

# Essay: The Integrative Function of a European Constitution\*(Discussion of Chr. Dorau: *Die Verfassungsfrage der Europäischen Union*\*)

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By Jo Eric Murkens

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[1] Why did the European Union (EU) leaders at the Laeken summit in December 2001 agree to a constitutional convention headed by the former French President Valéry Giscard D'Estaing to design a constitution for the EU when, according to the European Court of Justice (ECJ)(1) , the German Federal Constitutional Court (2) , and many academic commentators, the founding treaties already form a constitution?

[2] In its famous decision in *Van Gend en Loos* (3) in 1963 the ECJ held that the Treaty of Rome had created a Community not only of governments but of peoples, and that the Member States had agreed to limit their sovereign rights in certain fields. A year later the ECJ established the doctrine of supremacy of Community law in *Costa v. ENEL* (4) which was basically accepted by national constitutional courts. These decisions heralded the 'creeping constitutionalisation' of Community law. The novelty of the ECJ's approach was that it did not try to squeeze the Treaty into the constitutional mould of the *Verfassungsstaat*. More important than the 'formal constitution' was the interpretation of the Treaty by the ECJ as the 'material constitution' (Petersmann 1991: 28), whose basic tenets include the doctrines of direct effect, supremacy, and implied powers, as well as respect for human rights.

[3] Christoph Dorau's book *Die Verfassungsfrage der Europäischen Union* (the following citations relate to this book, if not indicated otherwise) also begins from the assumption that the founding treaties of the European Community (now Union) and the interpretation lent to them by the ECJ already amount to a constitution. But for Dorau a comprehensive constitution is more than a juridical construction of foundational principles (such as direct effect, supremacy) that structure a specific legal and political order. It is also an instrument of social integration and an expression of community norms and values. Accordingly, he purports to examine the possibilities and limits of developing a constitution for the EU which could fulfil this *integrative* function. His analysis is guided by two questions, first whether the EU as a supranational polity can have a written constitution at all, and second whether it needs one.

## 1. Can the EU have a constitution?

[4] The question underpinning the pan-European debate is whether the European Union can have a constitution without becoming a state, or whether it will metamorphose into a state if given a constitution. Dorau applies Georg Jellinek's traditional three-pronged characteristics of a state (*Staatsgebiet, Staatsvolk, Staatsgewalt* or territory, people and effective government) to the EU. He concludes that while the EU has been given competence in most areas its jurisdiction is not general but "thematically limited" (at 34), and also contingent on the legal authority of the Member states (at 35). Therefore, even though the EU has certain state-like characteristics, so long as the EU does not possess the competence to give itself competence it is not a sovereign state in the received sense. But does that automatically mean it cannot have a constitution?

[5] The historical link between state and constitution is often readily accepted—too readily, as Dorau contends. Dorau disentangles the two concepts and in so doing creates space for a European constitutionalism in which to place his thesis. His definitions of "constitution" and "state" are historically sensitive and yet tweaked towards contemporary demands. He traces the terms back to ancient Greece and Rome. Aristotle's *politeia* stood for 'good democracy' (*politie*) and 'legitimate order' of the constituent powers of the polis. But Dorau notes that the link between the *polis* and the modern state is too tenuous, and that one cannot unearth the link between "constitution" and "state" by going back to Aristotle (at 45).

[6] Similarly, Cicero's *constitutio* did not describe a written constitution but rather a body of customary rules and traditions of the advanced political order in Rome (at 46). Even though the Roman terms *civitas* or *res publica* are usually translated as "state", they too are inadequate descriptions of the modern state. That said, in Anglo-Saxon jurisdictions Cicero's term *constitutio* was later translated as 'constitution' and, without changing the antique concept, understood from the 17th century onwards as 'form of government' (*ibid.*).

[7] Dorau demonstrates convincingly that "state" and "constitution" are not natural twins but that they were linked when the state was redefined and recreated during the process of secularisation. After the religious wars of the second half of the 16th century in France and of the first half of the 17th century in England the separation of law and religion was seen as necessary to counter-act religious strife, and the creation of a sovereign and neutral state was seen as the only viable counter-weight to the Church.

