

CROSSROADS

An interdisciplinary journal for the study
of history, philosophy, religion and classics

VOLUME III ISSUE I 2008

ISSN: 1833-878X

Pages 16-25

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Does Europe Need a Constitution?

ABSTRACT

The notion of a European constitution is highly divisive, and has been intensely debated for several decades now. Following the 2005 failure to ratify a proposed European Constitutional treaty document, the text of a 'Reform Treaty' has been agreed upon. The Reform Treaty will be submitted to the European leaders on 13 December 2007, after which each member state of the Union will have to ratify it. European constitutional issues and debates thus remain highly topical. This article analyses the main arguments for and against a codified European constitutional document, and concludes that at this moment in time the prospect of an EU constitution would create more problems than it could rectify.

BIOGRAPHY

Lillian Goldsmith is an Arts/Law graduate, currently undertaking a Masters in European Studies at Monash University. Her thesis focuses on EU security and defense issues, in conjunction with a forward-looking analysis of the EU-ASEAN regional security relationship.

DOES EUROPE NEED A CONSTITUTION?

INTRODUCTION

The notion of a European constitution is highly divisive, and has been intensely debated for several decades now. After efforts during the 1980s and 1990s foundered,ⁱ calls for an EEC/EU constitution intensified with the fall of the Iron Curtain and the looming Eastern enlargement. It is generally agreed that the most recent constitutional debate was sparked by a speech delivered on 12 May 2000 at the Humboldt University in Berlin. Joschka Fischer, German Foreign Minister, spoke in a private capacity in the debate on the future of the European Union, proposing a constitutional treaty be concluded. In 2002 the Laeken Declaration was released, posing fifty questions on the proposed development of the European Union. The Declaration was followed up by the 2002 launch of the Convention on the Future of Europe, and in 2003 an Inter-Governmental Conference draft treaty was approved. However, in 2005 the draft treaty was rejected by national referenda held in France and the Netherlands. A period of reflection followed and it now appears likely that a revised draft known as the Reform Treaty will be approved. There are important arguments both for and against the need for a European constitution. Arguments *against* reason variously that Europe already has an uncodified constitution, that the issue is too divisive and would entrench unwanted reform, and that the EU does not possess the necessary prerequisites - such as a homogenous demos - to install a constitution. Arguments *for* a constitution include the notion of constitutional patriotism, an argument for greater clarification of and identification with a European *telos*, and the need for institutional reform. There is perhaps the temptation to see a European constitution as a universal panacea for all the problems of a European Union under siege. Ultimately this paper will conclude that the divisive nature of a constitution in the European Union today obscures the relative usefulness of the notion. Instead, it would perhaps be more useful to progress with treaty streamlining and continued public debate until such time as popular support is more firmly behind the notion of a European Constitution.

DEFINITION

'A constitution is the fountain head from which other laws flow and derive validity.'ⁱⁱ Constitutions are found in many different forms, and fulfil various functions. The precise nature of the term changes dependent on the time, place and the nature of the organism it is being applied to. A constitution may be the founding text of a State. It may be written or unwritten,ⁱⁱⁱ rigid or flexible, normative or merely descriptive.^{iv} However as Dehousse and Coussens point out, a constitution can also be the founding text of an international organisation: 'Revealingly, the Universal Postal Union... has a Constitution. The International Labour Organisation is another example.'^v Bellamy & Schoenlau take a prescriptive stance, stating that 'a constitution both establishes a polity, defining who the people subject to it are and within which functional and territorial spheres, and creates a form of regime'.^{vi} The typical *content* of a constitution can also vary. Essentially it describes how a state is constituted and functions.^{vii} 'A common argument in political science is that constitutions are created to solve collective action problems.'^{viii} Thus, Ziller highlights Article 16 of the *Déclaration des Droits de l'Homme et du Citoyen* of 26 August 1789: '*Toute société dans laquelle la garantie des droits n'est pas assurée ni la séparation des pouvoirs déterminée n'a point de Constitution*'. For Ziller the common action problems of society are the organisation of the relationship between the state and citizen, and the establishment of checks and balances between institutions.^{ix} Føllesdal agrees with this statement, and defines the four functions of a constitution as follows:

A constitution creates new institutions or codifies existing institutions with specified competences in the form of bundles of legal powers. It curbs such power...by securing human rights and other legal immunities and powers, and by dividing political authority among several institutions. A constitution may also [indicate] the goals to be pursued, typically... stated in preambles. Fourthly, a constitution contains rules for constitutional change.^x

Here the idea emerges of a constitution as the founding document/s of an organisation, typically concerned with the organisation and allocation of power between *les gouvernants* and *les gouvernés*.

