

The French Refusal: A Bless for Europe?

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Abstract

Penolakan terhadap Konstitusi Eropa yang telah terjadi, ternyata bukanlah dikarenakan sisi formil ataupun sisi materil yang riil dari Konstitusi itu, akan tetapi lebih pada masalah pendapat dan interpretasi yang berkembang di tengah-tengah masyarakat terhadap isi konstitusi, dimana terdapat kecurigaan dan masih tersisanya tanda tanya besar akan masa depan mereka dengan peningkatan proses integrasi yang terus terjadi. Mereka membutuhkan penjelasan yang lebih mendalam akan hal ini. Para pemimpin Eropa seharusnya menilai hasil referendum yang terjadi di Prancis sebagai suatu pengalaman positif, karena tidak jarang terjadi perdebatan besar dan intensif pada masyarakat Eropa dalam setiap langkah proses integrasi apabila menyangkut interpretasi terhadap teks suatu dokumen hukum yang akan diberlakukan. Perkembangan yang terjadi saat ini yang melibatkan bangsa-bangsa Eropa membuktikan, bahwa Uni Eropa perlu melakukan reformasi dalam setiap upaya integrasi yang dilakukan dengan cara lebih melibatkan dan mendekati diri kepada masyarakatnya. Dengan kata lain, dapat dinyatakan bahwa "Suatu Traktat yang konstitusional membutuhkan pemahaman dan dukungan sepenuhnya dari seluruh bangsa Eropa".

Keywords: constitution, European Union, referendum

Since the French refused to approve by referendum the treaty establishing a Constitution for Europe, the project of European construction seems to have lost a bit of its flair. Logical if you consider that it is not only one of the states that took the very initiative for European unification but also one of the dominant states inside the actual Union (the so-called French-German

axis), which seems to decide to halt the process of further integration.

The press comments immediately after the vote were quite uninteresting as they were not so much trying to understand what really happened, as they were condemning the error that had just been committed. Just like before the vote most journalists devoted their time to promoting the treaty rather than to analyzing it. Even

Jürgen Habermas doesn't seem to have been up to his standards when commenting the text.¹

But what really happened in France? To answer such a question, one should above all try to understand what the French said no to and hence look at the text itself. This will clearly lead to an analysis founded more on legal than on socio-political grounds. Our approach will as a consequence be very different from those who wish to explain the Constitution by the work of the Convention on the one hand², or by putting it in line with the development of an economic integration process. We wish to consider the text as it was presented to the French on the 29th of May 2005.

The main thesis of this paper is that the vote signified neither a refusal of a European Constitution, nor the expression of an all-round opposition to the national government. It was instead the refusal of the constitutionalization of a text that had neither the formal characteristics nor the content to form the basis of a future Europe to come. The scope of this text will thus be to clarify this aspect that became fundamental and decisive in popular and intellectual circles. We start from the supposition that the text of the draft was studied and more or less known by the French. Anyone present in France during the

campaign, even for a short while, will confirm that such was undoubtedly the case.

Formal aspects of the Draft

The contemporary European Union has been constructed mainly by international treaties, did this "constitutional" text change this aspect of the EU? Voting in favor or against a European constitution one could think so, since there's indeed a huge gap between a constitution and a treaty. But then again, the citizens called to the vote didn't have to pronounce a verdict concerning a European Constitution, but concerning a treaty "establishing a Constitution for Europe", which makes it a whole different story. The clear primacy given to the Constitution in the hierarchy of the concerned European legal systems, could indeed make it appear as a constitution, but then again, considering European jurisprudence, can't we say that communitarian law already primed national law and wasn't this one of the reasons the Irish population initially refused the Treaty of Nice in 2001?³ Quite some scholars indeed have underlined that European and national jurisprudence had *de facto*

¹ L. Sève, "Non, Jürgen Habermas!", L'Humanité, 26 Mai 2005

² E.g. P. Norman, *The Accidental Constitution. The Story of the European Convention*, EuroComment, Brussels, 2003.

