

Europe's Constitution: Genesis in Search of Destiny

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GIULIANO AMATO, HERVÉ BRIBOSIA & BRUNO DE WITTE (eds.), *Génèse et Destinée de la Constitution européenne – Genesis and Destiny of the European Constitution* (Brussels, Bruylant 2007) xxxi + 1363 p., ISBN 978-2-8027-2343-1

In his underestimated novel *Le Passage* (1994), Valéry Giscard d'Estaing displays his deep sense of political timing. It is a tale of moments missed and seized, placed in the sphere of hunting. The protagonist, a notary bored with his life in provincial France, is invited by a friend on a hunting tour. Once in the wood, he has the perfect occasion to shoot an immense and beautiful deer, but eye-to-eye with the animal, he waits too long and misses the moment. Back home, his friend, angry and dissatisfied, asks him: 'Why didn't you shoot? No doubt we will not see this deer again.' The narrator replies, weakly: 'I hope you will find it again.'¹

This little hunting scene by the former president of the European Convention would have been a fitting motto to the new Bruylant-volume *Genesis and Destiny of the European Constitution*. It is a massive yet thoughtfully organised book on the drafting and fate of the European Constitutional Treaty. The main focus is on the legal innovations the Constitution brought. The first Part (*Genesis*) contains, in some 900 pages, a detailed examination of the ideas, arguments and negotiating positions that shaped the final document, as signed by the Union's political leaders on 29th October 2004. The smaller Part II (*Destiny*) offers reflections on Europe's constitutional future and on possible exits from the constitutional impasse in which the Union found itself after the French and Dutch No-votes from 2005. Although the second part includes some intelligent essays, the book's remaining value lies in the expertise assembled in the first part, thanks to the attribution of the different

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¹ Valéry Giscard d'Estaing, *Le Passage* (Paris, Robert Laffont 1994), p. 36.

European Constitutional Law Review, 4: 383–390, 2008

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doi:10.1017/S1574019608003830

topics to actors closely involved in the actual drafting and negotiation of the Constitution. Interestingly, though, it is precisely this quality of the book that may shed some light on the ultimate fiasco its object became.

The three editors embody the worlds that this volume aims to bring together: Amato the (academic &) politician, De Witte the academic, Bribosia the official (& academic). The latter, a former member of the Convention Secretariat and as such one of the Constitution's drafters but now back at the European University Institute in Florence, was the book's scientific co-ordinator. It is presented as a 'collective work' (p. xv). Most authors from the first part worked during the decisive period 2002-2004 either for the Convention Secretariat (six) or for the Commission Taskforce on the Future of the Union (ten). The editors refer to all of them as 'the 'machinists' of the European Convention' (p. xvii), although strictly speaking this holds only for the first group. Opting for a substantial Commission contribution may be the fruit of availability or coincidence, but gives undeniably a certain *communautaire* flavour to the interpretations throughout the book. The second, forward-looking part has been (mostly) entrusted to academics, both constitutionalists and political scientists. The number of people needed to cover the ground is in itself a sign of the Union's constitutional development, or at least of the intensity of the last experience. By comparison: only four officials from the 1991 Luxembourg presidency wrote the impressive Bruylant-volume on the Maastricht Treaty, this book's forerunner in approach and ambition.²

Genesis and Destiny of the European Constitution was conceived during the uncertain 'reflection period' which the European leaders imposed upon themselves in June 2005, after the negative French and Dutch referenda. Judging from the editors' Preface, the book's writing was finished in September 2006, that is, three months after the European Council had decided to transform the pause into another year of 'extensive consultations' with the member states.³ All observers agreed at the time that a new constitutional settlement would at the earliest be decided during the French presidency of the second half of 2008, so that this volume, appearing in mid-2007 as it did, could even hope to play a modest role in the final phase. The editors were unlucky. The sudden acceleration of negotiations under the German presidency of the first half of 2007 caught everyone by surprise.

In itself this outcome does not undermine the academic enterprise with which we are concerned. The editors themselves wrote pre-emptively: 'Whatever its destiny [of the Constitution] may be, its genesis will remain in the annals of the Euro-

² Jim Cloos, Gaston Reinesch, Daniel Vignes and Joseph Weyland, *Le Traité de Maastricht. Génèse, analyse, commentaires* (Brussels, Bruylant 1993), x + 804 pp.

