

## Death by Constitution? The Draft Treaty Establishing a Constitution for Europe

By Jan Klabbers & Päivi Leino\*

### I.

It has been argued that the best possible constitution is a short constitution.<sup>1</sup> If so, then the Draft treaty establishing a constitution for Europe is a spectacular failure: at more than 250 pages, comprising some 450 articles and a handful of protocols and declarations, the Draft constitution is anything but short.<sup>2</sup>

However, if this were its only drawback, this brief comment would be unnecessary. But, in fact, the Draft constitution (we will use this term as a convenient shorthand and so as to underline the sense of alienation that oozes from the use of the term constitution, although it would be better to speak of a draft treaty) raises issues on a number of rather fundamental points. Its main characteristic, we will argue, is a soaring ambivalence on the two points that really matter: What to do with the Union? And what to do with Europe's citizens?

The Draft constitution is as large as it is because the task given to the constitutional Convention was an impossible one to begin with. In December 2001, the European Council adopted the Laeken Declaration on the Future of the European Union.<sup>3</sup> In accordance with this document, a constitutional Convention was to be established,

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<sup>1</sup> See K.C. Wheare, *Modern Constitutions* (2d edn., London: Oxford University Press, 1966), at 33-34.

<sup>2</sup> The text is available in English at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (last visited 1 September 2003).

<sup>3</sup> Available, for instance, at the EU's website, at [http://europa.eu.int/futurum/documents/offtext/doc151201\\_en.htm](http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm) (last visited 1 September 2003). A paper version is included in Annex 1C to Peter Ludlow, *The Laeken Council* (Brussels: EuroComment, 2002), 227-235.

consisting of representatives of the member states, the future member states, their national parliaments and the various EU institutions, with the task "to consider the key issues arising for the Union's future development and [to] try to identify the various possible responses." While the term 'constitution' was not explicitly used in the convention's terms of reference, the remainder of the document makes clear that something like a constitution was envisaged. But not only a constitution: the Convention was also expected to simplify the existing treaties and streamline them, and was given the task of figuring out what to do with human rights, now that the EU Charter of Fundamental Rights had proved acceptable to the member states, albeit in a non-binding form.<sup>4</sup>

The Convention would eventually consist of 105 individuals and 105 alternates, and would be chaired by former French president Giscard d'Estaing.<sup>5</sup> A number of salient issues, such as the question of the Union's legal personality, or how to incorporate human rights, were to be studied in smaller working groups, which then reported back to the plenary. Other issues, however, do not seem to have been the subject of much consideration by the Convention: the possibility of withdrawal from the Union, for example.

In the end, the Constitution was presented to the European Council in the summer of 2003, and is emphatically to be regarded as a Draft constitution. It will take an intergovernmental conference to decide what to do with the draft, whether to accept it in whole or in part or whether to modify it beyond recognition. Still, while there is much in the Draft constitution that would warrant rethinking, the expectation is that the current draft will survive an intergovernmental conference relatively unscathed: the circumstance of having been drafted by a group encompassing the member states (present and future) as well as the EU institutions will mean that large portions of it will most likely prove to be acceptable to the member states, and much of the text itself is bland enough so as not to give rise to much controversy.<sup>6</sup>

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<sup>4</sup> There is something seriously troubling about drawing up a list of fundamental rights which are, however, not deemed fundamental enough to be binding.

<sup>5</sup> The technique of entrusting the drafting of an instrument to a broad convention encompassing many diverse interests was first used in connection with the Charter on Fundamental Rights. See generally Gráinne de Búrca, "The Drafting of the European Charter of Fundamental Rights", 26 *European Law Review* (2001), 126-138.

