

The debate on Europe's constitutional future

Burca, Grainne de
European University Institute
Law Department
Villa Schifanoia
Via Boccaccio 121
I-50133 San Domenico di Fiesole. Italy

Iaz, lehen aldiz Europako Batasunean, Europako konstituzionalismoaren gaiak toki gailena hartu zuen agenda politikoan, Jschka Fischerek Europako etorkizuneko konstituzioaz egindako hitzaldia zela bide. Gaur egun eztabaida sendoa egiten ari da Europako konstituzioaren premiaz (edo premiarene ezaz), EBren itunaren erreformari buruzko 2004ko Gobeinuarteko Konferentziari begira. Txosten honek eztabaidaren alderdi batzuk aztertuko ditu, honako hauek bereziki: aginpide eta botere banaketaren arazoa, hazten ari den Europako Batasunean; eta Europako konstituzioa desiragarri ote den, europar herritartasun eta demokrazia indartuagoa izan gabe.

Giltza-Hitzak: EB. Europako konstituzioa. Konstituzionalismoa. Herritartasuna. Botere banaketa.

El año pasado, tema del constitucionalismo europeo fue colocado, por vez primera en la historia de la Unión Europea, en un lugar preponderante de la agenda política con motivo del discurso de Jschka Fischer sobre una futura constitución europea. Ahora se está produciendo un vigoroso debate sobre la necesidad (o no) de una constitución europea, antes de la próxima Conferencia Intergubernamental sobre la reforma del tratado de la UE en 2004. Esta ponencia examinará algunos aspectos del debate, incluida la cuestión de la división de autoridad y poder dentro de una creciente Unión Europea, y si es deseable una constitución europea sin una ciudadanía y democracia europeas más fuertes.

Palabras Clave: UE. Constitución europea. Constitucionalismo. Ciudadanía. División de poderes.

En dernier, le sujet du constitutionnalisme européen a été situé, pour la première fois dans l'histoire de l'Union Européenne, à une place prépondérante de l'agenda politique à l'occasion du discours de Jschka Fischer sur une future constitution européenne. Il se produit maintenant un débat vigoureux sur la nécessité (ou non) d'une constitution européenne, avant la prochaine Conférence Inter-gouvernementale sur la réforme du traité de l'UE en 2004. Cet exposé examinera quelques aspects du débat, y compris la question de la division d'autorité et de pouvoir au sein d'une Union Européenne croissante, et s'il est souhaitable d'avoir une constitution européenne sans une citoyenneté et une démocratie européennes plus fortes.

Mots Clés: UE. Constitution européenne. Constitutionnalisme. Citoyenneté. Division de pouvoirs.

This is a particularly interesting time for Europe for a number of reasons. We are currently in the situation where the so-called ‘post-Nice’ debate launched in January after the Nice Treaty was signed is being carried on across Europe (modestly called “the future of Europe” debate!) –even if still mainly by the political and academic elites– focusing on the question of Europe’s future as a constitutional entity and on a number of related issues identified by the heads of government at Nice

While the EU has been in a process of constant dynamic development for decades now, the first few decades can be characterized (crudely) as a relatively technocratic, market-dominated elite-driven process, beyond the gaze of the public and without any significant degree of popular interest. Successive developments and in particular successive treaty changes (several of which have required national referenda in various states before they could be ratified) have focused more and more public attention on the EU, but it is only in the last ten years that there has been any significant kind of articulated popular concern and debate about the European Union, generated in part by the huge ambitions of the Maastricht Treaty in 1992 and the then Danish no vote. The present moment in my view is one of great democratic opportunity, within a process which has been notoriously lacking in democratic input and legitimacy for a long time. There is clearly right now a shared sense –even, this time, amongst the elites– that Europe cannot continue without the stronger support and involvement of the peoples of Europe. Ireland’s recent no vote to Nice has in this context been a positive influence in highlighting the urgency and significance of the democratic weaknesses of the European system, and in particular of the existing reform processes. The “reform process” to date has been the Intergovernmental Conference system for changing the Treaties –a closed system of diplomatic and official negotiations and in the final analysis of political horse-trading with almost no democratic input and minimal public discussion. The original Danish no to Maastricht and Ireland’s no this time around provide very important moments of democratic participation. The problem is, of course, that due to the nature of the only effective channels of input provided, they are forced to be crude and ‘negative’ forms of participation– to say no to an entire package which was negotiated with little or no democratic input, without having any opportunity to influence or reshape what might be decided in the future. And this is precisely why the current moment in European development is unique: because there actually are a number of opportunities now available for a more vocal and constructive input into the process, and the range of national Fora on Europe which have been set up in different Member States (not yet clear if Spain has established anything like this?) are one example –even if flawed or weak in various respects– of the ways in which this process might be begun.

