Rethinking EU Scholarship

Following the dramatic No votes in the French and Dutch referendums on 29 May and 1 June 2005, a need was felt in the European constitutional law profession to react to the shock.

EuConst invited members of its Board and members of the European Constitutional Law Network to write a short comment about possible and possibly salutary effects of the events on the ways of European scholarship and teaching. Below are the reactions received. Authors are all members of ECLN and/or the Board of EuConst.

The contributions to this issue of *EuConst* by Jacques Ziller, Sacha Prechal and Herman van Gunsteren incorporate their comments on the events.

The Limit of Consensualism and Pragmatism

Jiri Zemanek, Prague

For decades we have lived with an inborn patrimony that the project of European integration was produced in the 1950's by a conspiracy of political and intellectual elites against the conservativism of Europe's peoples. The evolution of the Treaties was captured by this path dependency as the *peoples* – relying on the inertia of the system *per se* – used to not oppose the innovations drafted by *their* member states. There were only few temporary exceptions.

As long as the coherence and solidarity of big and small, old and new, etc., were crucial, this political pragmatism allowed an implicit consent to be managed even through changes. The no-votes showed that further testing of the capacity to make a consensus is impossible. A straight contradiction occurred between the nation state and the Union, in France as well as the Netherlands and – in a latent way – in some new members. Another rupture was caused by the fear of a weaker social protection, in France notably. A distinct right/left polarisation has come alive in the perception of European policies at the national levels.

It was *not* a fundamental anti-Union sentiment that led to the rejection of the European Constitution. Rather it was a drainage of the spiritual dimension of the European integration, perceptible already for several years in the European parlia-

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mentary elections. The initial paradigm has definitely changed now that the past has caught up with the present: citizens in France and the Netherlands did not want to wait until the European Constitution would have strenghtened their 'say' in European affairs.

The lesson to be taken from this experience is that there is no way forward unless the member states and their peoples, the *Union citizens,* come to share the same *values and ideals*, the execution of which is to be entrusted to the Union. All applauded *Vaclav Havel* when he was speaking about the need to revitalise the *contrat social européen*. In a post-bipolar world, however, such a contract cannot be ordered and imposed from above, it can be only stimulated and expected.

The only answer is to stage a European democratic debate on European policy. Academia should take an active part in this by all available means. It should encourage discussion and debate on the following topics: does the political moment have priority over the administrative one? Is the European government legitimised enough by European elections and responsible toward the citizens? Should not the political parties, communicating with and recognised by the citizens at the Union level, draft uniform programmes and field teams of top candidates recruited EU-wide for the key positions in the European government? Should not all next amendments to the Treaties and enlargements of the Union be ratified in Europe-wide referenda?

Through such a debate, European issues may be identified in their unmanipulated appearance and political frustrations avoided. If this does not take place, the delegitimisation of the Union will continue.

Union of Equals

Peter G. Xuereb, Malta

I was not surprised by the votes as such, and I think that a way forward will be found, but a certain haste on the part of some to shelve an agreed-upon process dismayed me. Since when does what happens in one or two member states, even old and hallowed member states, mean more than what happens (or may or may not happen) in another, not as to outcome but as to whether a process agreed to by all should stop or not? As it happens, and one can understand why some would want to postpone their referendum plans, the compromise reached in the 15 and 16 June summit left the way open. But the point is that clearly some leaders and some people, going beyond their right to have their say and making all allowances for changed circumstances, still view the Union as that of yesterday if not yesteryear.

Unless our teaching, our research, our public pronouncements, our conferences and the thinking, speeches and actions of our leaders project a Union of equals, as does the Constitution, even the current Union construct will be at risk, for the smaller and newer member states will feel that *plus ça change plus c'est la même chose*.

Unfortunately, this impression has already been given and whatever can be recovered as far as the Constitution is concerned, formally speaking – I have every hope that it will come to be ratified – it will take some time and much contrary evidence from the actions of the 'leaders in Europe' to convince the new European citizenry that the Constitution will be their Constitution as much as that of some member states.

Now that would be a Constitution! And it could be interpreted, taught and promoted as such. The new citizenry is watching very carefully indeed.