<sup>6</sup> For a balanced assessment of the convention method, see Johannes Jarlebring, "Taking Stock of the European Convention: What Added Value Does the Convention Bring to the Process of Treaty Revision?", 4 *German Law Journal* (2003, no. 8), 785-799, available at: [http://www.germanlawjournal.com/pdf/Vol04No08/PDF\\_Vol\\_04\\_No\\_08\\_785-799\\_european\\_jarlebring.pdf](http://www.germanlawjournal.com/pdf/Vol04No08/PDF_Vol_04_No_08_785-799_european_jarlebring.pdf)

The draft, influenced by a strong Presidium of limited composition (it hardly formed a representative sample of the convention), does not however proclaim a new stage on the way to the ever closer Union of the peoples of Europe; if anything, it is part of the trend, begun with the Maastricht Treaty<sup>7</sup>, to erode the Union from within. The federal vision has long been discarded. While the term 'federal' made a feeble appearance in an earlier draft<sup>8</sup>, it is completely absent from the final version. What is left is a regrouping of the member states, nicely co-operating on the international level but without the ambition to achieve a serious level or form of unity. What thus remains, in other words, is the 'Europe des patries' of De Gaulle, or a vision of Europe so favoured by Margaret Thatcher<sup>9</sup>; Jean Monnet would not be impressed.

There are two main issues that lead one to speculate that the Draft constitution is in fact a proclamation of the end of European integration. One is that on a number of crucial power issues, the Draft shifts the emphasis to the member states and reduces the ambitions of and for the Union. The second point is related, causally or otherwise: the draft is hopelessly unclear as to whom it addresses or, in other words, the identity and composition of the political community that the Convention had in mind when drafting the draft. And where this is more or less clear, the policy choice in favour of the member states is unfortunate and, really, difficult to justify. It is these two fundamental points which will occupy the remainder of this brief note.

## II.

The philosopher Avishai Margalit has recently made the point that constitutions are "a constitutive part of the community's shared memory."<sup>10</sup> If so, then Europe has a bit of a problem, as it lacks a shared memory on any level but the most general. True, most or all of Europe has been affected by the likes of Charlemagne, Napo-

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<sup>7</sup> For a brief polemic to this effect, see Jan Klabbers, "On Babies, Bathwater and the Three Musketeers, or the Beginning of the End of European Integration", in Veijo Heiskanen & Kati Kulovesi (eds.), *Function and Future of European Law* (Helsinki: Helsinki University Press, 1999), 275-281.

<sup>8</sup> See Document CONV 528/03 of 6 February 2003, draft article 1, paragraph 1.

<sup>9</sup> It is perhaps no coincidence that Laeken's main architect, Belgian prime minister Guy Verhofstadt, was once described by an official as "the nearest Belgium has to a Thatcherite", although he was later thought (not entirely convincingly perhaps) to have had a change of heart. As quoted in Ludlow, *supra* note 3, at 49.

<sup>10</sup> See Avishai Margalit, *The Ethics of Memory* (Cambridge MA: Harvard University Press, 2002), at 12.

leon and Hitler; in that general sense our memories are shared. But they are not shared on the more concrete level: Hitler affected Germany rather differently than he did neutral Sweden; 'Anschluss Austria' has a rather different relationship to Nazism than, for example, the United Kingdom.

Of course, absent a shared common memory, the next best thing is to create one, to imagine a community as Benedict Anderson<sup>11</sup> would have it, and that is indeed one of the visible aims of the Laeken Declaration. This Declaration, adopted in December 2001, is quite an amazing document. While more cynical observers could interpret Laeken as an attempt to falsify history, it offers a retouching to Europe's history, in an attempt at creating something of a shared memory. Remarkably, for example, when discussing peace and the victorious emergence of human rights in post-cold war Europe, the small matter of a bloody civil war in Yugoslavia is conveniently ignored; the fall of the Berlin Wall is listed in the same breath as the Magna Carta, the Bill of Rights (the English one, we may presume, rather than its more familiar and arguably more influential US namesake) and the French Revolution; all this to highlight that Europe is, and always has been, the "continent of humane values", despite the bloodshed after the French revolution, despite episodes such as feudalism and absolutism or, indeed, despite the very construction of the Berlin Wall. From this perspective alone, the Laeken Declaration is a truly remarkable piece of paper, bringing home the message in a handful of pages that not only does Europe have a shared history (enabling it to have shared memories and therewith being ripe for constitutionalisation), it is also a rather wonderful history, in which the Europeans did great things for themselves and, no less importantly, for the world (of course, colonialism, that quintessential European invention, is not mentioned either).

