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Edited by J. H. H. Weiler and Marlene Wind

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Introduction

European constitutionalism beyond the state

J. H. H. WEILER AND MARLENE WIND

The pace of change in European public discourse has been dizzying. At the beginning of the last decade, in the heady days before Maastricht, the Socialists and the Christian Democrats in the European Parliament were poised to divide the reporting spoils – such as they were then – between themselves. The two big prizes were the report to be presented as Parliament's input into the Maastricht process and the grand project, dating back to Spinelli's Draft Treaty, of writing a constitution for Europe. The Socialists held the majority and had the right of first choice. They chose Maastricht and they chose wisely. Readers are more likely to remember the Martin Report than the eventual Draft Constitution that was presented to plenary, provisionally approved and instantly forgotten. The C word (Constitution) was just as bad as the F word (Federalism) – both were considered as useless toys of the almost lunatic federalist fringe. But that was last century, of course.

How things have changed in the first few years of the new century. The floodgates were opened with that latter-day Joshua, alias Joschka (Fischer), and Jacob, alias Jacques (Chirac), and a lot of fellow travellers eager to take us into a new Promised Land in which Europe (or at least the bit of Europe that, in their opinion, counts) will have a constitution. Even *The Economist* jumped into the fray with its Draft Constitution. And now we have the Convention whose President has not shied away from naming the European Philadelphia and which in all likelihood will produce a document in the title of which the word 'constitution' will surely figure.

What is interesting and, indeed, admirable is the speed by which constitutional rhetoric has been normalized and mainstreamed and how quickly

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the debate has moved from 'Does Europe need a constitution?'¹ to 'What should be in the new European Constitution? A list of competences? A Constitutional Court? A reconfigured Council with a president? An elected president? et cetera et cetera.' The debate and reflection, such as they have been, have also been fuelled, in a very typical European fashion, by a political agenda (enlargement) and timetable (the Intergovernmental Conference (IGC) 2004). This is not to plead for an ivory tower conception of academia which is detached from the so-called 'real world'. But it is to point out that this 'real world' can at times be inimical to the quiet, long-term and profound virtues of *La Vita Contemplativa*.

The sudden popularity of a 'Constitution for Europe' is rooted in many factors. Here are just a few. In part 'constitution' simply became a fashionable code word, like 'governance', for the need to engage in more profound institutional reform in view of enlargement. In part it seemed a ready-made model for solving some of the legitimacy problems of an enlarging community and even a subterfuge for *not* dealing with deep-seated problems of democracy. In the Union of 2003 the democracy deficit seems to have been resolved by arguing that it does not exist – 'and we will have a constitution to prove it'. Clearly, if the Constitution of Europe is to replicate more or less the existing structures and processes adapted to deal with twenty-five members it will do no more than entrench, constitutionally, the existing democratic deficit.

At the political level the discussion of a Constitution for Europe resembles the discussion of democracy. Most people are not theorists of democracy. The democracy they have in mind when they examine and discuss Europe is the national model to which they are accustomed. That experience defines the democratic benchmark for most. Likewise, most people are not constitutionalists. And many constitutionalists are not constitutional theorists. Thus, their discussion of a Constitution for Europe is largely conditioned by their experience and understanding of constitutionalism in some national setting.

A common characteristic of this debate was, and is, a sometimes facile assumption that one could transfer and adapt constitutional frameworks which have been associated, inextricably, with the state to the European level. One can of course transfer the vocabulary, even the institutions such as a Constitutional Court and various constitutional doctrines. Even some of the more thoughtful contributions to the 'do we need a constitution?' side of the discussion are implicitly operating within a statal notion of

¹ D. Grimm, *Braucht Europa eine Verfassung?* (Munich: Werner von Siemens Stiftung, 1994).

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constitutionalism. One can transfer and adapt statal constitutional frameworks to Europe (just as we transfer and adapt state institutions such as a parliament) and one can theorize on the need for a European constitution with a statal model in mind – that may be the very normative purpose of both exercises.

The underlying rationale of this volume is that there is a difference between constitution and constitutionalism. Constitutionalism, for example, embodies the values, often non-stated, which underlie the material and institutional provisions in a specific constitution. At this level, separating constitution from constitutionalism would allow us to claim, rightly or wrongly, for example, that the Italian and German Constitutions, whilst very different in their material and institutional provisions, share a similar constitutionalism, vindicating certain neo-Kantian humanistic values, combined with some notion of the *Rechtsstaat*.

