

## Why a European Constitution? Theoretical and Practical Interpretations<sup>1</sup>

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### Abstrak

Perjalanan Uni Eropa untuk menjadi suatu entitas regional yang lebih padu, solid dan responsif terhadap tantangan zaman, saat ini sedang menemui masa yang cukup kritis. Penolakan masyarakat Perancis dan Belanda yang mereka simbulkan dengan hasil negatif pada referendum bagi Konstitusi Eropa telah menjelaskan secara nyata bahwa perlunya menelaah lebih dalam lagi urgensi sebuah Konstitusi bagi Uni Eropa. Meskipun masa depan Konstitusi ini belum final, akan tetapi ketiadaan rencana cadangan (Plan B) atas kemungkinan kegagalan referendum tersebut menjadikan model regionalisme ini (seharusnya) berkonsentrasi pada pengambilan langkah-langkah analitis strategis untuk memuluskan pembuatan Konstitusi yang bagi sebagian kalangan dianggap merupakan suatu keharusan.

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Contemporary European Union (EU) is the upshot of the hard endeavors built in for the sake of working for the united Europe. The EU is established on their tangible achievements. In no other region in the world have sovereign countries pooled their sovereignty to this level and in so many areas of decisive importance to their citizens. The EU has shaped a single currency and a lively single market in which people, services, goods and capital move

around liberally. It makes every effort to guarantee that, through social advancement and fair competition, as many people as possible enjoys the profit of this single market. The ground rules of the EU are set out in a sequence of treaties: *the Treaty of Paris*, which set up the *European Coal and Steel Community (ECSC)* in 1951; *the Treaty of Rome*, which set up the *European Economic Community (EEC)* and the *European Atomic Energy Community (Euratom)* in 1957. Then, these founding treaties were subsequently amended by *the Single European Act* in 1986; *the Treaty of European Union (Maastricht)* in 1992; *the Treaty of*

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*Amsterdam* in 1997; and *the Treaty of Nice* in 2001. The European integration has successfully conducted in prevailing over age-old enmity between European countries. Attitude of dominance and the employment of force to resolve international disparities have been substituted by the "Community method" of working together. This method, which balances national interests with the common interest and respects national diversity while creating a Union identity, is as precious today as ever. In Union identity building, the discussion of the construction and ascription of identity and the implications for international events is not meant to be understood as simply symbolic or metaphorical but as real and concrete.<sup>2</sup> However, along with the rapid development of European integration, we find more wide-ranging and massive wishes and challenges. EU is believed having larger political weights in line with its enormous economic, social and cultural influences. It is presently facing the needs to sharpen its identity as the impact of the dynamics of quickly international relations changing and internal aspirations. EU, for some peoples, is considered

immediately to have a constitution which roles as a sturdy basis to preserve and protect its sustainability. The challenges of expanding enlargement<sup>3</sup>, more effective common foreign policies, concrete and constructive global roles, and bolstering the economic and social growth to each EU Member States have been small considerations upon the vast challenges owned by this regional entity that unavoidably need to be addressed.

This condition may provoke the question on "Does Europe need a Constitution?" This is the question that has attracted the attention of observers of the European scene, especially lawyers and political scientists, ever since the debate over Giscard d'Estaing's draft Constitution revived public interest in the European project. The general consensus is that the European Union needs a Constitution because it does not have one in the true sense of the term.<sup>4</sup>

<sup>2</sup> Marysia Zalewsky and Cynthia Enloe, "Questions about Identity in International Relations", in Ken Booth and Steve Smith (eds), *International Relations Theory Today*, University Park, the Pennsylvania State University Press, 1995. Pg.293

<sup>3</sup> Enlarging the Union will pose a major challenge for economic and social cohesion, because development in some regions of certain candidate countries make the Union more diverse and require further efforts at sectoral and regional adjustment. See Pascal Fontaine, *Europe in 12 Lessons*, Brussels, European Commission, 2003. Pg.25