Apart from providing a revisionist history lesson<sup>12</sup>, the Laeken Declaration also spells out some of the ideas as to why a constitution would be needed, relying to a large extent on a unsubstantiated vision of what Europe's citizens want and invoking integration theory in suspect ways. For one thing, the Declaration suggests that peace is supposed to lead to a strong and unified Europe, rather than, as integration theory generally has it, the other way around.<sup>13</sup>

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<sup>11</sup> See Anderson's classic study *Imagined Communities* (2d edn., London: Verso, 1991).

<sup>12</sup> Then again, as Renan already recognised in 1882, "L'oubli et je dirai même l'erreur historique, sont un facteur essentiel de la formation d'une nation..." Quoted in Eric Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (2d edn, Cambridge: Canto, 1990), at 12.

<sup>13</sup> On integration theory, one of the classics remains J.K. de Vree, *Political Integration: The Formation of Theory and its Problems* (The Hague: Mouton, 1972).

The curious thing though, and the reason why the Laeken Declaration can be regarded as a thoroughly ambivalent piece of paper, is that whereas all this attempting to forge a common history out of nowhere would seem to suggest a political project geared to integration and, indeed, federalization, the remainder of the text is diametrically opposed to integration.

For the Laeken Declaration, almost in an aside, set the tone for the draft constitution, signalling to the Convention that the end-point of European integration had just about been reached. Arguably the Declaration's key sentence is this: "In *coordinating* the economic, financial and fiscal environment, the basic issue should continue to be proper operation of the internal market and the single currency, without this jeopardizing member States' individuality"<sup>14</sup>, and so as to drive the point home the Declaration explains that what Europe's citizens expect "is more results, better responses to practical issues and not a European superstate or European institutions inveigling their way into every nook and cranny of life."<sup>15</sup>

In other words: the Laeken mandate to the Convention was to present the outlines of a joint venture of co-operating states, with the task of the Union's institutions limited to providing the co-ordination. True, this co-ordinating task might cover new subject areas, but the main point would be that the Union's role would be limited to that of a centre for co-ordinating domestic policies.

This finds its cause perhaps in the observation that one would expect the absence of a common history to lead to a retreat to the nation state<sup>16</sup>: Europe's member states, after all, do have localised common histories, or at least (and this is what matters) they think they do. In this light, that Laeken signalled the return to the fore of the member states is not surprising; but what is surprising is that it does so despite its attempts to forge a European history from disparate experiences.<sup>17</sup>

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<sup>14</sup> Laeken Declaration (emphasis in original; one emphasis deleted), *supra* note 3.

<sup>15</sup> *Ibid.*

<sup>16</sup> See on this point Miguel Poiars Maduro, "Europe and the Constitution: What If This Is As Good As It Gets?", in J.H.H. Weiler & Marlene Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: CUP, 2003), 74-102, at 78.

<sup>17</sup> Incidentally, European historiography appears to be a relatively new phenomenon, which only started to blossom in the 1920s and 1930s. Prior to that, it seems it had not occurred to many to write a history of Europe. Pioneering works include Henri Pirenne, *Geschiedenis van Europa* (4th edn, Amsterdam: Veen, no year), which contains a preface (presumably written for the first edition) dated 1917, and Benedetto Croce, *History of Europe in the Nineteenth Century* (1963, New York: Harcourt, Brace & World, Inc., first published 1933, First transl.).

