

4

The EU's Constitutional Moment: A View from the Ground Up

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This chapter transcribes a conversation between one of the book's editors, Nick Barber, and me. We have kept it free-flowing to reflect this. It offers some reflections based on my role in the Constitutional Convention as a 'sherpa' to the Greek Presidency (~~Spring 2013~~). As the representative of the last Presidency of the Convention, the Greek Minister of Foreign Affairs, George Papandreou, was part of the Praesidium which met behind closed doors, with one sherpa each, under the alternate chairmanship of Valéry Giscard d'Estaing and Giuliano Amato. Praesidium members prepared and discussed the various amendments percolating up from the Convention and down from the secretariat and the President. Members of the Greek team, including myself, took turns in joining the minister in these meetings in addition, of course, to taking part in the Convention debates proper.

In a different space, the Greek team was especially attuned to one of the great power games played out on the Convention floor, that between big and small states – pardon me, smaller states – and chaired a group bringing together representatives of the latter group, self-styled as 'friends of the Community method'.

In anticipation of its privileged role in the Convention process, the Greek government entrusted me with creating and chairing an international group of experts which met at regular intervals in various European cities to provide advice and feedback. Members included Paul Magnette and Joseph Weiler, Stanley Hoffmann, Anand Menon, Helen Wallace, Haris Pamboukis, Nikos Kotzias and Jean Nestor.

The original plan before the launch was for the Greeks to foster a renewed democratic covenant through the Convention and our group was tasked with translating this commitment in constitutional terms. After all, said the Greeks, we invented democracy, didn't we?! I wrote a draft inaugural speech for George Papandreou that would have turned this narrative on its head:

We Greeks started to invent democracy way back when, but failed to make it inclusive of women, slaves and strangers. Our modern era proceeded to reinvent democracy and, in the process, to make it genuinely inclusive. A never-ending task, in the making for the last two centuries. To the extent that modern Greeks can humbly claim a bit of historical

legacy, we feel especially responsible for bringing this commitment to inclusiveness to the European level: A European democracy, for all. That should be our shared motto.

Would a Greek minister have said this? We will never know. For the day of the speech in January 2003, Papandreou had to choose whether to fly to New York instead of Brussels to talk about War in Iraq rather than Eternal Peace in Europe. Between these two agendas, guessing which came first is not, hum, rocket science.

NB: *Can you say more about how you see the origins of the Draft Constitution?*

When asked this question, many refer back to Joschka Fischer's 2001 speech at Humboldt University as the starting point for the story of the Draft Constitution. But of course, the roots of the Draft Constitution reach much deeper in time. You could even say that some dreamers after World War II hoped to create a new kind of European nation to replace the flawed nation states, and that they dreamed of a constitutional order for Europe at the time of The Hague Summit back in 1948. But we got instead a Union, not a state, and a Treaty not a Constitution. Why, some 50 years later, this urge to cross the Rubicon and give the EU something called a Constitution, albeit to start under the guise of a constitutional treaty? There were at least three possible motivations.

The first was a simple, almost mechanical, need to modify the Treaties in light of the enlargement of the Union to East and Central European states that was to come in 2004. The old decision-making rules found in the Treaties would have struggled to cope with these extra members. Member States were aware of the challenges that this new round of accessions would bring when discussing the reforms that eventually became the Amsterdam Treaty in 1997, but the Amsterdam modifications to Europe's structures were widely regarded as inadequate; a temporary solution at best. Enlargement would have required institutional adaptation in any event, but in power-political terms it raised worries in the larger Member States that they would lose power to their smaller, more numerous partners. To some extent the production of the Constitution was driven by the Gulliver syndrome that is, a fear by the large states of Europe that the inclusion of many more smaller states after enlargement might slow decision-making within the Union or, worse still, that the larger number of smaller states might be in a position to band together to tie them down. Did this concern really warrant a Constitution?