<sup>4</sup> Gonzalo Villalta Puig, "The European Constitution: Past and Future" in National Europe Centre Paper No: 115. See [www.anu.edu.au/NEC/Puig\\_constitution.pdf](http://www.anu.edu.au/NEC/Puig_constitution.pdf)

The European Union works practically well under its present treaties. But the system has become very intricate and inflexible for most people to comprehend. That is the reason why, several years ago, the EU's presidents and prime ministers requested a band of experts to draw up a single, simplified Treaty - the "Constitution for Europe". EU leaders concluded the new text in 2004. The Constitution brings together the accomplishments of the last fifty years. It makes the European Union clearer and more transparent for every of its citizen. Simpler decision-making rules also construct the EU work more efficiently and effectively. The Constitution generates the European Union more democratic by providing a bigger role to the European and national Parliaments, and by giving EU citizens the right to ask the Union to launch new initiatives.

Setting back to the past, at the June 2004 European Council meeting, the governments of the 25 EU Member States signed a Constitutional Treaty for the European Union. This treaty had been two years in the making; it was drafted by an unprecedented "Convention on the Future of Europe" proposed to allow participation from voices not usually heard in the European integration process including national parliamentarians and civil society actors. From there, the draft was focus to a nearly year-long negotiation by the member state governments that, after fierce

bargaining, eventually produced a treaty. But the process is not over; rather it has entered its final and perhaps most difficult phase. The text must be ratified unanimously by the member states, each according to its own national process. There is a real risk that the process may fail, an outcome that would have unpredictable and potentially serious consequences for the future of European integration. The primary risk comes from the intention of many of the member states to hold referendums on the Constitution. A majority of member states are either committed to holding a national referendum for ratifying the Constitution or, at least, have not definitively ruled out this option. Only three member states have explicitly rejected recourse to a referendum: Malta, Sweden, and Germany. So why have so many national authorities decided to use a referendum as the instrument for ratifying the EU Constitution?<sup>5</sup>

#### The Referendum Uniqueness

In a basic understanding, a referendum is not required to ratify an international treaty in which, strictly speaking the EU Constitution

<sup>5</sup> Carlos Closa, "Ratifying the EU Constitution: Referendums and Their Implications". Pg.1. See [www.brookings.edu/fp/Cuse/analysis/closa\\_20041101.htm](http://www.brookings.edu/fp/Cuse/analysis/closa_20041101.htm)

is an international treaty, in any EU Member State. At most, a referendum may be required to reorganize the national constitution in order to incorporate amendments needed to conform to an EU treaty. More commonly, a number of European constitutions exhibit a certain mistrust of referendums. In Germany, the domestic constitutional arrangements reflect the negative view of referendums inherited from the abuse of such instruments in a totalitarian past. The Greek Constitution allows them, but there exists no enabling legislation establishing the procedure, and the last one was held in 1974. In Italy, there is a widespread feeling that a referendum should be held on the European Constitution, but the Italian government argues that are certain "technical difficulties" to holding a referendum on the Constitution.<sup>6</sup> This various notions posed by the EU Member States have invited the uniqueness of referendum concerning the Constitution.

It completely depends on each country to come to a decision of how it will ratify the Constitution, concerning to its own constitutional rules. It could probably do so by parliamentary approval and/or by referendum. If the approval is completed by the national Parliament, the course of action lays on the arrangement of the State and of the parliament. Some parliaments are

composed of a single chamber (Greece); some have two chambers, and both must vote on the Constitution (Germany). In some Member States, such as Belgium, the Constitution also has to be supported by the regional assemblies.

