globalisation with the existing Nice Treaty since the Constitution would not enter into force in a near future. Barroso insisted that this could be regrettable but should not lead to paralysis and great things like the Lisbon agenda for growth and employment could still be achieved with the existing EU framework. Needless to say, the Commission is thought to be crucial for this purpose.

President Barroso seems to depart from the Commission's own Annual Policy Strategy for 2006 (COM(2005) 73 final, 3) where the Commission stated it would 'continue to support the ratification process and prepare a number of legislative initiatives to ensure immediate implementation of the Constitution when it enters into force on 1 November 2006'. But the very same Commission, which has adopted a White Paper on a European Communication Policy (COM (2006) 35 final), seems to be failing in its own communicative purpose: as of June 2006, in the eve of the European Council that dealt with the issue of the ratification impasse only to decide to postpone it, the last document in the official Commission website on the Constitution for Europe was dated 26 September 2005! This has later been mended, the latest document available at the end of 2006 was dated October 2005, and it was Plan D. The website does contain a series of conferences and debates that were organised in different European cities.<sup>14</sup> The European Council conclusions of December 2006 inform us that

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<sup>13</sup> The Austrian presidency of the EU for the first half of 2006 announced its intention to speed up and intensify the stage of reflecting together the future of the EU invoked by the European Council; and not simply as regards the institutional make up of the EU but also fundamentally about its way of life and socio-economic model. See interview with Foreign Minister Plassnik in *Le Monde* of 21 December 2005.

<sup>14</sup> See [http://europa.eu/constitution/events\\_en.htm](http://europa.eu/constitution/events_en.htm).

there has indeed been a process of consultation of Member State capitals by the Finnish Presidency, but we are not informed of the outcome.

*Fifth*, the Heads therefore decided to open up a wide debate involving all sectors of society. Interestingly enough that is precisely what they (were supposed to) have done since the Laeken declaration. Should this statement and the recent statements made by the European Parliament calling for a new, fresh debate in the Member States, be understood as a double recognition that (1) the Convention on the Future of Europe was really a failure, and (2) it was a failure partly because the locus for the debates is really and should have been the Member States? If the debate has to take place at 'national' level, then the aim to create a Constitution for Europe would be self-defeating.

Disconnected national debates and referenda are in conflict with the idea of a European *demos*. But perhaps this is another peculiarity of the European Constitutional way, i.e., that it has no *demos*, only citizens and these citizens express themselves at national, not European, fora. The statement affirms that citizens are attached to the construction of Europe and if that is really the case, why not attempt to hold a truly European debate throughout Europe and why not celebrate ratification on the same date in all the Member States, as the European Parliament elections? Why not work to bring about truly European, trans-national platforms for discussion, participation, debate and dialogue? Why re-nationalise the debate?

It seems frankly odd and self-deceiving that the European Parliament should also call for citizens' forums on Europe to be held in the Member States on issues like the competences of the EU or the role of the EU in the world. These are precisely the issues the Convention has addressed! Observers had assumed that the Convention representatives had carried out that debate in their own constituencies. Is this subsidiarity at its most ridiculous, or is this another politically conscious recognition that a European constituent body, a *demos*, does not and cannot exist, because formally speaking, each Member State is a separate *demos* and can hold or block any decision of the lot? But is this then the right time to start discussing a new way to bring together the different *demos* in a new version of *demoicracy* as advocated by, e.g., Samantha Besson in the *Chasing Constitutionalism* Conference.

The underlying assumption could then be that the bringing together of all the *demos* in a shared Convention will ultimately bring about a new European *demos*, but then this plan is defeated by the requirement of unanimity for ratification and the holding of the referenda at different times, which tilts the balance in favour of the formally sovereign Member States. But perhaps the flaw was already contained in the

Convention draft.<sup>15</sup> Even if all ratified, the coming into being of the Treaty establishing a Constitution would still not bring along a new European constitutive people because it does not even purport to do so (Closa 2005, 147) since it requires ratification in each and everyone of the Member States by whatever process this is brought about. The Treaty does not purport to be founded by a European people or peoples, only by Member States and citizens.

In an interesting study carried out at the end of 2004 on a survey of national experts in the wake of the ratification process, Kurpas et al. found that the key players in the debate are set to be national politicians.

This holds out the promise of lively national debates on a European issue in particular in those countries where referenda will be held. Yet it also carries the risk that debates may be ‘hijacked’ by national actors pursuing a domestic agenda.<sup>16</sup> European actors and transnational involvement of key players are still largely absent from the debates.

There seems to be a certain set of core issues that is recurring throughout the ratification debate in most of the member states. Nevertheless, these issues are looked at through national lenses and there appears to be limited scope for transnational influences.

Moreover, it is often the issues directly related to the Treaty, which are more technical in nature and thus inherently less interesting for the general public, that are used by proponents in their attempt to generate support for ratification, whereas political issues tend to be brought up more frequently in arguments put forth by opponents to the Treaty. (Kurpas et al. 2005, i)

The European Council insists on the need to reflect together, but if the debates are to take place in the Member States, in national debates, the reflection will hardly be done ‘together’, at best it will only mean that all are reflecting separately. Reflecting together and opening the debate will not however secure ratification. Spain had very little, and indeed very tedious, discussion before its referendum and yet it ratified; France and the Netherlands have had a much livelier debate involving all sectors of

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<sup>15</sup> According to Klabbers and Leino (2003), the Draft constitution dodges the issue of whether it wants a European political community of individuals: ‘one cannot bring Europe closer to its citizens while keeping the member states as an intermediate layer, indeed, strengthening the position of this intermediate layer’ (paragraph 28).