In any conceptual definition of 'constitution', it is important to appreciate from where an individual constitution gains its authority. A constitution does not anchor a society's legal system by virtue of name alone. It must draw its authority from somewhere.^{xi} In the case of an international organisation, constitutional authority is usually conferred via member-state ratification of the founding treaty. In regards to a democratic nation-state 'it is generally agreed that...whatever the nature of the constitution, its authority flows from the people of the polity.'^{xii} At the time of the French Revolution, Thomas Paine elucidated more clearly that, 'A constitution is

not the act of a Government, but of a people constituting a Government, and a Government without a constitution is power without right... A constitution is a thing antecedent to a Government; and a Government is only the creation of a constitution.^{xiii}

Thus in a typical democratic nation-state of Western Europe, the constitutional rules gain their legitimacy from the polity. This seemingly benign point enjoys great prominence in the European constitutional debate and will be revisited at a later point.

PRE-EXISTING ORGANIC CONSTITUTION?

In assessing the need for a European constitution, it is important to consider to what extent one already exists. Weiler makes a convincing argument: there is general agreement in legal circles that an uncodified, organic constitution has been established through integration.^{xiv} More precisely, constitutive rules can be found in a variety of documents, as opposed to a single, overarching, codified document. In 1986, the European Court of Justice delivered a landmark decision, *Les Verts*, which described the founding treaties of the EEC as a 'constitutional charter'.^{xv} Then in 1991 in its *Opinion of the EEA Agreement*, the Court said:

The EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals.^{xvi}

Crucially, it is possible to distil certain fundamental constitutional principles from the European treaties. The most important of these principles are the twin notions of the supremacy of community law and its direct effect on the member-states.^{xvii} A further fundamental principle is that of pre-emption by community law, so that when the EU moves to act in an area, member states lose their ability to act in that area henceforth.^{xviii} Further identifiable constitutional rights include a right to effective legal protection,^{xix} and a catalogue of fundamental rights upheld as part of the general principles of law whose observance the European Court of Justice ensures.^{xx} Returning to the definitions of a constitution offered above, it seems that the unwritten European constitution fulfils at least partly Føllesdal's constitutional criteria.^{xxi} It creates institutions with specified competences; it, partially, curbs such power; and it contains some rules for treaty reform. There are also indications, to an extent, of some of the goals to be pursued by the Union.^{xxii}

Concerning the significance of an uncodified constitution in the larger constitutional debate, in a key speech given in 2000 British Prime Minister Tony Blair commented:

In practice I suspect that, given the sheer diversity and complexity of the EU, its constitution, like the British constitution, will continue to be found in a number of different treaties, laws and precedents. ... A constitutional debate must not necessarily end with a single, legally binding document called a Constitution for an entity as dynamic as the EU.^{xxiii}

In the same speech however, Blair went on to call for a 'statement of principles' via a political document forming a charter of competences.^{xxiv} This suggestion aptly highlights a key criticism levelled at the 'unwritten constitution' school: that an unwritten constitution is too amorphous, inaccessible and unwieldy, especially in an enlarged EU of 27 member-states.^{xxv} As the 2001 Laeken Declaration pointed out: 'The European Union currently has four Treaties. The objectives, powers and policy instruments of the Union are spread across those Treaties. If we are to have greater transparency, simplification is essential.'^{xxvi} Critics argue that even if the EU is underpinned by various constitutional principles, it would benefit greatly from clearer definition of power sharing and organisational structure. It is here that a *written* European constitution would be of great benefit.

Following on from this criticism of an unwritten European constitution, Grimm does point out that, 'legal binding of the public power exercised by the [EU] is not lacking.'^{xxvii} However, he is uncertain that this existing legal binding is sufficient.^{xxviii} Building on this contention Vaubel notes that the existing treaties 'do not constrain the power of the European institutions in an effective, democratic and incentive-compatible way.'^{xxix} More precisely, by examining the main EU organs,^{xxx} Vaubel argues that the present constituting treaties of the EU violate firstly the principle of the separation of powers, secondly the democratic principle and thirdly the

principle of subsidiarity.^{xxxii} These arguments concerning the institutional deficiencies of the current European Union are accepted by a significant number of commentators.^{xxxiii} Thus critics argue that an unwritten constitution is not sufficient to govern such a large and complex organisation as the EU, and that a written constitution would be more appropriate.^{xxxiii} There is therefore a tendency to view a written European Constitution as an opportunity to reform the EU, and to bring it into line with liberal democratic principles on the organisation of governmental power. A further issue for some writers is that uncodified constitutional principles enjoy no special pre-eminence over other bodies of law, and have no status of unrepealability. Some argue that this is cause for concern, and that important constitutional principles must be entrenched in order to safeguard them properly.^{xxxiv} These are all significant criticisms, suggesting that further analysis of whether Europe needs a (codified) constitution should be undertaken.

OPPORTUNITY FOR INSTITUTIONAL REFORM?

