

# The European Constitution is Dead, Long Live European Constitutionalism

**Richard Bellamy**

Two contradictory defenses were offered for the proposed EU Constitution, which have generated two similarly divergent analyses of why it failed. On the one hand, strong advocates of the EU Constitution argued that the process of drafting and the Constitution itself represented a step-change in the quality of EU integration. It shifted the EU from being a largely functional, market-oriented, intergovernmental organization towards becoming a post-national polity based on a commitment to rights, including social and economic rights.<sup>1</sup> On the other hand, weak advocates portrayed the Constitution as a mere tidying up exercise and insisted on its formal status as a Constitutional Treaty.<sup>2</sup> True, they hoped greater clarity about what the EU does and does not do, along with better voting rules and some other mild improvements to existing arrangements, would make the EU work more efficiently and improve its legitimacy. However, their declared intention was not to alter but to clarify the EU's character.

These two camps have tended to blame each other for the Constitution's failure. Strong advocates complain that its transformative potential was fatefully compromised by intergovernmental bargaining and the continued insistence on the EU's market and economic liberal focus, especially by countries such as Britain.<sup>3</sup> By contrast, the weak advocates argue that people misguidedly associated the Constitution with the strong advocates' agenda, which they regarded as taking too much power away from the member states.<sup>4</sup> If strong advocates attribute the Constitution's rejection to its not going far enough, weak advocates contend it was rebuffed for going too far. As a result, one camp propose strengthening the Constitution, particularly in areas such as social rights, while the other suggest yet further weakening, concentrating simply on those changes needed to facilitate EU decision-making.

Each of these diagnoses can claim some support. Indeed, there is some truth in the view that the resulting document was an unstable combination of the two positions that consequently pleased no one. Yet, both accounts are misleading. In different ways, they miss the real problem with current arrangements. Strong advocates are right to argue that the EU as presently organized suffers from a legitimacy deficit. The weak advocates' thesis that it wasn't broke and the mistake lay in appearing to try and fix it does not explain the slow but steadily growing disaffection with the EU across Europe over the past decade – including within

the new members. However, weak advocates correctly note that the EU's value for most citizens lies in the concrete, mainly economic, benefits they believe it brings them. The grander vision of a united Europe holds little appeal, with solidarity and most symbolic attachments and significance being at the national or sub-national level. Their mistake lies in believing that just because so much of the EU's remit concerns technical economic policy making, the details of which can be deadly dull, people have little ability or desire to exert any democratic control over it. After all, most domestic elections within the Member States turn on economic policy. Yet, in a different way, the strong advocates make the self-same error. For they assume a wish for greater democratic accountability must be realized through the EU taking on more polity-like characteristics and becoming the all-encompassing source of constitutional norms within Europe. This assumption neglects that the Member States are for most of their citizens already sources of constitutional and democratic values. Turning the EU into a constitutional democracy on its own account may produce conflicts with these domestic normative systems.

The common lacuna of both the strong and the weak advocates of the EU Constitution, therefore, lies in overlooking that citizens want the EU to relate better to their various domestic political arrangements. The weak theorists suppose they are happy to let domestic executives and their appointed technocrats resolve common problems and will trust them to pursue collective interests regardless of any genuine debate or control over policy. The strong theorists believe the solution resides in somehow merging the political value systems of the member states into some broader system, as if this can be achieved with no loss or conflict. Both accounts miss the constitutional and democratic potential of the present, largely intergovernmental, system and the possibilities that exist for developing it. The focus on the Constitution led to a neglect of the real practices of constitutionalism.