One of the frustrating features of a phenomenon as complex as the European ‘construction’ (European integration) is that the debate –inevi-

tably a highly political and politicised one– becomes quickly polarised along reductionist lines, and reasoned discussion or genuine intellectual inquiry becomes very difficult. Either any opposition or challenge to European developments, such as during the anti-Nice campaign and in the no vote, is seen as ‘Euroscepticism’, evidence of a lack of commitment to the process of European cooperation and rejection of all of the positive dimensions of European integration, thereby labelling and dismissing important debate and dissent; or else those who are involved in or supportive of European integration are characterised as “federalists” in search of a European superstate, seeking to eradicate the nation state. Unfortunately, political debate often reduces itself to slogans or appropriate media-sized soundbites, which simplifies and distorts a complex picture. The reality of the EU today is certainly complex and there is a very wide range of views both on the desirable future shape of the ‘polity’ as well as on how it could best be characterised at present.

To speak of the ‘constitutional’ nature of the EU –as increasing numbers of political leaders across Europe and from the EU accession countries have done over the past year– does not have to imply a European superstate with a written constitution and a strong government: the term ‘constitutional’ refers to a whole range of fundamental values, most centrally those of democracy, accountability, responsibility, legitimacy, and equality. The role of law in shaping a political system and in stabilising the channels and modes of action is complex, but the idea of ‘constitutionalising’ Europe means far more –and indeed far less– than that of creating a state-like ‘constitution’. Europe is not a state, it is a strange and so far unique ‘post-state polity’ and the challenge is precisely that we have never seen something of this kind before and so we don’t know how to characterise it. Calling it a superstate in some ways reflects the limits of our imagination, our capacity to imagine new forms of political ordering and cooperation, and associating a constitutional system inexorably with a state is one consequence of these limits.

Today’s world is arguably characterised by greater regional, national and personal interdependence than before and international, transnational and even supranational cooperation are positive developments. Problems created by economic globalization, of market action escaping boundaries and political control, of porous economic and geographical borders require collective action and cooperation if they are to be well addressed; international and transnational peace and solidarity call out for even stronger mechanisms for conflict resolution and resource-sharing, and the emergence of the EU with its strongly integrated decision-making mechanisms and political fora provides the possibility, on a regional European scale at least, for these problems to be addressed and tackled.

First a personal view: the development of the European Union as a political entity has involved

both gains and losses, costs and benefits for all of its members and for all of its inhabitants and citizens. The gains are often perceived in economic terms, whereas the costs are seen mostly in terms of the changed (reduced) degree of influence over policy: democracy in the sense of self-government becomes more complex and challenging the larger the social and political 'unity' in question. [As Giuliano Amato in his 'constitutional speech' recently noted, it was almost self-evident years ago that the costs of non-Europe were higher than the costs of Europe. Nowadays, many people think that the costs of Europe may be higher] But despite the many legitimate criticisms and concerns, I believe that overall it has been much more of a positive than a negative development. In terms of the relations between states which were at war; states which often were aggressively competing with one another; states whose interests were opposed, there are now 15 and soon to be twenty-odd states working together on a daily, weekly, monthly basis to try to solve collective problems and advance social and economic welfare. There are also a great many problems associated with cooperation on this scale and of this extent: not only (just as within any nation state) are there particular policies (whether agricultural, competition etc), activities and political choices which can strongly be criticised, but more importantly—and this in my view is the most critical issue to be addressed—the entire system of governance in Europe at present still lacks the broad trust, solid democratic foundations, cultural acceptance and overall legitimacy that most states possess.