In light of the inherent difficulties in operating under an unwritten constitution, a pressing argument for a European constitution has centred on the need for EU reform. There is broad agreement that the EU in its current form designed primarily for 12 member states,^{xxxv} is suffering under the strain of 27 member states. Structural problems have emerged from an asymmetry between dense horizontal market integration and looser vertical political integration of individualist national governments, compounded by 'a corresponding deficit in the democratic legitimation of EU decisions'.^{xxxvi} Increasingly, an EU constitution has been seen as an appropriate medium for reform.^{xxxvii} There is growing awareness that successive treaties in Maastricht (1992), Amsterdam (1997) and Nice (1999) had failed to properly address institutional reform and that further clarification is required.^{xxxviii} As President of the 2003 Convention on the Future of Europe and former President of France, Valéry Giscard d'Estaing identified key areas where reform were needed, in line with the Laeken Declaration objectives of 2001.^{xxxix} In particular, d'Estaing highlighted the need for simplification of EU instruments, the Commission crises of the 1990s and the difficulties of reaching consensus in an enlarged EU, the democratic deficit^{xl} and the need to improve the perceived accessibility of citizens to the EU as well as the need for a clarification of institutional structure and the division of competencies and, finally, the issue of a common foreign policy.^{xli}

Whilst there has been general consensus on the need for reform, debate on what *type* of reform can be separated into two broad camps: the supranationalist approach, and the federalist approach. 'In addition, national and ideological differences cut across this divide.'^{xlii} Supranationalists campaign for the creation of a true European polity, and the creation of a European superstate. In line with this ambition, a constitution is seen as having the potential to cement the notion of Europe as a supranational order and contribute to the success of the supranational vision.^{xliii} On the other hand, those in the opposing federalist camp advocate a vision of the EU as a 'Federation of Nation States'. Federalists are often more cautious about a European constitution. They recognise that reform via the implementation of a constitution will bring about greater surety and stability. However, constantly on guard against measures aimed at superseding the nation-state, federalists warn that the constitution must entrench the individual power and identity of member-states.

Therefore reformists argue for a constitution on the basis that it will help implement various goals and, crucially, help to legitimise the EU by reducing the democratic deficit. However, the obvious answer to reformists of either ilk is that treaty reform can be carried out without recourse to a European constitution. Treaty-creation and subsequent modification and reform have been features of the EEC/EU since its inception. By itself, the need for reform is insufficient justification for a European constitutional document. As Skach points out, there are fundamental problems with the reform argument. The first issue revolves around assertions that a formal constitution will help solve the EU legitimacy deficit. 'There is simply no comparative historical evidence that this is indeed how one builds legitimacy – through a written constitution.'^{xliv} On the other hand, there are well-established democratic and legitimate states such as the UK, New Zealand and Israel who operate without a codified constitution. A constitution *per se* is not a legitimising force. It must be accompanied by judicial backing and a strong sense of popular support in order to help overcome the perceived democratic deficit. Those who argue for reform via a constitution however, assert that it is the provisions contained within the document which will help enshrine legitimacy. And it is here that a second problem emerges. 'If the crafting of a formal, written constitution is seen as an opportunity to clarify all rules, and if this involves trying to produce a very detailed rigid document, pinning down exact concerns and even negotiating immediate political conflicts, then such a constitution may actually work against the goal of setting up a stable, effective system for governing.'^{xlv}

The contentious issue of religion within the failed Constitutional Treaty provides an apt example of a destabilising issue within the constitutional process. Furthermore, the negotiating and compromising process may result in the codification of unpopular measures, which could cause possible future resentment and further

destabilise the EU. As Chambers points out, a far less destabilising approach would be an evolutionary one, whereby the constitution is seen as: ‘a model of agreement based on maintaining a conversation over time rather than concluding a contract’.^{xlvi} This approach resonates well with Blair’s proposed ‘Statement of Principles’ discussed above. On the whole, it is apparent the EU needs legislation reform in order to cope with enlargement strains. Yet from a technical point of view it is not so apparent that a reform via a constitution is the best solution. However, the debate over a European constitution encompasses more than the issue of reform.

A EUROPEAN *TELOS*

A related but distinct argument *for* a European constitution centres on the need for redefinition of a European *telos* and vision for the integration project. As Dobson & Follesdal point out, ‘Sharper definition of the EU in its international environment [demands] greater unity of purpose within the EU. It also [requires] more public legitimacy and support than the effective performance of bureaucrats and technocrats in the duller reaches of economic policy could provide.’^{xlvii} The assumption behind the *telos* argument is that the process of adopting a constitution would generate public debate and eventual agreement on an overall vision for Europe. This view reiterates the notion that the development thus far of EU constitutional rules has lacked public input and debate. Thus Weiler talks of a constitution without constitutionalism, and argues that, ‘What Europe needs...is not a constitution but an ethos and *telos* to justify the constitutionalism it has already embraced.’^{xlviii} Eriksen & Fossum are in accord when they argue that, ‘the EU has developed a set of binding norms and rules but their principled and practical status is unclear and incomplete. They have not been properly debated’.^{xlix} There is a clear hope that a written constitution would provide direction by urging the EU towards a common goal agreed upon by public consensus. The symbolic institution of a constitution could assist in both formulating and enshrining a sense of common destiny within the European peoples. This is a similar argument to the notion of constitutional patriotism addressed below.