³ B. Olivi, *L'Europa difficile*, Bologna, Il Mulino, 2001, p.575-576

constitutionalized European Treaties.⁴

Since it's not opportune nor productive to dwell too much on formalistic issues, we assume as a starting hypothesis, as the French campaigners did, that this text was indeed different from a normal treaty and was to become a true European Constitution if voted. Hence we'll assume that the referendum didn't just concern the approval of an international treaty, as was the case with the Maastricht Treaty. The first obvious interrogation then concerns the drafting of the text. To justify the democratic character of the drafting commission or "Convention", the possibility given to citizens to question it or to debate with some of its members on the internet is often invoked. The limited extent of this participation, in no way comparable to a Constituent Assembly, is however not the scope of our approach, since we don't want to focus on the already quite well-known topic of the "democratic deficit" of the EU, but on the proposed Constitution itself. Before discarding the argument, it should however be mentioned, to

avoid overlooking the obvious, that the refusal of a text by the people is obviously not without link with the widespread feeling of exclusion haunting important parts of the so-called "European population".⁵ It should, moreover, be stressed that this limited participation was without a doubt a missed change to democratize the elaboration of fundamental Union-texts.⁶

If this text was really what it officially ought to be, that is a constitution, then what should be its main characteristics? Without wanting to enter to deeply in theoretical legal debates, some basic (and very general) principles have to be invoked. Generally constitutions, as an expression of the people's will, express, after the enumeration and the definition of the fundamental rights and liberties,

⁴ See for example: T.C. Hartley, "Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community", *The American Journal of Comparative Law*, Vol.34, No.2, (Spring, 1986), pp.229-247 and A. Stone Sweet & T.L. Brunell, "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community", *The American Political Science Review*, Vol.92, No.1 (Mar. 1998), pp.63-81

⁵ See for example G. Mammarella & P. Cacace who notice that the Constitution did not involve citizens, nor tried to resolve the democratic deficit, in *Storia e Politica dell'Unione Europea*, Bari-Roma, Laterza, 2005, p.324 Consider as well the relation between constitution and citizenship in C. Closa Montero, "Between EU Constitution and Individuals' Self: European Citizenship", *Law and Philosophy*, Vol.20, No.3, Union Citizenship, (May, 2001), pp.345-371

⁶ Schmitter considered in 2000 that although the EU was not ready for a constitutional process at that time, such a process could however in no way be dissociated from democratization. P.C. Schmitter, *How to Democratize the European Union and Why Bother*, Lanham, Rowman & Littlefield Publishers, Inc., 2000, p.119

state order. They attribute powers, duties and responsibilities to certain institutions and institutionalize often, in European countries at least; a separation of powers. They thus guarantee not only fundamental rights, but also the structure and functioning of the state and, so doing, provide the framework for political and social life within the state. To protect such a fundamental text, it's generally rather hard to change the so-called "rigid constitution" (a special parliamentary procedure with qualified majorities is most often required).

What are the main characteristics of this constitutional draft? Can it be considered having some common features with traditional Western European democratic constitutions? An often heard criticism of the constitutional draft is that on several levels it gravely violates the traditional features of a democratic constitution. This fact induced some to say that the very basics of constitutional law as most European countries know them are questioned by the introduction of this draft constitution.⁷

Above the already mentioned problems of the coming into existence of the text, we have thus now to look at the articles concerning these formalities to understand if it is or was

a text deserving to form the basis of "an ever closer union"⁸, ready to take the step towards a political union. Let's look at some of the formal aspects characterizing a traditional Western-democratic constitution, we'll withhold two: *readability* and *formal rigidity*.

Readability

One of the first points to be considered should be the readability. Not only should a constitution emanate from the people, it should also be short and easily understandable for all. This requirement has different motivations. First of all it's an obvious fact that the bases of state organization should be clear to everyone as should be the expression of the values on which the state is based. Secondly, the readability is necessary to allow a certain criticism of the text. Thirdly, if you want the people's adhesion to the Fundamental Law of the state, they should be able to read and understand it.⁹ Is this the case with the European Constitution? 448 articles on 199 pages are not really an example of a clear and short text, but

⁸ D. Dinan, *An Ever Closer Union*, Palgrave Macmillan, 2005

⁹ It's regrettable that this essential requirement is so often neglected in discussions on European citizenship. See: M. Kumm, "To be a European citizen? the absence of constitutional patriotism and the constitutional treaty", *Columbia Journal of European Law*, Issue 11:3 & J. Lacroix, "For a European Constitutional Patriotism", *Political Studies* 50/5 (2002), pp.944-958.