The statistical analysis produced in the aftermath of the rejection of the Nice Treaty in Ireland in June suggests that the reasons why so many people did not vote, and that those who did vote chose to do so as they did, it seems that indifference (leading to non-voting), lack of information and a feeling of general dissatisfaction with the whole EU system and decision-making process were the largest factors. Apart from that, at least three specific issues seemed, to a smaller degree, to account for a reasonable proportion of the no-vote: first, opposition to the gradualist move towards 'militarisation' continued by the Nice Treaty (after TEU and TtA), secondly (lesser but still some) opposition to enlargement, and thirdly opposition to the perceived risk of liberalisation of divorce and abortion laws. But these seem to have been much less numerous and significant than non-understanding or confusion as reasons for abstaining or voting no. So if, as this suggests, recent opposition to European treaties may be substantially based on non-understanding, concern about the remoteness of the processes and difficulty in engaging with the complexity, it is obvious that what Europe is missing is a 'politics'—an active public engagement with the questions of what the EU is about, what it is for, what its future is. This kind of politics can't be artificially 'produced' on demand but the current climate is a more hopeful one for facilitating genuine citizen engagement with European issues than there has been for a long time.

The EEC was originally constructed in the post-war climate, following the Coal and Steel Treaty in 1952 & Community which was clearly intended to rein Germany in, to bind states together politically which had been at war and deeply divided. The EEC later in the 1950s was a strongly economic project—a market project which aimed to boost Europe's economy by opening up trade, creating a common market and encouraging as much economic cooperation as possible, with the aim of raising standards of living, enhancing wealth etc. That project has been a rather successful one on its own terms, though of course with economic success and a greater degree of prosperity come other costs, and in some ways, Europe has in the last decade or two—particularly since the strong 'single market' project of the 1980s—begun to face those costs more directly. There are environmental costs, social costs and more generally 'cultural identity' costs to a strong project of economic integration such as Europe's was and has been for decades.. The response to this has been the gradual, but uneven and also contested, development of policy capacity at European level in each of these fields: the creation of a more social Europe, one with stronger environmental powers. In other words, when Member States regulatory capacities are negatively affected or restricted by the market liberalising policies adopted at EC level, there is a need to respond to that by strengthening the capacity to act to improve social protection, to strengthen environmental protection, to protect cultural heritage and specificity.

With internationalisation and opening up of borders, both to trade and to people, comes advantages, enrichment but also certain losses—some weakening of the autonomy and cultural specificity that may be thought to come with more separate and independent societies. On the other hand, while we can say that membership of the EU has opened individual states up in various ways, and yet they can hardly be said to have been 'homogenised' by that process. As is well known, cohesion and regional policies in the EU have helped to regenerate parts of countries such as Ireland and Spain, the social funds have supported many national and local policies, and there are funding programmes to assist in promoting goals like linguistic diversity and lesser-used languages. Arguably, as this unprecedented experiment in European integration proceeds, it is possible to believe that national identity and regional integrity do not necessarily have to suffer, even if they unavoidably change in ways.

In other words, if the advantages of a common market (and now of EMU) are accepted, so must be the need for at least a coordinating capacity in all sorts of other related fields where national policy-making powers have been affected or reduced and where they cannot alone adequately address the challenges which arise. There are few areas where at least coordinated (however strongly or weakly) action is not valuable for Europe: whether in immigration policy, social policy, environmental, vocational training, industrial policy etc.

But the crucial questions for now, given how far beyond a simple common market Europe has grown, are what kinds of policy-making mechanisms and decision-making mechanisms can be devised which respond to the concerns of many that there is too much centralisation, too little participative democracy, too much hierarchical and non-responsive regulation at the European level. How if at all can a constitutional system be devised or developed which respects the strength and importance of national (and local) democracies, which respects the implications of principles like subsidiarity, and yet which allow for policies to be developed which address collective problems of welfare and environment which have been affected and disrupted by the development of a strong and large market?