Second, as I wrote at the time with Andrew Moravcsik, the Draft Constitution also aspired to entrench and build upon the constitutional settlement that had been developed in the 1990s. So the Convention was not only part of the ongoing constitutionalisation process of the Union, but would take this process to a new level. For some, the broader question of the identity of the Union had been left unresolved in Amsterdam; the Draft Constitution was an opportunity for the Union to reflect on the settlement it had already reached and express it in a form that would bring into being a new European body politic. The Draft Constitutional Treaty provided an opportunity to manage, recognise and make visible the existing settlement.

But was this a 'constitutional moment', a moment when a fundamental shift in the nature of the Union should be formally recognised in a new type of Covenant?

Third, the Draft Constitution was a response to the legitimacy deficit debate that had been going on since Maastricht: resistance to the creeping competences of the Union; the feeling that this was a centralising project that lacked proper democratic controls; and the persistence of a wide gap between the people and the institutions of Europe at a time when the launch of the Euro required, on the contrary, that democratic anchoring be strengthened. People needed to be reassured that this construct served them. There was a hope that, perhaps, the structures of the Union could be clarified, simplified and presented in a more accessible form. This may be the context in which Joschka Fischer's speech should be placed: he was arguing that we needed to name the animal, to give a story to the project, to make the Union seem less remote and less alarming. Constitutions do two kinds of things. Most obviously, they allocate power within the system – creating and shaping institutions. But constitutions also tell a story about the polity, a story about what type of state it is, and what it aspires to be. Constitutions present the values and character of the common polity to its people, and some would argue that in doing so they actually constitute the people. The time and angst expended on the Preamble to the Draft Constitution shows the concern of the Convention with this, symbolic, side of the Constitution's nature. Some believed that by presenting the Union as a federation, at least through implicit analogy with the United States, a Constitution would make the Union more comprehensible to its people, as well as, somewhat in tension with the United States analogy, underline what the Union is not; that it is not some sort of super-state, and has no aspiration to become one. And, perhaps, along with a recognition of the Union as a federation would come the establishment of effective democratic structures. People are familiar with federations, and, it was hoped, would be more willing to engage with its constitutional structures.

The decision to label this document a 'constitutional Treaty' (a Treaty that would give birth to a Constitution) prompted widespread debate amongst academics and politicians. There was debate over whether the label was a wise one, but also over what it connoted. The supposed Constitution was not a constitution in classical political terms, yet perhaps it merited the title. This uncertainty over the nature of the document recurred throughout the story of the Draft Convention. Indeed, even with the Laeken Declaration, the Declaration that heralded the start of the process, it was not clear whether the final document would be presented as a constitution. There was broad consensus on the need for a treaty change, but little consensus over the form that this change should take. So paradoxically the very fact of 'constitutional moment' was itself contested throughout this Convention.

These three strands, three explanations of the origins of the project, could all be taken as implying arguments for or against a constitution. Regarding the first strand, it could be argued that the reunification of Europe after the fall of the Eastern Bloc was a moment that required a constitution; the territory of EU was now, in broad lines, determined. But, expansion need not have required a

new constitutional form. And conversely, the United States adopted a constitution well before its borders were set. The relationship between constitutional settlement and territorial settlement is, then, ambiguous, at best. Even if it were to be argued that the expansion of EU, this ‘big bang’ should be celebrated and marked by the adoption of a constitution, others could, equally well, argue that the Union should continue to be defined as a fluid entity, one whose borders could still change. It could also be argued (second strand) that the Constitutional settlement was precisely about incremental treaty change not a big bang Constitution.

As to the third strand, I often draw the distinction between mimetic and transformative reasoning. There are two kinds of ways of thinking about the EU. One is mimetic: understanding the EU as more or less like the nation state – as like a more decentralised Germany, but borrowing a great deal from the USA. The second is transformative, inventing a new form of polity which involves transforming our understanding of both the nation state (into ‘member states’) and the older, Westphalian, European system of states itself. Through the classic mechanisms of international law a new type of entity has emerged, one which is not seeking to jump into a new form of state, but is rather something different, something new. I argued at the time that we should be referring to a federal union not a federal state. A deeper form of collaboration which involves, in addition to economic interdependence, democratic interdependence. What happens in the democratic game of one Member State impacts on other Member States, and there is the challenge of intermingling political legitimacies.