If referendums are permitted for changing the national constitution, *firstly*, the majority of cases require a decision as to the extent to which the EU Constitution modifies the "rules of constitutional engagement" of each member state, that is, whether and how adopting the EU Constitution requires changes to the national constitution. This process not only makes national constitutional courts important players, but it also means political agreement among parties becomes crucial. *Secondly*, a factor shaping the decision to hold a referendum is the *existence of a split between parliament and public opinion regarding EU matters*. In some member states, the parliament is keener on the EU Constitution than the citizenry at large. In these cases, governments who do not want to risk a rejection have good reason to avoid a popular vote. Thus, in Malta, where EU membership was approved by a slim majority, and Sweden, where a referendum rejected adoption of the euro as the national currency, the EU enjoys broad cross-party support in parliament, but very questionable support in public opinion.<sup>7</sup>

<sup>6</sup> Ibid. Pg.2

<sup>7</sup> Ibid. Pg.2-3

Additionally, the new ideological cleavage between pro- and anti-European forces in many countries means a referendum battle might result in a significant shake-up in national politics. The battle over the Constitution has already created some strange bedfellows, as in France, for example, where part of the French socialists, the Communists, the Greens, the far Left, the "sovereignists" and the far Right (the National Front) all unite in their opposition to the Constitution—although for very different reasons. In this context, appeals to "national interest" will probably trump the call to consider broader issues of European integration. The need to satisfy national aspirations and the need to obtain unanimous approval of the member states creates a daunting European-wide task: supporters of the Constitution must bring together sufficient majorities in every country, but each majority must be shaped by unique national circumstances.<sup>8</sup> Nevertheless, if the Constitution is not ratified by one or more Member States, the current Treaties (*Nice*) would probably continue to apply. This means that all existing twenty-five Member States would persist to belong to the current Union. The *Nice Treaty* (Article 43) allows Member States to go ahead with enhanced cooperation under very stringent conditions.

<sup>8</sup> Ibid. Pg.4

### Why a Constitution; Theoretical Interpretations

James Bryce defined the Constitution as "a framework of community of politics which is organized by and through the law. In other words, law stated the establishment of permanent institutions with eligible functions and legalized rights." The Constitution, moreover, could be viewed as the collection of principles that manage the government's powers, the rights of the governed (peoples), and correlation between the two. Constitution could be a written documentation and may be found in the form of changeable and amendable documents regarding to the needs and changing situation; a Constitution may be a set of separated laws and having special authority as a Constitution law. Or, those such principles of Constitution stated in one or two laws and the remaining depends on the authority of customary law.<sup>9</sup> In addition, a constitution may also write apparent explanations on following matters: *first*, the procedures of institutions management; *second*, typical powers entrusted to such institutions; and *third*, how the implementation of powers conducted.<sup>10</sup> To this point, Bryce has drawn up the flexibility of a constitution in which written documented laws may contributively

<sup>9</sup> C.F. Strong, *Konstitusi-Konstitusi Politik Modern*, Bandung, Penerbit Nuansa-Nusamedia, 2004. Pg.15

<sup>10</sup> Ibid. Pg.16

meet the existing customary law. In the context of European Constitution, this, of course, illustrates the reality found in the diversity of European Member States due to the aforementioned differences that Member States frequently undergo.

It is also important to viewpoint the European Constitution from the perspectives of *functional definition* in which the Constitution concentrates on the two purposes it must serve. *First*, a Constitution must legitimize political rule. This it does by establishing the legitimizing principle for political rule and the basic legitimacy conditions of its exercise along democratic lines. That is, the constitution places sovereignty in the trust of the people, the *pouvoir constituant*, and makes its exercise by the State, the *pouvoirs constitués*, permissible only on their behalf and for the purposes they set. *Secondly*, a constitution must institutionalize and regulate political rule. In other words, the constitution gives effect to the rule of law: that political rule is through law, via its institutionalization, and under law, via its regulation. It is, then, quite comprehensible that insofar as Constitutions are concerned with the legalization of political rule, the *living Constitution* of the Union, namely, the interaction between the Treaties and the case-law, leaves little to be desired. From that particular interpretation, therefore, Europe does not need a Constitution for it has one already. That same *living Constitution*

