

EUROPEAN CONSTITUTION:  
A CHALLENGE FOR CONSTITUTIONAL THEORY

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I. A NEW FIELD FOR THE CONSTITUTIONAL PHENOMENON

1. THE debate on the future European Constitution and the more or less adherence of the European Union as such to the rationale of the constitution and in particular to the form of a constitution and the system of concepts related to the constitutional phenomenon, is indeed a major challenge for constitutional theory<sup>1</sup>.

This stands true irrespective of the more specific form to be attributed by the European Union to the concept and form of the constitution at the end of this entire complex procedure, which essentially commenced upon the end of the Intergovernmental Conference in Nice, continued with the Laeken Declaration, took shape at the European Convention and will be completed at the Intergovernmental Conference of 2003-2004.

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<sup>1</sup> For the beginnings of this discussion see D. GRIMM, Does Europe need a Constitution?, *European Law Journal*, 1995, pp. 282 et seq., J. HABERMAS, Remarks on Dieter Grimm's "Does Europe need a Constitution?", *European Law Journal*, 1995, pp. 303 et seq. From the more recent bibliography see indicatively P. HÄBERLE, *Europäische Verfassungslehre*, Baden-Baden, 2002, I. PERNICE, Multi-level constitutionalism in the European Union, *European Law Review*, 2002, pp. 511 et seq., J.H.H. WEILER, A Constitution for Europe? Some hard choices, *Journal of Common Market Studies*, 2002, pp. 563 et seq., P. MAGNETTE (ed.), *La constitution de l'Europe*, Bruxelles, 2002, B. DE WITTE (ed.), *Ten reflections on the constitutional Treaty of Europe*, EUI, San Domenico di Fiesole, 2003, D. TSATSOS, Zur gegenwertigen europäischen Verfassungsdiskussion-Zukunftpragende Grundlagenprobleme, speech at the Conference *The possibility of a Constitution for Europe*, Thessaloniki, 28.2.2003/ 1.3.2003. For the discussions in the framework of the European Convention see <http://european-convention.eu.int/>

In other words, it holds true irrespective of which of the following terms will be chosen “European Constitution” or “European Constitutional Treaty” or the phrase “Treaty establishing a Constitution for Europe,” which was used in the draft decided upon by the European Convention and was subsequently proposed to the European Council in Thessaloniki in June, 2003. It also holds true, despite the fact that no procedure referring to the “European demos”, in the form of a Pan-European referendum, will be held. Besides - as mentioned below - the procedure establishing the new fundamental legal document of the Union is already in place, and has an intergovernmental character unmistakably, without underestimating all other elements offered by the European Convention (as in the previous case of the Convention that had prepared the Charter of Fundamental Rights)<sup>2</sup>.

2. Thus, from the point of view of constitutional theory, the entire procedure and, in particular, the entire debate may signify the entry into a new era for the constitutional phenomenon. The constitution, as a legal and political phenomenon, has been essentially identified in the three previous centuries (from the American and French revolutions to the constitutions of new states resulting from the collapse of existing socialism and the disintegration of the former Soviet Union and Yugoslavia) with two phenomena: *state and sovereignty*<sup>3</sup>.

Throughout this period, the Constitution has entailed a state with all its constituent elements and has been called to organise and delimit state authority. In this way, a constitution and, in particular, a constitution establishing a state, represents its status and external sovereignty, and is the utmost expression of internal sovereignty in the form of primary statutory power.

In this historical framework, the state is the so-called national state, including the large federal states reduced to a nation, older (such as Germany) or more recent (such as the U.S.), or to a single source of power (such as the “peoples” of the former Soviet Union).

Currently, despite the debate on the future Constitution of the Union, all this is not self-evident. The establishment of a European Constitution does not imply that the European Union will be automatically transformed into a large state and, indeed, a Federal state. This would be tragically naïve.

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<sup>2</sup> See G. AMATO, *Il metodo de la Convenzione*, introduction to F. BASSANINI / G. TIBERI, *Una Costituzione per l'Europa*, Bologna, 2003.

<sup>3</sup> See indicatively D. GRIMM, *Die Zukunft der Verfassung in: Id., Die Zukunft der Verfassung*, Frankfurt an Main, 1991, pp. 397-473.

No one can ignore or underestimate the grave reality of national Member States or the strong intergovernmental features of all crucial procedures involved in the European Integration, procedures carried out according to the provisions of the Member States' constitutions.