The Convention, it must be acknowledged, has taken Laeken's brief to de-integrate extremely seriously. Article 1, paragraph 1, of the Draft constitution (it is useful to remember that this is the article which in an earlier version still contained a reference to federalism) is exemplary in this regard:

"Article 1: Establishment of the Union

1. Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise in the Community way the competences they confer on it."

Clearly, what this provision does is ensure that all responsibility for activity resides with the member states. It is the member states that confer competences, and they do so not to reach an "ever closer Union" or anything to that effect, but merely "to attain objectives they have in common". The member states devise policies in order to achieve their own objectives, and all the Union is supposed to do is co-ordinate those policies. The common future of the opening sentence is a common future of co-operation, not integration, and the reference to 'the Community way' in the final sentence merely pays lip-service to the possible interplay of European institutions. What matters is that all grander ambitions have been thrown out of the window: the Europe that emerges from Article 1, paragraph 1, of the Draft constitution is a Europe of co-operating but otherwise unconnected states. The unifying ambitions of the past will be replaced by a marriage of convenience, to be cancelled at will as soon as it is no longer thought convenient.

No provision makes this more emphatically clear than Article 59 of the draft, which creates a right of withdrawal.<sup>18</sup> The old EC did not (and still does not) have such a provision<sup>19</sup> and arguably wisely so, as withdrawal provisions, however juridically neat perhaps, have the awkward drawback of making withdrawal an easy, and thus at times attractive, policy option.<sup>20</sup> Whereas the idea behind the original

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<sup>18</sup> The classic general study is Nagendra Singh, *Termination of Membership of International Organisations* (London: Stevens & Sons, 1958).

<sup>19</sup> This has been the topic of a large amount of speculation in the academic literature. One contribution is Arved Waltemathe, *Austritt aus der EU: Sind die Mitgliedstaaten noch souverän?* (Frankfurt am Main: Peter Lang Verlag, 2000).

Community was always to embark on a journey together, although the destination was unknown<sup>21</sup>, the idea oozing from the Draft constitution is that this journey can be undertaken in separate boats and, to continue the somewhat limp analogy, that it is perfectly legitimate to stop in mid-stream or turn around to abandon the voyage.<sup>22</sup> The member states therewith become (or remain, as some would have it) the undisputed '*Herren der Verträge*', thereby providing an answer to a question that has long occupied scholars.<sup>23</sup>

Of more immediate practical concern perhaps is that an explicit withdrawal clause also makes it attractive for states to hold the entire decision-making process hostage merely by threatening to withdraw.<sup>24</sup> A member state about to be outvoted on an issue which it holds to be of great value might decide to play hardball and use the withdrawal provision as a trump card: either give us what we want, or we will simply walk away; not unlike the French empty chair policy of the 1960s, but with a greater degree of legitimacy and a greater threat of finality. The net result, amidst much talk of increased qualified majority voting, is to recreate a type of Luxembourg accord, which will allow the member states to invoke vital national interests as they see fit under threat of withdrawal. And that is, optimists may point out, a 'best-case-scenario'; at worst, it may mean that there will not be enough member states left after a while to make 'Europe' worthwhile.

This impression of the recreation of an intergovernmental, less-than-integrated Europe is strengthened by other articles. Article 5, for example, speaks of the "tasks" that the member states give to the EU. That is a far cry from the classic European notion of the Union as an independent actor with its own mind and will; and the formal grant, in Article 6, of legal personality (often deemed to suggest a

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<sup>20</sup> This is one of the lessons the drafters of the UN Charter learned from the League of Nations experience, as withdrawal from the League had been far too easy an option for Germany, Italy and Japan to resist.

<sup>21</sup> This refers to J.H.H. Weiler, "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration", 31 *Journal of Common Market Studies* (1993), 417-446.

<sup>22</sup> Any associations the reader may have with rats and sinking ships are entirely the reader's responsibility.