⁷ E. Chouard, "Une mauvaise constitution qui révèle un secret cancer de notre démocratie", http://etienne.chouard.free.fr/Europe/Constitution_revelateur_du_cancer_de_la_democratie.htm

adding the protocols and annexes, forming an integral part of the document (art. IV-442), we arrive at a text of 485 pages. In comparison, the French Constitution counts only 89 articles, the Italian 139, the Belgian 188 and the American 7 (with 27 amendments). It can be easily said that almost none of the Spanish citizens voting in favor of the text read it totally. These annexes and protocols are however not just technical specifications that can be overlooked without too many consequences.

An example suffices to underline the importance of these annexes. Art. II-61 of the Treaty states clearly "Everyone has the right to life. No one shall be condemned to the death penalty, or executed." But, looking at Annex 12, article 2, 3§, one can read that: "Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- a) in defense of any person from unlawful violence;
- b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c) in action lawfully taken for the purpose of quelling a riot or insurrection."

It doesn't take a lot of legal interpretation to understand the far-reaching consequences of these exceptions to the so-called general rule. Not only does this illustrate how important the annexes are and how unreadable and

thus undemocratic their mere existence makes this draft, moreover it shows that the text leaves open an important possibility for the instauration of capital punishment. This offered a great argument to human rights advocates for opposing the proposed text.

Formal Rigidity

A second fundamental element of a constitution, linked to the importance of the text is that it should be protected by a certain formal rigidity. This protection, as important as it may be, should however not be absolute, since as the French *Déclaration des Droits de l'Homme et du Citoyen* of the year 1793 wisely enounced: "*Un peuple a toujours le droit de revoir, de réformer et de changer sa Constitution. Une génération ne peut assujettir à ses lois les générations futures.*" (art.28)¹⁰ Could this constitutional draft be altered once approved? Was it an option to approve it first and change it later, as the French President Chirac suggested? To change the Constitution, once adopted, a unanimity on the European level is requested. This means thus that all the governments of all the Member States (and afterwards even their parliaments and/or in case of a referendum the peoples of these countries) should agree on a

¹⁰ "A people always has the right to review, reform and change its Constitution. A generation can not submit to its laws future generations."

revision proposal. Considering the difficulties encountered to agree upon the establishment of the draft, one can easily state that this kind of double unanimity makes the revision process a rather desperate undertaking. It would be more difficult to change the European Constitution than the American one. But, might one oppose, such a unanimity has always been required. Correct, but shouldn't this be altered if we want to take a qualitative leap from a simple "international treaty" to a "European Constitution"? And even staying within the formal framework of a treaty, isn't there a considerable difference between the requirement of unanimity in a Europe of 6 or 9 Member States and a Europe of 25 or 27? This indisputable fact has been acknowledged by the gradual substitution of the unanimity procedure by a procedure of qualified majorities on different levels. Why wasn't this evolution incorporated in the procedure for "constitutional" revision? Why would a new treaty be necessary to change a constitution?

The Draft's Content: A Step but in what Direction?

The partisans of a clear "*oui*" defended that the draft contained quite some advancements. This statement should first of all be put into perspective by linking it to previous texts (in comparison to what is it an improvement?). Moreover, bearing in mind that the text is

supposed to be a constitution, one should also measure up to what point the content of the Draft coincides with what is expected from a constitution.

Institutional Functioning

The new treaty, if compared to the Treaty of Nice, offers (or offered) some interesting improvements on an institutional level. The critics of the limited role of the European Parliament had to admit that the multiplication of this institution's competences was a step forward. From this perspective the French refusal was hence a major setback for the well-functioning of the Union's institutions. One could however say that if those changes were so urgent, European leaders should have opted for a technical treaty that could have entered in vigor quasi immediately.