At an even deeper level constitutionalism is a self-referential concept – not a reflection of something that contains or embodies something else (like values) but the reflection of the very thing itself. This is abstract, we know. But rather than engage in further abstract clarification, we invite you to read the chapter by Miguel Poiars Maduro or Neil Walker in this volume – it will become a lot clearer. Falling in love provides a lesson in love that is rarely bettered by academic discourse.

It is the focus on constitutionalism on the one hand, and the very banal affirmation that it is not, decidedly not, a European state that we are after on the other hand, that underlies our project and this volume. For what is under investigation is a series of questions which may be termed of a ‘pure’ constitutional nature. We are not primarily interested in the various options concerning the Council or Commission, or the precise mechanisms for protecting the jurisdictional lines between Union and Member States. We are instead interested in, for example, the extent to which constitutions are inherently concepts associated with statehood and peoplehood. We are interested in the possibilities of constitutional ‘translation’ from Member State to Union without losing the distinct differences between State and Union. We are not totally in the rarified climates of abstract theory. But to the extent that we look expressly at democratic structures or processes, or at some other central features of, yes, Union governance such as comitology or enhanced cooperation, we examine these under an optic of a transformed constitutionalism. Ours then is not a contribution as to how to do it, but as to how to think about it.

Like many such volumes, this book began in a conference held, as is often the case, some time ago. Time has been on our side. What once

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seemed like an intellectual indulgence has suddenly become a central strand in political and academic discourse. We have purged some of the older papers, amended some others and added a few freshly baked, hot out of the oven.

Please do not be disappointed by, and do not accuse us of, a certain measure of ‘incoherence’. We think it is inevitable. There is as yet no developed field of comparative constitutionalism, especially if our interest is in non-statal constitutionalism. Ours is not a project driven by a systematic plan. Think of it the way you would of a *Festschrift* – a collection of papers animated by central preoccupation and sensibility but not constrained by a schema; an invitation for ‘think pieces’. Could there be more pieces included? Of course. Could the pieces be tied together more effectively than we have done? Maybe. But we firmly believe that no single person could achieve the richness of thought and reflection which these pieces achieve when placed side by side, even if there is a price to pay in eclecticism for that richness.

We have made a gesture towards organization through a certain clustering. We open with a chapter in which J. H. H. Weiler, in a rearguard and losing battle, returns to his defence of the status quo – his understanding of the extant European constitutionalism expressed in the notion of constitutional tolerance, and his fear that this may be lost by the adoption of a formal European constitution.

This is followed by Neil Walker, theorizing about constitutional translation, and then by Francis Snyder and Miguel Poiars Maduro actually doing some translation of their own – imagining a European constitutional order which is not a simple transfer from the national to the supranational.

After this Marlene Wind, Renaud Dehousse, and Antje Wiener examine certain features of the process and/or structure in the Union or certain fundamental doctrines and give them, in a variety of ways, a new intellectual twist.

We conclude the book with an Epilogue by Philip Allott which defies categorization but which we publish with no hesitation.

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PART I

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In defence of the status quo: Europe's constitutional *Sonderweg*

J. H. H. WEILER

Introduction: Europe's fateful choice

To judge by the renewed popularity of the idea of a Constitution for Europe one might get the impression that right now Europe is in some kind of constitutional desert. And now we have a European Philadelphia busy preparing yet another document in which the word 'constitution' is almost certain to figure. If a formal constitution is to be the European Promised Land, I think I will join Moses and stick to the desert. In this chapter I will explain this preference.

The idea of a constitution is presented as indispensably part and parcel of a legitimating reform package of an enlarged Europe. It is not, of course, an original idea and can be traced back at least to Spinelli's Draft Treaty for European Union. Whether one can have a Europe which would respect the current constitutional *acquis* and embed it in a formal constitution adopted through a *European constituent power* and, at the same time, not become a federal state in all but name is very doubtful.¹ I think it is a chimera. But the very idea of a formalized constitution requires some serious critical reflection. What appears to be progressive may in fact be regressive. This new fad of a new constitution for Europe may, in fact, be leading us away from the Promised Land into a familiar and boring desert.

Let us step back a minute to review our well-known history.

As a result of a combination of express Treaty provisions, such as those stipulating that certain types of Community legislation would be directly applicable;² of foundational principles of international law, such as

¹ If a 'constitution' by anything other than a European constituent power, it will be a treaty masquerading as a constitution.

² Originally Article 189 EEC (Treaty of Rome).