³ One contributor refers to the situation in early 2007 (J. Ziller, p. 168), but this seems an exception.

pean integration process' (p. xxiii). This is certainly true. However, the new situation invites a fresh reading of events. The 'de-constitutional' outcome of the Lisbon Treaty forces us to reflect on the incapacity of the Constitution to inscribe itself in political reality. To use, if not a *Genesis* metaphor, at least a Biblical one: why did the Word not become Flesh? The key authors in the volume concur in blaming the Word, in particular, the Constitution's adoption and revision clauses.

The book opens with an overview in five chapters of the process of drafting and adopting the Constitution: historic origins – Nice to Laeken – Convention – Intergovernmental Conference – Ratification and Reflection.

The preliminary chapter explores the origins of the constitutional process. In the shadow of a motto by European *Ur*-father Victor Hugo, Nathalie Berger (Commission) brings us all the way from the early modern period to the post-war European founding until the treaty changes in the late 20th century – i.e., from Erasmus, to Messina to the euro. Berger gets the facts right, but her story is, apart from being full of Community textbook clichés, missing a point. It relies on the bureaucratic plot in which every Treaty revision follows seamlessly from a protocol, declaration or article of its predecessor. Politics or events, like the fall of the Berlin Wall, are absent. But if the beginnings of the European Constitution disappear in the darkness of times, it becomes impossible to answer the question: *Why does (or did) the Union need a Constitution at this particular moment?* However, that is the kind of basic thing national electorates want to know before voting Yes to it. In Berger's piece one perceives most clearly the contradiction to which even some of the brightest contributors in this volume fall prey. Working in the Brussels world of bureaucratic continuity they desire a European founding moment, but remain unprepared to rely on old-fashioned politics, the art of playing in historic time with continuity and rupture, to bring this about. One perceives a longing for the impossible, a constitutional rupture *sans douleur*.⁴

Guy Milton and Jacques Keller-Noël, both at the Council and not tempted by such longings, deal with the Union's twelve months from the Nice summit to the Laeken summit. Their assessments of individual actors and of the limits of Europe's reform capacity after Nice show inside knowledge and fine political judgment. Milton and Keller also bring in a quality seldom found in Brussels prose, irony. Take their comment on Prime minister Verhofstadt's claim to European fame, the declaration that paved the way for the Convention, in late 2001. 'The Laeken Declaration, like so many documents of the Union, will not enter the literary annals. (...) But what it loses in literary style, it gains in deft manipulation of language. The latter helped guarantee a successful outcome at the Laeken sum-

⁴ Paraphrasing a remark by Raymond Aron, about the impossibility of a 'painless' European federalism.

mit (...); the former ensured that the document would be forgotten even before the ink was dry.' (p. 43) One might object to this chapter only that it was already published elsewhere.⁵

The overview article on the European Convention is by political scientist Florence Deloche-Gaudez (from Sciences-Po, Paris). She compares this new mode of Treaty revision with the classic Intergovernmental Conferences, focusing on the actors and new argumentative constraints and describing the Convention's inner workings thanks to interviews with members of its secretariat. Her normative frame is Elster's distinction between deliberation and negotiation. In this reading, a constitutional Convention should be a public arena where arguments are exchanged until a rational consensus emerges, whereas an intergovernmental conference cannot be but the theatre of power play and secret deals. Not surprisingly, Deloche-Gaudez has to conclude that the records of the real Convention are mixed (as would be, presumably, the records of any IGC the other way around). However, she demonstrates convincingly how deliberation did become a norm as '*conduct code*' (p. 71). Even ministers and government representatives addressing the Convention plenary were obliged to dress their points in deliberative style, with some unexpected results. Deloche-Gaudez thus adds a valuable insight to the still growing Convention literature,⁶ which is amply confirmed in later chapters.