Piecing the Treaties Together

Bruno de Witte, Florence

One of the most commonsensical and least controversial reforms in the Constitutional Treaty is the merger of the EC and EU Treaties into one common text (that the Euratom Treaty was left out of the merger was aesthetically regrettable but of little practical importance). There was little debate about the merger operation in the Convention. In fact, a consensus was reached fairly early in the framework of the working group on Legal Personality. It was ably steered by Giuliano Amato towards the conclusion that a full-scale merger of the two major Treaties was needed. This conclusion, in turn, paved the way for the ultimate reorganisation of the common Treaty into four separate Parts.

Thus, the 'bits and pieces' which the Maastricht Treaty had left in its wake[1] were re-assembled into an overall structure. Personally, I think that the re-assemblage was not taken far enough in the text of the Constitutional Treaty. Much of its complexity is due to the fact that the Community method and the intergovernmental approach continue to 'live apart together' in the new Treaty. This is the cause of many of the intricacies of Part I, for example where it deals with competences and legal instruments and with the dangerously hybrid Minister of Foreign Affairs. Moreover, the present pillar structure went underground, hiding

[1] I borrow from the famous title of Deirdre Curtin's commentary of the Maastricht Treaty: 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', 30 *Common Market Law Review* (1993) p. 17.

in small corners of Part III, such as in the provision excluding the European Court's jurisdiction in common foreign and security matters.

Still, the merger operation was a very welcome reform, and one that did not provoke any opposition from the side of individual governments in the IGC. Nor was it controversial during the French and Dutch referendum campaign. It is a pity, therefore, that should the Constitutional Treaty be lost, the merger of the treaties would go down with it. Despite the fact that such a merger is politically uncontroversial and legally feasible, and that it would contribute to make the European Union more understandable for its interested citizens, it cannot be done without treaty revision. In my view, the merger of the treaties should be part of any 'minimum platform' of treaty reform that may be envisaged after the recent referendum debacle. However, it seems difficult to imagine that member state governments would embark on a treaty reform that would have as its sole aim to merge the current treaties. It seems more likely that the plan for a treaty merger would be accompanied by other, more substantive, reform plans (if only because a merger necessarily raises the question of the appropriate mix of 'EC-based' and 'EU-based' elements in the common text). In this case, political controversy and ratification risks would plague the reform plan once again.

In the meantime, there is nothing to prevent EU law practitioners and academics from trying to identify and strengthen the common elements of the EU Treaty and the EC Treaty and patiently construct the contours of a single legal order. In its own modest way, the European Court of Justice contributed to this 'piecing together' in the recent *Pupino* judgment, also mentioned in Jo Shaw's contribution to this issue.

Thinking About Rethinking

J.H.H. Weiler, New York

What is telling and requires interpretation is the feeling that rethinking of thinking should be needed. The editors were speaking for many even if, in my view, the feeling is not entirely justified.

There is, to be sure, one phenomenon regularly occurring to me over the last three decades of being an observer not only of the European construct but also of thinking about it. It is the ease and speed in which the European law professoriate becomes mobilised.

It happened with Spinelli, it happened with the Single Market, it happened with Maastricht and it happened again with the 'Constitution'. The professors' detachment, dispassionate distance and critical outlook are blunted and at times

even lost, and one sees their transformation, unselfconscious, into European patriots – constitutional patriots of course.

A great part is played by the seduction of power and the delusion of self-importance. Think how many conferences, workshops and symposia took place where the guiding spirit was giving advice, indicating 'the way forward'. Sure signs are those ridiculous deadlines: please send in your report by date x so that it can be published before this Summit, before that Report, before the change in Presidency, etc., all extending the vain hope somehow to be part of the process, partake in the glory.

The Commission has become very sophisticated at this kind of mobilisation, with its plethora of sponsored conferences, symposia, workshops and commissioned research.

Make no mistake: we are all citizens as well as scholars and have the right and maybe even the duty to partake in the public debates which shape the polity. What I am talking about here is a more subtle, sometimes unarticulated and even subconscious mobilisation jeopardising the best traits in recent European constitutional scholarship and even the civic duty of intellectuals in the body politic.

The call for rethinking is at least in part the dejection that is experienced against the background of mobilisation.

If there is any rethinking needed about the way we think, it should include reflection on this mobilisation and the ensuing dependence. Let me raise again my Cato's cry against the role the Commission, which should be a principal object of critical academic enquiry, has come to play in shaping the research direction and agenda of European scholarship generally through its massive financial dole outs. Often these have squeezed other public and private sources. Departments, institutions and brilliant scholars are spending inordinate amounts of time jumping through the bureaucratic hoops held up by the Commission. Worse, the availability of that funding, (often necessary for the maintenance of their institutional infrastructure, funding Ph.D students, supporting young colleagues) is determining the intellectual agenda.