THE NO DEMOS THEORY

It is important to recognise however that there are those who argue vehemently that Europe does not need a constitution. A highly controversial dispute within the debate rages over the so called ‘No Demos’ theory. The No Demos theory argues that a European constitution is inappropriate for Europe, on the basis that Europe lacks a cohesive, unitary demos with the power to legitimise a constitution.^l The No Demos theory is underpinned by the fear that a European Constitution would entrench Europe as a superstate.^{li} In turn, this notion is based on the argument that a constitution is a formative or constitutive feature of the nation-state: ‘Constitutions form the basis of states. Supranational institutions, by contrast, have their legal basis in constitutional treaties.’^{liii} At present the EU is anchored by a complex system of international treaties, which draw legal authority for the legal principle of *pacta sunt servanda*.^{liiii} However, within a state, the legitimacy for the constitution is drawn from the people.^{liv} This is the basic tenet of Western liberal democratic nations. It is therefore possible to argue that within this ideological framework, democracy is the only acceptable method of legitimating a constitution. However, as Weiler summarises: ‘Democracy does not exist in a vacuum. It is premised on the existence of a polity with members – the Demos – by whom and for whom democratic discourse with its many variants take place.’^{lv} It is only within the political boundaries of the Demos that a majority has the authority and legitimacy to compel a minority. Therefore, without a Demos there can be no operating democracy.^{lvi} The argument runs that if Europe had a constitution, its authority would then stem from the constitution, and no longer be drawn from principles of international law. At this point, it would need to be legitimated by a majority of the governed populus, in order to align with the democratic principles underpinning the European Union. Thus to be legitimate, any European constitution would have to draw its power from the people of the EU. The main contention of the No Demos theory however is that there is no single European demos capable of giving authorised majoritarian approval, and that therefore there can be no legitimate European constitution. From this logic is drawn the (perhaps slightly hysterical) conclusion that a constitution that is not empowered via the people is illegitimate and verges on the despotic.^{lvii}

The lack of a European demos is asserted through empirical observance. ‘Demos’ is employed here in the nation-based or ethnic conception of the term.^{lviii} Objectively, a pan-European organic homogeneity, on which the subjective elements of the demos are constructed, is lacking. The subjective elements of the demos include a sense of shared collective identity and loyalty based on a common culture and historical view,^{lix} generally equating to the German notion of the *Volk*.^{lx} The theory does not accept that the last fifty-odd years of peace, economic unity and increasing social intercourse can be substituted for the traditional bonds of the demos. As Weiler points out, there are two serious implications resulting from this view. The first is that *sans* pan-European Demos, there can be no pan-European democracy. The second, Weiler contends, is that the theory is not simply an empirical observation on the lack of European demos. Rather, it is a normative prescription that

precludes even a possible future European demos. Thus for the No Demos school, the *telos* of European integration is, ‘...an ever closer union among the *peoples* of Europe.’^{lxi} It is not about creating a homogenous, pan-European body, ‘a European nation or people.’^{lxii} This is an argument against a European constitution on two grounds. The first is a technical argument that there lacks a legitimate structural basis on which to found a constitution. The second argument is normative, and asserts that in the interests of preserving individual nation-state identities, a constitution and the ‘suprastate’, which would ‘inevitably’ result from the constitution, is undesirable.

CONSTITUTIONAL PATRIOTISM

However, there are strong rejoinders to the No Demos argument arguing *for* a European constitution. The main riposte is founded on the concept of constitutional patriotism. Despite the arguments of the No Demos theory, the establishment of a European identity has long been considered essential to prevent Europe re-fragmenting into religious, ethnic and national splinters.^{lxiii} For this reason commentators such as German philosopher Jürgen Habermas consider that for the EU to remain a stable, lasting political community, it is essential that citizens identify with the organisation.^{lxiv} As the No Demos theory accurately points out, European identity politics thus far have enjoyed limited success.^{lxv} Constitutional patriotism argues that it is for this reason that a written European constitution is necessary, in order ‘to bring citizens closer to the European design and European Institutions.’^{lxvi} Habermas thus proposes that a European constitution be founded on civic patriotism. He emphasises the distinction between citizenship and ‘a community of fate shaped by common descent, language and history’,^{lxvii} and argues that the fundamental mistake within the No Demos theory is its failure to make this distinction. Habermas’ argument for a European constitution is founded on this precept.

