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european dilemmas

did europe need a constitution? between facts and theories

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Kimmo Nuotio (ed.)
(Helsinki, Forum Iuris, Faculty of Law University of Helsinki, 2004), 211 pp., ISBN: 9 5210 0914 4

Diritti e Costituzione nell'Unione Europea
Gustavo Zagrebelsky (ed.)
(Roma-Bari, Laterza, 2003), 308 pp.,
ISBN: 8 8420 6983 3

EUROPEAN DILEMMAS

After the French and Dutch rejections of the Treaty establishing the EU Constitution, the national leaders meeting in Brussels for the June 2005 European Council have given themselves and the European Union as a whole some time for reflection. This is perhaps wishful thinking. For neither politics nor law allows for a kind of vacuum in which agents can reflect while postponing action. Fortunately, academic research has such a luxury. Indeed, there is something to be said in favour of a period of stock-taking and quiet reflection in the debate about EU constitutional politics.

During the last ten years at least, a considerable literature on constitutional politics and constitutional law has emerged as part of the academic research on the European integration process,

contributing to focus the attention on issues of legitimacy and on the normative underpinnings of the political, legal and administrative system comprising the EU and its Communities. The recent, and in some respects surprising, constitutional season of EU politics, has obviously contributed to the rapid acceleration of the rate of academic production on these issues. Keeping pace with conferences, web papers and various publications (in many languages) has become a daunting task. The slow and painstaking times of scholarly production in these theoretically inclined areas have given way to a kind of running commentary on the ongoing constitutional transformations, increasing the ever-present danger that what one writes can soon turn out to be either obviously wrong or irrelevant, or indeed both. All the volumes and most of the articles cited in this review article were written at different stages of the drafting process of the text of the Constitutional Treaty, at times when it seemed likely that, though with some difficulty and the occasional obstacle along the path (the British referendum being the most obvious candidate for this role), the Treaty would eventually be approved. With the advantage of hindsight, we now know that the road to the EU constitution is far more complex than even sceptics were predicting a year ago, and far from being a certainty. If anything, at this stage it is safer to bet on its complete demise. However, in truth, most of the scholars writing on the EU constitution and European constitutionalism have on the whole been cautious in their analysis and prediction on the import of the current 'constitutional moment' and of how this would change the EU polity and its *modus operandi*. Eventhough the object of analysis of the books and articles discussed here may turn out to have been ephemeral, they have lost none of their interest. The EU constitution may be moribund, but the issues that it has

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contributed to raising are very much alive.

So, did Europe need, or does it still need, a constitution? In the present climate of reflection that the French and Dutch voters have plunged us into, it is possible to see – perhaps more clearly than in the past two or three years – that this question conceals a host of practical and theoretical problems. There may thus be some merit in outlining the different nature of such problems and how they interact with the constitutional question. This is the limited aim I wish to pursue in this review.

CONSTITUTIONAL LEGITIMACY

The first set of problems is well captured by the title of the collection edited by Nuotio: *Europe in search of 'Meaning and Purpose'*. This is also the title, as well as the focus, of Ian Ward's opening essay, which borrows the expression 'meaning and purpose' from a speech by Romano Prodi on February 2000. In some of their significations, meaning and purpose are interchangeable terms, but in their common use, particularly when referring to institutional entities, they imply different attributes of, or different ways in which one may consider such entities. Purpose has a more definite instrumental connotation, so that questions about the 'pur-

pose' of the EU can be satisfied only by identifying some external aims, or a series of individual and social needs that are separate from the very existence of the EU as an organisation. Meaning instead has a more internal quality. People find a 'meaning' in an organisation in so far as that institutional entity is capable of contributing to some self-constructed narrative of the individual and/or the community. Naturally, political organisations can have both purpose(s) and meaning(s); and modern constitutional charters, or more generally constitution-making processes, have often contributed to express these two separate, though somewhat related, aspects of state-building.