NB: If these were the goals, did the Convention achieve them? What was the process like?

Well in the end, the Convention did not contribute a Constitution as classically understood, but one more Treaty reform. Nevertheless, it provided a chance for what might be termed constitutional pedagogy; an opportunity for the people of Europe to formulate an account of the European project, which could then be formalised into a constitutional text. The process could have enabled people to learn from each other, and to produce a text that would stand as an articulation of the values and point of the Union.

And indeed, as I argued at the time with Paul Margette, the process did involve much more Habermasian logic of persuasion than ever before in Treaty reform, although in the end and unsurprisingly the bargaining logic prevailed, both in the Convention and in the IGC that followed. But the fact that the process included people beyond the usual suspects of politics, especially legal scholars, did mean that we were able to generate text that encapsulated better than ever before what European democracy looks like. Articles 9 to 12 of the final Treaty summarise a great amount of non-mimetic thinking about European democracy. Indeed, these debates inspired my own concept of demoiocracy, which I developed at the time to try to translate them in theoretical terms (defined as ‘a union of peoples who govern together but not as one’). It was striking, above all, that European democracy was going to rely on a notion of European people or the primacy of the European

Parliament in expressing its 'will'. This meant that the Draft Constitution – and later the Lisbon Treaty – enshrined the European Council and clearly assigned to this club of executives a core representative function alongside the Council, which is not to the taste of traditional constitutionalists. Most importantly, if we have European peoples plural then the democratic focus is on citizenship, with all the rights, obligations, aspirations that it implies. Unfortunately, the text does not reflect an inclusive notion of citizenship all the way down, speaking instead in paternalistic terms of citizens 'who shall receive attention' from EU institutions. And while the European Citizen Initiative became the flagship of 'democratisation' when the Convention members tried to sell the Constitutional treaty in the latter phase, this was not something that at least the leadership of the Convention had embraced with enthusiasm, to say the least.

Perhaps this substantive lacuna is unsurprising, as many in the Convention were ill-placed to facilitate the learning process that underpins the logic of persuasion and the construct of a modern democratic ethos. Too many Convention members, crucially including the President of the Convention – Giscard d'Estaing, who thought not only in mimetic terms but who did not believe in what I would call 'the promise of democratic effervescence'. Delegates struggled to escape their statist biases. Perhaps worse still, supporters of the statist approach to the project thought of themselves as idealists, as defenders of the true calling, the true ambition for Europe. Those who had other visions of Europe were regarded as anti-EU, as objectors who needed to be overcome. The main drafters failed to fashion a constitution that reflected the truly novel nature of the Union.

The pedagogic potential of the Convention was further undermined by the failure to engage those outside of the Convention. During the Convention there was an aim, an intention, to engage, and there was some engagement in various forms. For example, NGOs were included in the process to a limited extent. They had tables set out in the corridors leading to the Convention floor which allowed them to engage with delegates. There was a one-day opportunity for some of the NGOs to speak to the Convention, with each given a short timeslot to make their case. But the utility of this contribution was limited. The NGOs that were present were a small microcosm of the broader political community. And their one-day opportunity to address the delegates turned into a shambles, as most of the speakers failed to focus on details and instead turned lyrical, treating their moment on the stand more as a chance to express their grand vision of Europe rather than as a chance to influence the delegates. The delegates were bored for a day, and then the process moved on.

Of course, the very diversity of delegates also made it harder for the Convention to engage with those outside of the room. There were delegates from the Member States, from national parliaments, from the European Institutions. And cross-cutting these categories were political groupings like the Christian Democrats or the Social Democrats, organisations which had regular meetings outside of the Convention. They found it difficult enough to engage with each other, let alone to talk to those outside the Convention. In contrast to a legislative assembly, the Convention lacked established political connections which would facilitate decision-making: it was a

new-born political body, and struggled to find its voice, even if many delegates did try to do what they could, on the ground.