The Commission has yet to learn the good practice of insulating itself, as funding authority, from the delicate issues of intellectual design, personnel and the like.

If there were to be a rethinking of thinking, I would hope that the issues of mobilisation and dependence would be an important part of that agenda.

The Whole and the Parts

W.H. Roobol, Amsterdam

As scholarship ought to be to a large degree independent of politics, it is somewhat inappropriate for an academic of European constitutional law to be shocked by the blow of the No votes. The making of a constitution has always been an irregular and often even an irrational process of wrangles and compromises, of leaps forward and setbacks, of stop and go. Nevertheless I agree with the editors that the 'period of reflection' of the politicians can be used by academics as well, to consider again some of the interwoven problems of state formation and constitution building.

Although historians and political scientists under the impression of nationalism and the seeming homogenisation of states in Europe in the 19th century have coined the term *nation state*, the idea of the congruence of state and nation or of state and people has remained more of an ideal than of a reality.

All states, whether they are formal federations, centralised states or something in between, are more or less divided up in population groups with their own identities, imagined or real, that may or may not coincide with geographical and/or administrative units. The division of power between the whole and the parts in the states of Europe, as a result of age-long constitutional struggles, is very variegated and most of the time rather confused. No wonder then that the builders of the European Union thus far did not find an elegant and satisfactory solution to this problem.

The concept of *subsidiarity* with its historical roots may be ingenious and politically apt, but as it can be used to justify decentralisation as well as centralisation, it arouses distrust and therefore seems to be constitutionally a misfit. Many of the troubles of the European Union, including the recent budgetary quarrels, have to do with the defaults in the structure of the Union and in the proposed constitutional treaty concerning the division of power between the whole and the parts. It may not be a bad idea, therefore, to tackle this problem by studying it in the context of American and European comparative constitutional history. Perhaps even the politicians could profit from it.

After the Outbreak: Change or Continuity?

Jo Shaw, Edinburgh and London

Should we see the outcome of the reform processes which led to the adoption of the Constitutional Treaty, and its subsequent rejection in referendums by the French

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and Dutch electorates, as precursors of *change* or of *continuity* in relation to the tasks of European Union legal studies? Carrying on as before may not be a straightforward option.

In conversation with a colleague, we thought the unthinkable: could the rejection of the Constitutional Treaty be construed as the *ex post facto* delegitimation of the Court of Justice's case-law on the relationship between EU law and national law dating back to *Costa* v. *ENEL*?

It will be hard to trace any direct consequence from the outbreak of popular democracy to the approaches taken by national supreme or constitutional courts to future challenges posed by EU law. But if there is to be a backlash it might be expected to concentrate in the third pillar segment of Justice and Home Affairs. The European Arrest Warrant measure is one already raising constitutional questions at the national levels, both before the Polish Constitutional Court and before the German Federal Constitutional Court.

Meanwhile the Court of Justice's *Pupino* judgment of 16 June 2005 (Case C-105/03) appears to have extended the principle of loyal co-operation contained in Article 10 EC to the field of co-operation in criminal matters. The Court concluded (rejecting an argument made by the UK and Italian governments) that:

> It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions (para. 42).

This led the Court to conclude that there was a general obligation on national courts to interpret national law so far as is possible in conformity with relevant provisions of EU law – a similar obligation to that which exists as a general principle under the law pertaining to the EC treaty.

How will national courts react to such a new demand upon their sympathies in relation to the application of EU law in national courts? It is interesting to see that the Court's judgment is dated after the French and Dutch referendums. There is certainly no evidence of a sudden mood of caution taking over within the Luxembourg Palais.

The challenges for research, scholarship and teaching remain, as I see it, largely the same, after the debacle of the Constitutional Treaty and the referendums, as they were before. The key to EU law continues to be its complexity, both in a factual sense since there is ever more law for students and academics to assimilate, and also in a normative sense, since the EU retains its Janus-faced part-international/part-constitutional system of law that defies straightforward classification.