The attempt to find purpose and meaning for the EU is, however, not that simple. As constitutional documents readily show, the purpose of traditional political communities is so obvious and of such a general nature – in principle, to provide the conditions for the liberty, security and happiness of its members – that in itself it has little instrumental value, since it is not very different from the ability of the citizens to lead their own life within a social setting. To insist therefore that the EU must have a definite purpose – the often discussed issue of 'finality' (Castiglione, 2004; Walker, forthcoming 2005b) – is to accept that it lacks the unspoken characters of the political community, that kind of naturalness and inevitability that even contractualist theories of the state as an artificial construct implicitly admit. The search for meaning presents a similar conundrum. For, in a sense, the meaning of a political community cannot be expressed in a way that is different from what the mere existence of the community is capable of conveying. Such a meaning can be formulated through the articulation of values, traditions and ways of life that emanate from the experience (or occasionally the prospect) of living in common, but it is difficult to find a meaning that is not already the concrete expression either of some shared experience or of some ties that are presupposed (memories, language, culture, or even, for some, religious and ethnic affiliations), and that as such give sense to the prospect of living together politically.

This may seem a rather naturalist (or perhaps communitarian) conception of the political community, but one does not need to embrace such substantive positions to agree on the fact that the modern state, and many modern constitutions, have relied on such unquestioning conceptions of what it is for a political community (mainly in the form of the nation state) to have meaning and purpose. This picture, or self-image, may be overdrawn, but is still operative in modern politics and is something that European political integration must confront. Part of this confrontation implies the recognition that, on the one hand, the kind of meanings and purposes that are traditionally attached to national political communities are both resilient and interwoven with the popular understanding of democratic self-determination; while, on the other, those same meanings and purposes are weakened by the transformations (market dominance, globalisation, individualisation and multiculturalism) that are affecting modern politics. For the EU this means that it can neither supplant the nation states in the production of traditional political meaning and the satisfaction of the general purposes of social organisation, nor can it simply develop its own version of those meanings and purposes on a grander scale. It is those very meanings and purposes that need in part to be rethought.

In constitutional terms this debate has developed along two main lines of dispute, which reflect intersecting political and legal preoccupations. These are the 'demos' question, and the 'treaty or constitution' question. Both questions involve

a difficult mixture of socio-empirical and legal-normative problems, and their solution often depends on the kind of approach one elects to follow. The question of whether the text that emerged from the European Convention, and that was finally approved in the 2004 IGC – but whose ratification is now uncertain – inclines more towards a Treaty or a Constitution may seem a purely nominal one. Such a conclusion, however, would miss the substance of what is here at stake. Dieter Grimm has perhaps been the most authoritative and consistent voice arguing against the view that the European Union can, at this stage of its development, meaningfully give itself a constitution. In his two separate contributions translated in *Developing a Constitution for Europe* and in *Diritti e Costituzione nell'Unione Europea*, Grimm makes two main points. One speaks of the nature of constitutional law, and the other to the legitimate relationship between sovereignty and the constitution. With reference to the former point, he remarks that the emergence of modern constitutions is intrinsically linked to the way in which positive law operates at two levels over the public domain. The first level establishes the legitimate source of state power and regulates the operation of government. The second level follows from the exercise of state power itself, but it acquires force in so far as state power has been bound by the rules set down at the first level. Grimm argues that this is not the way in which Community law has operated over the years, and that any attempt to constitutionalise it comes against the other of his points, the intractable question of who are the 'masters' of the Treaty, the ultimate repositories of sovereignty in the EU legal and political system. According to Grimm, these remain the member states, who, as actors within an international system, are not subject to the constitutional discipline typical of first and second-order

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positive law, as it applies in constitutional states. The argument here is that the EU legal space, because of the dominance of separate state actors, lacks the distinctive structural properties of constitutional law. Attempts to introduce some form of constitutionalisation remain partial and superficial until the EU can claim some form of self-sufficient statehood independently from the member states.