<sup>23</sup> The seminal paper is by Ulrich Everling, "Sind die Mitgliedstaaten der Europäische Gemeinschaft noch Herren der Verträge? Zum Verhältnis von Europäischem Gemeinschaftsrecht und Völkerrecht", in Rudolf Bernhardt *et al.* (eds.), *Recht zwischen Umbruch und Bewahrung: Festschrift für Hermann Mosler* (Berlin: Springer, 1983), 173-191.

<sup>24</sup> See more in-depth Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: OUP, 2001), esp. ch. 4.

"volonté distincte" on the part of the organisation<sup>25</sup>, or an indication of an organisation's soul<sup>26</sup>) does not change this circumstance. Article 9 makes clear that powers not conferred upon the Union rest automatically with the member states<sup>27</sup> and thus, incidentally, makes a finding of implied powers highly unlikely, whereas Articles 16 and 17 specify that EU measures in fields such as culture "may not entail harmonisation" of domestic law.<sup>28</sup> Creeping integration ('mission creep', in strangely appropriate military parlance), so important a part of the history of the European Union, is thereby quite categorically excluded. Obviously, whether de-federalisation of the Union is to be considered a good or a bad thing is a matter of political judgement, but at the very least it is ironic (and a testimony to the Draft constitution's ambivalence) that a nominally constitutive document is employed in order to de-constitute the Union. The Draft Treaty establishing the Constitution may establish something called a constitution, but the text does not constitute anything remotely resembling a political community, not even one consisting solely of states.

### III.

This then relates to the second main noteworthy feature of the Draft constitution: it is rather unclear as to whom the Draft constitution is a constitution for. In other words: the members of the political community addressed by the draft remain unspecified. Thus, to the (limited) extent that the draft aims at the creation of a political community, who or what would be comprised by such a community?<sup>29</sup>

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<sup>25</sup> See generally Jan Klabbbers, *An Introduction to International Institutional Law* (Cambridge: CUP, 2002), esp. ch. 3.

<sup>26</sup> See David J. Bederman, "The Souls of International Organizations: The Lighthouse at Cape Spartel", 36 *Virginia Journal of International Law* (1996), 275-377.

<sup>27</sup> This may be impossible to maintain in practice, given the limited analytic utility of the notion of powers. See, e.g., Jan Klabbbers, "Restraints on the Treaty-Making Powers of Member States Deriving from EU Law: Towards a Framework for Analysis", in Enzo Cannizaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer, 2002), 151-175.

<sup>28</sup> Again, one may wonder whether this is at all possible: harmonisation may well result from uncoordinated individual acts of member states. This is, indeed, much of the rationale of the free market ideology. Still, what matters is that as a formal matter, harmonisation is excluded: this displays an intention not to proceed with integration.

<sup>29</sup> This does not relate to the more common discussion whether Europe can have a constitution without a European *demos*. What occupies us is a different issue: does the Draft constitution speak to the people at all, and if so, how and to whom, exactly? An example of the *demos* debate is the discussion between Dieter Grimm and Jürgen Habermas in 1 *European Law Journal* (1995), 282-307. See also part II of J.H.H. Weiler, *The Constitution of Europe* (Cambridge: CUP, 1999),



National constitutions typically aim to address the country's citizens and, normally speaking, may also cover those who are permanently resident without holding citizenship. By contrast, treaties establishing international organisations typically address the organisation's member states, despite the occasional rhetorical bow to other entities.<sup>30</sup> Indeed, the Treaty establishing the European Community used to include a similar reference in its preamble, referring to an "ever closer union among the peoples of Europe", something the Court used to good effect when proclaiming the EC as a new legal order in the early 1960s.<sup>31</sup>

The constitutional Convention, unwilling to make up its mind, has decided to aspire to both. As Giscard d'Estaing put it when presenting the Draft constitution to the European Council, the Union is supposed to be "a union of citizens and a union of Member States."<sup>32</sup>

The Draft constitution is replete with examples of this seemingly ambivalent attitude. The preamble, for example, refers to the peoples of Europe, although it does so in an indirect manner. Where the old EC Treaty referred to the determination of the Heads of State of the original founders to create an ever closer union among the peoples of Europe, the Draft constitution's preamble has lost this ambition: it merely records the conviction of the drafters that the peoples of Europe are looking for a common destiny; a different approach altogether.