<sup>16</sup> In this sense see Mateo González (2006, *passim*) who argues, based on empirical research carried out in 10 Member States, that political actors use the possibility of holding referenda on European issues as a means to strengthen their positions in the domestic context.

society, but they did not ratify. If you want to have a positive result try to ensure a low-key, boring national debate, one could be inclined to think. Not quite so! Luxembourg ratified in the peak of a fairly heated pre-referendum debate and did so against a negative tide provoked by the Franco-Dutch rejections and by the European Council moratorium.

It is difficult to hold that one electorate has been more enlightened than the other or that the debate has been of a higher quality in one rather than the other context. On what methodologically sound basis can one say that the French or Dutch debate on the Constitutional Treaty was more informed than the Spanish one? As regards the French debate, many of the 'no' voters seem to have reacted against Part III of the Constitutional Treaty most of which has been in force for many years in the EC Treaties! And again, if the president of the Convention on the Future of Europe is to be followed, for the ratification to prosper the people should not really be fully informed. Indeed, in a truly 'transparent' spirit, Valéry Giscard d'Estaing told the New York Times he believed it had been a mistake, of which he had actually forewarned Chirac, to send a full version of the Treaty to every French household! He is not the only one to think so either.

The Commission President Barroso, in a recent speech delved into political sociology when he stated in truly manichean fashion: *'Le débat a été mélangé à des enjeux nationaux et les arguments débattus au cours des deux campagnes avaient souvent peu à voir avec la Constitution européenne...-...Lors d'une campagne référendaire il est difficile d'éviter la contamination de la question posée par d'autres sujets, même s'ils n'ont pas un rapport direct avec la consultation'*. So the French and Dutch debates had little to do with the Constitution, but nobody really questioned whether the debate in the Spanish campaign had actually had much to do with it at all! It was positive, and that was it. The Constitutional Treaty was also widely publicised within the electorate and the debate, if debate there was, seldom turned on any specific article of the text. It seems that only the 'no' results are infected by the purely internal political debate whereas the yes results are truly European. Being in favour of the Constitutional Treaty would be a sign of enlightenment and political correctness; voting against would mean being nationally biased. This way of putting things is not very constructive.

*Sixth*, any decision as to what happens next is now postponed until June 2008, when the national debates and the consultations will have presumably delivered something. The European Council of December 2006 announced a German Presidency initiative for the declaration of the 50th anniversary of the EC, but little else. The text

of the Declaration<sup>17</sup> has avoided taking a stance on the way forward and instead speaks of placing the EU on a renewed common basis before the European Parliament elections in 2009. According to press reports, reaching a consensus on this Declaration was no easy task. The German Presidency is to sketch the main lines of the new version of the Constitutional Treaty for the June 2007 European Council, which will probably call for a new IGC and a ratification process between 2008 and 2009. If there is sufficient agreement, the new text could actually be in force for the next European Parliament elections of 2009. This scenario seems to imply that referendums on the resulting 'Treaty' will be avoided as far as possible. But of course, we know the Treaty itself requires ratification by all 25 (or 27) Member States. It is clear it will not enter into force until the totality of the Member States will have ratified it and if two have already refused to ratify it, then it cannot possibly enter into force. The remaining Member States clearly have a right to decide when they submit this ratification to their citizens or their representatives, as the case may be. They have the right, nay the legal obligation, to take a stance on ratification. It would be the first time in international law that a government of a State signs a Treaty and then decides not to submit this Treaty to ratification by the popular representative which holds sovereignty in that State, i.e., the Parliament (if referenda are held, the citizens directly mandating the Parliament), and the formal signature by the Head of State. In spite of this, some Member States have decided to postpone or even suspend the ratification process.

What an odd notion of democracy and separation of powers to sign a Treaty and then hold its ratification because another Member State is finding obstacles for ratification! This attitude runs counter to established principles of law and to the Vienna Convention on the Law of Treaties – comity, *venire contra actum proprium*, *pacta sunt servanda*, legitimate expectations. Citizens from other Member States are being denied the right to say 'yes' or to say 'no' only because the presence of ideological cleavages is feared. And what happens in those Member States that have ratified? Their citizens have formally approved something they are not getting. They, and their States, also have a right to be taken seriously, but so far only the French and the Dutch voters have been taken seriously. Indeed, Spain has been leading the camp of the ratifying Member States, trying to save the Constitutional Treaty. But the victory by the neo-Gaullist N. Sarkozy in the French Presidential elections will again intensify the pressure for a new IGC of a technical and diplomatic nature in order to produce a Mini-Treaty saving as much as possible from Part One of the Constitutional Treaty and avoid risky referendums.

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<sup>17</sup> See <http://www.eu2007.de/de/>.

