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## Editorial: The European Union as a Constitutional Experiment

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## Editorial: The European Union as a Constitutional Experiment

*George A. Bermann\**

In the constellation of international governance régimes, the European Union occupies a singular place, and not merely because it has recently engaged in the process of drafting a document whose title includes the words ‘A Constitution for Europe’. Even if that particular document, or any such document, were never to see the light of day as a fully adopted and ratified instrument (an eventuality I consider to be unlikely), the EU will already have been constitutionalised, albeit in a fashion unfamiliar to those who, like most of us, are accustomed to the constitutions of Nation States. To claim that the EU may properly be understood as a constitutional experiment may be to push quite far the boundaries of what is an acceptable definition of a constitution, but that is what the EU experience challenges us to do.

One best begins by not even mentioning the terms constitution or constitutional, but rather by making a simple observation, albeit a seemingly paradoxical one. On the one hand, the EU has in various iterations—the original European Coal and Steel Community, the European Economic Community, the European Community, the European Union—travelled further along the road away from ‘pure’ intergovernmentalism than virtually any other international governance régime, and than one might realistically ever have imagined at the outset. No other international governance régime can even plausibly present itself as governing a ‘polity’, especially a polity in the most day-to-day, operational, ‘business as usual’ sense of the term.

And yet, viewed from a greater distance and over time, the EU does seem to be beset by a pattern of vicissitude and more than occasional crisis. Some of these vicissitudes and crises are not altogether unusual or atypical of constitutional régimes. (I think, by way of example, of the resignation of the Santer Commission under pressure by the European Parliament.) But others of them are more unusual, and their chronic character inevitably raises the question of just how much it is in the EU that has been ‘constituted’. Surely the collapse last December in Brussels of the constitution-adopting project is one of those.

But looking back over the years, we see many such moments: real threats of withdrawal over budgetary imbalances, last minute nail-biting negotiations at virtually every intergovernmental conference looking to amend the basic treaties, rejections and near-rejections in national referenda on important stages in the integration process, and deep embarrassment at the EU’s impotence in dealing effectively and constructively with the violence that accompanied the disintegration of Yugoslavia in the Union’s own

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backyard. There have also been political confrontations among Member States not merely over purely external political affairs (such as the positions to be taken on the war in Iraq or over the proper role of the UN in that matter) but over such profoundly internal EU affairs as whether and to what extent a Member State such as Austria may or should be ostracised on account of the political complexion of its coalition government, and, to give a final example, enduring divisions along what we in the USA might regard as an antiquated distinction between 'large' and 'small' states—a division that erupted time and again during the constitutional convention and most recently outside that framework over France and Germany's torpedoing of the Growth and Stability Pact, whose deficit spending constraints had been considered a cornerstone of the economic and monetary union.

In truth, the fact that the EU has travelled its astonishing distance away from pure intergovernmentalism, while exhibiting patterns of vicissitude, recrimination and even crisis, is not so very paradoxical. On the contrary, these phenomena are almost certainly linked. International governance régimes simply may not be able to travel this distance without generating the kinds of frictions that underlie the very vicissitudes, recriminations, and crises that we observe.

We should first seek to explain why and how the EU, in what can still be referred to as a 'mere' 45 years, has gone the distance that it has from the kind of intergovernmentalism that still characterises the great majority of today's institution-based international régimes. We can then seek to identify the reasons why this progression has not only been so uneven and non-linear, but also marked by serious constitutional misgivings and crisis. I want, lastly, to suggest that what emerges from this pattern is a true constitutional experiment.

Five factors, to my mind, have mainly contributed to enabling the EU to travel the distance that it has as an international governance régime. While none of these considerations alone can account for the distance travelled, they have combined to make the EU as 'constitutional' a governance régime as could realistically be imagined, while still remaining in important and definitional ways 'international'.