Even if we assume that Grimm is right in his analysis of the structural limits to be overcome in order to for the EU to have a constitution, it could be argued that the post-Laeken process and the 'Treaty establishing a Constitution for Europe' has meant precisely that, the attempt, that is, to create those structural conditions. This raises another point of controversy, intriguingly captured by the decision made in the Convention to mix the languages of international and constitutional law by referring to the agreed document as both a 'treaty' and a 'constitution', or as they have put it: a treaty establishing a constitution, where it remains unclear where the 'text' of the treaty ends and that of the constitution starts. This linguistic solution, however, can only mask (or unmask) the problem. As elegantly suggested by Bruno De Witte (2004), a close exegetical analysis of the language of the approved text and of the formal status of the document seems to support the case that the way in which the document is both

conceived and formulated is entirely within the tradition and language of international treaty making, showing the clear intention of the drafters to confirm, rather than weaken, the position of the member states as the 'High Contracting Parties', who have the power to bound themselves to the agreements set up in the Treaty, within the limits set by their own *separate* constitutional orders. Such evidence, however, does not in itself seem conclusive, for constitutions have occasionally been formulated in contractual terms under the species of treaties, and there is nothing to prevent the possibility that a treaty of this sort may be conceived as developing the basis for a self-contained constitutional order. In this respect, the intentions of the framers are of limited guidance. The more fundamental problem remains the one underlying the other question which we have already referred to, that of the European 'demos'.

Together with Grimm, though with a somewhat different range of arguments, Joseph Weiler – also represented with two essays in the same collections where Grimm appears – has been one of the main proponents of the 'No demos' theory. Simply put, this theory suggests that without some kind of unified people there cannot be democracy. In its starkness, such a proposition is breathtaking. It encompasses at least three centuries of discussions about the social presuppositions of democratic government, but, as with the related issue of the source of meaning, or identity, of a political community, one can readily see the problem without necessarily subscribing to a particular supporting theory. The issues commonly raised in relation to the 'demos' question in the EU are of three kinds. One concerns the deliberative presuppositions for democracy to operate. These comprise a diffuse and fairly integrated European public sphere, a working representative system at the European level, and even more obviously the ability to communicate and understand each other through a shared language. All these elements are, in some limited and/or rudimentary form already present in the EU, but at present it is difficult to see how such conditions can operate beyond the narrow circle of European elites, denying any genuine popular character to a European-wide democratic system. The second issue concerns the way in which, in a democracy, people are prepared to accept collective decisions, which have often redistributive implications, out of a sense of solidarity with the other members of the community. The nature and boundaries of such solidarity are strongly contested, but historically in Europe democratic citizenship has developed in parallel to a solidaristic conception of the national community. A working democracy at the European level would, therefore, need some form of connective solidarity to ensure that people were willing to accept as legitimate the application of the majoritarian principle across a series of important policy decisions. The third issue, finally, is that of cultural diversity. Whereas the experience of democracy within the nation state has tended to coincide with a certain homogeneity of the people – or, if this was not readily available, with some form of consociational accommodation or neutrality-aspiring ideology – in the EU, cultural and national diversity is both pervasive and considered as a value to be preserved. This leads to the often-cited paradox of the EU's *raison d'être* consisting in the promotion of a 'closer union' between the European peoples and, at the same time, in the preservation of their distinctiveness. The tension between these two principles is no more evident than on the language question, which would ideally require the development of a policy combining principles of efficiency and ease of communication, of equality (between individuals and between linguistic communities), and of recognition of the

expressive role that languages play in both social and political life. To all accounts and purposes this seems an almost impossible task.

When translated into the constitutional language, the issue of the 'demos' takes us back to the question of sovereignty and particularly to the unresolved (and perhaps unsolvable) question of the nature and role of the constituent power. In the experience of national constitutionalism, the ultimate appeal to the demos, as both a unitary and self-constituting subject ('We, the people'), has played an important role as the source of and legitimating influence over the exercise of power by the political and legal institutions – the constituted powers. In the EU, it is difficult to imagine such a self-constituting act of the people, for the national demoi still claim their separateness and ultimate sovereignty, while demanding the recognition of their separate interests and their own conceptions of the common good. The unresolved contest between a demos- and a demoi-based conception of the European constitution highlights a point recently emphasised by Miguel Pojares Maduro (2003), who suggests that in the debate on European constitutionalism most of the attention has focussed on how to ensure the legitimate exercise of EU governance, leaving in a relative shadow the legitimacy of its very existence. In other words, constitutionalism has been thought in terms of 'regime' legitimacy, neglecting 'polity' legitimacy (*cf.* Bellamy and Castiglione, 2003), or the necessary interaction between the two. So, while much intellectual and political effort has gone into arguments on how the constitution and the constitutional process may contribute to bring legitimacy to democratic governance in the Union, there has been less sustained discussion over the fact that the very process of making the EU constitution is itself in need of democratic legitimacy – something that, per-

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haps, did not entirely escape the voters in France and the Netherlands.