## **2. Excursus: Explaining ‘yes’ and ‘no’**

So what are the sources for the European Council’s restrained optimism it shows in the June 2005 Joint Declaration? ‘Yes’ voters were mainly guided by their general positive opinion on European integration (52% in France and 44% in the Netherlands). On the other hand, ‘no’ voters did not have a negative view of European integration. Some of the reasons behind the negative vote in the French and Dutch referenda were related to issues like the fear of unemployment<sup>18</sup> the speed and breadth of enlargement, the recognition of Turkey as a candidate country (see Nicolaidis 2004), the fears of global competition and its effects on national economies, the fear of outsourcing services and delocalising companies, the feeling of insecurity at work, the fear of losing important social benefits and seeing the social models crumble especially when combined with economies that are net contributors to the EU, the perceived erosion of the nation-state and of national sovereignty, the distancing of the political and economic elites, the democratic deficit and complexity and perceived lack of transparency of the EU.

The Eurobarometers<sup>19</sup> also give an interesting insight into the results. Some of these have been conducted after the referenda, others are done periodically. They all shed some light on what prompted voters’ choices and their attitude to European integration. First, there seems to be a direct relation between older age (over-55s) and the ‘yes’ vote, and in this case the importance of the Constitution for continuing European integration is the reason most ‘yes’ voters give spontaneously in France (39%) and in the Netherlands (24%). In Luxembourg too the ‘yes’ vote carries more support amongst women (60%) and over-55s (72%) whereas younger voters lean to the ‘no’ (62%).

Second, and perhaps related to this, socio-economic worries tend to explain the ‘no’ vote. What most influenced the choice of ‘no’ voters, both in France and in the Netherlands (47% and 26% respectively), was the country’s economic and social situation.<sup>20</sup>

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<sup>18</sup> For instance, 25% of French under 25-year-olds are unemployed and every percentage point increase in unemployment brought about a 0.23% fall in the yes vote (see Goux and Maurin 2005).

<sup>19</sup> See [http://europa.eu.int/comm/public\\_opinion/index\\_en.htm](http://europa.eu.int/comm/public_opinion/index_en.htm).

<sup>20</sup> In France, ‘no’ voters refer first and foremost to socio-economic aspects to explain their choice: fear of the harmful effect on jobs (31%), the present economic and labour-market situation (26%), the impression that the Constitution leans too much towards the liberal (19%) or not enough towards the social (16%), and dissatisfaction with political leaders or

According to these statistics, support for membership of the Union is indeed practically total: 88% of the French and 82% of the Dutch view it as a good thing. Among the 'no' voters, 83% in France and 78% in the Netherlands share this positive view. But on the other hand, the latest Eurobarometers had been showing a decline in support (the percentage of people who think EU membership is a good thing dropped from 54% to 50%). The European institutions, on the other hand, do not enjoy such a good image: 53% of the French and only 31% of the Dutch hold them in esteem. The latest figures for the EU are very telling: in many Member States there is a shift away from outright support towards more neutral opinions. According to the Eurobarometer, 46% of the population trust the Commission and 40% trust the Council, but as many as 33% do not trust any of the EU institutions.

These surveys have been reconfirmed at EU level. The recent Qualitative Study of the Eurobarometer produced by Optem and published in May 2006,<sup>21</sup> shows a general climate marked by uncertainty, fear and by some very deep worries of a socio-economic nature: fear of the effects of globalisation, especially on employment, worry toward the weakening of the social protection systems. In the same line, support for enlargement of the EU seems to be dwindling. Likewise, the House of Lords' select committee on the European Union, drawing data from the Standard Eurobarometer 65 published in July 2006, noted this climate: 'there are still more people in the EU who support future enlargements than people who oppose it. However, the gap between supporters and opponents is small and narrowing: 45 per cent were in favour and 42 per cent were against enlargement in the spring of 2006. This compares with 49 per cent in favour and 39 per cent against in the previous survey conducted in the autumn of 2005' (House of Lords paper 273 of 23 November 2006). The select committee is very critical of the use of the notion of 'absorption capacity'.<sup>22</sup>

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certain parties (18%). In the Netherlands, the most frequent reason given is the lack of information (32%), ahead of fear of a loss of sovereignty (19%). In Luxembourg, the main reasons for the 'no' (43% in the referendum) are linked to the domestic political debate like employment or outsourcing (rather surprisingly since unemployment in Luxembourg was below 4% at the time!), or the lack of a social Europe.

<sup>21</sup> See [http://ec.europa.eu/public\\_opinion/quali/ql\\_futur\\_en.pdf](http://ec.europa.eu/public_opinion/quali/ql_futur_en.pdf).

<sup>22</sup> See Chapter 4 and especially paragraph 153. In this sense see also Emerson et al. (2006, 22) who claim that 'it would be a strategic blunder for the EU now to invent a new irreversible dividing line within this map between "real Europe" and an imagined "other" (uncivilised?) Europe beyond. The term "absorption capacity" should be dropped from use in official texts, unless deconstructed into objective elements. Otherwise it is giving the impression of some pseudo-scientific and static reality, and plays into the hands of populist political rhetoric'.



Margot Wallström, Vice-President of the Commission with responsibility for inter-institutional relations and communication strategy, had the following to say on these polls:

The economic and social climate played a big role, but it is clear that the dialogue between the citizens of the European Union and its institutions has to be improved. Europe needs a plan D: D for democracy and dialogue.