There is a long intellectual tradition of distinguishing between civic and ethnic membership of a community.^{lxviii} Post-World War Two, the theme has been taken up by liberal philosopher Karl Jaspers^{lxix} and by Jaspers’ pupil, the German Dolf Sternberger. More recently it has been examined by thinkers such as Habermas, Müller and Weiler. Briefly, the term ‘nation-state’ as generally understood in Western Europe is a conglomeration of *nation* – ethnic culture – with *state* – as republican sovereignty. Yet for Habermas, ‘A nation of citizens must not be confused with a community of fate shaped by common descent, language and history.’^{lxx} In the English-speaking world, this concept is often confused under the catch-all term ‘citizenship’, a factor which has been exploited by the No Demos argument with its criticism of the Maastricht innovation of European citizenship.^{lxxi} A more precise expression is found in the French language, which makes a distinction between *citoyenneté* referring to membership of a political community, and *nationalité*, which is the legal status linking an individual to the state.^{lxxii} The No Demos argument tends to fuse these two notions of ethnic-culture and political citizenship, as is traditional under the classic Westphalian model of the nation-state. However, Habermas argues that nationalism is in fact a specific and deliberate construct^{lxxiii} that has been utilised by politics and various interest groups. It has been the exploitation of constructed nationality that has allowed the imposition of cultural and ethnic homogeneity within states and the creation of European national *demos*. Thus for Habermas, nationalism provides empirical evidence that a ‘community of strangers’ can be consciously created. This is in contrast to the No Demos school, which asserts that nationalism is an organic, irreplicable process.

Habermas’ own work rejects the traditional No Demos conception of organic cultural-ethnic citizenship,^{lxxiv} and differentiates between a common *political* culture and a plurality of national traditions and historiography. The philosopher argues that the concept of citizenship is based on republican ideals, in which the state is founded by the praxis of citizens actively exercising their civil rights.^{lxxv} Applying this in the European context, constitutional patriotism rests upon three central tenets: the ethos of the post-war welfare state, the universality of human rights and the constitutional principles of sovereign democracy. Habermas also emphasises that recent history also plays a significant role in creating a shared European culture. ‘What forms the common core of a European identity is the character of the painful learning process it has gone through...It is the lasting memory of nationalist excess and moral abyss that lends to our present commitments the quality of a peculiar achievement.’^{lxxvi}

Constitutional patriotism asserts that European individuals across the continent will join in legitimation of these shared values, stimulated by the institution of a European constitution. Allegiance to this common political culture will form the basis for a more meaningful European citizenship. Habermas puts forward Switzerland and Belgium as examples of functioning multi-nation states, to show that political citizenship does not rely on the traditional one-nation, one-state conception. He then extrapolates from these examples to argue that in fact there can be a, ‘common, supranationally shared political culture of the European Community’ under the auspices of a European constitution.^{lxxvii}

Essentially, Habermas conceives of a European constitution and constitutional patriotism theory as a solution to ethnic-nationalist division within the European Union. A Constitution would signify European consensus, and be the 'symbolic crystallisation of a political act of foundation'.^{lxxxviii} Although Habermas considers the fundamental prerequisites for a pan-Europe civic culture to be in place, he feels that a constitution is needed to prevent the EU degenerating into a loose economic alliance: 'A European constitution would not only make manifest the shift in powers that has already taken place. It would also release and foster further shifts.'^{lxxxix} Habermas envisions that the constitution will combat asymmetry between economic and political integration in the EU, and the corresponding democratic deficit.^{lxxx} The intellectual elites and mass media are required under the model to help create a common public sphere to foster a shared political community.^{lxxxii} This process will then help contribute to a sense of 'European constitutional patriotism [which] would grow out of different interpretations of the same universalist rights and constitutional principles'.^{lxxxiii} Thus constitutional patriotism reiterates the argument that a European Constitution is needed to enhance reform, and argues further that a Constitution would stimulate a European *telos* and community spirit. Constitutional patriotism justifies the need for a European constitution as part of a unifying vision for the new, integrated Europe.

As Müller points out however, a major criticism at this point is that a European constitution and the notion of constitutional patriotism generally are too abstract to command the hearts and minds of citizens.^{lxxxiii} Modern procedural liberalism has no room for the strong passions of belonging, loyalty, and allegiance, and so it cannot inspire the moral and civic engagement self-government requires.^{lxxxiv} Ultimately, this is an argument that can only be resolved by empirical evidence over time. A second important criticism Müller makes is that Habermasian constitutional patriotism underestimates the role of particularist political cultures in grounding universalistic principles of democracy and justice.^{lxxxv} Furthermore, critics argue that Habermas and his predecessors draw upon a common Germanic post-war culture in which stridently ethnic conceptions of nationality are considered taboo. The post-war German nation prefers instead to privilege a civic conception of political community, underpinned by the rule of law. Thus Müller argues that constitutional patriotism applies best to the specific historical circumstances of Germany, and is less convincing as justification for a European constitution. However, whilst it is important to recognise the circumstances that gave birth to the theory, there is still objective merit in Habermas' concept of a community *artificially constructed* in order to pursue certain goals and ideals. It is the underlying theory - that it is possible to construct a pan-European *demos* - that best justifies the need for a European constitution.