which, as a whole, has been established to adequately legalize political rule by the Union must be split into its dissimilar components if it is to be precisely analyzed from a formal interpretation. With respect to the component of the Union's *living Constitution*, the Treaties, it is argued that the validity of their claim to signify norms of a primary nature is, at best, questionable. From a formal interpretation, therefore, Europe needs a Constitution for it does not have one. Does Europe need a Constitution? It is generally agreed that it does. In a politico-democratic circumstance, Constitutions are universally defined in both functional and formal terms. From a functional perspective, a Constitution is the respond to the democratic calls for political rule to be legitimized and legalized. A Constitution is a body of primary norms coming from the people, commanding supremacy over the legal order and capable of amendment by the people only. In the light of this definition, it is empirically observed by lawyers and political scientists alike that the European Union is not founded upon a constitution and that, therefore, it needs one. Formally, the *living Constitution* of the Union, the Treaties and the case-law whose interaction has the effect of adequately institutionalizing and regulating political rule at the Union level, cannot be said to represent a body of primary norms. In conclusion, the functional and

formal insufficiencies of the *living Constitution* upon which the European Union is based at present inspire the call for the introduction of a constitution in the true sense of the term.<sup>11</sup> Hence, the plurality of conceptualizations of the term of Constitution is rather problematic when we enter a Constitution lead to very different interpretations of the procedure and the agenda of Constitution-making and also to different preferences concerning the outcome of constitutional deliberation.<sup>12</sup>

Furthermore, in the context of the constitution as a product, a constitution is frequently differentiated into written and unwritten constitutions; however, this differentiation is totally untrue since there is no constitution that is entirely written or completely unwritten. The constitution, which is commonly written, is documented and owns its special secrecy. The constitution, that is usually unwritten, is developing on the basis of custom rather than written laws. Nevertheless, that so-called written constitution is a complete instrument which has been compiled for the sake of any possibilities emerging in the implementation. In other case, we could find the written constitution in a basic law that is adopted and settled by the

constitution writers in terms of providing as spacious as possible for the process of regular laws to build up the constitution in prepared rules. Therefore, it needs to be reiterated that the constitution classification based on written or unwritten has been illusory. It is true that sometimes there is a significance to differentiate them, however, it should be noted that written constitution is merely a documented constitution and unwritten constitution is undocumented constitution.<sup>13</sup> The European Constitution, somehow, may come to the middle of this – a constitution as a product-debate particularly if it is not finally performed in a terminology of “constitution” due to the referendum failures and returns to the existing treaties.

#### European Constitution in Practices

The Constitution will not produce a *European Super State*. Even if it is called a “Constitution”, it is quite simply an international treaty agreed and ratified by sovereign countries, which remain in charge of the Union. Article I-1 of the Constitution obviously states that the Union echoes the will of its citizens and its Member States, and that its powers are given to it by these States. The Constitution will construct the Union stronger and more effective, but not by taking any powers away from its Member States.

<sup>11</sup> Gonzalo Villalta Puig, loc.cit.

<sup>12</sup> Agustín José Menéndez, “Three Conceptions of the European Constitution”, See [www.arena.uio.no/publications/wp03\\_12.pdf](http://www.arena.uio.no/publications/wp03_12.pdf)

<sup>13</sup> C.F. Strong, op.cit, Pg.90-92

The basic relationship between the Union and the Member States will stay the same, and any further major transformation to the Constitution will, at rest, have to be determined unanimously by the Member States. Article 1-5 of the Constitution unambiguously calls for the Union to respect the national identities of the Member States, including their systems of regional and local self-government. Being part of the European Union indicates that countries pool their sovereignty. In other words, in areas where they have decided to work together, EU Member Countries take joint decisions. They do so via EU institutions, such as the Parliament, Council and Commission, which they have set up for that purpose. They have given these institutions specific powers and responsibilities. This way of taking decisions jointly is called the "*Community method*". It is designed to work for the common interest of all EU Member States. The rules of the system are spelt out in the EU treaties, which are agreed collectively by the Member States. The Constitution does not make any major changes in the current system.