And yet the ‘no’ to the Constitution should not be seen as a ‘no’ to Europe: belonging to the Union is considered a good thing by a large majority of the public. For a number of years the Eurobarometer surveys have been showing us that what people want is not less Europe, but more results. It is now more important than ever for the institutions to shoulder their responsibilities and find ways of satisfying people’s expectations.<sup>23</sup>

There are indeed two tendencies shown by the Eurobarometers which tend to counterbalance the Commission’s spokeswoman’s overacted enthusiasm: a dwindling trust in support for the EU institutions and a growing sense that membership of the EU is not that good after all.

So the panacea for this dwindling enthusiasm, if ever there was any, is an improved communication strategy which in fact puts the burden on local actors. According to the White Paper, ‘it is the responsibility of government, at national, regional and local level, to consult and inform citizens about public policy – including European policies and their impact on people’s daily lives – and to put in place the forums to give this debate life’ (COM(2006) 35 final, 5). In 2005, the Commission set out an Action Plan with a detailed list of specific measures it would take to improve the way it communicates with citizens (SEC(2005) 985 final). These include, for example, reinforcing the Commission representation offices, better internal co-ordination and planning, work on language and presentation, and more access points for citizens. The Commission also launched the ‘Plan D for democracy, dialogue and debate’ (COM(2005) 494 final) which is intended to involve citizens in a wide-ranging discussion on the European Union – what it is for, where it is going, and what it should be doing. Now the White Paper on Communicating Europe identifies five areas for action but it is difficult to see how any of them might contribute to soothe the distress provoked by unemployment, weak social protection, or climate change:

- (1) defining common principles in a Code of Conduct for Communication;

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<sup>23</sup> Rapid Press Release, IP/05/740, of 15 June 2005.

- (2) empowering citizens: education programmes, online connected libraries and info centres on Europe, open virtual fora, improved visits to the EC institutions, standards for consultation;
- (3) working with the media and new technologies: a European Round Table for Democracy as suggested in Plan D;
- (4) understanding European public opinion: upgrading Eurobarometer in the line of the Qualitative Studies, a network of national experts in public opinion research and an Observatory for European Public Opinion; and
- (5) doing the job better.

At least, the Commission, or perhaps we should say Commissioner Wallström, is staging a strategy to counteract. The threefold strategy seems to be led by an obsession with media and communication: Plan D is presented as a contribution to the reflection period between the ‘nos’ and the German Presidency; the Action Plan is an internal set of actions the Commission intends to adopt in order to improve its practice and image; and the White Paper is a consultation on a pack of measures. The idea seems to be that citizens need to perceive more clearly what the EU is about, Europe has to be communicated better and there should be enhanced debate and dialogue. But perhaps there is a different strategy at the top of the Commission. Thus, President Barroso’s quotes above could be interpreted as a recognition that the failed ratification is a lesser evil. His statement made in Brussels on 25 September 2006 on enlargement to the effect that ‘[t]here is no formal decision but I think it would be unwise to bring in other Member States, apart from Bulgaria and Romania which will be joining us soon, before we have sorted out the institutional question’ were the cause for concern at the House of Lords in its enlargement report. Interestingly, the ratification of the Accession Treaty of these two new Member States carries automatic ratification of the Constitutional Treaty. The optimist reading of this statement would be that at last Barroso has realised there is a serious institutional problem which calls for reform.

Only a month later he made another ‘interesting’ contribution: ‘What Europe needs is capacity to act. Of course there is a lot we can do, and have been doing, on the basis of the existing Treaties. I do not subscribe to the view that Europe is stuck [...] But the fact remains that the current set-up is less than optimal [...] As the number of Member States rises, the time it takes to reach a decision increases. Agreement and action becomes more difficult to reach [...] In thinking through Europe’s capacity to act, we need to examine afresh which policy fields require a further pooling of

sovereignty, and also examine which require less.’<sup>24</sup> In a way, this would require re-convening the Convention on the Future of Europe. All the questions he mentions are precisely the ones the Convention addressed.<sup>25</sup> But, given the negative precedent of the Constitutional Treaty, this examination phase might be reserved to the Heads of State and/or Governments. The question now is: Who is going to have a voice in this new phase, only the governments of the Member States in an Inter-governmental Conference or all the citizens of Europe through their parliamentary representatives or in direct consultation? The answer will differ depending on what conception of European constitutionalism one adheres to: a bureaucratic and elite-led conception might secure ratification, while a democratic and participatory conception runs the risk of paralysis if the requirement of unanimous ratification is not revised.

## **PART TWO: THE WAYS OF CONSTITUTIONALISM**

There are different notions or conceptions of a ‘constitution’. First, we could simplify this by distinguishing between written and non-written constitutions and between constitutions and constitutional processes. Next, we can ask what the Treaty establishing a Constitution for Europe exactly is. The Heads of State or Government of the EU Member States call it a ‘Constitutional Treaty’, the media and a large sector of the population in Europe call it plainly the Constitution. But in an important way, the Treaties by which we now govern ourselves in Europe can, in their turn, be considered also as somehow ‘constitutional’ without engaging in a long conceptual enquiry.