CONCLUSION

Inevitably, any organisation which comes together with a common purpose, or a series of common purposes, will tend to create a formal, political structure by which those purposes may be achieved and a general system according to which the members of the organisation agree to be governed.^{lxxxvi} This process of creation is evident within the EU of the past and the present and there exists already 'the embryo of a European Constitution'.^{lxxxvii} Perhaps the most relevant observation for the purposes of this article is to note that the enlarged EU of 27 member-states operates today *without* a formally codified constitution. As McGiffen observed prior to the 2005 constitutional referenda failures: '...in the short term the inability to agree a Constitution would have no profound consequences, especially as most of the more far reaching changes would have been implemented only after a considerable delay'.^{lxxxix} Thus cynics see the constitutional debate as a largely rhetorical exercise which consolidates but does not surpass the achievements of recent intergovernmental conferences or fundamentally change the nature of the EU.^{xc} Some deny even the basic infrastructure of a *demos* necessary to implement a constitution. Idealists such as Habermas view it as offering the potential for a new departure that replaces intergovernmental bargaining with deliberation to produce a genuine European consensus.^{xci} As previously observed, there is a tendency to herald a European constitution as a universal panacea, envisaging it as a catalyst engineered to stimulate flagging Eurobarometer polls and to revitalise the collective project of Europe. Perhaps a more realistic method of achieving these goals however is further treaty reform, and potentially a basic Charter of Principles *à la* Blair, accompanied by serious attempts to stimulate pan-European discourse and to engage the populace at large. These measures might prove more successful than the divisive and potentially politically destabilising institution of a European constitution. Whilst formal codification of Europe's constitution may be appropriate in a future political climate, it is difficult to argue that it is the best course forward at this point in Europe's evolution.