Therefore, what the future European Constitution is called to represent, establish and delimit is not a "state" power, but rather a different, peculiar, dynamic and complex phenomenon, namely the European Union.

Therefore, the constitution, as a notion and legal form, confirms its capacity to exist and operate irrespective of the traditional perceptions of state and sovereignty. In the draft of the European Constitution prepared by the European Convention, things become quite clear: the competencies of the Union are delimited and exercised based on the principles of conferral, subsidiarity, proportionality and loyal co-operation. The first three of these four principles are based on the fundamental acknowledgement that the competencies of the Union are secondary and strictly delimited compared to those of the Member States. The second section of paragraph 2, Article 9 of the draft of the European Constitution expressly reaffirms the competence belonging to the Member States. Simultaneously, however, an express clause is introduced on the flexibility of Article 17 which allows - with unanimous decision - the expansion of the Union's field of action, even beyond the limits of the expressly mentioned and anticipated "powers of action," were this to precipitate one of the aims of the Union, defined in the Constitution itself.

3. This flexibility and adaptability of the constitution, indicating its capacity to also function dissociated from the notions of state and sovereignty, is due to its exceptional and irreplaceable advantages, which are mainly *textual, symbolic and methodological*.

The existence of a single, codified, systematic, inaugural and elliptical legislative text, encompassing all basic rules governing the establishment and operation of a political organisation, is something absolutely useful, at least for reasons of internal economy and regulatory sufficiency. This *textual advantage* is also part of many declarations or contracts or protocols, yet no legislative text exhibits simultaneously the inaugural, declaratory and regulatory nature of the constitution. These *textual advantages* go hand in hand with the equally important *symbolic and legitimising advantages* of the constitution, which, historically, refers to, on the one hand, democracy and, on the other hand, state capacity.

No other legislative and inaugural document exhibits this advantage, in terms of its course in history and legal and political associations, which is particularly important at the present stage of European Integration, both

for the symbolic and legalising as well as for the organisational and political needs of the European Union.

The constitution, as a form of legal and political organisation, and a means of formulating the rules governing the establishment, operation and delimitation of a political organisation, presents (for comparative, historical and linguistic reasons) an equally important *methodological advantage*:

It is subject to a known and proven, both theoretically and jurisprudentially, method of interpretation and application, which is absolutely essential for the longevity, regulatory sufficiency and effectiveness of any constitutional document.

Thus, the fact that the debate on the European Constitution confirms all the above-mentioned advantages of the form "constitution" signifies a strong renewal of its importance in the beginning of the 21<sup>st</sup> century<sup>4</sup>.

4. The adaptability and flexibility of the form "constitution" is also related to the new forms under which the "constituent" and, subsequently, "reforming" function may appear.

The European Constitution as a production procedure has obviously no relation to the classical forms in which the constituent authority is manifested and organised on a national state level: In the case of the European Constitution, the way revisional power was exercised was nothing more than an intergovernmental conference using certain parliamentary methods or such procedures in the preliminary phase. This preliminary phase was carried out - as we all know - at the European Convention, within which an early intergovernmental conference was held due to the *de facto* particular role of the representatives of the Member States or their governments, who for the large part were Foreign Ministers or responsible for European Affairs. However, the institutional "environment" of the Convention was strongly parliamentary due to both the way in which the debate was organized and the participation of national and European parliamentarians.

The main phase, the 2003-2004 Intergovernmental Conference, which began under the Italian Presidency, is expected to be purely intergovernmental. The same is true for the third and last phases, while the future basic document will have to be accepted (ratified and validated) according to the constitutional procedures of the individual states. Therefore, the future

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<sup>4</sup> See EV. VENIZELOS, *The New Youth of the Constitution*, in: G. AMATO / G. BRAIBANT / EV. VENIZELOS, *The Constitutional Revision in Today's Europe*, London, 2002, pp. 25 et seq.

European Constitution could be characterized as the “Intergovernmental Constitution<sup>5</sup>.”