First, the EU has historically been propelled by a strong sense of regional and, very broadly, cultural identity that distinguishes it from many—though obviously by no means all—international governance régimes. Its 'regionality' is given emphasis by the absence in its midst of the usual behemoths whose inclusion in international governance régimes inevitably tends to complicate their construction and operation—no USA, no China, no Russia, though the latter's eventual membership cannot, geographically speaking at least, be fully excluded. Of course the EU has no monopoly on 'regionality', far from it. Moreover, its regionality has not been a constant—a matter of which we are particularly reminded today as membership grows in unprecedented numbers through enlargement in a distinctively eastward direction, and as the EU confronts the profiles of candidate states like Bulgaria and Romania and, much more delicately, the profile of Turkey. Even so, the EU's sense of regionality has historically been a strength.

If regional specificity tends to vitalise an international governance regime, the same is not necessarily the case for subject matter specificity. While the EU has defined itself explicitly in regional terms (and largely maintained that definition), it has not defined itself very explicitly (at least it does not any longer) in terms of scope of subject matter, and that too has helped to propel it forward. The EU may have begun some 50 years ago as a narrowly conceived and rather technocratic Coal and Steel Community, but it has been far from that for some time now. To be sure, the Union has its core mis-

sions and its more peripheral ones. Also to be sure, it has its limits. Some of these limits are specifically inscribed in the details of the treaties establishing the European Community and the European Union; some are captured in vague notions like subsidiarity; and still others are captured in the simple fact that EU legislation still requires approval by the Council of Ministers and that nothing gets by the Council without the support of a qualified majority of the Member States, however differently that term is defined at any given time. But, when all that is said and done, the fact remains that no policy initiative any longer seems to lie categorically beyond the reach of EU law or policy. Even by regional integration standards, EU governance is exceptionally 'dense' governance.

To the EU's combination of regional specificity and subject matter amplitude must be added a third element, which is its enjoyment of a complex institutional apparatus enabling it to deliver a variety of state-like functions, among which we may discern functions broadly recognisable as law-making, law-applying, and law-enforcing. The very fact that the EU even has departments that we can liken, however approximately, to legislative, executive, and judicial distinguishes it from most other such régimes. Not even NAFTA, the WTO, or the International Criminal Court—which are among the best-equipped international governance régimes—are nearly as well equipped.

As we look around, we see that some international governance régimes receive their full complement of legal norms from the State actors that have set them up and that they can elaborate no fresh legal norms of their own. Some may be empowered to generate fresh norms but cannot apply, much less enforce, them. And most international governance régimes have no judicial institutions at all, and therefore little opportunity to do anything that even begins to resemble the rendering of judicially authoritative or binding interpretations, much less the propounding of what can only be called 'constitutional' norms such as supremacy and direct effect. By contrast, the European institutions have generated vastly more numerous and detailed norms than they have received; they enforce them; and the European courts in particular resolve authoritatively disputes over both their meaning and their validity. As always, of course, we must not exaggerate. Yes, the EU has evolved in ways that have tended to loosen the grip of national authorities (including national legislatures, executives, and courts) in favour not only of the EU institutions, but also of the private and public actors and interests who seek to use EU processes to their advantage. But the Member States are far from displaced, not only as norm-givers, but as the administrative apparatus upon which the effectiveness of EU policy still chiefly depends.

Fourth, while international governance régimes that do anything of significance have decisional ground rules for doing them, the EU has a distinctive set of decisional ground rules, which have in themselves been a work in progress. Moreover, at virtually every point in time, those ground rules have been ones that—even within the most intergovernmental of the EU's institutions, namely the Council—permitted certain important decisions and policies to be taken or made, *grosso modo*, over the political opposition of one or more Member States, and therefore probably over the political opposition of their populations. Qualified majority voting has lately become the procedural norm in the Council and in the multitude of committees and working groups that act as its proxies in controlling the exercise of authority by the independent European Commission under delegations from the Parliament and Council. Indeed, under the draft constitutional treaty, the adoption of legislation would, starting in November 2009, ordinarily require, in addition to a simple majority of members of the European Parliament, no more than a simple majority of the 25 Member States

(as of May 2004) as represented in the Council, provided only that that majority in turn represents at least 60% of the EU population, all told. (The 60% proviso can scarcely be considered unreasonable, given the wild disparity in Member State populations between say, Germany and Malta.) I doubt that, among international governance régimes, fresh policymaking has ever been made 'easier' than that, certainly not within such overtly intergovernmentally structured institutions like the Council.