On one view, this can be seen as a sympathetic reference to a bottom-up process of community-building, where the urge must not come from the Heads of State but rather from the peoples themselves. This, however, would most likely be too generous a reading, for other elements of the draft make clear that much will still rest with the member states; indeed, the same preamble underlines, two points further on, that the draft is prepared "on behalf of the citizens and States of Europe."

All in all, it would seem that the Draft constitution mostly envisages a community of states. Not only are, as noted above, a number of provisions formulated so as to indicate tasks which the member states give to the Union, but also the citizenship

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<sup>30</sup> An example is the UN Charter, the preamble of which famously starts with "We the peoples of the United Nations...", but otherwise makes clear that it is the founding document of an organisation of states.

<sup>31</sup> The preambular reference to the peoples of Europe was invoked to confirm the Court's impression that the EC Treaty was more than merely an agreement between states in case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

<sup>32</sup> Rome Declaration of 18 July 2003, para. II, available at [http://european-convention.eu.int/docs/Treaty/Rome\\_EN.pdf](http://european-convention.eu.int/docs/Treaty/Rome_EN.pdf) (last visited 1 September 2003).

provisions as such largely point in this direction: they singularly fail to give flesh to the notion of citizenship - any notion of citizenship, for that matter.<sup>33</sup> Article 8 deals with citizenship, but goes little further than the existing Treaty: it essentially repeats the same rights that are attached to European citizenship.<sup>34</sup>

But the most serious problem in terms of political community is the continuing impossibility for EU citizens who have migrated between member states to vote in the national elections in their state of residence. While migrating individuals may participate in municipal politics and in elections to the European Parliament, they are still not allowed to vote in national elections.<sup>35</sup> Yet, as any political activist or observer will testify, it is national elections that are often seen as the ones (the only ones?) that matter and, more to the point perhaps, policies towards European integration are determined on the national level - and given the reconstitution of the EU as a co-ordinating centre for member state policies, this is not likely to end anytime soon. Thus, this leads to the curious situation that the most European of Europe's citizens, those who actually move throughout Europe and make the free movement of persons more than an abstract notion, are excluded from participation in the political processes where Europe's fate is being determined: to the extent that Europe is a political community, it excludes those Europeans from meaningful political participation.

The traditional rationale for this state of affairs is that individuals are thought to be capable of only singular loyalties: we can be loyal to one state, but not to two or three simultaneously.<sup>36</sup> But part of the point of the European experiment was precisely to create a loyalty towards Europe above and beyond our national loyalties, and while this has by and large been successful on the level of everyday

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<sup>33</sup> Which entails, in effect, that the EU remains stuck with "the legacy of the market citizen" as it has been called: Europe's citizen is a worker and a consumer, not someone participating in the public realm. For an illuminating analysis, see Michelle Everson, "The Legacy of the Market Citizen", in Jo Shaw and Gillian More (eds.), *New Legal Dynamics of European Union* (Oxford: Clarendon Press, 1995), 73-90. Indeed, Europe barely has a public realm to begin with, and the Draft constitution does nothing to change this.

<sup>34</sup> A fine overview of European citizenship is Jutta Pomoell, *European Union Citizenship in Focus: The Legal Position of the Individual in EC Law* (Helsinki: Erik Castrén Institute, 2000).

<sup>35</sup> And are thus effectively denied membership of arguably the most relevant political community, at least as determined by the Draft constitution. On the importance of such membership, see Hannah Arendt, *The Origins of Totalitarianism* (San Diego: Harvest, first published 1951), esp. 290-302.