In some respects, the Convention now seems very dated. There was only very limited use of the internet, for instance. It is possible to imagine a different form of Convention made full use of the early possibilities of e-democracy provided by new technologies. The Convention could have, should have, used the internet to publicise its debates and to enable people to comment and engage with proceedings in innovative ways.

In addition to this gloomy picture, the President of the Convention – Giscard d’Estaing – was not the best person to engineer democratic decision-making. While Giscard had a deep knowledge of European Institutions and had himself introduced the notion of the European Council in the 1970s, he had an autocratic manner that impaired his capacity to engage with people. There are many different ways of failing to be democratic – and d’Estaing suffered from many of them. He could not engage with people, and, moreover, demonstrated a contempt for small countries. As part of the Greek delegation, working with the Greek government, I helped coordinate a group (called ‘the friends of the Community method’) that sought to bring together the smaller countries and protect the interests of those smaller countries in the European project – by, for example, protecting the rotating Presidency. But being French as well, I often mingled with the French group. There is no question that the delegates from France, including Giscard, least appreciated the need for federal balancing, and the need to protect the smaller nations. Federal equality should have been central to the Draft Constitution, but the French delegates privileged the Franco-German axis as usual. Giscard’s attitude bordered on the contemptuous in his comments on the smaller members, overheard asking his staff, ‘who do they think they are,’ or ‘they are less than a third of the Union’.

Giscard was not, of course, the sole author of the Draft Constitution – and he did give way on various issues. He was an expert at recognising the points at which to expend political capital. But his position in the Praesidium allowed him to dominate that body and, through that body, the Convention itself (the Praesidium was the body that guided the Convention, formulating drafts and deciding what measures would be put to the floor). Only limited records were kept of discussions in the Praesidium in spite of the crucial role it played, so it might now be impossible to fully assess how it operated. For scholars today, the Praesidium is a ‘black hole’ within the drafting process. As a small example: who can recall today how much contestation occurred in the Praesidium around the drafting of the Preamble? We all believed that this would be a very important statement, a chance to spell out what the Constitution was all about. So with the Greek delegation, I spent time gathering inspiring Preambles from countries around the world, such as some from the Pacific like the Marshall Islands who tend to tell a story very directly, emphasising diversity. We produced drafting suggestions but the President was not interested. He retreated into his ivory tower, probably gazing at the horizon of his posterity late at night, and drafted it by himself. Who did he think he was?

In retrospect, it is a shame that Giuliano Amato was not in charge of the process. Amato was a far more ebullient character, winning people over with charm and humour. Because Greece was one of the three states that had the Presidency during the Convention, and because I was an advisor to the Greek Foreign Minister, I sat in the Praesidium a few times. The difference in style between Giscard and Amato was dramatic. Whereas the former sought to stifle debate, Amato sought to encourage it. Perhaps if he had been the President of the Convention things might have turned out differently. He would have been more open to discussion, and more willing to compromise. And, crucially, Amato knew, and could deploy, the power of humour (promising a recalcitrant Praesidium member that his stubborn resistance was duly noted and could be inscribed on these walls for posterity to acknowledge).

If there had been a President who had recognised the need to avoid federal mimetism, who had been able to engage with the public more broadly, who had been more consensual, and, perhaps, more open to using social media as a tool to build consensus around the Constitution, the fate of the Draft Constitution might have been very different.

NB: *To what extent does the constitutional process explain the results of the referendums?*

Throughout the Convention, some of us had been worried about the lack of buy-in from citizens, who after all were supposed to be the authors of this new constitutional treaty. One of my personal crusades was a proposal on behalf of the Greek team for holding an ambitious constitutional *agora*, an open space in which the merits of the Draft Constitution could be debated in a festive atmosphere. I referred to it as ‘the Woodstock of European politics’, a five-day festival that would happen in Athens, from the beaches to the parks, held between the end of the Convention of the European Council adopting the draft in June 2003 and its adoption by the Heads of State, a chance for people from all over Europe to debate the document, with the possibility of amending the text. I suggested this about a year before the end of the Convention. The Greek Presidency was supportive, and, I hoped, there would be a symbolic benefit in enabling the people to debate the Draft Constitution before it returned to the Heads of State. We presented this to Giscard in the Praesidium, arguing that it would change the ethos of this exercise, but he was not interested, and we made no headway. Needless to say, the failure to engineer popular ownership of the Draft Constitution had lasting consequences. Publics across Europe could have been engaged upstream in different ways of course but it was wrong to do so only at end when they were asked to rubber-stamp a process they had not been connected to. This is a point we tried to make during the IGC with a group of approximately 100 EU scholars from around the world in a document entitled *Making it Our Own*, where we suggested amendments to the text addressing citizens’ concerns such as power, repatriation and the like. Again here, it proved impossible to burst the drafting bubble.