However, this entire procedure is not as original as one might think, in terms of its relation with the form “constitution.” *Oftentimes in the past, state constitutions were generated as a result of the correlation of international political powers, assumed the form of an international convention and were, subsequently, transformed into national constitutions or integrated into national constitutions<sup>6</sup>.*

This is the case of the 1960 Constitution of the Republic of Cyprus as a result of the international conventions of Zurich and London, the case of Bosnia as a result of the Dayton Agreements, the FYROM case after the peculiar (both international and constitutional) Ohrid agreement on the position of the Albanian element within the state and the Afghanistan case in the context of the Bonn Agreement.

Interestingly enough but in the opposite sense, Canada - just a few years ago - brought up the issue of “repatriating” its constituent authority, from the British parliament to the competent state institutions, with the elective body being the supreme body.

5. All this points to the fact that the dynamics of European Integration as a legal phenomenon is taking shape in ways that *overcome the distinction between constitutional law, classic international law and European Community law*. Everything that is taking place or being planned may be described and construed using the conceptual and theoretical apparatus of all three fields. What is important is the reasoning and the systematic sufficiency of self-referentiality exhibited by each of these three systems. The fact that we are accustomed to using certain concepts and systems does not mean that these may not find new applications or adapt to new facts.

6. Therefore, the fact that the European Union enters an integrated system, which we could call constitutional, has immense repercussions.

First of all, we have already noted the obvious symbolic and legalising consequences. This, however, also works in reverse, *because it highlights the existing deficits at the Union level* compared to a classical, typical and fully European constitutional democracy. Besides, every constitution is historically called to organise a regime, in other words, a method of setting

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<sup>5</sup> See EV. VENIZELOS, *The challenge of the European Constitution*, Athens-Thessaloniki, 2003, pp. 23 et seq. ( in Greek).

<sup>6</sup> See N. MAZIAU, *L'internationalisation du pouvoir constituant*, *Revue Générale de Droit International Public*, 2002/2003, pp. 549 et seq.

up and operating political authority, namely, a political system. This in turn requires the establishment of certain political correlations essential for the democratic operation of constitutional bodies and the entire constitutional system.

What is entirely obvious and self-evident for all constitutional and democratic states, is not at all self-evident for the European Union, where - as I recently had the chance to argue - even though a Community administrative system and an interstate negotiations system exist, *there is no complete political system in place*<sup>7</sup>, which would be based on its correlations, namely the democratic principle (even moderated to the extent required by the Community decision-making method, where applicable).

Henceforth, an entire system of concepts, methods and contradistinctions opens up: The existence of a constitution is based on the contradistinction to the common legislation. Finally, the existence of a constitution requires a special revisional process that is slower and more laborious than the usual legislative process.

Evidently, all this may more or less be integrated into the inherent logic of the European Constitution, resulting in the renunciation or readjustment of another system of regulations, that of the system of Community law based on other concept pairs: The relation between primary and derivative law and the relation between intergovernmental and Community method will by necessity give way to constitutional conceptuality and typology, without however losing much in terms of content. However, constitutional terminology alone and the use of interpretative methods vis-à-vis the constitution undoubtedly offer new potential.

II. THE REVERSE FUNCTION:  
THE CONSTITUTIONAL ORGANISATION OF THE EUROPEAN UNION  
AS A PRISM FOR THE REASSESSING MEMBER STATE  
CONSTITUTIONAL ORGANISATION

1. However, the fact that the constitutional phenomenon and, in particular, the form "constitution" is called to adjust to the size, specificities and needs of the European Union, has its reverse effects, too:

The constitutional solutions applicable to the Union phenomenon lead to a review of essential acknowledgements, encountered - almost as self-

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<sup>7</sup> See EV. VENIZELOS, *The challenge of the European Constitution*, *op. cit.*, p. 71 (in Greek).

evident - in the constitutional texts and the constitutional orders of all Member States.

This is obvious in three essential stereotypes of nearly every national constitution:

*a.* The head of state as a single-person institution, exercising the “external” duty of representing the country internationally, and the internal responsibility of regulating the regime.

*b.* The classical distinction of three powers as a general principle supplemented by numerous exclusions and variations.

*c.* The judicial control of the constitutionality of laws, which in one or another form, is almost everywhere regarded as a constituent element of a strict constitution.

Contrary to these classical patterns, the constitutional arrangements, discussed within the European Convention and in general for the future of the European Union, are much more flexible and original.

2. The debate on the Presidency of the European Council and of the Council of Ministers, as well as the representative of the Union for matters of foreign policy is very intense. The form decided on by the European Convention, that is, of an elected President of the European Council, with a Foreign Minister presiding over the Council of Foreign Affairs and a rotating (but collective) Presidency in the other compositions of the Council, is hard to find on the level of constitutional institutions of Member States.