REFERENCES

- ⁱ An early agitator was the Italian federalist Altiero Spinelli, who founded a pro-constitutional group of Members of the European Parliament - the Crocodile Club - in 1980. In 1984 the European Parliament adopted the constitutional *Draft Treaty Establishing the European Union*, drafted by Spinelli. The proposal was quashed by the member-states however, and never got off the ground. In 1990 the Parliament set forth guidelines for a draft constitution for the European Union, and again in 1994 it mooted a resolution entitled the 'Constitution of the European Union'. Again, the various proposals failed to make it past the member-state executives.
- ⁱⁱ D. Pollard, N. Parpworth & D. Hughes, *Constitutional and Administrative Law*, 4th ed. (London: Oxford University Press, 2007), 1.
- ⁱⁱⁱ I.e. The UK has a longstanding constitutional tradition based on an on organic, unwritten constitution: P. Norton, *The Constitution in Flux* (Oxford: Basil Blackwell, 1984), 8.
- ^{iv} See generally: Pollard, Parpworth & Hughes, Ch.1.
- ^v F. Dehousse and W. Coussens, "The Perils of a European Constitution", 18 September 2002, European Policy Centre Working Papers, at: http://www.theepc.be/europe/strand_one_detail.asp?STR_ID=1&TWSEC=EPC%20Working%20Papers&TWD_OSS=&REFID=902, accessed: 10/10/07.
- ^{vi} R. Bellamy & Schoenlau in *Political Theory and the European Constitution*, eds. L. Dobson & R. Follesdal (London & New York: Routledge, 2004), 57.
- ^{vii} Pollard, Parpworth & Hughes, 2.
- ^{viii} I.e. Buchanan and Tullock (1962); Taylor (1976); Ostrom (1990). Cited in S. Hix, *The Political System of the European Union* 2nd ed. (Hampshire: Palgrave MacMillan, 2005), 111.
- ^{ix} J. Ziller, 'National Constitutional Concepts in the New Constitution for Europe', *European Constitutional Law Review*, vol 1, (2005), T.M.C.ASSER PRESS and Contributors, 247–271.
- ^x Andreas Føllesdal, *Drafting a European Constitution – Challenges and Opportunities* Constitutionalism Web-Papers, ConWEB No. 4/2002, <http://les1.man.ac.uk/conweb4-2002.pdf>.
- ^{xi} P. Lynch, N. Neuwahl and W. Rees, *Reforming the European Union from Maastricht to Amsterdam* (Essex: Pearson Education, 2000), 216.
- ^{xii} E. Eriksen and O. Fossum, eds., *Democracy in the European Union: integration through deliberation?* (New York: Routledge, 2000), 111.
- ^{xiii} Thomas Paine, 'The Rights of Man 1791-1792' in Lynch, Neuwahl et al, 218.
- ^{xiv} J. H. H. Weiler, "Does Europe Need a Constitution? Reflections on Demos, Telos and Ethos in the German Maastricht Decision." in *The Question of Europe*, eds. Peter Gowan and Perry Anderson (London: Verso, 1997): 265.; Pollard, Parpworth & Hughes, 2.
- ^{xv} Case 294/83, *Les Verts v European Parliament*, [1986] ECR 1339 ; [1987] 2 CMLR 343 at para. 22.
- ^{xvi} Opinion 1/91, *Re the Draft Treaty on a European Economic Area*, [1991] ECR I-6079.
- ^{xvii} Lynch, Neuwahl et al, 219; see also *Van Gend en Loos v Nederlands administratie der belastingen*, Case 26/62 [1963] ECR; *Costa v ENEL*, case 6/64 [1964] ECR 585
- ^{xviii} Lynch, Neuwahl et al (2000) 219; see for example, Case 83/78 *Pigs Marketing Board v Redmond*, [1978] ECR 2347.
- ^{xix} Curtin (1990) & Ross (1993) cited in Lynch, Neuwahl et al, 219
- ^{xx} See, especially, Case 29/69 *Stauders v Uhm* [1969] ECR 419 & Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.
- ^{xxi} Andreas Føllesdal, *Drafting a European Constitution – Challenges and Opportunities* Constitutionalism Web-Papers, ConWEB No. 4/2002, <http://les1.man.ac.uk/conweb4-2002.pdf>.
- ^{xxii} I.e. The Lisbon Agenda
- ^{xxiii} T. Blair, 'A super-power but not a super-state', *The Guardian*, 7 Oct. 2000, <http://www.guardian.co.uk/politics/2000/oct/07/uk.tonyblair>, accessed 22 Oct 07.
- ^{xxiv} *Ibid.*
- ^{xxv} S. McGiffen, *The European Union: A Critical Guide* (London: Pluto Press, 2005), 45.
- ^{xxvi} Laeken Declaration of 15 December 2001.
- ^{xxvii} D. Grimm, 'Does Europe Need a Constitution?', in *The Question of Europe*, P. Gowan and P. Anderson, eds. (London: Verso, 1997), 254.
- ^{xxviii} *Ibid.*
- ^{xxix} Vaubel in *Quo Vadis Europe?*, H. Siebert, ed. (Tuebingen: JCB Mohr, 1997), 10.
- ^{xxx} I.e. the European Commission, the Council, the European Parliament & the European Court of Justice.
- ^{xxxi} Vaubel in Siebert, 10.
- ^{xxxii} *Ibid.* See also: McGiffen, Ch 2; Grimm; G. Stuart, *The Making of Europe's Constitution* (London: Fabian Society, 2003); Hix.