### **The Gap between the Ideal of an EU Constitution and the Constitutional Reality**

Let's begin with a few facts. Eurobarometer polls over the past decade consistently reveal that on average a near or bare majority of European citizens support the idea of unification, think membership is a good thing and believe their country has benefited from the EU. That said, only a small minority, around 15 percent, think it is a "bad thing," even if 34 percent believe they have "not benefited."<sup>5</sup> Nevertheless, even among the pro-European majority, the intensity of support turns out to be lukewarm. Strong enthusiasm for the EU, like hard line Euroskepticism, is a minority pursuit.<sup>6</sup> The tepidity of support for the EU is born out when we look at the figures for identification with the EU and fellow Europeans. By and large, around three percent of citizens generally view themselves as 'Europeans' pure and simple, with barely seven percent saying a European identity is more important than their national one. By contrast, approximately 40

percent describe themselves as national only and 47 percent place nationality first and Europeanness second. Indeed, though 89 percent of these citizens usually declare themselves attached to their country and 87 percent to their locality, only 58 percent feel attached to the EU. It is also instructive to note the areas that citizens believe the EU ought to be involved in. Issues relating to socio-economic rights, in so far as they involve health, welfare and education, all have a low Euro-legitimacy, with 65 percent or more of European citizens regarding these as exclusively national responsibilities. The areas enjoying high Euro-legitimacy are either those tied to market building, such as freedom of movement (including gender equality), competition policy, currency matters, and structural funds for disadvantaged regions, or policies that have a clearly transnational dimension and where international cooperation secures a genuine public good for all member states, such as environmental protection, the fight against drugs, foreign trade, and relations with other states more generally. Finally, satisfaction with democracy in the EU is around 42 percent, although only about four percent of these respondents are “very” as opposed to “fairly” satisfied.

What do these figures tell us with regard to a possible EU Constitution? I think four points emerge fairly clearly. First, there is little in the way of a pan-European “demos.” An EU identity is weak. This absence need not be interpreted in narrow ethno-cultural terms. The sheer size of the EU, especially post-enlargement, and its linguistic diversity are themselves barriers to the development of a European wide public sphere. No pan-European television or newspaper media have developed, as they surely would had a commercial opportunity been there (altering overnight the deep Euroskepticism of the Murdoch press in Britain). Moreover, given that all the member states are already democracies, which by and large enjoy high levels of support,<sup>7</sup> there is a natural tendency for citizens to support these arrangements and feel ambivalent about measures that might weaken them. Second, as a result, measures that require the levels of trust and solidarity typically associated with a sense of peoplehood, notably those requiring some redistribution between different groups, have comparatively low levels of support at the EU level. Third, relatively strong support does exist for issues where Pareto-efficient improvements can be made through cooperation in order to resolve collective action problems, protect against negative externalities and gain the full advantages of positive externalities. Not all these areas are purely economic. Fourth, even in these areas, though, democratic control is still thought desirable and the existing arrangements are perceived as unsatisfactory.

These four points reveal the weaknesses hinted at above with regard to both the strong and the weak views of the Constitution. As I noted, the aspiration of the strong advocates was a postnational constitution centered on human rights. These rights were supposed to offer the basis for a ‘constitutional patriotism’ that provided an alternative foundation for demos formation to national allegiances. They would do so by establishing the basis “both for protecting the integrity of the individual (private freedom) and for making possible participation in the

opinion-formation and decision-making processes (that is, political rights that establish public freedom).”<sup>8</sup>

There are several problems with this thesis. Though all the member states value rights, possessing some form of domestic bill of rights and a degree of rights-based judicial review, they offer differing “valuations” of them. Their understandings of both private and public freedom differ, often in conflicting ways. For example, Chancellor Schröder was able to prevent *Die Bild Zeitung* reporting certain details about his personal life that *The Sun* was allowed to publish. Moreover, not only do member state valuations often conflict with each other, but they may also clash with the valuations offered by the ECJ at the EU level, as cases such as *Grogan* notoriously revealed.<sup>9</sup> Of course, citizens within each of the member-states also differ in their views of rights. However, they can resolve these differences either through majority decision-making or via national constitutional courts that standardly reflect sustained national majority opinion. For unlike the European Court of Justice, national courts are embedded with national political cultures and make controversial decisions in the shadow of lively political debate. By and large, their legitimacy depends on being roughly in tune with popular opinion, even if courts fiercely defend their independence and claim to make decisions on ‘purely’ legal criteria.<sup>10</sup>