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the general principle of supremacy of treaties over conflicting domestic law, even domestic constitutional law;³ and of the interpretations of the European Court of Justice,⁴ a set of constitutional norms regulating the relationship between the Union and its Member States, or the Member States and their Union, has emerged which is very much like similar sets of norms in most federal states. There is an allocation of powers, which (as has been the experience in most federal states) has often not been respected; there is the principle of the law of the land, in the EU called Direct Effect; and there is the grand principle of supremacy every bit as egregious as that which is found in the American federal constitution itself.

Put differently, the constitutional discipline which Europe demands of its constitutional actors – the Union itself, the Member States and state organs, European citizens and others – is in most respects indistinguishable from that which you would find in advanced federal states.

But there remains one huge difference: Europe's constitutional principles, even if materially similar, are rooted in a framework which is altogether different. In federations, whether American or Australian, German or Canadian, the institutions of a federal state are situated in a constitutional framework which presupposes the existence of a 'constitutional demos', a single *pouvoir constituant* made up of the citizens of the federation in whose sovereignty, as a constituent power, and by whose supreme authority the specific constitutional arrangement is rooted. Thus, although the federal constitution seeks to guarantee state rights and although both constitutional doctrine and historical reality will instruct us that the federation may have been a creature of the constituent units and their respective peoples, the formal sovereignty and authority of the people coming together as a constituent power is greater than any other expression of sovereignty within the polity, and hence the supreme authority, of the Constitution – including its federal principles.

³ The general rule of international law does not allow, except in the narrowest of circumstances, for a state to use its own domestic law, including its own domestic constitutional law, as an excuse for non-performance of a treaty. That is part of the ABC of international law and is reflected in the Vienna Convention on the Law of Treaties, Article 27. *Oppenheim's International Law* is clear: 'It is firmly established that a state when charged with a breach of its international obligations cannot in international law validly plead as a defence that it was unable to fulfil them because its internal law . . . contained rules in conflict with international law; this applies equally to a state's assertion of its inability to secure the necessary changes in its law by virtue of some legal or constitutional requirement', *Vol. I: Peace*, 84–5 (Sir Robert Jennings and Sir Arthur Watts eds., 9th edn (Harlow, Essex: Longmans, 1992)).

⁴ See generally J. H. H. Weiler, 'The Transformation of Europe', in *The Constitution of Europe* (Cambridge and New York: Cambridge University Press, 1999).

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Of course, one of the great fallacies in the art of 'federation building', as in nation building, is to confuse the juridical presupposition of a constitutional demos with political and social reality. In many instances, constitutional doctrine presupposes the existence of that which it creates: the demos which is called upon to accept the constitution is constituted, legally, by that very constitution, and often that act of acceptance is among the first steps towards a thicker social and political notion of constitutional demos. Thus, the empirical legitimacy of the constitution may lag behind its formal authority – and it may take generations and civil wars to be fully internalized – as the history of the USA testifies. Likewise, the juridical presupposition of one demos may be contradicted by a persistent social reality of multiple ethnoi or demoï who do not share, or grow to share, the sense of mutual belongingness transcending political differences and factions and constituting a political community essential to a constitutional compact of the classical mould. The result will be an unstable compact, as the history of Canada and modern Spain will testify. But, as a matter of empirical observation, I am unaware of any federal state, old or new, which does not presuppose the supreme authority and sovereignty of its federal demos.

In Europe, that presupposition does not exist. Simply put, Europe's constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos and, hence, as a matter of both normative political principles and empirical social observation the European constitutional discipline does not enjoy the same kind of authority as may be found in federal states where federalism is rooted in a classic constitutional order. It is a constitution without some of the classic conditions of constitutionalism. There is a hierarchy of norms: Community norms trump conflicting Member State norms. But this hierarchy is not rooted in a hierarchy of normative authority or in a hierarchy of real power. Indeed, European federalism is constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and real power.

You would think that this would result in perennial instability. As we shall see, one of the virtues of the European construct is that it produces not only a surprisingly salutary normative effect but also a surprisingly stable political polity. Member States of the European Union accept their constitutional discipline with far more equanimity than, say, Quebec. There are, surely, many reasons for this, but one of them is the peculiar constitutional arrangement of Europe.

This distinct constitutional arrangement is not accidental. Originally, in a fateful and altogether welcome decision, Europe rejected the federal

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state model. In the most fundamental statement of its political aspiration, indeed of its very telos, articulated in the first line of the Preamble of the Treaty of Rome, the gathering nations of Europe ‘Determined to lay the foundations of an ever closer union among the peoples of Europe’. Thus, even in the eventual Promised Land of European integration, the distinct peoplehood of its components was to remain intact – in contrast with the theory of most, and the praxis of all, federal states which predicate the existence of one people. Likewise, with all the vicissitudes from Rome to Amsterdam, the Treaties have not departed from their original blueprint as found, for example, in Article 2 EC of the Treaty in force, of aspiring to achieve ‘economic and social cohesion and solidarity among Member States’. Not one people, then, nor one state, federal or otherwise.