<sup>36</sup> It is this conception of nationality that underlies some of the classic international law decisions: *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, [1923] *Publ. PCI*, Series B, no. 4, and the *Nottebohm Case (Liechtenstein v. Guatemala)*, *Second Phase*, [1955] *ICJ Reports* 4.

life<sup>37</sup>, it has yet to be translated in political terms: the chance to stimulate this has once again been bypassed.<sup>38</sup> The only exception (the utility of which remains to be seen) is the creation of a citizen's right of initiative in Article 46, giving a large group of individuals coming from a "significant number" of member states the possibility to bring matters to the attention of the Commission. While such a provision clearly has emancipatory and democratic potential, there is also a risk that it may end up being hijacked by particular interest groups. But at least it is a bit of a fresh air in an otherwise not terribly inspiring text.<sup>39</sup>

The main point of principle, eventually, is this: the Draft constitution barely speaks to Europe's residents, or even its citizens. Instead, it dodges the issue of whether it wants a European political community of individuals. And for a treaty (sorry, we mean constitution, of course) that was drafted under the explicit instruction to bring the Union closer to its citizens, that is simply not good enough: one cannot bring Europe closer to its citizens while keeping the member states as an intermediate layer, indeed, strengthening the position of this intermediate layer. After all, the more the position of the member states is carved in stone by being constitutionalised, the more difficult it will be to upgrade the position of citizens where doing so would be difficult to reconcile with the position of member states. The only plausible conclusion is, once again, that the Draft constitution spells the end of European integration and marks the final passage of the transition from integration to intergovernmental co-operation. Admittedly, the modalities of co-operation are more sophisticated than they were half a century ago, but that only amounts to bureaucratic window-dressing.

#### IV.

In order to become the constitution of Europe, the draft, as amended by the intergovernmental conference, will have to be accepted by the individual member states in accordance with their domestic procedures and constitutional requirements; and given the influence of the Presidium on the draft, that is a good

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<sup>37</sup> As Maduro puts it, "we are no longer prisoners of our original polity and can choose to live among a variety of polities", in Maduro, *supra* note 16, at 85.

<sup>38</sup> More generally, it has been observed that states have become more relaxed about such things as dual citizenship, and thus take the point about loyalty less seriously than they used to. In this light, the drafters' apparent reliance on outdated theories becomes even less comprehensible. See, e.g., Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford: OUP, 1999), esp. ch. 4.

<sup>39</sup> Note also that the draft constitution does not address the position of third country nationals residing permanently in the EU. This might still mean, in Arendtian terms which are only slightly overblown to cover the occasion, that these third-country nationals are expelled from humanity. See Arendt, *supra* note 35, at 297.

thing too.<sup>40</sup> In some member states this means that parliaments must approve it; in others it may entail approval of the final text by referendum. Either way, a large degree of political pressure will be exercised so as to guarantee the smooth sailing of the text through the various approval procedures: while many political groups will find some things wrong with the draft, most (perhaps all) will nonetheless grant their approval, as on points of detail all groups can claim that the text will be of some use and beneficial.

Europhiles could, for example, present the (spurious) argument that Europe's position will be strengthened through the formal granting of legal personality<sup>41</sup> or the codification of the 'primacy' of EC law over domestic law.<sup>42</sup> Those who think that Europe's future demands a stronger European Parliament (not a bad idea in itself) can point to the strengthening of the EP's role as co-legislator. Human rights activists can endorse the draft as it incorporates, albeit in less than unequivocal terms, the EU Charter on Fundamental Rights.<sup>43</sup> Those who favour backroom politics by backslapping or backstabbing politicians may point to the blissful circumstance that governance (good or otherwise) is not a prominent topic in the draft. And those who think little of European integration can endorse it because the Draft constitution itself also thinks little of European integration.