It might be objected that all the member states already accept the decisions of the European Court of Human Rights. However, the ECHR operates at the margins. Its function is to ensure that all signatories provide political arrangements and policies that can be regarded as plausible readings of the European Convention on Human Rights and to protect those, such as asylum seekers or foreign nationals, who have no voice in the country’s democratic system. Consequently, the ECHR employs abstract formulations compatible with widely differing valuations of rights and grants a “margin of appreciation” to states in many cases. The role of the ECJ is quite different, though. It seeks to ensure uniformity of application. As a constitutional court, its role would be to ensure rights conformed to a putative EU view. Yet, there is no evidence such a position exists or that the Court could possess the legitimacy needed to bring it about.

The strong advocates’ case proves to be back to front. They see agreement on rights as establishing a demos, whereas it is the presence of a demos that produces agreement on rights – or at least allows the decision of either a legislative majority or a constitutional court to define the collective position in ways that are accepted as legitimate. Some argued that democratic legitimacy for their proposals came from the drafting process itself, given that the Conventions that drew up both the Charter of Rights and the Treaty contained a large number of parliamentary representatives.<sup>11</sup> However, neither of these bodies was electorally accountable. Nor can their deliberations be said to have issued in a pan-European consensus. On the one hand, the drafters side-stepped their disagreements by choosing formulations that were so abstract that all sides could read into them what they liked. Yet, this strategy merely postpones the day of reckoning and assumes legitimate bodies

exist to decide the question, which is doubtful. On the other, they bargained to produce very determinate solutions reflecting the current balance of ideological and national interests. But that holds the danger of binding future parties to an agreement that made sense at the time, but all too rapidly would look outdated.<sup>12</sup>

The topsy-turvy nature of their proposals is particularly evident in the case of socio-economic rights. They claim that seeing such rights as an EU matter would enhance the EU's legitimacy. Yet, as we saw there is little support for such a measure – only about 12 percent of EU citizens see social protection as an EU issue, and with good reason. Welfare rights tend to be best protected in unitary, parliamentary systems where a strong and cohesive demos provides the social solidarity needed to allow legislative majority's to pass redistributive measures. Systems, such as the US, where there are lots of counter-majoritarian veto points perform significantly worse in such areas, with constitutional courts often serving as a further break on the promotion of such collective goals.<sup>13</sup> Given the diversity and size of the EU, a Madisonian-style system of federal checks and balances, with a strong executive and federal court but a weak legislature, is probably the most likely form of Union. However, it is precisely this arrangement that is likely to perform worst on the very rights measures the strong proponents' advocate.

Do the weak proponents' arguments fare any better? To the extent they portrayed the Constitutional Treaty as a mere tidying up exercise, they clearly understated both its symbolic import and the potential changes it might bring – not least in turning the ECJ into a constitutional court. They also underestimate the degree to which reform of the current system might be desirable.<sup>14</sup> For example, many in the weak camp are the least open to the EU gaining a competence in matters of both international and domestic security,<sup>15</sup> yet on certain issues cooperation in these spheres is widely accepted as necessary. National executives tend to argue these areas are central to state sovereignty. What they really mean is that they personally have traditionally enjoyed maximum authority in this field. But most citizens are all too aware that international collaboration and joint ventures are now inevitable in foreign affairs.