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- ^{xxxiii} Pollard, Parpworth and Hughes, 45.
- ^{xxxiv} Pollard, Parpworth & Hughes, 3.
- ^{xxxv} Valery Giscard d'Estaing, "The Convention and the future of Europe: Issues and goals", 2002, 2. www.jeanmonnetprogram.org/seminar02/spring.htm, accessed: 10/10/07.
- ^{xxxvi} J. Habermas, "Why Europe Needs a Constitution", *New Left Review*, 11 (September-October 2001): 13.
- ^{xxxvii} L. Dobson and A. Follesdal, eds., *Political Theory and the European Constitution* (London & New York: Routledge, 2004), 1.
- ^{xxxviii} Dobson and Follesdal, 1; Pollard, Parpworth & Hughes, 341.
- ^{xxxix} Laeken Declaration of 15 December 2001.
- ^{xl} The democratic deficit is of especial concern: the term 'democratic deficit' refers to the powers that national parliaments have lost to intergovernmental non-majoritarian bodies of the European Union. G. Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford: Oxford University Press, 2005), 23. There are, however, commentators who argue that the problem is not so much a *democratic* deficit as a *political* deficit.
- ^{xli} D'Estaing, 1-9.
- ^{xlii} Bellamy and Schoenlau in Dobson and Follesdal, 57.
- ^{xliii} Habermas, 2001, 8.
- ^{xliv} C. Skach, 'We the Peoples? Constitutionalising the European Union', *Journal of Common Market Studies*, 43, 1 (2005): 153. Skach offers the USSR and Pinochet's Chile as examples of illegitimate polities which operated under a legal constitution.
- ^{xliv} Skach, 155.
- ^{xlvi} Chambers in *Democracy in the European Union: integration through deliberation?* E. Eriksen and O. Fossum, eds. (New York: Routledge, 2000), 143-144.
- ^{xlvi} Dobson & Follesdal, 2.
- ^{xlvi} Weiler in Eriksen & Fossum, 111.
- ^{xlvi} *Ibid.*
- ⁱ I.e. Boeckenforde, *Welchen Weg geht Europa ?* (1997) cited in Habermas, 2001, 15.
- ^{li} Eriksen & Fossum, 114.
- ^{lii} Grimm, 239.
- ^{liii} The international legal principle that, 'every treaty in force is binding upon the parties to it and must be performed by them in good faith': Art. 26, *Vienna Convention on the Law of Treaties*.
- ^{liiv} In line with the notion of popular sovereignty pioneered by Enlightenment thinkers such as Jean-Jacques Rousseau and John Locke.
- ^{lv} Weiler in R. Bellamy and D. Castiglione, *Constitutionalism in Transformation: European & Theoretical Perspectives* (Oxford: Blackwell Publishers, 1996), 111.
- ^{lvi} *Ibid.*
- ^{lvii} Weiler, 1997, 273.
- ^{lviii} *Ibid.*, 219.
- ^{lix} Weiler in Bellamy & Castiglione, 111.
- ^{lx} Weiler, 1997, 265.
- ^{lxi} Italics added.
- ^{lxii} Weiler in Bellamy & Castiglione, 111.
- ^{lxiii} E. B. Haas, *The Uniting of Europe, The Uniting of Europe* (Stanford: Stanford University Press, 1958), 16; U. Meyer-Cording, 'Die Europäische Integration als geistiger Entwicklungsprozeß', *ArchVR* 10 at 42, 45, 49, 58ff., 68 (1958): cited in Bellamy & Castiglione, 219.
- ^{lxiv} Habermas, 2001, 6.
- ^{lxv} Detailed data on this point can be found in the 'Eurobarometer', available: http://europa.eu.int/comm/public_opinion/archives/eb/eb59/eb59_en.htm.
- ^{lxvi} Preface, European Convention, Draft Treaty establishing a Constitution for Europe (18 July 2003).
- ^{lxvii} Habermas, 2001, 15.
- ^{lxviii} Including thinkers such as Immanuel Kant and Charles Montesquieu.
- ^{lxix} I.e. *The Question of German Guilt* (1946).
- ^{lxx} Habermas, 2001, 15.
- ^{lxxi} Weiler, 217.
- ^{lxxii} C. Shore, "Whither European Citizenship: Eros and Civilisation Revisited." *European Journal of Social Theory*, 7.1 (February 2004): 6.
- ^{lxxiii} J. Habermas, "Citizenship and National Identity: Some Reflections of the Future of Europe," *Praxis International*, 12.1 (April 1992): 3.
- ^{lxxiv} Eriksen & Fossum, 114.

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- ^{lxxv} Habermas, 1992, 3.
- ^{lxxvi} Habermas, 2001, 21.
- ^{lxxvii} Habermas, 1992, 7.
- ^{lxxviii} Habermas, 2001, 6.
- ^{lxxix} *Ibid.*, 17.
- ^{lxxx} *Ibid.*, 13.
- ^{lxxxi} *Ibid.*, 17. See further, Habermas' earlier work on the public sphere, including his *Theory of Communicative Action* (1981).
- ^{lxxxii} Habermas, 1992, 12.
- ^{lxxxiii} J. Müller, 'On the Origins of Constitutional Patriotism', *Contemporary Political Theory*, 5. 3 (2006): 1; Markell (2000) in Müller, 2.
- ^{lxxxiv} *Ibid.*
- ^{lxxxv} It has been asserted that the ethnic heritage of the European Enlightenment shows through in Habermas' argument. Habermas asserts the existence of a *universal* liberal political culture through which ethnicities can transcend their national culture and enter into a pan-European or global political culture. However, these universalist aspirations of constitutional patriotism are themselves grounded in a specific *European* ethnic heritage. Liberal democracy is a particular Western European ideology whose roots are anchored firmly in the western Enlightenment. This liberal heritage of democratic thought and universal rights is certainly not omnipresent on a global scale, and perhaps not even completely on a pan-European level. Thus, the argument becomes circular perhaps when Habermas argues for the transcending of ethnic nationalities towards a universal political culture, which is in fact the product of a specific ethnic national heritage itself. Müller, 1; see also Cecile Laborde, 'From Constitutional to Civic Patriotism', *British Journal of Political Science*, Cambridge University Press, 32 (2002): 591-612.
- ^{lxxxvi} Pollard, Parpworth & Hughes, 293.
- ^{lxxxvii} R. Ryssdal, 'On the Road to a European Constitutional Court', cited in Pollard, Parpworth & Hughes, 182.
- ^{lxxxviii} McGiffen, 164.
- ^{lxxxix} *Ibid.*
- ^{xc} A. Moravcsik, 'Reassessing Legitimacy in the European Union', *Journal of Common Market Studies*, 40. 4 (November 2002): 45.
- ^{xci} Bellamy & Schoenlau in Dobson & Follesdal, 56.