Which brings us to the loud French and Dutch ‘Nos’ in the spring of 2005 after the timid Spanish ‘Yes’. Whilst there were many factors that led to the rejection of the Draft Constitution in France and the Netherlands, the opacity of that document did play a role. The Draft Constitution singularly failed to resonate with voters and it might be this lack of identification that allowed other issues to come forward in the campaign, such as the fear of the Polish plumber in France. That the campaigns were so strongly affected by issues not related to the Draft Constitution is, itself, evidence of its failure to engage with the people it was supposed to address. People did not care enough about the text to overlook the context. The lack of proper engagement entailed that, for many voters, the Draft Constitution fell from the sky; it was not a project people had invested in, even those who might, in other circumstances, have supported the substance of the proposals. People did not care, and had not even noticed the Convention.

I campaigned for ‘Yes’ in the French and Dutch referendums by arguing that the label of a constitution did not necessarily connote that the thing being constituted was a state. After all, we can adopt constitutions for clubs of all sorts. But for this message to come across clearly it should have been written in a different way. The Preamble, for example, should have emphasised the peoples of Europe – ‘We the peoples of’, and list every country. The Constitution needed to be clearly for a different kind of animal: it needed to be obvious that this was not a mimetic exercise. The primacy clause, in particular, created problems for the Yes campaign. As I campaigned in neighbourhood markets, in meetings or on TV, I constantly sought to explain that the Constitution only asserted primacy in circumscribed areas and context rather than a general assertion of primacy. Moreover, it depended on prior agreement by the states – states who had agreed to accept the outcome of any adjudicator of these disputes. This was targeted primacy, circumscribed primacy. But it was understood, wrongly, as all-encompassing, an assertion of power by the Union over national laws in general. To be sure, there was much to defend in the Draft Constitution including as mentioned the passage designed to lay out how the EU combines representative, direct and participatory democracy in novel ways. Nevertheless I was somewhat uncomfortable, defending something that was not what I thought it should have been.

The French campaign was dominated by debate over the dreaded ‘country of origin’ principle and the ability of workers in the accession states to travel to France – even if this was about the new Draft Directive on services by Commissioner Bolkenstein and had nothing to do with the Draft Constitution. Having long worked on mutual recognition in the single market, I believe that this principle was at the heart of the European construct even if it needed to be managed with care. But it became anathema to defend it and even counterproductive if you wanted to campaign in favour of the Constitution. Even politicians sympathetic to the European project used the debate over the Draft Constitution to air their concerns over these issues. We struggled to maintain public focus on the Draft Constitution itself, as opposed to the Polish Plumber controversy.

After the referendums rejected the Draft Constitution, I was very concerned by the suggestion that it should be put to another referendum – and concerned when much of the substance of the Draft Constitution was resurrected in the Lisbon Treaty. Something like the Lisbon Treaty was necessary; the pressures of accession were real. And thankfully, the Treaty did remove much of the statist paraphernalia. Nevertheless, the decision to press forward with the substance of the Draft Constitution after its rejection by the French and Dutch peoples did lasting harm to the European project. It may have been a necessary sin, but it was a sin all the same. Much water has flowed under the bridge since then. The constitutional settlement consolidated by the Lisbon Treaty has proven resilient even if the substance of EU policies have become deeply contested. But I believe that the EU has yet to undergo what I called at the time our ‘democratic atonement’.