WHAT'S IN A CONSTITUTIONAL MOMENT?

One of the reasons for the relative insensitivity to the distinction between regime and polity legitimacy in the present debate lies perhaps in the confusion surrounding the second set of problems emerging from the constitutional question in the EU. This concerns what, following Bruce Ackerman (1991), has been referred to as the existence of a 'constitutional moment'. In a more popular version, this has taken the form of the question of whether the European Convention is a New Philadelphia. The main confusion on this issue is whether one takes this question to be mainly historical or normative. In both cases, the writing of the constitution has an important 'generative' quality, whose standing depends on how protracted in time its effects are. However, their analytical elements are different, belonging to separate forms of discourse and evaluation. For one, failure and success have very different meanings when referred to either a historical or a normative evaluation of the Convention. From the constitutional perspective discussed here, what really matters is the

normative dimension, and I shall therefore limit my comments to it.

In spite of the lingering confusion in some of the literature, much good material has been written about the different aspects and features of Europe's 'constitutional moment'. Both *Developing a Constitution for Europe* and *Political Theory and the European Constitution* contain many interesting essays on the subject. Normatively, the evaluation of a constitutional moment involves two orders of assessment. One is concerned with establishing the specific *generative* qualities that distinguish a constitutional moment; the other with assessing the *forms* that characterise it. The two assessments are obviously linked, but have different aims in view. Identifying the generative quality of constitutional moments is another way of posing the question of the sources of legitimacy discussed in the previous section. In other words, a constitutional moment is such, if it is capable of bringing into being the fundamental elements that give legitimacy to a polity and to its political regime. Here, views may diverge on whether what matters is more an outcome-based assessment of legitimacy – a constitutional moment is therefore assessed on the kind of constitutional order it produces – or whether legitimacy is seen in more procedural terms: if, for instance, the constitutional moment succeeds in mobilising the citizenery or producing a higher form of consensus.

The second order of assessment concerns the forms through which the generative qualities of the constitutional moment can be seen to operate successfully. So, outcome-based conceptions may be interested in judging the substance of the constitutional text and of the constitutional order that emerges from the constitution-making process (like for the topics explored in the essays by Myrto Tsatika, Lynn Dobson and Stijn Smismans in *Political Theory and the European*

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Constitution); while process-based views may focus on the nature of deliberation and mobilisation during the constitutional moment (as discussed by Carlos Closa, Paul Magnette and John Erik Fossum in *Developing a Constitution for Europe*). The Constitutional Convention has offered an interesting terrain for developing and debating the validity of the latter approach, and particularly the normative and socio-psychological basis for a deliberative approach to democracy and constitutionalism. All the three chapters already mentioned in *Developing a Constitution for Europe*, and the more sceptical discussion of constitutional politics in the contribution of Richard Bellamy and Justus Schönlau to *Political Theory and the European Constitution* engage with the issue of the nature of discourse and agreement in politics, and what normative force they carry with it. In this respect, the analysis of the forms of the constitutional moment connects directly with the question of its generative capacity, or lack thereof.

The question of whether Europe has undergone a constitutional moment, and indeed of whether such moments carry a particular normative force, is central to the political debate surrounding the whole experience of the drafting of the Constitutional Treaty and of its halted ratifica-