Fifth, once an international governance régime becomes endowed with the properties that I have mentioned, it has every likelihood of mobilising the same sets of public and private-sector actors—industry, labour, political parties, civil society, the press, for example—that tend to mobilise around the governmental entities that perform broadly comparable functions at the national and sub-national levels within States. Cognisant of this fact, the Commission has recently helped launch new regulatory methods known as 'open methods of co-ordination' (or 'OMC'), which seek to open up the decision-making process by giving access to a range of public and private-sector actors commonly referred to in this context as 'transnational networks'. In short, although the EU may have at one time been thought of as a delegation by nation states of purely administrative functions to a set of so-called 'supranational' institutions, it is now plainly much more than that. Around the EU there have developed processes that are genuinely 'political' in every sense of the term—which of course explains why the EU, while attracting the interest of legal academics, has attracted measurably more interest among political and social scientists.

This is what we then have: regional specificity built on a semblance of cultural identity; subject matter amplitude (with market integration still situated, engine-like, at its core); a serious set of legislative, executive, and judicial equipment; relatively 'easy' international decision-making; and palpable politicisation in the purest sense of the term. Such are the elements that have put the EU as an experiment in international governance on the path to becoming a great deal more.

Yet, while strongly buoyed by this critical combination of factors, the EU has nevertheless moved very unevenly and non-linearly. Its short history is punctuated with vicissitudes, reverses, even crises, many of them politically conspicuous. I suggested at the outset that this is really not very paradoxical, and I now wish to show why that is so.

At play is not merely proof of the old physics maxim that every action produces a reaction. (An example of that would be the growth and consolidation of EU powers under the Maastricht Treaty producing a defeating Danish referendum.) That is certainly part of the explanation, but it is by no means a fully adequate one. Rather, the same elements that go into making a potentially strong, broad, effective and politicised international governance régime also generate demands and expectations, and quite high ones. Those demands and expectations are many, and some of them surfaced conspicuously in the deliberations and difficulties over the EU's recent constitution-drafting exercise. Three sets of special demands and expectations seem to me most salient in this regard.

A first set of demands and expectations is essentially reactive, emanating chiefly from the echelon of national political élites and expressing an urge to retain selected aspects of political autonomy. Given the EU's properties as an international governance régime as I have described them, this should come as no surprise. Judging by the post-mortems from last December's summit in Brussels, the failure to agree on the draft constitutional treaty can be traced, at least in part, to a sense on the part of certain states, notably Spain and Poland, that they, *qua* states, stood to lose the numerical weight in the

Council (between now and 2009 when States would cease to be assigned numerical weightings) that they had been promised in the Treaty of Nice of 2001. This, of course, came swiftly on the heels of precisely another such assertion of political prerogative by France and Germany, demanding and winning suspension of the Growth and Stability Pact's deficit spending ceilings. Described by some as rank lawlessness (and currently the subject of an infringement proceeding by the Commission in the Court of Justice against *all* the Member States on account of their acquiescence), the Pact's suspension reminds us that the EU is still in important ways very much a state-centred international governance régime, and not quite yet entirely its own polity.

This kernel of 'reactive intergovernmentalism' is visible in other arenas. Perhaps none will be as salient to constitutional lawyers as the slowly growing number of Member States whose supreme or constitutional courts have, following the German example, in effect stated that, while they intend for them and their national judiciaries to show the highest degree of respect for the pronouncements of the Court of Justice (even on matters as sensitive and important as protection of human rights and fundamental freedoms), they will not in principle cede to that Court ultimate authority for determining the outer boundaries of the EU's legislative and policy powers. Under that view, *Kompetenz/Kompetenz* does not lie in Luxembourg (except of course for Luxembourg); it lies in the seats of the highest courts of the Member States, almost as if in the USA it lay, as it assuredly does not, in the state capitals.