In addition, even if there were some undeniable enhancements, some of the institutional reforms were to be considered a missed change and, although an improvement compared with earlier treaties, certainly insufficient for a constitution. A major innovation of the Treaty was the right of petition (art.47.4), the possibility given to citizens to intervene directly in the law-making process is undeniably a positive innovation. Not only is it in essence a democratic enhancement, it forms furthermore one of those tools "*par excellence*" able to bridge the gap between citizens and institutions. Unfortunately the opportunity offered by this right of

petition was not seized entirely, reading the article one can indeed see that it's quite limitative. Not only should it be filed by at least one million citizens of a "significant" number of different states, but moreover such an initiative would in no way force the Commission to discuss the topic requested by the petition and even less to take a legislative initiative. The article states that the initiative merely "invites" the Commission to submit a proposal. For the French this small step forward could in no way outweigh the negative sides of the Treaty concerning the democratic functioning of the Union. All the more since it was considered an instrument with little efficiency, as the French know quite well, since most petitions inviting their National Assembly to some particular measure serve only as decoration to the caves of this same Assembly. This made that the argument of the right of petition, used quite frequently by those defending the draft, lost much of its strength.

The functioning of the institutions remains one of the main tasks of a constitution and thus a good way to judge the content of it. The powers of the European Parliament have been extended in the Constitution, which is, as we mentioned, a step forward. But on the other hand art. 20.1 dismisses out of hand the separation of powers characterizing any democratic constitution. It's stated that "The European Parliament shall,

jointly with the Council, exercise legislative and budgetary functions." But what is the Council? Is it legislative or executive? Moreover art.26.2 evokes "Union legislative acts may be adopted only on the basis of a Commission proposal,(...)." Why does the executive power still have the exclusive right of initiative in a text that should form the (unchangeable?) basis of the European Union? These are no details as some politicians or analysts tried to affirm, but it concerns the essence of democratic state-constructions. The French citizen came to the conclusion that nor the European Commission, nor the European Council (Council of Ministers) are really accountable for their choices on a European level.

A Neutral Framework?

If the text doesn't guarantee one of the fundamental features of traditional democratic states, being the separation of powers, does it at least provide an efficient framework for political activity and debate? Does it, in other words, create a space where the democratic debate can take place freely and find its expression in legislative work? Obviously the denying of right of initiative to the MP's would make us respond no. Although this intuitive answer is correct, the reasons are even more numerous than those already indicated would lead to presume. The text doesn't only not enable those chosen by the people to take

legislative initiatives, it moreover indicates a clear ideological path in which the Union's politics should engage. It's thus not an ideologically neutral text, as a democratic constitution should be.

This ideological character can be illustrated in a different number of ways. If we look at art.5, enumerating the functions of the State¹¹ in the participating countries, it mentions only the very basic liberal ones, as there are the protection of "territorial integrity of the State, maintaining law and order and safeguarding national security." And the first time the draft speaks about "fundamental freedoms", that is in art.4, it speaks about "The free movement of persons, services, goods and capital, and freedom of establishment" but this same article "forgets" to mention fundamental liberties, as freedom of speech. In this first mention of fundamental liberties, liberalism seems thus limited to its economic versant. If such a choice is logical and completely acceptable in a Treaty concerning economic integration, in which states decide to coordinate in a certain way their economic policies, it's a whole different story for a text that is supposed to form the foundation of a "state-structure".

The most important indications of the ideological inspiration and conditioning of the draft are visibly the articles concerning the economic

policy of the Union. The economically very liberal policies that have characterized European construction up till now, have been integrated in the text (that can in this light thus be considered a treaty updating its predecessors). Independently of what one may think about economic policy, it's obvious that a constitutional text indicating which economic policy should be followed doesn't leave any space for socio-economic political debate. What use having different political parties on the national level, or even on a European level, if the fundamental policy is already determined. Let's take the example of art.156-157, stating that "(...) *restrictions both on the movement of capital and on payments between Member States and between Member States and third countries shall be prohibited.*" Such a clause makes any kind of discussion concerning for example a form of Tobin tax completely useless. The French based international organization ATTAC rightly objected to this article that the organization's existence would lose all meaning. Even less radical theories as those defended by Nobel Prize winner Joseph Stiglitz¹² would be looked upon with suspicion. By blocking the political debate on such important levels the draft Constitution doesn't seem to fulfill the basic function of a constitution being to provide the framework for political and social life and debate within the state.