Renewing the Social Contracts, European and National

Ingolf Pernice, Berlin

Only a deep crisis can attract such an interest of the media and, as a consequence, of the people. And we should be grateful for this. This public, Europe-wide debate should have taken place much earlier – during the work of the Convention and the IGC. Now that the European Council this June wisely opted for a 'reflection'-period, it is time for a new and broad debate. It should be on substantial issues such as what this Europe is for, why it was a success-story so far, why it is so attractive for new member states and what it should develop into. A Constitution needs more time for reflection than many have thought. That is the first lesson to learn from the French and the Dutch referendums.

Someone said, ironically: 'this is the first time peoples took their own governments seriously'. And indeed, have not the governments themselves blamed the EU for every failure and unpopular measure, while priding themselves for successful European policies? The economic crisis, unemployment and *l'angoisse sociale* are homemade in all the big original member states. Other members perform much better. The EU has no effective competence for economic and social policies.

The French case indicates a deep divide between the political class and the people. If similar problems exist in all the member states of the Union, the crisis we see of Europe, indeed, seems also to be a crisis of democracy within the member states. The question of a Constitution of Europe is a question of the national constitutions too. The political situation in Europe shows that the two constitutional levels, European and national, are closely tied together, interlaced and interdependent parts of a composed system in process. This is so, indeed, since the conclusion of the EC-Treaty in 1957.[2]

We cannot change the existing Treaties or the Constitution, which is in the process of ratification. All proposals and advice to governments would remain academic and never reflect what the outcome of the political process would be. What we can usefully explain is the specific nature of the EU and European law; that calling the Treaty a *Constitution* does not imply that a state or 'super-state' is being created; that the new Treaty would express more honestly that any European public authority is a matter and responsibility of the citizens, no less than of national authority and government; that the legal acts of the EU are an expression of self-rule of the (European) society.[3]

[2] *See* Ingolf Pernice, 'Multilevel Constitutionalism in the European Union', 27 *European Law Review* (2002), p. 511.

[3] This has been noted by Armin von Bogdandy, 'Konstitutionalisierung des europäischen öffentlichen Rechts in der europäischen Republik', *Juristenzeitung* (2005) 529, 531.

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People want to understand the specific nature and structure of this new system, distinguishing it from a sovereign state in the traditional sense. They need an explanation as to why this Union is a necessary additional safeguard for peace, freedom, social solidarity – complementary to their nation-state, based on it and depending on its democratic functioning.

This is a great challenge, but the 'no' in the referendums gives Europe and its citizens a new and unexpected opportunity to conduct a meaningful Europe-wide debate, to understand the EU, to consider our common values and interests, to revisit and to renew both the European and the national social contracts.

Thinking About Thinking on European Constitutionalism

Miguel Poiares Maduro, Luxembourg (in personal capacity)

Europeans appear to address the European Union in a way similar to how Woody Allen described the approach of two old ladies in a New York restaurant, spending the entire meal complaining of how bad the food is and concluding: 'and the portions are so small'…

Contrary to what is becoming a popular view, I do not believe that the problems we are facing are due to an over-constitutionalisation of the Union (for which, EU scholars, would be largely responsible). If there is a critique that can be made to us, it is that we have not taken constitutionalism sufficiently seriously. It is the adoption of a half-baked constitutionalism, providing the EU with constitutional authority and constitutional doctrines without constitutional politics, that is to be greatly blamed by the current debacle. I am not talking here about whether the Union needs or not a document called a Constitution. I am talking of the tension that has emerged between the extension of the reach of the Union, supported by a constitutional rhetoric, and the lack of a constitutional deliberative culture, with policies shaped by intergovernmental and not constitutional principles.

As a consequence, the Union reaches the citizens through the filter of national governments, which pick and choose what political costs to transfer to the Union and what merits keeping for themselves. I believe that the time has come to really go back to basics in revisiting the entire EU project. Constitutionalism should be used, not to discuss if the Union needs or not a Constitution or even a constitutional moment but, instead, to assess many of its current policies and mechanisms of deliberation. I would put forward these priorities for thinking:

– Constitutionalising EU policies: can they continue to be the product of states bargaining and not of constitutional principles? How is their drafting

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along state lines compatible with the recognition of an equal status to all European citizens?
- Constitutional review of the intergovernmental decision-making process: to which extent do decisions agreed upon by States still deserve their current degree of deference? Who ought to be considered the primary political agents of the Union: citizens or the States?
- Decide how to decide first: a debate on how to decide on the nature and extent of constitutionalism for the European Union. This process, which could still take the Constitutional Treaty as a point of departure for discussion, should, in my view, be guided by some basic principles: all national constituencies must be given an equal opportunity to express their voice; any form of direct legitimacy must be provided ex-ante so as not to fall in the 'referenda trap'; it should be an open ended process; and national decisions should be placed in a European context.