If there is a reactivity within high national political circles, there is in the EU also a much more diffuse reactivity among national populations and sub-communities. This is of course not a reactivity that was quite as visible in the halls of the constitutional convention or of the intergovernmental conference at which the constitutional draft was debated. But its presence was felt. It is best captured in the various national referenda casting their shadow over the entire constitution-drafting process—referenda in which communities will register assorted misgivings, not only over the terms of the new draft constitutional treaty, as such, but also over the EU's embrace of ten new Member States to the east with which this constitutional initiative largely coincides in time. This moment of constitutional change and massive enlargement toward the east is one in which the by-now classic *demos* question inevitably re-emerges. To put the matter bluntly, are people prepared to see 'European' as their *demos*, or sufficiently among their *demoi*, so that they are willing to be outvoted, on matters that may at some time down the road mean a great deal to them, by a coalition of other 'Europeans'?

This diffuse reactivity is likewise inscribed in manifold ways in the text of the draft constitutional treaty. Surviving in the draft are virtually all the instruments and devices that the law was able to devise in recent years to preserve the possibilities of 'differentiating' among communities within a regionally integrated Europe, while avoiding undue detriment to the purposes that fundamentally fuelled the integration drive in the first place. The planners of the EU had been quite inventive in designing 'difference-preserving' strategies, ranging from precepts (like subsidiarity and proportionality), to legislative techniques (like minimum harmonisation), to expedients (like particularised derogations and 'opt-outs' of various kinds), to procedures (like associating national parliaments with the EU legislative process), to whole new régimes (like the euphemistically titled 'enhanced cooperation', conditionally permitting a subset of Member States to go programmatically further than the others are at the time willing to go).

None of these is missing from the draft constitutional treaty. All are retained in the apparent hope that the—or a—proper balance may be struck between preserving legit-

imate differences and achieving integrationist goals. Joining them in the draft treaty is also a somewhat, though not dramatically, clearer enumeration of EU competences, an exercise whose evident purpose is to halt, or at least give the impression of halting, what has come in the trade to be known as the Union's competences 'creep'.

But the third and most challenging of the demands and expectations facing the EU can not fairly be characterised as reactive at all. These are demands and expectations that any international governance régime can expect to generate if it is perceived as profoundly enough affecting a broad enough range of sufficiently important interests among the governed. I refer to an ill-defined circle of demands and expectations that we associate with polities, actual or emerging: demands for participation, demands for real representation, demands for transparency, demands concerning human rights. These are demands that are being made, in varying degrees, of all international governance régimes, including even the most purely intergovernmental. Small wonder that they are being made more insistently of the EU than of perhaps any other international governance régime, even than of the much-besieged WTO. Because members of the polity are being joined in these demands by other more interest-oriented actors, many of them transnational actors, acting in the private as well as the public interest, these demands have become very audible.

Within this third set of demands and expectations, there is one that captures their essence especially well and that also both animates and challenges the current constitutional reform. That is, for lack of a more specialised term, 'simplification' of the treaties and institutional 'coherence'. Indeed much has been accomplished by way of simplification. The Communities disappear. The pillars disappear. The Charter of Fundamental rights becomes integrated into the constitutional treaty. The European Union gets a President, albeit one who will have to share authority with a Commission President elected by the European Parliament. And so on. But there can be no doubt that the very challenges that I have enumerated—especially those having to do with preserving certain state prerogatives and respecting the need for internal differentiation within the EU—place severe constraints on the draft treaty's capacity to satisfy the simplification imperative. I am not convinced that all the simplification and coherence that could realistically have been achieved has been achieved, but that is assuredly a subject for another day. But this may explain why perhaps the most visible and least equivocal step taken by the draft constitutional treaty is the creation of a post of Minister of Foreign Affairs, integrated (albeit awkwardly) into both the Council and the Commission. The notion that the EU needs to be able to speak with one clear, forceful and authoritative voice (when the Member States choose to allow it to do so) is one that, at least on this level of generality, commanded the support and approval of just about all interested parties on the European scene.