As I mentioned at the outset, the EU is at a stage of its development at which there are unprecedented demands and opportunities for greater democratic involvement. The 'legitimacy crisis' which has been rumbling on since its identification as such at the time of the Maastricht Treaty has led to much greater awareness—even if that awareness initially expresses itself in concern and opposition—of the influence and impact of Europe on all levels of policy and life. And instead of falling on deaf ears, there is a vivid sense at the moment that the 'elite', the politicians, the leaders, the institutions, the organs of government and governance, may actually be open to listening. Not, no doubt, through any sudden enlightened recognition of the moral importance of democratic strengthening, but rather through need, through crisis, and through precisely the kind of popular responses to the Maastricht Treaty and again after Amsterdam and Nice. And there are new opportunities opening up as a result of the genuine political uncertainty which has been generated. This is very much a time to participate rather than to self-exclude, to determine to have an input and some influence on the creation and shaping of better ways of addressing collective social, political, economic and environmental problems.

For all the blueprints and plans and speeches being given across the capitals of Europe by various dignitaries, heads of government and heads of state, there is evidently as yet no single 'masterplan' which has been devised and which is widely shared by those in power in the EU. On the contrary, the picture is rather one of considerable confusion, differences of view amongst different member states, amongst the accession states amongst the Commission and the European Parliament members, as many different plans and visions of a desirable European future as there are participants. Even the 'stronger and bigger' Member States do not share a view, the different speeches that have been made on 'Europe's constitutional future' by Fischer, Blair, Verhofstadt, Rau, Amato, Prodi, Schroeder, Chirac, Jospin and others over the past year are in many ways diverse and often contradictory.

Take for example the original Humboldt University speech in May 2000 of Joschka Fischer which is conventionally seen as the 'opening point' for the explicit constitutional debate at the European political level. Fischer's speech represents a classic federal constitutional vision of Europe: a written constitution for the EU establishing either a politically accountable Commission with an elected president as Europe's government or developing the European Council as the effective executive government, establishing a second chamber of the European Parliament, a clear division of powers and competences between European, regional and national levels of government with a strong central Court of Justice to oversee this, and possibly providing for an 'inner core' and outer periphery of states. By contrast, Lionel Jospin has spoken in favour of a slightly different constitutional vision, what he calls a federation of nation states (a model which Fischer doubts on the basis that "clinging to a federation of states could mean standstill with all its negative repercussions") and where he emphasises the need to strengthen not just the Commission but the Council of Ministers by making it a "permanent body". Jospin's model also stresses strongly the social dimension of Europe, solidarity and cohesion (and, differing also from other German voices such as Wolfgang Clement or Edmund Stoiber, he rejects the idea of renationalising European regional policy). Blair's vision, on the other hand, voiced in his speech to the Polish Stock Exchange, indicates a clear bias towards strengthening the role of the member states in the form of strengthening the legislative agenda-setting role of the heads of government in the European Council. And unlike Chirac, Jospin and Fischer (as well, more recently, as Schroeder), he does not necessarily favour the drawing up of a European constitution, but rather a more fluid statement of constitutional principles (in particular as regards the question of 'competences' and powers of the EU and the member states), monitored not by the European Court of Justice but by a political chamber of national parliamentarians which would form a second chamber of the European Parliament.

So although there are many variants on the future constitutional image of the EU, there are overlaps and continuities also to be seen. Virtually all of the political leaders who have spoken, for example, share a conviction that further use of 'closer cooperation' will be necessary in an enlarged EU, although some leaders clearly have in mind a core group or 'vanguard' of states, while others have a more fluid system of overlapping spheres in mind. (And Spain, of course, has always been the member state most opposed to the existence and use of 'reinforced cooperation'). There seems however to be a genuinely experimental process in, rather than a joint conspiracy to foist a pre-determined constitution for a European federal state on the states of Europe, but there is undoubtedly a great deal of complexity and uncertainty, and there are difficult and seemingly intractable problems to be addressed.