The nicest surprise in this section is Bobby McDonagh's chapter on the 2003-2004 Intergovernmental Conference. The diplomat, now Ireland's permanent representative to the Union, relates from the cockpit of the Irish presidency 'How The Deal Was Done'.⁷ We follow the sequence of events from the catastrophic, Berlusconi-chaired European Council of December 2003, where the Treaty negotiations collapsed and the Irish carved themselves a mandate to pick up the pieces, until the June 2004 summit where final political agreement was reached. McDonagh gives unique insights from the black box of a presidency: the advantage of a small team, the primordial role of his Prime Minister, the importance of timing and of luck. This piece deserves a place in a future handbook of European negotiation.

⁵ Guy Milton, Jacques Keller-Noël with Agnieszka Bartol-Saurel, *The European Constitution: its origins, negotiations and meaning* (London, John Harper 2005).

⁶ A considerable number of Convention members, including its president, published books on the subject. The academic literature is also expanding (see a bibliography in Deloche-Gaudez, p. 83-85, and end of volume, p. 1281-1285); a fine recent monograph is J.J. Hesse, *Vom Werden Europas. Der Europäische Verfassungsvertrag: Konventsarbeit, Konsensbildung, materielles Ergebnis* (Berlin, De Gruyter 2007).

⁷ For the first half of the IGC under the unfortunate Italian presidency, not treated in this volume, one may read: Rocco Cangelosi, 'Il progetto di Trattato costituzionale, la Presidenza italiana e la Conferenza intergovernativa; da Roma a Bruxelles: cronaca di un negoziato', *La Comunità internazionale* 58 (2003) n. 4, p. 533-560. Like McDonagh, Cangelosi was at the time his country's director-general of EU Affairs and is now its permanent representative to the Union.

Jacques Ziller (European University Institute) deals with the 2005-2007 ratification processes in the member states. The author excels in precise constitutional analysis. He insists for instance on speaking of 'parliamentary authorisation to ratify' instead of 'parliamentary ratification' *tout court*. This helps the reading of events in Germany, where the Constitution's ratification was still pending after positive parliamentary votes, because the Constitutional Court had been seised and refused to express itself during the Union's reflection period. Ziller also contrasts the Union's experiences after the Danish and Irish 'No's of 1992 and 2001 with what happened after the two negative 2005 referenda; he blames (writing in late 2006) the French and Dutch political elites for hiding behind the respective popular verdicts ever since, whereas they were among the first, in 1992, to assert that the Danes should solve their own problem (p. 168).

The volume's core consists of a detailed commentary on the Constitutional Treaty in the light of the *travaux préparatoires*, in twenty-three chapters. About half of these are concerned with the Treaty's constitutional nature and foundations; the other half with constitutional aspects of the Union's internal policies and external action. We thus find contributions on simplification (by Bribosia), adoption and revision (Triantafyllou), membership (Van Nuffel), values and objectives (De Poncins and Pilette), fundamental rights (Ladenburger), democratic life (Sipala), institutions (Ponzano), the decision-making system (Stancanelli), national parliaments (Sleath), and finances (Martínez Iglesias). As for the policies, there are, amongst others, pieces on the internal market (Winterstein), social Europe (Pilette), justice and home affairs (Ladenburger and Verwilghen), foreign policy (Grevi) and commercial policy (Brakeland). Every chapter follows the textual meandering of its subject through the Convention – working groups, plenary discussions, deals in the Presidium – to the end of the Intergovernmental Conference; most contributors were close to, some apparently even in charge of 'their' articles' drafting in the Convention phase. Some topics have been treated more elaborately elsewhere.⁸ Nevertheless, in its accuracy and exhaustiveness, this collective work will be hard to surpass.

The genealogical approach is particularly fruitful for understanding the end result in terms of negotiation dynamics. On more than one occasion, one sees how it became difficult for individual member states to defend certain existing rules. Once the Convention had established a 'normal' decision procedure, some of these could only be perceived as 'exceptions'. The 'burden of proof' was

⁸ The chapter on the institutions is far less detailed in its account of the battles between member states than some reconstructions by journalists (e.g., Peter Norman, *The accidental Constitution – The story of the European Convention* (Brussels, Eurocomment 2003); Alain Dauvergne, *L'Europe en otage. Histoire secrète de la Convention* (Paris, Saint Simon 2004).

inversed, as Jean-François Brakeland (p. 852) expresses it. He gives the example of the European Parliament's new rights in commercial policy, from which it had ever since 1957 been excluded. Once a Convention working group on simplification had promoted the co-decision procedure to the status of normalcy, it was up to the member states to defend their old prerogatives; in this case, only Sweden and Finland did, unsuccessfully. Paolo Stancanelli's first-rate contribution on the decision-making system is full of such examples; it also provides three useful annexes on remaining 'exceptions', i.e., special legislative procedures, non-legislative acts and legal bases requiring unanimity votes, and one on new legal bases requiring majority votes (p. 529-543).