### **1. Concept and conceptions of constitution**

Indeed, before the coming into being the European Union, the Court of Justice of the European Communities has reconstructed its legal order as constitutional (case 294/83,

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<sup>24</sup> ‘Seeing through the hallucinations: Britain and Europe in the 21st Century’, the Hugo Young Lecture, London 16 October 2006.

<sup>25</sup> As UK Prime Minister Tony Blair said in a speech at the European Studies Centre at St Anthony’s College, Oxford on 2 February 2006: ‘I accept we will need to return to the issues around the European Constitution. A European Union of 25 cannot function properly with today’s rules of governance. Having spent 6 months as EU President, I am a good witness to that.’

*Les Verts*, ECR [1986] 1339). But perhaps this metamorphosis of the Treaties into a constitution is only visible to lawyers, perhaps the wider citizenry needs to be given a 'constitution' in a text properly so called but yet, again, if that is what they need, it seems rather untoward to offer them only a constitutional 'Treaty'.

It is difficult to assess to what extent the terminological confusion or name game may have played a part in the referendum debates or whether it may have alienated citizens from the constitutional process, this question has not been included in pollsters' researches. What the 142/2 Flash Eurobarometer on the Convention did find is that a vast majority of persons interviewed still could not indicate the correct type of text the Convention had elaborated; by November 2003 the knowledge in the EU-15 had somewhat decreased, while in the adjacent countries it had slightly risen. If it was a big mistake to distribute to the electorate a copy of the full version of the Constitutional Treaty with its four Parts, Protocols and Declarations, it was an even greater mistake to have produced such a document, first at the Convention on the Future of Europe, and next at the IGC. The December 2005 Eurobarometer also shows overall support for the concept of a 'constitution': 63% of Europeans, and this includes French and Dutch voters, would support one, and only 21% would oppose to the concept. But supporting an idea of constitution does not amount to supporting the Treaty establishing a Constitution for Europe.

Will it be because an initial draft was proposed by the Convention to the IGC that the text became constitutional or unconventional? The Convention which led to the adoption of the Charter of Fundamental Rights of the European Union, a success story with humbler founding parents, would then also merit the 'constitutional' label and yet nobody considers this to be a constitution even though, from a theoretical point of view, it could be considered as the supra-constitution of the EU. Or perhaps the fact that the text will be ratified by referendum in some Member States and by national parliaments in others makes this different from the present Treaties? Let alone the fact that these Treaties went through similar procedures!

It seems that we cannot even agree on a concept of ‘constitution’.<sup>26</sup> If we insist on a text which is called so, and which is somehow to be treated as a fetish, then clearly we have not had one until now and we have not been offered one for ratification. On the other hand, and this is a normative question, are we sure we need one? If we think of constitutionalism as a process potentially but not necessarily leading to a text called the Constitution, and as a sort of strategic thinking about the nature, the make up and the proper running of the complex European *polis*, then we may well be involved and embarked in a constitutional process which could be more significant than the text itself, and this could even breed a political culture that we would agree to call ‘constitutional’. Perhaps this is what European citizens responding to the Eurobarometer have in mind when they claim to support the concept of a Constitution, perhaps this is the essence of the *European way of constitutionalism*; constitutional strategic thinking without a written Constitution.

## **2. The tranquil constitutions**

However, in this sense, the strategic thinking behind the Charter of Fundamental Rights, or behind the Lisbon summit, especially when combined with the Sustainable Development Strategy first adopted in Gothenburg in 2001, which has arguably re-invented the economic constitution often called the ‘Social Market Economy’, or indeed the thinking behind the Governance White Paper, are just as important as the strategic thinking behind the ‘Constitutional Treaty’ which took place in the combination of Laeken, the Convention on the Future of Europe, the IGC, and the ratification debates. This is what I would call the silent or tranquil processes of strategic constitutional discussion, which is characteristically European. They can have enormous impact and

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<sup>26</sup> See Bengoetxea 2005a, 47: ‘Constitutions set out, among other things, dreams and visions that citizens share as regards the organisation of a polity or a commonwealth: how they wish to be governed and control their rulers, how they believe binding decisions ought to be adopted, what values the commonwealth is to defend internally, and also externally in its relations with other entities, what minimum rights can never be transgressed even by the will of a majority, how justice is to be rendered, and so on. Complex states or organisation made up not simply of citizens but, significantly, of citizens and the territorial entities of governance in which these citizens are constituted and which have different degrees of local, regional, or national identities. Constitutions then also characteristically set out what the different member regions, member nations or member states want to do together, and how they want to do it, and what they want to do on their own.’

influence on the Constitution understood as a vision and as a set of strategic principles of a *polis* or a community.

Thus, the White Paper on Governance intends to transform or reform the way the institutions operate, the way they interact with the citizens and with public administrations at the state, regional and local level, or the way they create law and policy. Is there anything more ‘constitutional’ than that? And yet, all these reforms are supposed to take place without touching the Treaties as they stand and without disrupting the heated conventional and intergovernmental discussions leading to and following from the Treaty of Nice. Officially, it is not the Commission’s position as regards the constitutional debate for that had already been done by the draft Constitution proposed by former President Prodi, known as Penelope, but at a deeper level, it is precisely that.