Back to Basics for Progress

Jean-Victor Louis, Brussels

The internationalist vision of European Community law is gaining supporters. And some constitutionalists seem inclined to follow suit. This movement is encouraged by unintended effects and biased interpretations of some provisions of the Constitution, which are thought to be codifying the *acquis* and putting the member states at the centre of the system. The more emblematic provision in this respect is Article I-60 on the right of unilateral withdrawal from the Union expressly recognised to states but there are other such provisions, like the revision procedures and Article I-5 on national identity of the member states and the respect of the essential functions of the State, which are inducing similar interpretations.

In parallel, a current of thinking tries to let us believe that political integration is an obsolete dream that was perhaps understandable in the immediate period after World War II but that is now put into question by globalisation. Researchers and teachers of Community law should resist both trends, confirm the political vocation of European integration and underline the specificity and effectiveness of the Community method. It is the only one capable of preserving the rights of the citizens and business enterprise by giving them the right to be heard before their jurisdictions under the unifying interpretation of the Court.

The word Constitution is a polysemic concept. It was misunderstood and apparently feared by a number of citizens asked to vote in referendums. We should

recognise the material constitutional substance of the treaties and explain what it concretely means for the citizen. The legal literature should neither 'sacralise' nor 'banalise' the concept, which plays an important role in understanding both the reality of the present functioning of the Union and the necessary orientation of its development.

The reflection would be concentrated on policies in the months to come more than on looking for a new institutional scheme. A compromise is not to be expected on an institutional framework different from the one agreed upon by the Convention and the IGC in the short- or medium-term. In that sense, the Constitution is not dead. On the other hand, the member states and the institutions have to answer to the preoccupations of the citizens for more and better jobs, knowing that every "model" has its limitations. They will have to work for a better allocation of resources and, to be sure, an increase of them. It should be said that the choice is not to renationalise entire policies but to pursue their reform. And the credibility of the reformers could only be enhanced by their participation in the single currency, which necessarily includes both positive and negative elements, to be shared in the name of solidarity.

I Feel So Perfect But I Lost My Soul

Rick Lawson, Leiden

I feel so high, it must be low
I feel so fast, it must be slow
I feel so handsome but I am still alone
I feel so perfect but I lost my soul

(Herman Brood, 'Doin' it', from the album *Shpritsz,* 1978).

EU law and European human rights law have several features in common; so do the lawyers that specialise in these areas; and so does the criticism with which they are confronted.

First the legal disciplines. Ideals play a key role, both in EU law and in human rights law: both strive for peace, prosperity, the rule of law – in short a decent life. Both disciplines are relatively young, when compared to the traditional areas of civil, criminal and constitutional law. This means that, despite appearances, they (like public international law) are engaged in a continuous struggle with the old sovereign state in order to secure their own position. At the same time, EU law and human rights law develop exceptionally quickly. The *acquis communautaire* is

an expanding universe of itself; the Strasbourg Court decides 20,000 cases a year and in doing so is constantly refining the standards of the European Convention of Human Rights.

Then the specialists. They tend to identify with their topics. One explanation is that they are simply captivated by the idea of European integration and protection of the individual, and that they perceive a need to protect 'their' law and institutions against nationalist sentiments. At the same time they devote the largest part of their time to the very latest developments: these must be followed, analysed, systematised; the legal community must be informed about them. As a result, the specialists are not inclined to be critical about Luxembourg or Strasbourg, and at any rate they lack the time for critical reflection. They do not want to be associated with cheap and populist Euro-bashing, so they do not subscribe to critique, even if, on rare occasions, it happens to be well founded.

Now the critique. Both EU law and human rights law are being criticised as technical, too detailed, undemocratic. The EU may be used to this criticism, but human rights law, too, is increasingly depicted as an out-dated concept. It is said to have lost contact both with its post-war roots and with the contemporary world outside; it now mainly serves to prevent public officials from running the country and from protecting the public against terrorists. Very little is said in defence of human rights law.