This is the background against which we may ask just what kind of process was set in motion some 45 years ago—a process that could yield such manifest progress in the direction of constitutionalism, while at the same time generating chronic stresses and periodic crisis. Given the durability of this pattern, it is tempting to conclude that something constitutionally unusual has been going on in Europe, long before the term 'constitutional' finally made its way into the title of a document emerging from a summit of EU heads of state or government. What has gone on is a constitutional experiment.

The core of the experiment, it seems to me, lies in the fact that, perhaps like the architects of no other international governance régime before it, the architects of the Community created something that was constitutive, but at the same time never at any point seriously expected to endure in its *then current* form. This is consistent of course with

the neo-functionalism and 'spillover' hopes on which the original Coal and Steel Community—and later the European Economic Community—was based. Even with the Communities' broadening and deepening in the 1980s and 1990s—through successive milestone instruments like the Single European Act and the Treaties of Maastricht, Amsterdam, and Nice, or through milestone developments like a common foreign and security policy pillar or an Economic and Monetary Union marked by a single currency and single central bank—at no time was the kind of permanence (or semi-permanence) we associate with a constitution even an illusion. No sooner did one intergovernmental conference produce a 'settlement' of sorts than the wheels began to turn in preparation for a successor conference and a successor 'settlement'. Such a *modus operandi* for the deliberately progressive building of a polity out of nominally sovereign states is simply quite unprecedented.

When nations embark on a stated programme of ever greater closer integration, while leaving over—on an ongoing basis—the decision of whether, when, how, and subject to what specific conditions and reservations to travel down that road, and how fast or linearly to do so, the constitution-making that occurs will be highly untidy and the product at any given time will look highly unfinished. This is all the more so when the only thing that has been predetermined is that these states will in principle continue to deliberate among themselves (and with other partner states they might pick up along the way), when each amendment will have to have been the product of the untidy political bargaining that strongly typifies intergovernmental decision-making, and when, by way of innovation under the new draft constitution, all States know that their partners have the express right to withdraw if they should ever become sufficiently disenchanted or come to look upon the EU as a sufficiently bad bargain.

It is fair to ask whether the adoption and ratification of a constitutional treaty along the lines of the one before us would bring an end to this pattern of evolutive constitution-building or in the incidence of setbacks and crises observable over the lifetime of the EU. I think it may do so, to a degree, but not nearly as much as it might have, if, for example, the architects of that treaty had distinguished among constitutional 'matter'. In effect, they placed on the same constitutional plane (albeit in different parts of the draft treaty) such basic matters as Union competences, EU citizenship and the Charter of Fundamental Rights, on the one hand, and the particularities of agricultural and fisheries policies or the technicalities of judicial cooperation in civil and criminal matters, on the other. From a constitutional perspective, an excellent opportunity to meaningfully segregate the permanent and durable (read 'constitutional') from the rightly impermanent and changeable (read 'political') may have been missed.

The constitutional experiment is, accordingly, likely to go forward, with the arrival at constitutional understandings best understood as an ongoing process in which, at every moment, the future constitutional shape depends on present political relationships and calculations—without however the whole thing ever falling apart. To this extent, the EU challenges us, as it continues to evolve, to expand our notion of constitutionalism. The price of such a process may be to prolong the period that it takes for a single European *demos* to emerge (if ever); to that extent, the pattern, by its very nature, will only increase the likelihood that the constitutional experiment will actually keep on going, rather than transition into something more easily recognisable as a constitution.

This would be tragic only for those who see a stable European federation as Europe's manifest destiny. I believe that—notwithstanding the Union's unprecedented eastward enlargement, notwithstanding the schisms that have erupted over the war in Iraq or



over the demise of the Growth and Stability Pact, and notwithstanding other frictions that are bound to result from the impermanent and evolutionary way in which Europe conducts its constitution making—there is a sufficient sense of collective self-interest in robust European economic integration economic and a sufficient sense of urgency in being able to speak with one voice in external affairs to provide the glue needed to keep this enterprise afloat and indeed moving in a discernible direction. Before other regional groupings around the globe begin emulating this EU constitutional experiment, they would do well to consider also whether they too have sufficient commonness of purpose to withstand the stresses that accompany so distinctively protracted and disorienting a mode of constitution-building.