We have therefore different constitutional moments or processes which form part of the deeper structure of European constitutionalism or construction. One of them, the *Treaty establishing a Constitution* has received a serious setback, although it cannot be excluded that it will be the French and Dutch ‘no’ that really turned this particular document into a major constitutional moment in European history. The ‘nos’ have had the effect of shocking overconfident European elites. So long as ratifications were obtained, there was plain normality, but only when the ‘nos’ entered the ratification scenario was there any real noise or dissonance that provoked the type of European debate that the very Convention on the Future of Europe tried, but obviously failed, to bring about.

One year later, only 1% of the 55% of the French ‘no’ voters say they regret having voted ‘no’ whereas 10% of those who voted ‘yes’ now think they were mistaken to have voted so. As regards the Netherlands, it was 62% of the voters that opted for the ‘no’, but one year later, this figure would rise, according to the polls, to 68%. The ‘nos’ have been so significant that an otherwise insignificant fact like the approval of the Constitutional Treaty by the Luxemburgers on the referendum of 10 July 2005, insignificant from an international media review perspective,<sup>27</sup> became a resounding news. Indeed, the EC/EU is not only a success story in designing, planning and implementing institutional and procedural arrangements in the supra-state level and in the state and infra-state levels; it is also a story of missed opportunities, crises, and a story of muddling through and concocting solutions. We tend to forget the crises

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<sup>27</sup> To what extent this yes may have been influenced by the damage caused in London and in all of Europe by the sinister bombings of July 7th 2005, will be difficult to tell, but the Luxembourg ratification has acquired a constitutional dimension.

provoked by France with the rejection of the European Defence Community or with the empty chair policy, partially resolved with the Luxembourg compromise. A story of harmony-order and chaos-noise as Niklas Luhmann would probably have said.

Another silent constitution, *the Lisbon process*, is proving to be a failure since in the middle of the process, in March 2005, the Council admitted that the Lisbon objectives for 2010 – to become the most competitive knowledge-based world economy with full employment and quality jobs – were far from being achieved. The debates on the next budgetary framework for the years 2007-2013 are proving to what extent Lisbon can be just rhetoric with no real bite, even more so when combined with the Sustainable Development Strategy<sup>28</sup>. At the same time, those Member States that do take Lisbon seriously can perfectly well do it, so that the European added value of placing Lisbon on the agenda is more difficult to perceive. Some Member States like Finland or Denmark are actually achieving the results, others are failing. But the EU is given no sense of real governance that would bring about the Lisbon objectives.

The other ‘constitutional’ process, *Governance*, is silently doing progress and may transform many constitutional customs and practices. In a situation where there is a serious leadership crisis in Europe, perhaps even an institutional one, the steering wheel is precisely in the hands of the Commission. What a paradox! The most technocratic and bureaucratic of the institutions is the only one that seems capable of delivering a vision for Europe together with legal-bureaucratic rationality. If things go wrong, it can be easily blamed; if the process proves successful, it will almost go unnoticed since only practices and work methods, the administrative and bureaucratic culture, will be affected. Nothing quite as spectacular as a true constitution.

### **3. The Peter Pan syndrome**

Jean-Claude Juncker, Prime Minister of Luxembourg and during the first semester of 2005 President of the European Council delivered a speech to the European Parliament where he talked about an immature Europe. The problem was a lack of maturity. The question that many Europeans and observers around the world are asking is what is happening to Europe? Is it not ready yet for serious constitutionalism? Is there a complete cleavage between its leaders, the European elites and its citizens?

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<sup>28</sup> See the Communication on the future orientations of the EU Sustainable Development Strategy, COM(2005) 37, February 2005. The two strategies, Lisbon and SD, were merged in the European Council of March 2005.

In my book *La Europa Peter Pan* (2005b), I reflect on the process of integration and draw the conclusion that national elites in the Member States suffer from what we could call the Peter Pan syndrome, i.e. they do not want to abandon childhood and fantasy. Childhood could be identified with the chimera of national sovereignty which secures a comfortable feeling of control and power. But this is unrealistic: material sovereignty has faded away and only formal sovereignty remains and even then within important bounds. If national elites do not want to give up this mirage oasis of national politics, further European integration will not occur. As Pascal Lamy has put it: what has been specific about the European Communities as a regional governance experiment is the will to establish, clearly define and organise interdependence.<sup>29</sup> The will to integrate brought along an understanding as to the main objectives and the strategic vision, and this facilitated the institutional machinery and procedures to carry it forward. An agreement as to the vision carries along an agreement on methods.

In the history of European integration, whenever the will and the intellect have met, amazing things have followed; think of the constitutionalisation of the EC Treaties by the Court of Justice in the seminal cases, or in the recent citizenship cases. Europeans – all sectors of the European polity – must first realise and recognise that there is a problem, that the EU and the EC will not work with the Nice framework for decision-making because unanimity is almost impossible to achieve. They must realise that something is not quite right in the current European way of Constitution-making. Perhaps the vision is not shared. If this is seen as a problem, the next step is to decide to do something about it. It is both a matter of having the intellectual vision and the determination to carry it forward.