¹¹ Without specifying if these are to be considered examples or if this is a limitative enumeration of those functions that the Union accepts ex officio

¹² J. Stiglitz, *Globalization and Its Discontents*, W.W. Norton & Company, 2002

Ideological Counterbalancing?

The text seems to offer a certain counterbalancing of this economic liberalism. In this way article 3 is extremely interesting, in the sense that it mentions the aim of "social progress" as one of the fundamental aims of the Union. How will this social program be realized? Reading the articles concerning the economic policy, one has to assert that it's quite clear how the economic objectives are going to be developed, can the same be said of the aim of social progress? Art. 177.1 and 178 give us an idea of the "how" of the realization of the objectives of art.3, namely "the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition." (art. 177.1) It's thus correct to state that the way of arriving at the economic objectives is supposed to lead automatically to the realization of "social progress". When talking about the practical implementation of the counterbalancing of a too extremely unilateral economic policy, it's important to analyze the articles 209 to 219, that give some further indications. Bearing in mind though that even in these articles is stated "To this end the Union and the Member States shall act taking account (...) the need to maintain the competitiveness of the Union economy." (209.2)

As some partisans of the draft rightly mentioned article 210 is an example of what the social dimension of Europe could be. Even though it puts on the same foot the right to strike and the "right to impose lock-outs", a choice explicitly and purposely not made by most European social models, the article consists in an impressive list of social rights and acquisitions. However, scrolling to the end of the article, one has to notice that most measures in this domain have to be approved by a unanimity in the Council. The problems with such a unanimity procedure have already been mentioned.

Those trade-union leaders, as the European Federation of Trade Unions, speaking about a social step forward were right and wrong at the same time. Right because there's indeed in the history of the construction of the EU no treaty that enumerates more social rights. Wrong because if this draft were to replace legislation in vigor today for many Western European states it would mean a social step backward.

Empirical verification, which remains the best method to deconstruct political rhetoric, imposes a return to the text for some examples. In the French Constitution, as in the Belgian, the Italian and the Spanish one, the "right to work" exists in one form or another. This right can thus be supposed to be part of the so-called "acquis"? What does the European Constitution offer instead of this?

Art.75.1 guarantees "the right to engage in work and to pursue a freely chosen or accepted occupation." The right to find a job replacing the right to a job, even clearer in French (*droit au travail vs. droit de travailler & droit de chercher un travail*), can objectively not be considered a social step forward. A second example concerns the politics of the European Union in matters as social security (art.94). The three paragraphs of the article are once again a nice summary of what social security could mean. The most interesting part of the article lies however in the verbs used to describe the role of the EU in the realization of such a system of social security. The article, paragraph 1 and 3, speaks about "recognizes and respects". Once again no need here for extensive interpretation to understand that these words do not mean "guarantees" or "acts actively to attain".¹³ The Union takes thus minimum responsibility in these matters. It limits its role to looking and respecting, what does and doesn't exist. Such respect is clearly to be considered limited to the framework of the economic system diffused by the rest of the draft (§3). One can thus easily see that all

necessary parameters for a certain economic system are present, but the same cannot be said of the social part of the draft.

Once again this reality can be easily understood as a logical consequence of the history of European integration of which the social component is a rather recent phenomenon. However the lack of such clear social measures provided the Leftist opponents of the draft with a strong argument, since what is acceptable and normal for and in an international treaty, is not "*forcément*" so for a constitution.