Of course, it has been by treating the EU as a branch of foreign policy that executives and their administrations have continued to exert considerable influence over EU decision-making with comparatively little democratic oversight. The low turn out in European elections is sometimes taken as a sign of a "permissive consensus" on EU matters. Others argue that it would be higher if the European Parliament counted for more. Neither argument rings true. Though the European Parliament has become steadily more important over the past two decades, average turn out in EU elections has just as steadily declined from the high of 63 percent in 1979 to 45.6 percent in 2004.<sup>16</sup> Disturbingly, turnout was low even in the new member states post-enlargement. However, Eurobarometer polls also show dissatisfaction with the EU has slowly grown throughout this period. Given the rejection of the constitution by two hitherto pro-EU countries, current misgivings clearly were not allayed by proposals that represented an

incremental centralizing of EU decision-making power, notwithstanding the enhanced role for the European Parliament. Again, the absence of a European demos, and hence of any European party system outside the factions within the Parliament itself, makes democratic accountability at the EU level hard to achieve.

### **Bringing the Constitution Back Home: Domesticating EU Politics**

If neither the strong or weak defenses of the Constitution work, what ought to be done? In different ways, both approaches overlooked the constitutional and democratic potential of existing arrangements. Despite the emphasis on rights by the strong advocates, there was little evidence for, or concern about, a rights deficit within the EU as a whole. In fact, most worries came from the very body they sought to empower – the ECJ. After all, it was challenges by national constitutional courts, particularly the German and Italian courts, which obliged the ECJ explicitly to incorporate human rights considerations into its jurisprudence. Moreover, it did so by reference to a wide range of documents – from the European convention and other international charters, to the bills of rights found in many of the member-states. Notwithstanding the ECJ's assertion of its supremacy in *Simmenthal*, *International Handelsgesellschaft*, and elsewhere, EU law is to a large degree multi-dimensional, with most member state courts locating EU law within the domestic legal order.<sup>17</sup> The result has been a deep and nuanced jurisprudence that has obliged both the ECJ and national courts to have a fuller appreciation of the concerns of different traditions. EU law has been the beneficiary, gaining in the process strong domestic sources of legitimacy within the member-states, which after all are ultimately responsible for its implementation. Replacing this evolving and flexible European common law tradition, based on mutual recognition and tolerance, with a single document presided over by a higher court was an unnecessary and retrograde step.

Instead of disposing of what is one of the EU's great successes, the EU should have built upon it and to some degree adapted it to the mechanisms of democratic accountability. Here too there is a need to domesticate EU decision making. As we saw, the apparent dilemma confronting the EU is that citizens want more democratic control, yet do not want to participate in EU wide elections. The obvious solution that parallels what has occurred hitherto in the field of law is for the national parliaments to play a more active part in EU decision making. For EU level decisions do not simply affect a superior level of activity between the Member States, but have a profound impact upon domestic policy making. EU politics is domestic politics and needs to be treated as such.

There is a major domestic democratic deficit with regard to the EU. For example, a British MEP, Chris Davies, discovered that in one session of the Westminster Parliament during which there had been 92 council meetings attended by a minister, only 79 questions were asked by MPs (compared to some

40,000 raised on other matters).<sup>18</sup> Some countries do better – a Danish parliamentary grand committee meets almost weekly to take evidence from ministers before every EU council. But they remain the exception. Likewise, apart from the Euroskeptic parties, MEPs are rarely elected for their position on Europe. To the extent people bother at all, domestic issues tend to dominate. As a result, domestic debates on the EU have a tendency only to surface at times of referenda on treaty changes and so turn on a simple ‘in’ or ‘out,’ ‘yes’ or ‘no,’ rather than subtler differences of opinion over the kind of Europe citizens might want.

The Constitutional Treaty did contain some positive proposals in this regard. For example, it imposed an obligation on the Commission to keep national parliaments adequately informed of EU developments and gave them a limited role in policing infractions of subsidiarity (Protocol on the Role of National Parliaments in the EU). Of course, how far such measures become a real resource for more informed discussion of EU politics at the domestic level is a matter for national politicians themselves. Voting in the Council of Ministers was to have been made transparent. This too was a welcome step, for it would prevent governments claiming they were not a party to potentially unpopular policies that were ‘imposed’ by nameless others. Instead, they would be obliged to defend their positions. They could also point out the votes that had gone their way and make more of them. Both these measures could be adopted voluntarily and immediately by the institutions concerned, with no need for any Treaty change at all.