The competencies of the elected President of the European Council who acts as a single body as well, recall those of a head of state in a parliamentary democracy. That is, competencies that are half-regulatory as that person will “work in order to facilitate cohesion and consent in the framework of the European Convention”, but also competencies of a representative of the Union abroad “exercising in this capacity and on his level the foreign representation of the Union in fields touching the common foreign policy and security policy, with the reservation of the competencies of the Foreign Minister of the Union” (who takes part in the deliberations of the European Council).

These quasi-regulatory competencies are, in the end, a long way from the regulatory (even if these are only symbolic) competencies of an elected head of state (appointment of a Prime Minister, dissolution of Parliament, etc.). Something analogous is occurring with the competencies of repre-

sentation abroad. These competencies are surely more substantial than the respective competencies of the head of state in a representative democracy, but they are linked with the fact that the President of the European Council “presides and directs the deliberations” of the European Council and “assures the preparation and its continuation in cooperation with the President of the Commission and based on the deliberations of the Council of General Affairs.” Thus, even though the President of the European Council has certain individual competencies, his major political role arises out of his participation in the collective functioning of the European Council.

This means that a large political organisation, of the size of the European Union, with high aspirations - unfortunately unproven as yet - regarding foreign and security and defence policies, may be set up and operate without the single-person institution as a “head”. Besides, this institution in national states is either a relic of monarchy, or its democratic counterpart: the monarch personified monarchy, and therefore, democracy would also have to be somehow personified.

3. Following the same reasoning, the debate on the European Constitution shows that despite the uncertainties and experimentation, the European Union does not mechanically adopt the classical separation of powers. Therefore, it is oriented towards institutional arrangements that may be politically insufficient, but may surely be, institutionally speaking, more sincere compared to the ones introduced by national constitutions. This is particularly true for the dual role of the Council as an institution - political and legislative - and the distinction between bodies exercising the “Union’s administration” and bodies exercising the “Union’s policy”.

Both the Commission and the Council are on the verge of this distinction, and one of the most critical points of this whole debate on the Union’s institutional future pertains to this issue.

Of course, one of the most severe problems arising, in this context, is the role of the European Parliament and national parliaments. In all the democratic representative systems the role of the parliament is decisive. Furthermore, the typology of regimes and governance forms mainly depends on the relation between the parliament and executive power.

This does not apply in the case of the Union, even following the enhancement or the further enhancement of the role of the European Parliament with regard to the nomination of the European Commission’s President and members. It would not even apply after the currently discussed enhancement of the role of national parliaments in the Union’s institutional

life, and in particular the exercise of its legislative power, within the European Convention.

The reason for this is the very structure and multiple institutional and political role of the Council within the Union. This role does not allow for direct transfer of the governance typology, historically formed in national states, at Union level.

4. The same is true *mutatis mutandis* for the judicial control of law constitutionality, which is interwoven with, first, the constitution's strict nature, secondly, the constitutional protection of fundamental rights and, thirdly, the development of the federal system and the distribution of competencies between the federal unit and the sub-states - where this system is applicable.

The critical issues of the distribution of competencies between the Union and the Member States seem to remain within the sphere of responsibility and political initiative of the Council and, finally, the European Parliament. Thus, the crucial arrangements will be directly political and will not appear under the legal form of a decision made by a jurisdictional body.

On the contrary, issues relating to the fundamental freedoms and rights of European citizens are anyway subject to a full judicial control via the entire system of jurisdictional bodies, both Community and national, including also the European Court of Human Rights. This is true regardless of the Union's accession to the European Convention for the Protection of Human Rights, which is expressly stipulated in the draft European Constitution.

The above means that the distinction between political and "constitutional" issues, at the level of the Union, is much more live and dynamic, and also much more sincere, than the typical distinction between constitutional and political issues at the level of Member States.

5. Exactly because constitutional arrangements are either historical or purely political, the federal principle, in its known classical and complete form, does not signify the establishment of the principle of a new institutional structure of the Union, and neither is this expressly mentioned as the ultimate goal. The vitality and complexity of the phenomenon of European integration cannot easily be reconciled with the typical federal pattern. Even more so, since the partners in this effort are states experiencing their own federal complexity (such as Germany) or absolute administrative unity (such as France or Greece).