Conclusion

The draft Constitution does clearly not present the characteristics of a traditional constitution, nor on a formal nor on a material level. The text was a better Treaty than the Treaty of Nice and could have been defended as such. However, it's clear that there are and should be essential differences between a constitution and a Treaty. In reality, one could assert that this difference has been bridged

were synonyms. This thesis is explicitly contradicted by a Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, White Paper on services of general interest, http://europa.eu.int/eur-lex/en/com/wpr/2004/com2004_0374en01.pdf p.22 The classic idea of "public service" in the French way is closer to "a service of general interest", expression not used in the constitutional draft.

¹³ The same goes for "services of general economic interest" (expression replacing "public service" (art.96)). The second expression is used only once in the draft (art.238 regarding transport and those free movement of goods, services and so on), but is generally replaced by the term "service of general economic interest". Some have pretended that these terms

by the emerging idea of a Supranational constitution¹⁴, since treaties have *de facto* taken the position and gotten primacy over national constitutions. As correct as this may be, the French refusal showed an important symbolic attachment to the idea of a constitution formally guaranteeing a certain state-order and values, allowing moreover a withdrawal from treaties.

If one wants to involve the "people" in European construction, this symbolism should be taken into account, especially since any form of mixture between treaty and constitution can only end up in a hybrid text, not good enough to form the basis of a "state-underconstruction". Obviously, the refusal expressed also an opposition to the sacralization of a certain economic policy and a discontentment with the measures attributed to the Union in the last years. But the French vote against the Constitution wasn't a refusal of "more" Europe, little less of a political Europe, but expressed the opposition to a text that was inapt for the purpose it was supposed to serve. The argument made by Habermas¹⁵ and many others about "why Europe needs a constitution" had therefore clearly become

obsolete. The French accepted implicitly, by participation and public debate, the necessity of a constitution, but they wouldn't agree on just any text.

Is there a European *demos* from which the Constitution should emanate? The question wasn't directly addressed by the French, but it could be essential if one wishes to elaborate a constitutional framework. Giving a constitution to a people that doesn't exist is risky, trying to impose it by an international treaty even more so.

What text would have been fit? Should one go on with the constitutionalization of Treaties? Is it possible to develop a Constitution for Europe today or is this still "a bridge too far"?¹⁶ The refusal of this hybrid text puts Europe in front of a choice that was inevitable since the very start of the integration period and no "supranational constitution" could avoid it: the one between an economical union or a federal state. It's not a coincidence that the book "The United States of Europe" of the Belgian Prime Minister was published few months after the negative

¹⁵ J. Habermas, "Why Europe Needs a Constitution", *New Left Review*, nr. 11, September-October 2005, p.5-26

¹⁶ See on this discussion: A. Estella, "Constitutional Legitimacy and Credible Commitments in the European Union", *European Law Journal*, Volume 11 Issue 1 Year 2005, pp. 22-42

¹⁴ A. Stone, "What is a Supranational Constitution? An essay in International Relations Theory", *The Review of Politics*, Vol.56, No.3 (Summer, 1994), p.441-474.

referenda results.¹⁷

It would be a grave error to consider that the public disaffection for the EU and its policies could be resolved easily. The process of involving the European *demos* in the process of EU-reform can no longer be avoided. In this sense, the proposition of Barroso to go on with the same draft after a "period of reflection" could, in case of a positive outcome, hide or postpone the question but not solve it. If it could thus serve Barroso and his Commission, on the long run such a solution risks to endanger even more the European construction, deepening the gap between the Union and its people(s). Rather than stating,

as did the Belgian vice-president of the Convention Dehaene, that the draft was too difficult for a referendum, European leaders should consider the result of the French referendum as a positive experience. Not once in the history of European integration was there such a broad, intensive and deep debate about a European text. So if the text was refused, there was no refusal of the European integration, but a refusal of a European state-structure over the heads of those that would have to form the basis of such a Union. In other words, we could definitely state that "*The Constitutional Treaty can however lay the foundations for We the European people to speak.*"¹⁸ □



¹⁷ G.Verhofstadt, *De Verenigde Staten van Europa*, Houtekiet Uitgeverij, Antwerpen, 2005

¹⁸ J.E. Fossum, A. José Menéndez, "The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union", *European Law Journal*, Vol. 11 Issue 4, July 2005, p.380-440

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