Of course some will refuse to see the present stalemate as a problem requiring any sort of solution. Others may recognise that there is a problem but may very well disagree on the diagnosis, and the treatment and prognosis will vary accordingly. Listening to the different reactions to the present predicament, one can detect that almost each and every European leader gives a different diagnosis; institutional crisis, leadership crisis, lack of maturity, selfishness and lack of vision, conflicting models of Europe (social, market, enlarged, enhanced). To my view, the most sincere recognition to date made by any of the EU leaders, was that of the acting President of the EU, Finnish Prime Minister Matti Vanhanen in his address to the EP (21 June 2006): ‘The

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<sup>29</sup> ‘Gouvernance Globale: Lecons d’Europe’, speech at the *Conference Gunnar Myrdal* at the UN Economic Commission for Europe, 22 February 2005. Other regional experiments are Mercosur, the Andine Community, ASEAN, the African Union, NAFTA, CAFTA, etc.



EU faces two key problems that form a vicious circle: weak legitimacy and ineffective decision-making which lead to a lack of visible, tangible results. The leaders of the Member States have not been willing to formulate sufficiently bold solutions for the future since this would mean compromising their national position. The consequence is a Union that cannot deliver.'

What can be done now? The scenarios arising from the different diagnoses are quite different and each would require a different therapy proposal, but we can try to identify some possible ways for European Constitutionalism to proceed:

1. *Crisis scenario.* This would mean dragging on and limping forward, a process of mutual accusations as to what went wrong and negative reactions towards enlargement neglecting the fact that it plays a fundamental role in consolidating the EU's security policy and in securing positive economic, legal and political changes in the candidate countries. In this crisis scenario we find the blame game and ambivalent or contradictory attitudes of the Heads of government/state: first they ask all Member States to ratify, now they ask those who have not yet done so to slow down the process. It would be the first time an international treaty was signed but then removed from ratification allegedly out of fear of rejection, but then the governing class claim that the polity must be closer to the citizens. This scenario is one of contradictions and criticism of others. Everyone is in, simply because being out is not seen as an option or is seen as a failure. An expanded version of this crisis scenario would add that things would need to get even worse before starting to get better; the EU decision-making in crucial matters will be simply blocked and leaders will all realise they must actually do something about the rules.<sup>30</sup>

2. *Plan B.* This strategy would see what can be saved from the Constitutional Treaty and move to new, more focussed and limited Intergovernmental Conferences. Most of Part One of the Constitutional Treaty would probably be turned into a Treaty amending the Treaty on European Union. The EC Treaty could be amended in order to add some enhanced spheres of cooperation like the fight against global warming. Any new adventure of cooperation between Member States would be limited to the diplomatic level outside the EU, or to the open method of coordination within the EU. This seems to be the *realistic* approach followed by the German Presidency in order to

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<sup>30</sup> See Baldwin (2006, 14): '...at some stage, a 'tipping point' will be reached and a broad consensus will emerge in the EU27 that an institutional reform is necessary. It is impossible to predict what collection of sweeteners will be necessary to get the deal done, but it is easy to predict that the core of the grand bargain will involve the issues identified by the European Council in 1993 – Council of Ministers voting and composition of the Commission.'

accommodate for the reservations of those Member States who are reluctant to continue with the process of ratification of the Constitutional Treaty.

3. *Variant of Plan B, piecemeal approach.* Joakim Nergelius (2005, 426) has forecast that after some time has passed, the Member States may agree, unanimously, on different parts of the Constitution (i.e. the most important and urgent ones).<sup>31</sup> Then, step by step, major parts of the Constitution may enter into force by traditional international agreements; other parts may be subject to new inter-institutional agreements and different kind of 'soft law-arrangements'.

4. *A new written Constitution.* This would involve starting a completely new process to elect a different, more representative, Convention and go through it all over again, hopefully with a different, less Philadelphian format, but risking yet another rejection by the electorate because of insistence on the unanimity rule and on the principle of national sovereignty.

5. *Ad hoc agreements between Member States.* Another option would consist in actually implementing some of the elements, ideas and formulas of the Constitutional Treaty as a matter of convention between the Member States; items like the participation of national and regional parliaments, the subsidiarity alert mechanism,<sup>32</sup> the popular legislative initiative, to name but a few. In this vein, the Commission has announced that it will send its legislative proposals to national parliaments for consultation.<sup>33</sup> The Charter of Fundamental Rights was actually adopted at Nice in the year 2000, and it would be a very good idea, in my humble opinion, to give it legal force and make it invocable by individuals before the EU institutions and the Member State authorities.

6. *Overcoming the Peter Pan syndrome* and moving towards a real Constitution, either with a ratification process of 4/5ths (20/25 or 21/27) of the Member States, or by adopting a Constitution amongst those Member States that do ratify it, leaving aside those who do not. The proposal would be to keep the Common Market or the European Economic Area (EEA), the European Community and create a European Political Community falling short of statehood. This would probably

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<sup>31</sup> Nergelius warns that this approach may pose acceptability problems to the citizens of the EU.

<sup>32</sup> Some national parliaments have actually started discussions about how to organise this, especially in systems with regional parliaments and state-level parliaments having to coordinate to meet strict deadlines.