Even such limited measures are sometimes criticized for being largely negative – a way of constraining further integration. That need not be the case. They may also work to give integration greater legitimacy through possessing and mobilizing domestic support. Long term, it can also help forge transnational linkages. By making national politicians aware of common interests with colleagues representing constituencies with similar profiles elsewhere, and highlighting the ideological as well as the national divisions that surround most EU policy decisions, a genuine EU party system is far more likely to develop. In this regard, direct elections to the European Parliament were (and remain) premature and the blocking at the Convention of a formal meeting of national parliamentarians to discuss EU policy a mistake. More generally, national political parties as the organizations that represent millions of voters ought to be regular parts of the EU’s consultation process. Great emphasis is laid these days on consulting with civil society organizations. Yet most of those selected have no formal mechanisms of accountability with regard to the citizens they claim to represent – indeed, many have extraordinarily low levels of membership. However, the organizations that do have these mechanisms and comparatively high levels of active support remain on the side lines, unmentioned in any official document on the topic.

The EU has been idealized in certain sections of the democratic theory literature as an instance of a new form of cosmopolitan democracy.<sup>19</sup> Many of these ideals inspired the strong advocates of the Constitution – at least among academics. The reality was always rather different – an international organization based on

long-term mutual advantage on a limited series of concrete matters. However, that does not mean these issues were in some sense below (or, in their technicality, beyond) democratic concern or failed to raise issues of constitutional principle, as certain weak advocates claim.<sup>20</sup> Indeed, the strong and the weak advocates made a parallel mistake in this regard by seeing the current set up in largely instrumental terms and either condemning it or praising it accordingly. If the purposes the EU legitimately performs are limited, and seen predominantly, if not exclusively, through the lens of domestic concerns, they are neither unimportant nor free from the need for normative appraisal and control. The norms applied to them are many and varied, though, and require appropriate forums through which the differences between them can be discussed and resolved. For the moment these remain predominately national and international – the basis for supranational or transnational mechanisms is weak.<sup>21</sup> Moreover, they fly in the face of what has been a genuine achievement of the EU – the bringing together of the peoples of Europe in ways that promotes cooperation without abolishing their differences. The Constitution may be dead, but that gives us an opportunity to praise and give life to European constitutionalism by democratizing its essentially inter-national foundations.

#### NOTES

1. E.g., J. Habermas, “Why Europe Needs a Constitution,” *New Left Review* 11 (2001): 5 and E.O. Eriksen and J.E. Fossum, “Europe in Search of Legitimacy: Strategies of Legitimation Assessed,” *International Political Science Review* 25 (2004): 445–47.

2. A. Moravcsik, “The Unsung Constitution,” *Prospect*, March 2004, 80–81.

3. J. Habermas, “Europa ist uns über die Köpfe hinweggerollt,” *Süddeutsche Zeitung*, 6 June 2005

4. A. Moravcsik, “Europe Works Well Without the Grand Illusions,” *Financial Times*, 14 June 2005.

5. These figures, and the others reported in this paragraph, come from Eurobarometer 60 (published February 2004 and based on fieldwork October–November 2003), and the results of earlier studies reported there. I have used results based on the old 15 rather than the new 25 because these can be placed in the context of a general trend. Figures from Eurobarometer 62 (Field work October–November 2004, Publication December 2004) reveal the new members to be on average a little more positive about the benefits coming from the EU. As a result, the slow decline in approval of the EU from the high point reached in the early 1990s appears, temporarily at least, to have been slightly reversed. In fact, new members almost always boost average support for the EU, after which it declines slightly. The figures relating to identity have been remarkably stable over the past decade or so. (See J. Blondel, R. Sinnott, and P. Svensson, *People and Parliament in the European Union: Participation, Democracy and Legitimacy* (Oxford: Clarendon, 1998), 62–65). The latest Eurobarometer report, undertaken both before and after the French and Dutch referenda, reveal that the basic trends remain the same. Though support for the EU has gone slightly down, the belief that it is beneficial has gone up – with 53 percent of the French and 67 percent of the Dutch remaining positive (Eurobarometer 63, published September 2005 and based on fieldwork May–June 2005).