Europe was relaunched twice in recent times. In the mid-1980s the Single European Act introduced, almost by stealth, the most dramatic development in the institutional evolution of the Community achieved by a Treaty amendment: majority voting in most domains of the Single Market. Maastricht, in the 1990s, introduced the most important material development: Economic and Monetary Union. Architecturally, the combination of a ‘confederal’ institutional arrangement and a ‘federal’ legal arrangement seemed for a time to mark Europe’s *Sonderweg* – its special way and identity. It appeared to enable Europe to square a particularly vicious circle: achieving a veritably high level of material integration comparable only to that found in fully fledged federations, while maintaining at the same time – and in contrast with the experience of all such federations – powerful, some would argue strengthened,⁵ Member States.

At the turn of the new century, fuelled, primarily, by the Enlargement project, there is a renewed debate concerning the basic architecture of the Union. Very few dare call the child by its name and only a few stray voices are willing to suggest a fully fledged institutional overhaul and the reconstruction of a federal-type government enjoying direct legitimacy from an all-European electorate.⁶ Instead, and evidently politically more

⁵ See three classics: A. S. Milward *et al.*, *The European Rescue of the Nation State* (Berkeley: University of California Press, 1992); Stanley Hoffmann, ‘Reflections on the Nation-State in Western Europe Today’, in Loukas Tsoukalis (ed.), *The European Community – Past, Present and Future* (Oxford: Basil Blackwell, 1983); A. Moravcsik, *The Choice for Europe* (Ithaca, NY: Cornell University Press, 1998).

⁶ See e.g. Giscard d’Estaing and Helmut Schmidt, *International Herald Tribune*, 11 April 2000. For a more honest discussion, admitting the statal implications of the new construct, see, for example, G. Federico Mancini, ‘Europe: The Case for Statehood’, 4 *European Law Journal* (1998), 29, and Harvard Jean Monnet Working Paper 6/98, and see, of course, Jürgen Habermas’s suggestions in ‘The European Nation-State and the Pressures of Globalization’,

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correct, there has been a swell of political and academic voices⁷ calling for a new constitutional settlement which would root the existing discipline in a 'veritable' European constitution to be adopted by a classical constitutional process and resulting in a classical constitutional document. The Charter of Human Rights is considered an important step in that direction. What is special about this discourse is that it is not confined to the federalist fringe of European activists, but has become respectable Euro-speak in both academic and political circles.

Four factors seem to drive the renewed interest in a formal constitution rather than the existing 'constitutional arrangement' based on the Treaties. The first factor is political. It is widely assumed, correctly it would seem, that the current institutional arrangements would become dysfunctional in an enlarged Union of, say, twenty-five. A major overhaul seems to be called for. In the same vein, some believe, incorrectly in my view, that the current constitutional arrangements would not work. In particular, the absence of a formal constitution leaves all important constitutional precepts of the Union at the mercy of this or that Member State, threatening both the principle of uniformity of, and of equality before, the law as well as an orderly functionality of the polity. One is forever worried: 'What will the German/Italian/Spanish, or whatever, constitutional court say about this or that?' A formal constitution enjoying the legitimacy of an all-European *pouvoir constituant* would, once and for all, settle that issue.

The second factor is 'procedural' or 'processual'.⁸ The process of adopting a constitution – the debate it would generate, the alliances it would form, the opposition it would create – would, it is said, be healthy for the democratic and civic ethos and praxis of the polity.

The third factor is material. In one of its most celebrated cases in the early 1960s, the European Court of Justice described the Community as

New Left Review no. 235 (May 1999), 46, and *Die Einbeziehung des Anderen* (Frankfurt: Suhrkamp, 1996), ch. 3 'Hat der Nationalstaat eine Zukunft?', 128–91. There is an interesting political–legal paradox here. A 'flexible' Europe with a 'core' at its centre will actually enable that core to retain the present governance system dominated by the Council – the executive branch of the Member States – at the expense of national parliamentary democracy. Constitutionally, the statal structure would in fact enhance even further the democracy deficit.

⁷ In the political sphere see, for example, the over-discussed Berlin speeches of Joschka Fischer and Jacques Chirac. For text and comments on these interventions, see the special symposium on the Harvard Jean Monnet site: www.JeanMonnetProgram.org.

⁸ I am grateful to Professor Günther Frankenberg, University of Frankfurt, for sharing his idea.