So if policy makers suggest that it might be permissible to ill-treat a terrorist under interrogation because this may save lives, the specialists – and I consider myself to be one of them! – remain silent (probably because they have a deadline for a case note concerning this very interesting decision on the scope of application of the right to a fair trial). At best we quote a judgment where The Court said that the prohibition of torture is absolute, and that is the end of the matter as far as we are concerned. The Court said it, right, and if somebody out there happens not to be convinced, then that is too bad for him or her. Whether this is a meaningful contribution to an important debate, let alone an effective strategy to uphold human rights, is of course another matter.

So we may feel fast, we may feel perfect, with our Internet sites and latest case-law, but we have lost our soul in the process. We need to go back to the basics, read Jean Monnet and René Cassin – not in breathless admiration, not in order to copy the ideas that they developed in response to the problems of *their* era, but to rediscover the essence of our discipline. It is time to engage in the debate in order to defend the grand values that should guide Europe.

Ditching the Text

W.T. Eijsbouts, Amsterdam/Florence

What is there to explain the undeniable radiance of relief in the Dutch government and even Parliament right after the popular No vote? What made the government embrace this verdict immediately in a full about-face on the Constitution and declare the document dead, 'over and out'? All this was not only quite unnecessary nationally, it was unacceptable and even quite irresponsible in the European context.

The Dutch government, in ditching the document, may have hoped for the whole national cocktail of popular misgivings that this referendum had attracted to go down together with the document. If so, a smart hope that will prove idle.

There may be another merit, however, in the document going under. Even more than before, it will now be seen as necessary and reasonable for teaching and research of European Law to abstract from the text and its own logic and jargon to discover and proceed from generally established formats of legal and constitutional structure.

In the Constitution, for one example, there is no mention of a *government*. The Councils and Committees and Commissions abound, however, to the point of bringing any standard treatment of the situation directly under the mists of confusion.

In a future treatment of the Union's constitutional structure it may be easier to take a distance from the actual text and point out where is the Union's executive (in the pregnant sense) and what is the structure of its responsibilities. To be without a final text for some time to come (we fall back on Nice but that is even more provisional than before) may have a liberating effect and invite new discoveries of what solid reality and evolution there is to be found underneath all the existing, past and future versions of the Treaties, including the Convention's proposals.

Tailoring Legitimacy To the Shape of the EU

Deirdre Curtin, Utrecht

German Foreign Minister Fischer's Humboldt lecture of May 2000 was praised for lifting the EU's eyes from its shoes and toward some sort of horizon. The Convention on the Future of Europe however mostly muddled through, failing, as would the Intergovernmental Conference, to lift its eyes very high. That is not

surprising. From where we stand it is just not possible to clearly see the European horizon. We may need to accept that we cannot define, describe and justify the European Union in polity terms, at least not within any existing frame of reference.

Defining the EU in negative terms ('not just a market', 'not a federal state', 'not just an international organisation') will not convince the people to vote for an affirmative 'Constitution', that seems above all to threaten their existing, national frames of reference. The more positively slanted categorisations, such as 'a multi-level system of governance', 'a political community', are too indeterminate and abstract for the national fora. We scholars and teachers must guard against over-simplifications and against the appeal of familiar, but inappropriate, concepts. Perhaps the best approach is to conceptualise the polity of the EU in the conditional future tense, as not something that *is,* but something that may evolve over time. For the present, rather than focus on the horizon of the EU as a polity, we had better consider the EU as a composition of various regimes, grounded in empirical reality.

There are those theorists and scholars who present the EU in terms better fitting (aspects of) its various regimes, between an intergovernmental form of co-operation with the member states still as the 'masters' and, at the other extreme, a supranational form of integration through law. They do us all a disservice.

Instead we need a *differentiated* appreciation of the various regimes, which nestle within the EU and spread, in overlapping and dispersed ways, across the spectrum of policy areas. A bottom up look at the empirical practices of the EU will distinguish between the various modes of governance which are emerging in practice and which require a more subtle categorisation than we constitutional lawyers tend to make. Consequently the question of legitimacy must be the subject of tailored differentiation.

It is not true, as Tony Blair and others have it, that the current constitutional 'crisis' can be resolved by just providing leadership and seeking 'output legitimacy'. This approach is exclusive and simplistic, precisely now that *input* legitimacy and the overall accountability of power exercised should be put at centre-stage.