<sup>33</sup> The press reported this news at the COSAC meeting of September 2006 in Helsinki.

introduce variable geometry into the system in order to let those who wish more integration to proceed. Something of the sort exists right now with the EEA Agreement and with the existing forms of variable geometry: the Euro and EMU, Schengen, enhanced co-operation mechanisms, even the Working Time Directive has opt-outs. Surprisingly enough, this option seems to carry support throughout Europe.<sup>34</sup> Of course the whole nature of Europe would change radically, but for the better.

7. *Recovering constitutionalism as distinct from Constitution.* This is probably the European way of constitutionalism. Regardless of whether any option of the above is finally followed, the strategic thinking initiated with Lisbon and the White Paper of Governance will, and should continue and bring along important, but silent, changes in our constitutional culture. The Commission is putting forward a so-called plan D to revive the Future of Europe through dialogue, democracy and debate. If one adds de-centralisation, as Commissioner Hubner has accepted before the Committee of the Regions, one will be aiming at results similar to those sought by the Governance Paper. Equally, the strategic legal thinking by the Court of Justice should be aware of all these processes when interpreting and developing the law. The Commission is suggesting a restatement of the values and aims of the EU, in order to commemorate the 50th anniversary of the Treaty of Rome.<sup>35</sup>

Which of these ways will prevail, it is too early to say. Before the referendum shock, many enthusiastic commentators were talking about the Constitutional Treaty as a long-lasting process for a whole generation. That sort of triumphant attitude is considered quite naïve in hindsight. Perhaps one of the defining features of the European Way of Constitutionalism, periodic evolution of the system by means of diplomatic-technocratic formulae like the Intergovernmental Conferences or by means of more inclusive formulae like the Conventions, has some value in it; precisely because the constitutional texts, the Treaties, are not petrified into something that should not be

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<sup>34</sup> According to a Flash Eurobarometer (159/2) on the Future Constitution published in 2004, a majority of European Union citizens (61%) say they rather agree with a proposal according to which the Member States that so wish could increase their co-operation without waiting for the others. One sees a firmer rate of acceptance for this proposal in countries that tend to be more 'Eurosceptical' like the United Kingdom or Poland. The House of Lords report quoted above also suggests this could be an option. Obviously reinforced or enhanced co-operation is very difficult with the current Nice Treaty.

<sup>35</sup> 'The Commission is proposing that the Member States re-commit themselves, through a declaration, to the values and aims of the European Union. Some would say a re-foundation of Europe. Why not? A re-foundation of Europe – "une obligation d'engagement" – an obligation to deliver.' Speech of President Barroso 'A Citizens Agenda – Delivering Results for Europe' at The Europe Conference, Frederiksdal, Denmark 19 May 2006.

changed and amended. Instead, they are seen as elastic, interpretive, and dynamic strategic documents adapted to the new challenges in a competitive, global world, and provisional in their answers. Perhaps this is what distinguishes our constitutional culture, which I would call soft constitutionalism, the ongoing strategic debate with provisional answers and only few certitudes: those collected as our basic rights in the Charter.

What remains clear, as confirmed by Eurobarometer's qualitative study, is that in spite of all the pessimism following the ratification impasse, European citizens still retain strong expectations towards the European Union, and that the perceived gap between ideal and reality does not cause citizens to question the essence of the European project. Citizens want the EU to contribute to peace and encourage mutual understanding between States while asserting itself and being competitive and influential on the world stage. They want more unity and cohesion, a generalised Euro for all the EU, and greater 'harmonisation' but with smoother, less 'bureaucratic' and more efficient workings. They want the EU to contribute to people's well-being through economic development aiming to create jobs and to offer an equalitarian and generous social protection system. They also stress the need for solidarity in favour of less developed countries or regions so that comparable living standards result.<sup>36</sup> This is the essence of the European model based on principles like the open and democratic society with an open, social market economy and high environmental standards in a context of global competition, demographic shifts (see another of those strategic documents: COM(2006) 571 final), pressure on natural and energy resources, worrying climate change and global warming. It might be that only some of the Member States are willing and ready to move into a closer union to achieve these goals while the rest prefer to stay with the rules of the internal market, still to be materialised in many ways. This would of course require a consensus amongst those Member States who move faster to drop the right to veto amongst themselves in their closer union, and a consensus with the total number to allow them to move closer into a core constitutional arrangement for the avant-garde.

So Europe will become whatever its peoples, its citizens want it to become.<sup>37</sup>

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<sup>36</sup> See [http://ec.europa.eu/public\\_opinion/quali/ql\\_futur\\_en.pdf](http://ec.europa.eu/public_opinion/quali/ql_futur_en.pdf).

<sup>37</sup> I draw inspiration on this point from Antonio Padoa Schioppa, 'Europe: Values and Identity, Unity and Diversity', lecture given in Bilbao, 11–12 April 2006, in the context of a Conference organised by the Basque Government as a contribution to Plan D: 'It is not acceptable for whoever does not share the prospect of a European federal union not to resign itself to rejecting it, but wishing to prevent those who do share it from achieving it. Will the political class, above all governments, starting with the French government (because the real

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knot that has to be untied is France, not England), know how to finally renounce the semblance of an apparent sovereignty in order to find the capability of deciding our future at the European level? We do not know. The answer also depends on each one of us.'