A consequence of the volume's *material* approach to the Constitution's genesis is that it all adds up to a lot of little steps forward. In the concluding assessments of the different chapters one finds such expressions as 'évolution dans la continuité' (p. 480; on the institutions); 'a significant, if not radical, shift' (p. 562, on the role of national parliaments); 'la Constitution a manqué l'opportunité de faire un saut qualitatif' (p. 622, on finances); 'no meagre achievement' (p. 804, on foreign policy).⁹ From the engineers' point of view, there was hardly a sign of a constitutional rupture. The train just moved forward a bit again.¹⁰

Two exceptions must be mentioned. One was the fusion in the Constitutional Treaty of the existing treaties. This *simplification* meant indeed a break with the past. In his knowledgeable chapter on the topic, Bribosia reminds us that the incorporation in the Constitution of the existing articles on the Union's policies, resulting in the later infamous 'Part III', was an assumed political choice by the Convention Presidium, including its president. It was essentially a legal operation, which technically could have been executed '*à droit constant*' (as the author showed in an influential E.U.I.-report commissioned by the Commission). Bribosia recognises the big political fall-out of the legal clarification exercise in the French referendum. From that traumatic experience, the Union's leaders have meanwhile concluded that it is safer to bet on a classic revision Treaty, i.e., on legal continuity.

The other way to inscribe a formal rupture in the text would have been to change either the *adoption* or the *revision* clauses. Many voices in the Convention asked for future majority revisions of the Constitution; some even desired a majority adoption of the Constitutional Treaty itself, in violation of the unanimity requirement of the current revision article, Article 48 TEU. For those steeped in

⁹ Inversely, it is only against this unspectacular background that the 'communitarisation' of the third pillar can be characterised as 'perhaps the single most revolutionary achievement of the Constitution' (p. 770).

¹⁰ No wonder, one could add maliciously, that the Dutch voters were not convinced by the constitutional exercise and decided – as many of them expressed it in the days before the referendum – to 'pull Europe's emergency brake'.

constitutional thinking, this was the litmus test for the constitutional nature of the Treaty, the best chance to find a breach in the Treaty-as-treaty. These hopes were dashed; unanimous ratification was kept for now and the future.

Some contributors are still struggling with their disenchantment in this respect. Dimitri Triantafyllou (Commission), in his contribution on the final clauses' genesis, is busier deploring the unanimity requirement than analysing its coming about or constitutional significance. For him it is all due to 'lack of courage' and 'lack of foresight' of the responsible political leaders, in sharp contrast to the visionaries at Philadelphia in 1787 (p. 233). Triantafyllou seems to have missed that among the *conventionnels* pleading for a majority ratification of the new Treaty, there was only one government representative out of twenty-five.¹¹ (Whereas in Philadelphia only the Maryland representatives pleaded for unanimous ratification.) Triantafyllou also overlooks that a constitutional coup has to be *accepted* by all the political institutions and peoples in the Union before it becomes a political fact – or else your bluff will afterwards not be regarded as 'courage' but as sheer irresponsibility. Elsewhere in the volume, Bruno de Witte (E.U.I.) does acknowledge that 'the legitimacy of such a "big bang" or "Philadelphia" approach was always very questionable' (p. 920). Coining a nice term, De Witte refers to 'a "velvet Constitution", that would come in in the guise of an international Treaty' (*ibid.*).