The first and central question, as I suggested earlier, is not so much which are the best policies for Europe to pursue (however crucial these substantive questions may be) but *how* European policies should be pursued. In other words, the strengthening of democracy in Europe and the strengthening of the legitimacy and accountability of all forms of European decision-making must be the priorities, (and arguably, the question of the substantive content of policies will to some extent follow from the former). Of course, the more general questions of democracy are less easy to engage with than some of the salient substantive issues such as defence policy, enlargement or even abortion, which surfaced during the Irish Nice referendum. But nevertheless the questions of democracy, of reform of policy-making processes, of rendering accountable, of institutional and *constitutional* reform really are the key issues to be faced. It is not sufficient to discuss reform of the CAP, or internal market priorities, or regional policy or competition policy aims: these are all crucial issues but they follow from rather than precede, in my view, the question of the whole system of European governance and how it might be reformed. The Commission recently published a White paper (albeit much criticised) on European governance, which takes many things for granted and is problematic in many respects, but which at the same time begins to show a clear awareness within the Commission of the need for the EU to take democracy seriously, the need to develop and to promote newer, more participative, more facilitative forms of governance across all sorts of policy fields. It proposes a number of ideas such as co-regulation ("involving those most affected by implementing rules in their preparation and enforcement"), 'triangular contracts' between member states, subnational regions and the Commission to implement certain target-based EU policies (environmental and regional policies being suggested as candidates for this approach),

One feature to be noted, however, in most of the speeches of the political leaders on the 'constitutional future of Europe' is their focus on the central "canonical" EU institutions: ie principally on the European Council, the Council of Ministers and the Commission, and on the European Parliament (usually to suggest a second chamber of national parliamentarians or some other way of involving the national parliaments more). This focus, and the 'Federal state-like' model which is represented most clearly in Fischer's and Schroeder's speeches present a constitutional picture which is not only unpopular with many ordinary Europeans, but which seems inappropriate to the increasingly broad, diverse and growing EU. The obvious challenges posed by such a vast multi-level system of states, regions and transnational networks which is the reality of Europe are far from adequately addressed by these traditional constitutional solutions which provides answers like – "a stronger European Council", "an elected Commission", "a second chamber of the European Parliament", "a Court of Justice adjudicating on a clearer kompetenz-katalog".

These solutions only address some very partial, albeit high-profile dimensions of the question of democracy and legitimacy in Europe.

[Nonetheless, the mood post-Sept 11th suggests support for the 'stronger constitutionalised EU' of a more centralised rather than decentralised kind, given the increasing emphasis in political speeches on defence, terrorism, a European police force, arrest warrant etc. What I want to suggest is that another constitutional vision is possible, and that there are trends in that direction, even while they are challenged by recent events and the political responses to that].

So what I would like to do, in contrast to this focus so far in the 'constitutional debate', is to point instead to the emergence of a number of much more interesting and promising trends, from the point of view of the possible reform of European constitutionalism and democracy. There are four broad 'trends' which I will identify, which arguably exemplify some more challenging but also promising phenomena, which offer alternative constitutional possibilities (alternatives to the traditional focus reflected in most of the political speeches of the past 18 months) for Europe's future:

The *first* of these is the increasing focus in recent years on 'softer' forms of policy making in the EU (eg fewer regulations, more directives; fewer detailed measures and more *framework* directives; greater use of actions plans and recommendations rather than binding laws;) which allow greater scope for diversity at national and regional level. This use of softer forms of law, although often bringing with it other legitimacy challenges, nonetheless can be seen to reflect the principle of subsidiarity and respect for local diversity.