Taking recourse, however, to the form “constitution” for European Union as such, does not require, nor presuppose - in my opinion - an explicit and final response to all these issues; what is more, it does not require, nor presuppose an explicit and official introduction of the classical federal authority. On the contrary, the processing of the future European Constitution provides multiple and original options in terms of the constitution’s structure as well as in regard to the mention of organisational and interpretative principles which now become “constitutional”. I have already mentioned the principles of conferral, subsidiarity, proportionality and cooperation in good faith. It is obvious that they are the principles upon which the institutional structure of the European Union has been built on for decades. However, the fact that the latter seem to be capable and prepared to be certified as constitutional principles, on the one hand proves the flexibility and adaptability of the constitutional phenomenon, and on the other hand proves the specificity of the European Constitution compared to the constitution of any nation-state.

6. In conclusion, the debate on the European Constitution compared to the constitutions of Member States and the common European constitutional tradition raises the issue of *constitutional patriotism*<sup>8</sup>, in other words, the profound issue of political conscience and identity at national and European levels. Both these levels may exist and co-exist only through mutual acceptance and support. This applies on both Union and Member State levels.

7. Besides, the whole issue will not be decided on a symbolic or methodological level. It will be decided on the political, geopolitical, developmental and cultural capacity of the European Union to come together, affirm itself and exist as such in today’s world.

The stakes are high because of the immense historical burden involved. This is attested to by the various trials undergone by Europe in various situations (such as Iraq, or Yugoslavia in the past). The institutional and political composition of Europe is a prerequisite as well as a method for its composition in terms of economy, foreign policy, security policy and defence policy. Therefore, it is worth a try.

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<sup>8</sup> See J. LACROIX, For a European Constitutional Patriotism, *Political Studies*, 2002, pp. 944 et seq.

ABSTRACTS/RÉSUMÉS

The entire procedure for drawing up the European Constitution and, in particular, the whole debate on this procedure may signify the entry into a new era for the constitutional phenomenon. The Constitution as a legal and political phenomenon has been essentially identified with the notions of State and sovereignty. The European Constitution, though, is not called to establish and to become the symbol of a "state" power, but rather a different, peculiar, dynamic and complex phenomenon, namely the European Union. But even its drafting process, apparently, has no relation to the traditional forms in which the constituent power is expressed and organized at the level of the national State. Therefore, the Constitution as a notion and legal form confirms its capacity to exist and operate irrespective of the traditional perceptions of state, sovereignty and constituent power. This flexibility and adaptability of the form "Constitution" is due to its exceptional and irreplaceable advantages which are mainly textual, symbolic and methodological. However, the whole constitutional issue of the European Union will not be decided on the symbolic or methodological level. It will be, finally, decided on the political, geopolitical, developmental and cultural capacity of the European Union to come together, affirm itself and exist as an autonomous entity in today's world.

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Toute la procédure d'établissement de la Constitution Européenne et surtout tout le débat autour de celle-ci constitue, probablement, l'entrée dans une nouvelle ère du phénomène constitutionnel. La Constitution en tant que phénomène légal et politique a été liée, au fond, à l'Etat et la souveraineté. Cependant, la Constitution Européenne n'est pas appelée à structurer et à symboliser un pouvoir "étatique", mais un autre phénomène tout à fait particulier, dynamique et complexe, celui de l'Union Européenne. Mais, même la procédure de son établissement n'a, apparemment, aucun rapport avec les formes traditionnelles par lesquelles le pouvoir constituant s'exprime et s'organise au niveau de l'Etat national. Par conséquent, la Constitution en tant que notion et forme légale confirme sa capacité d'exister et de fonctionner indépendamment des concepts traditionnels de l'Etat, de la souveraineté et du pouvoir constituant. Cette flexibilité et cette adaptabilité de la forme "Constitution" sont dues à ses avantages exceptionnels et irremplaçables qui sont surtout textuels, symboliques et méthodologiques. Pourtant, toute la question constitutionnelle de l'Union Européenne ne sera jugée ni au niveau symbolique, ni au niveau méthodologique. Elle sera jugée, finalement, d'après la capacité politique, géopolitique, culturelle, et de développement de l'Union Européenne de se structurer, s'affirmer et exister en tant qu'entité autonome dans le monde contemporain.

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