If a new Treaty has to be *adopted* unanimously, there still remains the possibility of future majority *revision*. It is a subtle way of placing the constitutional break in the future. The idea also looms large in the volume's Part II, on the Constitution's future prospects. Thus Renaud Dehousse (Sciences-Po, Paris) claims that the Union 'devra franchir le Rubicon and faire sauter le verrou de l'unanimité' (p. 947). Even Paul Magnette (U.L. Bruxelles), in his excellent, well-balanced piece on the potential changes in the Union's political regime, considers it 'impératif' to revise the revision articles (p. 1079). The volume's mood in this respect does not surprise in view both of the 2005 referenda experience and the editors' previous publications and statements.¹²

Of the three editors, Giuliano Amato has the most intriguing position. The Constitution's revision clause had his supreme interest. According to one, the Convention's vice-president even confessed that 'the constitutional lawyer in himself would commit suicide if unanimity revision remained.'¹³ During the closing

¹¹ It was Luxemburg's Jacques Santer, the former Commission president.

¹² Hervé Bribosia was the author of the E.U.I.-report *Reforming the Treaties' Amendment Procedures* (2000); for De Witte's early pessimism about the Constitution's new rules of change, see a.o.: Bruno de Witte, 'Revision', 1 *EuConst* (2005) n. 1, p. 136-140.

¹³ Anecdote reported by Jean-Luc Dehaene, the Convention's other vice-president, who added dryly: 'The politician in Amato will survive'. (See Olivier Duhamel, *Pour l'Europe – Le texte intégral de la Constitution européen expliqué et commenté* (Paris, Seuil 2003), p. 125).

press conference, playing with the gender difference between ‘la Constitution’ and ‘le Traité’, Amato regretfully accepted that the ‘baby’ the Convention had produced was not a girl but a boy.¹⁴ Since mid-2003, his thought has apparently developed. In the Conclusion to the present volume, *il Dottore sutille* speaks of the enduring ‘hermaphroditic nature’ (p. 1276) of the European construction. He thus follows Magnette, who alludes to the Union’s ‘hybridité fondamentale’ (p. 1071). Amato proposes to end the ideological discussions between intergovernmentalists and federalists: ‘We already have our creature. It is a hermaphrodite and our only role is to make it healthy. Therefore let us stop fighting on the future sex of Europe.’ (p. 1279). The plea makes sense, but comes too late. While the politicians were hesitant (or divided), the national publics got confused. As a result of the two negative referenda, Amato’s hermaphrodite has in Lisbon been dressed up as a boy again, in December 2007. Even this new Treaty has yet to convince the various national publics of its inoffensive nature, as the latest negative referendum in Ireland showed.

In one of the most stimulating concluding essays in *Genesis and Destiny of the European Constitution*, Neil Walker (E.U.I.) distinguishes the ‘symbolic prize’ of the Constitution from its ‘material prize’. The material case is abundantly and convincingly stated in the volume, although its helplessness in face of a sceptic public remains unquestioned. The symbolic case for a European Constitution, i.e., its consecration of a certain political order, is ‘both more profound and more controversial’ (p. 1249). But the drafters of the Constitution never agreed amongst themselves to which political regime they were giving the constitutional imprimatur. In particular, says Walker, the document could be seen either as a ‘point of arrival’ (e.g., competence delimitations, charter of fundamental rights, the end of *finalité*) or as a ‘point of departure’ (e.g., its potential for further parliamentarisation). The Constitutional Treaty was, as any good constitution should be, both backward- and forward-looking, both a confirmation of what has been founded and the promise of a founding. Pushing Walker’s argument, one might say that, torn between past and future, the European Constitution missed its present. In this volume, though unsurpassable in its genre, one perceives what went wrong: its drafters, both those in the limelight and those in the coulisses, underestimated the political importance of the *moment*.

With the benefit of hindsight, we now know that, politically speaking, Europe’s first constitutional moment lasted Seven Years. Joschka Fischer opened it with his Humboldt speech of May 2000; Angela Merkel sealed it at the Brussels Summit in June 2007. During these seven long years, the Union approached the animal carefully, looked it deeply in the eye, and missed. There is currently not much to envisage, if only a feeble ‘*J’espère que tu le retrouveras.*’

¹⁴ Reported in Dauvergne, *L’Europe en otage* (see *supra* n. 8), p. 307.