In certain matters, the Constitution overrules the national law, but so do the present EU treaties, so this is nothing new. It should be understandable what "override" means. The Constitution says that EU law, i.e. the Constitution itself and the laws passed by the EU institutions, have

"primacy" over the law of the Member States. That means by transferring powers to the EU institutions and setting up the "*Community method*" of decision-making, the EU Member States have created a body of law which applies to themselves and their citizens. EU law is an integral part of the law in each Member State, and the courts in every EU country are bound to apply it. This is spelt out in the Constitution for the first time, but it is not new.

In the point of the EU enlargement, the Constitution does not make easier for new members to join the Union. As before, the accession of any new member requires first a unanimous decision of the Council and the consent of the European Parliament for starting the negotiations. At the end of the negotiations, a formal agreement must be concluded and ratified by all the Member States and the applicant country. The candidate country will have to subscribe to the Union's fundamental values. These include respect for freedom, equality, human dignity, democracy, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Moreover, the applicant country must not only respect, but also be committed to promoting these values. The other important EU Constitution practice is the reflection of the decision-making process; the Constitution makes the decision-making process simpler and more efficient. The Constitution



clearly sets out three categories of competences for the EU, which makes it easier for citizens to understand who does what. The Constitution extends "co-decision" to almost all policy areas<sup>14</sup>. In other words, the European Parliament and the Council will take most decisions together, sharing legislative power equally in almost every field. Thus, Parliament is again playing an important role in seeking constitutional change. It remains to be seen what will be the outcome of this particular round of treaty amendment, but another incremental step forward for the community, and for parliament within it is not unlikely. Parliament must examine some possible paths for the future development of the European's Parliament powers.<sup>15</sup> Moreover, it also happens in the roles of European citizens, the European citizens will be able to present initiatives to the Union's institutions and this is a great step forward for democracy. Article

I-47 of the Constitution introduces the European Citizen's Initiative. This is the EU's first ever "bottom-up" decision-making process. If EU citizens think a new EU law is needed in order to implement the Constitution, they may ask the Commission, within the limits of its powers, to propose such a law. The petition must be signed by at least one million citizens who are nationals of a significant number of Member States. The European Citizens' Initiative can cover any subject matter for which the EU has responsibilities. It might be nature conservation, child protection on the internet, health and safety at work, food labeling and many others.

#### The Strategies to European Constitution

The national parliaments will unquestionably have a larger say in European Affairs. For the first time, national parliaments will be straightforwardly involved in the European decision-making process. At a very early stage, when a European law is being drafted, national parliaments will take action as "subsidiarity"<sup>16</sup> watchdogs." It indicates that every draft European law must be submitted to all national parliaments of the

<sup>14</sup> Areas in which there has been a significant shift to co-decision between Council and Parliament include: Justice and Home Affairs issues generally; major policy aspects of the Common Agricultural Policy; some aspects of the European Union Court of Justice; staff regulations; and implementing decisions in the Common Commercial Policy. See "The European Constitution; White Paper", in [www.europeanconstitution.ie/pdfs/1013-white-paper-final-en.pdf](http://www.europeanconstitution.ie/pdfs/1013-white-paper-final-en.pdf)

<sup>15</sup> Francis Jacobs and Richard Corbett, *The European Parliament*, Colorado, Westview Press, 1990. Pg.253

<sup>16</sup> "Subsidiarity" means that – in the areas of shared competence – the Union may only act if it can demonstrate that the proposed action can be better achieved at Union level than by Member States.