6. E.g., when the image of the EU is broken down into “very positive” and “fairly positive,” then around 7–10 percent opt for the former category and 35–40 percent for the latter. A similar division can be found in most assessments of the EU, with the overall positive view fluctuating around 50 percent with a small but steady decline in support among long term members, albeit with

large differences between member states. See Blondel et al., *People and Parliament in the European Union*, 56–62.

7. In the old EU 15, only Italy and Portugal registered less than 50 percent of their citizens “satisfied” with their national democratic systems.

8. Eriksen and Fossum, “Europe in Search of Legitimacy,” 445.

9. Case C-159/90 *Society for the Protection of the Unborn Child (SPUC) v Grogan* [1991] ECR I-4685.

10. It should be noted the US Supreme Court, often looked to as a model in this literature, is no different in this regard – see N. Devins, and L. Fisher, *The Democratic Constitution* (New York: Oxford University Press, 2004).

11. Eriksen and Fossum, “Europe in Search of Legitimacy,” 453.

12. For an analysis, see R. Bellamy and J. Schönlau, “The Good, the Bad and the Ugly: The Need for Constitutional Compromise and the Drafting of the EU Constitution,” in L. Dobson and A. Føllesdal, eds., *Political Theory and the European Constitution* (London: Routledge, 2004), 57–71, and our “The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights,” *Constellations* 11, no. 3 (2004): 412–33.

13. R. A. Dahl, *How Democratic is the American Constitution?* (New Haven: Yale University Press, 2002), 168–69.

14. A. Moravcsik, “The EU Ain’t Broke,” *Prospect*, March 2003.

15. A. Moravcsik, “How Europe Can Win without an Army,” *Financial Times*, 3 April 2003.

16. Not that given that there is compulsory voting in Belgium, which has a turn-out of over 90 percent, and quasi-compulsory voting in Italy, where turn-out is usually over 80 percent, the average masks extraordinarily low figures in certain countries – including some new members – of around 20 percent. Only UK turn-out went up at the last election, mainly due to the introduction of postal voting. For electoral trends in the EU, see: [http://www.elections2004.eu.int/epelection/sites/en/results1306/turnout\\_ep/turnout\\_table.html](http://www.elections2004.eu.int/epelection/sites/en/results1306/turnout_ep/turnout_table.html).

17. N. MacCormick, “The Maastricht-Urteil: Sovereignty Now,” *European Law Journal* 1 (1993): 255–62 and J.H.H. Weiler, “In Defence of the Status Quo: Europe’s Constitutional Sonderweg,” in Weiler and M. Wind, eds., *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003), 7–23.

18. Cited in C. Huhne, “Nobody Tells Us When We Win,” *The Guardian*, 25 August 2004.

19. E.g., D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity, 1995), 112–13; Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Cambridge: Polity, 1998), ch. 6

20. E.g., G. Majone, “Europe’s Democratic Deficit: the Question of Standards,” *European Law Journal* 4 (1998): 5–28 and A. Moravcsik, “In Defence of the Democratic Deficit: Reassessing Legitimacy in the EU,” *Journal of Common Market Studies* 40 (2002): 603–24.

21. See the essays in R. Bellamy, D. Castiglione, and J. Shaw, eds., *Making European Citizens: Strategies of Civic Inclusion in Pan-European Civil Society* (London: Palgrave, 2006), especially my “Between Past and Future: The Democratic Potential of EU Citizenship.”

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