

Constitutional Law as a Work of Art - Experts' Eyes: Judges of the World examine the Constitution of Europe^{*}

By Alexandra Kemmerer

"To be honest," remarked Lord Scott with dry humor when we left Villa La Pietra, - "to be honest, I passed no single room where I would simply feel comfortable after a long day's labors." However, the British Lord of Appeal in Ordinary thinks highly of the arts, certainly no less than his colleagues from Washington, Paris, Rome, Karlsruhe and Luxemburg with whom he explored the collections at La Pietra on this midsummer afternoon. But the wealth and variety of the artworks assembled during the course of the last century by English eccentrics and their assemblage according to fairly personal esthetic criteria relieve the visitor barely for a moment of concentrated observation, requiring permanent attention - and considerate behavior in the midst of irreplaceable treasures.

The Actons' Florentine Villa, inherited in 1994 by New York University, is an art work *sui generis*. And so was the subject matter of the Transatlantic Dialogue on the Constitutional Future of Europe convened here by NYU's Global Law School: the Draft European Constitution recently released by the Convention on the Future of Europe. While in Brussels some Convention members still stood in line to sign the document, its structure and content was already subject to judicial and scholarly scrutiny in Florence. Members of the US Supreme Court and Judges of European Member State Constitutional Courts as well as scholars in the fields of European and American Constitutional Law discussed the Draft Constitution.

Beginning with the introductory question concerning the "nature of the beast", i.e. the legal nature of the "Treaty establishing a Constitution for Europe", the participants responded with as much diversity as logically possible. What to the eyes of one lawyer appears to be a constitution, is for his or her neighbor simply a treaty - and for yet another a "constitutional treaty". A constitutional treaty laying down only existing constitutional structures, one may precisely say. But who knows - the Convention's final document might as well mirror a profound change of the EU's constitutional foundations, or even of the entire European constitutional

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sphere, requiring, *strictu sensu*, an amendment to several Member States' Constitutions.

Koen Lenaerts, having been for nine years Judge at the Luxemburg Court of First Instance and just nominated as new member of the ECJ by the Belgian Government, sketched the steps of the Conventional process and introduced the structure and basic content of the Draft Constitution – a draft which still has to gain legitimacy by the consent of the citizens of Europe. Around the table, five US Supreme Court Justices listened attentively – a majority of the Court, as should be noted.

Right after the conclusion of the Supreme Court's 2002 Term at the end of June, Ruth Bader Ginsburg, Stephen Breyer, Sandra Day O'Connor, Anthony Kennedy and Clarence Thomas set out on a journey to "old Europe." Before travelling to Florence, the Supremes met with Judges and Advocate Generals of the European Court of Justice in Luxemburg and exchanged views with high-level representatives of the French judiciary in Paris. While scholars still discuss global judicial networks in subjunctive wording, such networks have already become an informal reality among constitutional judges. Numerous American and European constitutional judges know each other, meet now and again, are familiar with the institutional structure of other constitutional courts – and sometimes even with their respective decisions and patterns of argumentation.

However, a link as immediate as the explicit reference to decisions of the European Court of Human Rights in the Justice Anthony Kennedy's majority opinion in the U.S. Supreme Court's recent decision in *Lawrence v. Texas*, in which it struck down a Texas sodomy law, will remain an exception. More interaction would be hindered by too dissimilar constitutional forms and legal systems, one or another judge pointed out while strolling after lunch in the splendid Renaissance gardens of La Pietra. In a similar way, the EU's complex structure must not be superficially compared to classical federal systems, as tempting as parallels may be. After all, a foreign minister makes no state. And even if one admits that every thing in the universe is *sui generis* – as a US Supreme Court Justice bluntly emphasized, in response to the widespread talk of the Unions' *sui generis*-character - the EU does not simply fit into constitutional law's traditional categories.

But the Union is to be measured by them. As an American, familiar with a Constitution of sixteen pages, Justice Sandra Day O'Connor admitted that she had been astonished by the length of the Draft European Constitution, with its more than 300 articles. Judicial restraint kept the guests from Washington from further comments on the extent of the document. But, facing the complexity of their constitutional future, the Europeans should keep in mind a key question formulated by Justice Stephen Breyer which he characterized as a permanent

challenge for European as well as American Constitutional Courts: How should a constitution be written and interpreted to be understood by citizens, to be accessible for everyone and to enhance political participation? After all, the Brussels Convention set out on its historic journey sixteen months ago with the mandate to bring the Union closer to its citizens by simplifying its legal foundations.

According to former Karlsruhe Constitutional Court Judge Dieter Grimm, the “democracy problem” of the Union is not an institutional, but a socio-cultural problem, due to the lack of intermediary structures, of a common European public sphere. But is not the string of causality between public sphere and political structures a classical hen-and-egg-constellation? Or does a public sphere develop, as Judge Gertrude Lübbe-Wolff of the German Federal Constitutional Court dared to assume, just inevitably along the lines of power? Does it follow any shift in decision-making, to the institution or structure where crucial decisions are made? The conference’s host, Joseph Weiler, University Professor and European Union Jean Monnet Chair at NYU’s Law School, could not agree. He used to assume that the European Parliaments lack of power was the reason for its lacking legitimacy, Weiler confessed. But now, observing that citizens’ participation in European parliamentary elections is on a steady decline despite a remarkable increase of power and competences for the European Parliament in recent years, he could no longer stick to the hypothesis of a nexus between power and public attention.

Will, as the Portuguese scholar and designated Advocate General at the ECJ Miguel Poirares Maduro stressed, an enhanced transparency of European governance and a strengthened participation of national parliaments in European decision-making change this “legitimacy deficit” caused by the EU’s merely virtual public sphere? Lord Scott of Foscote, British Lord of Appeal in Ordinary, expressed his doubts, despite all his praise for the Convention’s achievements. Still, the institutions of the European Union would be lacking accountability for their actions.

A topic discussed *in extenso* during the meeting was the protection of fundamental rights in the Union. Francis Jacobs, Advocate General at the ECJ, introduced the Charter of Fundamental Rights, solemnly proclaimed in 2001 at the Laeken IGC. As Part II of the European Constitution, the Charter shall be a legally binding core element of Union’s legal order. The Charter does not create new rights, but crystallizes existing guarantees, Jacobs explained. However, the details of the Charter’s future relation to Member States’ Constitutions and, even more delicate, to the European Convention on Human Rights, will be one of the most interesting questions in the ongoing European constitutional discourse. A discourse which will from now on be mainly in the hands of judges.

The upcoming Intergovernmental Conference, discussing the Draft Constitution elaborated by the Convention, will barely change the European House's furnishings profoundly. But who would dare to predict whether the Europeans will feel comfortable in their new constitutional home? As so numerous experts participated in the Convention's work, its tiny rooms and great halls are furnished with diverse fittings of various constitutional provenances.