twenty-five Member States. The parliaments will then have the chance within 6 weeks to verify whether the draft fulfills with the principle of subsidiarity. To come into force, the Constitution has to be ratified by all the twenty-five Member States (Article IV-447). There are no formal rules saying what should be done if ratification fails or there is no "Plan B" provided by EU if the referendum fails. However, the Heads of State or Government of the 25 Member States took a political commitment to deal with the matter within the European Council to try to find a solution if, two years after its signature, four fifths of the Member States have ratified it and one or more Member States have had difficulties in going ahead with ratification. They might, for example, try a second time to have the Constitution ratified; they might hold a new intergovernmental conference, or make other *ad hoc* arrangements. Until a solution is found, the contemporary treaty of Nice would stay entirely in force.

In the reality facing the present difficulties to ratification, we find the need to raise the interest of European citizens in European Constitution, there are some following actions could be conducted such as tactical approaches by seeking the popular components in European constitution. In this regards, it is better conducted based on a new cooperation among EU Member States since this may benefit to work as European Cons-

titution acceleration. The alternatives of strategic approaches may have been a choice that is by having the European citizens' emotion cooling down and they could possibly think clearer. After that, it may begin the development process of new consensus among the Members of EU. It finds very significant to ask for the European citizens' views on the future of EU; a tight organization with all member countries pool their sovereignty significantly to the EU or EU as a loose regional cooperation.

This, then, continues to uphold the constitution by examining what the EU citizen needs concerning to the necessity of the Constitution establishment. According to Lord Bryce, the writing of a Constitution may be encouraged by these following motives<sup>17</sup>: *First*, The aspiration of the citizens to guarantee their rights when those rights are threatened and to control the government's attitudes. This may simply find the point that EU citizen is rather worried with the enlargement that will somehow threat their economic and prosperity attainment. The context of government here is indicated to the Union's behavior to; of course, preserve their economic interests and welfare gain. *Second*, the desire from one of the parties, citizens or EU, to hopefully fulfill the people's wants, determine the system of the EU based on the

<sup>17</sup> C.F. Strong, op,cit, Pg.185-186

positive rules in order to minimize the possibilities of abuse of power by the EU. In addition to economic desires, it could be recognized more importantly to the importance of the system basis which tends to empower the institution of EU and the watchdogs so that the implementation of the made policies will get the maximized achievements and extremely avoid the misuse of powers. *Third*, the aspiration of parties that establishes new political community to gain EU which is supported by the peoples. This notion is great ammo for EU to persuade its citizen that the citizen's role is much guaranteed. Their initiatives to the law-making and application as well as innovation are welcomed and would dominantly determine the future of EU. *Fourth*, the desire from the separated communities to guarantee the existence of the common effective actions while they are upholding their separated interests and rights. The debate over the common actions and individual interests and rights has been "*a forever controversy*" in the EU progress. It should not be avoided as long as the Constitution could guarantee the separation and protection of each action and right as well as the interest. The point is, the sovereignty sacrifice will be resulting the larger common prosperity and establishment of the regional togetherness and cooperation. Then, let the output the

Constitution answers the theories and paradigms.

### Closing

The optimism emerging when the Constitutional Treaty for the European Union was signed in Rome on 29 October 2004, however, it has gradually disappeared. Consequently, the pessimism has raised due to the referendum failures in France and the Netherlands that echoed the message of the peoples' rejection on the new Constitution. Though, the series of European Constitution ratifications by several EU members have been accomplished. In becoming entry into force and attaining legal personality, this treaty which has been a European consensus, must be ratified by 25 EU Member countries.

As a model of worldwide –recognized regional economic integration, emerging conflicts among EU member countries are inevitable which frequently motivated by basic diversity on culture, language, economy and, of course, politics. However, one thing for sure is EU will not stop working without Constitution. EU may continuously work based on agreed treaties. The future direction of EU has currently met obstacles since the referendum failures in France and the Netherlands; however, the future of European constitution has not definitely come to the final stage. □