What is fundamentally positive about the present situation is the acknowledgement of a need for greater reflexivity at various levels. Indeed this will feed input legitimacy and should be perceived as such. Calls for participation by citizens should come from various fora, which themselves must become more open and more inclusive and more genuinely deliberative. These include not just the traditional fora of representative democracy, the European Parliament and the national parliaments, but also those *loci* of decision-preparation, decision-taking and decision implementation with a more specific remit. It is not a matter of an

either-or choice but of opening up to the public currently existing conclaves where power is exercised.

This does not mean pushing a 'governance' approach at the expense of one honed towards a traditional notion of 'government', or deliberative democracy at the expense of representative democracy. Such oppositions are, again, oversimplifications that we must guard against in our teaching and research agendas. The conversation in which we elite may now participate is more open than in the past, engaging and reaching towards the citizens of the member states, rather than talking over their heads.

No Way About the Political Process

Gráinne de Búrca, Florence and NY

However we may choose to interpret the referenda results, the votes were messages directed in large part against the EU in its present state. The reasons for the 'no' may have been diffuse, varied and not even significantly linked to the constitutional document itself. Nevertheless, the votes were undoubtedly intended to express dissatisfaction with and rejection of aspects of the EU as it stands, and an unwillingness to approve or consolidate them by enacting a constitutional settlement.

The result points to an intractable problem with which academics and others have long grappled, but to which a convincing solution has not been found. It is this: however positive the European Union's evolution may be in terms of stability, co-operation and solidarity it has brought between its diverse states, it remains extremely difficult – beyond an audience of committed élites – to articulate the Union's raison d'être, function and role in a compelling or persuasive way.

The referenda results confirm the suspicion shared by many since the Maastricht Treaty that if some of the significant decisions of European integration were put to the public, they might well not enjoy support. On this reading, the initial Danish referendum result and the narrow French vote on the Treaty of European Union, and the first Irish referendum result on the Nice Treaty were not aberrations but premonitions. In terms of popular opinion, it seems that many aspects of the EU and its functioning are not well understood, or even that they are not well liked. The combination of a sense of increasing loss of national sovereignty and anxiety over the transfer of influence and power – especially power to determine the direction of economic and social policy – to a complex, distant, still relatively unknown and apparently only weakly accountable European 'sovereign', following a decade of rapid EU geographical and policy expansion, has led to mistrust, suspicion and ultimately an unwillingness to 'go further'.

If this suspicion is well founded, what does it suggest for the future? Some observers – Andrew Moravcsik being a particularly vocal spokesperson for this view – consider that popular referenda should simply not be held on EU matters, and that it is misguided to seek direct democratic support for European integration by means including such polls. Rather, Europe should proceed pragmatically and even technocratically, dealing with the issues it has long been dealing with in an efficient and low-key manner. Others argue to the opposite effect that the EU needs to become a fully developed democratic polity, according to a model of parliamentary or deliberative democracy.

The paradox is this. Unless the public, European and national, develops a clear sense of what the EU is about and a sense of identification with both the project and the polity, the trend indicated by the results of the Danish, Irish, French and Dutch referenda is set to continue. Yet how else can democracy and identification actually develop other than precisely through political processes like those represented by the recent referenda, which tend themselves mostly to express their shortcomings?

Remaining Relevance of the Constitution

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These referendum results must be respected although they unquestionably mean a setback for European integration itself. But the voices which want to bear the constitutional process to its grave or even draw the gloomy picture of a complete breakdown of the integration, have to be taught otherwise.

The current failure offers the chance to take a scientifically profound look at the process of constitution building in Europe. This should include a debate about the aims and objects of plebiscites or even the convention method. And the symbolic dimension of the constitutional process should be more intensely considered.

As to the substance of the Constitutional Treaty, it is obvious that its main target was to support a gradual development of the existing instruments (overcoming the deficits in the Nice Treaty, more openness in legal proceedings, a clear division of competencies among member states, a stronger integration in political matters like foreign politics, etc.). Regarding the form, the convention method but also the national ratification procedures were supposed to strengthen its authority. Even if there were no good reasons for rejection by the majority of voters, substance and procedures should be critically evaluated.

Despite the current crisis of the constitutional process we must assume that the Constitution will keep its practical significance for the future. It documents a minimum consensus of the member states' representatives and remains the starting point for all future considerations. Its rules could soon gain some influence on the interpretation of the present instruments.

A decision on whether it is useful and necessary to pick up single isolated elements and to develop them further will finally depend on the damage which the project of integration has in fact suffered. In any case the Constitution will provide an important element in the ongoing process of Europe's constitutionalisation.

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