tion process. One of the arguments that has emerged (or re-emerged) after the ratification debacle is that Europe did not need a constitution after all, and that having tried to force one on the people of Europe was a dangerous illusion into which a consistent part of the European political elite unfortunately fell. Andrew Moravicsik (2005) has made this argument with verve, suggesting that the 'current constitutional settlement' based on an intergovernmental compromise, farming out to the EU a minority of, mainly market-related, issues is both perfectly adequate and legitimate. In his view, the attempt to force a constitutional debate over a more political union was a badly conceived plan. Moravicsik's indictment of constitutional activism is not, however, the only argument against the advisability of forcing a constitutional moment. A variety of constitutional arguments have been advanced against both forcing the pace of the constitutionalisation of the EU and putting down a 'documentary' constitution. Many of these arguments rest on the suggestion, similar to that advanced by Moravicsik, but very difference in substance, that the EU had already a constitution – though not in the form of a self-contained document – and whose underlying principles were better served by leaving its development to a more evolutionary process. These positions mark a contrast between conceptions of the constitution that treat this as the result of an event (or a succession of discrete events and agreements), and those that consider the constitution as essentially a process (Shaw, 2003). Although during the Convention phase – when the idea of a written constitution, also favoured according to Europol surveys by a substantial majority of citizens across Europe, was gaining momentum – supporters of a more processualist conception had mostly reconciled themselves to the reality of a documentary constitution; this position has now returned to the

ascendancy. But, interestingly, as Neil Walker has argued in a number of recent essays (2004a, b, 2005a) the way in which the Constitutional Treaty was taking shape did not reflect one single conception of the European constitution and constitutionalism, but a variety of positions. Besides those like Jürgen Habermas, whose view of the constitution is that of a constructivist gambit intended as the beginning of the process of construction of a political demos in Europe, Walker lists other influences that have shaped the text and drafting process of the Constitutional Treaty, comprising those who were in principle hostile to it, to different shades of scepticism against constructive and documentary constitutionalism. From such a perspective, the Constitutional Treaty that was taking shape was already a compromise between different views, and the basis for future political and intellectual battles. Its defeat – if it comes to that – may not just signal the political retreat of constitutional constructivists and federalists, but that of the broader constitutional agenda after Maastricht.

EUROPEAN CONSTITUTIONALISM AND ITS FUTURE

For the moment, however, it is too early to predict Europe's constitutional future. The present crisis highlights once again the difficulties besetting any attempt to reproduce the traditional concepts of national constitutionalism at a European level, due to the reasons analysed in the first section of this review. The constitutional path, if there is one, will need to experiment along postnational lines. The nature of a European postnational constitutionalism is, however, unclear. A number of suggestions and lines of thinking have been advanced. It may be likely, extending Walker's analysis, that the EU institutional development will reflect a

combination of them. Looking at some of the contributions in the volumes under review, it would seem that European postnational constitutionalism would have to accommodate two major challenges posed by the integration process. One is that already discussed of the presence of different demoi at the heart of the construction of the EU as a polity. Joseph Weiler has argued that Europe has already developed its constitutional *Sonderweg* by adopting a kind of toleration towards different national constitutional traditions, renouncing, that is, to look for a 'positive' common constitutional culture. Similar echoes can be found in the contributions of Zenon Bankowski and Kaarlo Tuori to *Europe in search of 'meaning and purpose'*, as in Jo Shaw's (2003) proposal to apply to EU constitutionalism an open-textured and continuously negotiated (both internally and externally) method of constitution building.

The second challenge comes from the way in which the development of European community law has interacted not just with national legal systems but also with the various branches of law, contributing to redraw the boundaries between them, and in particular problematising the relationship between private and public autonomy that the development of the constitutional state in Europe had fixed for a while. This process, as the contribution of Oliver Gerstenberg to *Europe in search of 'meaning and purpose'* and that of Christian Jorges and Michelle Everson to *Developing a Constitution for Europe* make clear, is part and parcel of the open

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constitutionalisation of the EU legal system. The principles that guide it, however, are still very much a matter of experiment and contention.

What should be concluded from all this? Of one thing we may almost be certain, that the hierarchical and self-contained constitution that functioned as a link between law and politics in the nation state is no longer a viable model for the EU postnational polity. An open and evolutionary constitution is probably a better bet for the future of European constitutionalism. Yet, though the demise of the unity and coherence – of both principles and practices – offered by the old constitution may be inevitable, this may bring with it new dangers to citizens' acquired rights and to their public and private autonomy. So, postnational constitutionalism may come with both opportunities and costs. To balance them is probably the main challenge for the future of European constitutionalism and constitutional politics.

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