At the end of the day, though, it is important to realise that acceptance of the draft as it stands means the rejection of any greater ambitions for Europe for quite some time to come. The worst that can happen (but the thing that usually happens) is that the text will be welcomed as perhaps poor, but better than nothing, and as maybe representing something of a springboard for the integration process.<sup>44</sup> In

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<sup>40</sup> Article IV-8. The mere-fact, incidentally, that the draft constitution can unhesitatingly accept the existence of national constitutions already suggests that Europe's constitution cannot be very constitutional.

<sup>41</sup> This is spurious since, under international law, there can be little doubt that the EU possessed legal personality all along. For an overview of the debate, see Klabbers, *supra* note 25.

<sup>42</sup> One wonders though why the more usual term "supremacy" is not used. We have not found anything in the preparatory works explaining this shift, and it may simply be an unfortunate use of English, as in other languages more orthodox terms are used.

<sup>43</sup> Article 7 states that the Union "shall recognise" the contents of the Charter (as opposed, we presume, to recognition of the Charter itself), but there is no indication of those contents being incorporated into EU law, and paragraph 3 of Article 7 can even be seen to suggest that the Charter rights only form part of the Union's general principles to the extent that they coincide with rights emanating from other sources. For a critical analysis of the Charter itself, see Päivi Leino, "All Dressed Up and Nowhere To Go? The Debate on the EU Charter of Fundamental Rights", 11 *Finnish Yearbook of International Law* (2000), 37-81.

this case, however, committed europhiles might be forced to the conclusion that refusing to adopt the Draft constitution is the best thing they can do for European integration. It is of course also possible (perhaps even plausible) that Europe's citizens want non-Europe to take the place of Europe; if so, then that is fine too, as long as the decision-making is informed.

The idea that Europe requires a formal constitution has been a staple of European integration discourse for quite a few years now. Amidst all the enthusiasm, often inspired perhaps by the wonderful circumstance that no one knows what constitutionalism entails and which thus allows all of us to project our own preferred image of Europe under the constitutional banner, Joseph Weiler for one has remained a sceptic. He has repeatedly pointed out that a formal constitution might do more harm than good: it might end up undermining all the wonderful constitutional elements that have accrued as sediments<sup>45</sup> through judicial, institutional and member state practice since the 1950s, and it might end up undermining the deepest value Europe has, according to Weiler: the idea of constitutional tolerance.<sup>46</sup> Whether democracy should happily acquiesce in a (largely) judge-made constitution over one wittingly created by (somehow) representatives of the peoples of Europe is debatable<sup>47</sup>, but at least Weiler has a point in noting that the attempts to create a formal constitution may end up undermining the European project: the values which have more or less grown organically and become incorporated over the years can be undone by one stroke of the pen and be replaced by the bland consensus of the moment. And this is precisely what the Draft constitution does, however ambivalently. While ostensibly creating something new (a constitution, after all), it marks a retrograde move and spells the end of European integration as we know it. Perhaps that is a good idea, but at the very least it is an idea that should be made clear: it is the end of European integration that is at issue when the draft constitution will be submitted for domestic approval.

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<sup>44</sup> This is how the various amendments, ever since the 1985 Single European Act, have been traditionally marketed: "reculer pour mieux sauter", as the French put it, or "half a loaf is better than no loaf at all".

<sup>45</sup> We gratefully borrow the term from W.T. Eijsbouts, "Constitutional sedimentation", *Legal Issues of European Integration* (1996, no. 1), 51-60.

<sup>46</sup> He speaks, with capitals, of a Principle of Constitutional Tolerance. One of the more recent versions of the argument is J.H.H. Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*', in Weiler & Wind (eds.), *supra* note 16, 7-23.

<sup>47</sup> Although those peoples of Europe or their representatives have thus far, to the extent that they influenced the Draft constitution, been rather reluctant to make a strong statement as citizens, and have been happy to let the member states run away with what ought to have become 'L'Europe des citoyens' rather than 'L'Europe des patries'.