The *second* trend is the emergence of newer forms of governance and policy-making, the quintessential type being the 'open method of coordination' currently being used and proposed in a widening range of areas: employment, vocational training/ education, economic policy, immigration. These are guideline-led, standard-setting methods which (in their present form) leave it to each state to involve a broader range of relevant actors in the formulation of national plans, which are then pooled and compared at European level in an endeavour to develop and promote 'best practices', which remain legally non-binding but are hoped to be persuasive, thereby promoting solidarity and welfare across Europe. [contrast the weakest and yet one of the most traditional forms of European lawmaking

The *third* and possibly weaker but nonetheless emergent trend is a greater focus on the role of civil society, on the creation of channels for direct societal participation and involvement in addition to the traditional main European institutional channels; not simply the social dialogue for management and labour which has been promoted since the Maastricht Treaty, but also wider Commission

consultation in advance of policy-making of NGOs and other relevant networks. The Commission has sought in recent years to set up a more structured dialogue with NGOs, and again, in its recent White Paper it has emphasised the role of civil society—mentioning in particular the areas of trade, development and fisheries in which “a structured channel for feedback, criticism and protest” has apparently been offered in recent years. (Also see Ombudsman, increasing public role/ participation in Commission infringement proceedings, and partnership arrangements).

Fourthly and finally, on the level of ‘macro-constitutional’ reform, there are some very interesting developments taking place at present. The process of ‘constitutional debate’ across Europe is being stimulated at the same time as the traditional secretive, diplomacy-type, executive government-dominated IGC-method for Treaty making and ‘grand policy’ making is being gradually reformed. At present this is happening in a subtle form, whereby the IGC itself appears to be continuing, but it is to be preceded by a “Convention” body composed of various government and parliamentary representatives to present the IGC with a list of choices and possibilities for future reform. Although still a rather select representative group, this recently established Convention is proposed to operate in a manner similar to that of the ‘Convention’ which was established in 1999 to draft the EU Charter of Fundamental Rights, in other words, relatively openly, transparently and accessibly. The composition of the new Convention body for constitutional reform (and for making proposals on the post-Nice agenda) is to be very similarly composed: 15 MEPs, 15 govt reps, 30 national parliamentarians and a Commission member; with non-voting participation by the applicant countries and rights of audition for various others. A crucial issue here would be not only for active ‘civil society’ bodies—environmental groups, local democracy initiatives, NGOs etc—to get involved and to contact and make their views known to this Convention—but also for the two national parliamentarians to be *required* according to their mandate to report back regularly and to discuss the issues which are being debated in the Convention before the national and regional parliaments. This kind of regular interaction between the national political scene and other developments in Europe is essential.

It has often rightly pointed out that a large part of the democratic deficit in Europe is contributed to by the fact that many states—Ireland amongst them—have no mechanism requiring Ministers making decisions within the Council of Ministers to account back to their national parliaments, nor for proper parliamentary scrutiny of European decision-making. The Danish model is often mentioned as an example of very good practice in this respect, and that seems to be something which all national governments could seriously consider introducing.

Finally, it may be worth noting that one of the constitutional changes currently proposed by the ‘Commissioner for reform’ (Michel Barnier) who is currently trying to stimulate the debate on the future of Europe, is that there be a constitutional ‘exit option’ for all member states. This possibility has never formally existed in legal terms, so that if this change were introduced, it would finally be made clear that each state has an agreed constitutional choice to leave the EU.

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Despite the many legitimate criticisms, doubts, fears and objections to the EU as a project of integration, it is my view that on balance the existence of the EU has provided far more than it has caused any state or region to lose, whether a big federal state like Germany or Spain or a small one like Ireland. The needs and virtues of interdependence, collective solidarity and shared problem-solving outweigh the advantages of strong forms of national sovereignty. There *can* be room for diversity, localism, autonomy and cultural freedom within a closely interconnected and integrated Europe, and it seems that the EU itself has finally awoken, in recent years, to the merits and possibilities of this. The trend away from strong harmonisation and centralisation towards greater flexibility and ‘shared’ rather than mutually exclusive (national or EU) powers, and towards softer policy-making and the involvement of new social actors and civic groups, although embryonic still, is a positive move and one suggestive of new possibilities and the opportunity to shape a different kind of ‘constitutional system’ than that of the mythical federal superstate.