[8] It is only in the second half of the 18th century that the term "constitution" is given a narrow interpretation restricted to legalising sovereign state power. The American and French revolutions adopted the constitution as the primary tool of social order by giving their respective documents ideological and political meaning (at 47). The concept of a constitution has now been extended from a mere "form of government" to the incorporation of fundamental rights. Dorau shows that although those normative components are very relevant to today's understanding of "constitution", the concept itself goes way back to Ancient Greek and Roman times and pre-dates the modern, sovereign state (at 47). By cutting the ties between "constitution" and "state" Dorau is able to conclude that there is a European object of reference for a constitution. Dorau's conclusions fly in the face of Germany's most eminent commentators such as Paul Kirchhof and Dieter Grimm for whom there can be no constitution without a state and a people (Grimm 1997; Kirchhof 1999). In contrast, Dorau argues that the constitution is a means to further European integration, in other words a constitution can precede the creation of an integrated European demos or people. Dorau does well to dust off dated interpretations of well-worn concepts and use them in a contemporary manner which does them justice.

[9] Dorau then moves on to ask whether the concept of the modern, sovereign state is the appropriate tool to understand European integration and the transformation of the state (at 48). Sovereignty, according to Dorau, is a matter of executive monopoly and power of legal enforcement. The impact of new technologies and globalisation (of economic, political and social procedures) on the state has brought about a loss of state sovereignty, both legally and factually.

[10] But Dorau's analysis begs the question whether sovereignty has been lost in the way he claims. By taking for granted what has to be shown, he has asserted and not defended the constitutional choice for the EU. The question whether the image of the sovereign state reflects the legal and political reality of today is a hotly debated one. Commentators on one side of the fence will argue that the second half of the 20th century has witnessed the gradual erosion of the state, instigated and assisted by the European Community as well as by economic globalisation. According to this view Member states no longer enjoy sole control over traditional core state functions ranging from monetary policy and management of the economy to police, citizenship and immigration (Wallace 1997: 35; MacCormick 1999: 125; Dorau 48ff; 187).

[11] Commentators on the other side of the fence, however, will point out that the state remains the starting point even within the context of EU integration. Habermas argues that there is no "linear relationship between the globalisation of markets and reduced state autonomy" (2001: 10). Krasner points out that "there is no evidence that globalisation has systematically undermined state control. Indeed, the clearest relationship between globalisation and state activity is that they have increased hand in hand" (1999: 40). More directly related to the EU is Milward's theory that the Community was conceived of by individual states in order to *strengthen* the nation-state rather than bear witness to the total demise of the state or the emergence of a federal Europe. Accordingly, giving the EU a constitution would not be evidence of a further erosion of sovereign state powers but, on the contrary, part of an evolution in which the nation-state reasserts itself as an organizational concept (Milward 1992: 2-3). Milward also notes that the "argument that the Europeanization of policy necessarily usurps national democratic control treats the abstract concept of sovereignty as though it were a real form of political machinery" (1992: 446). Politics is commonly equated with national politics. Therefore, Member states will not adopt a constitution for Europe unless they are convinced it is in their national interest (1992: 446-7).

## **2. Does the EU need a constitution?**

[12] Having established that the EU could have a constitution, Dorau's second chapter asks whether the EU needs one. Dorau accepts the ECJ's interpretation of primary Community law as the formal and material constitution (at 98). It has an organisational function (with respect to Community institutions) and a protective function (with respect to the individual). Dorau questions only the integrative potential of the constitution as an expression of common values and citizenship. The highly technocratic nature of the founding treaties, consisting of more than 1000 articles, which exclude the Union citizens from the decision-making process prevent the integrative ability of the constitution.

[13] However, Dorau's initial hypothesis that the EU already has a formal and material constitution is more controversial than his exposition would suggest. What Dorau overlooks is that the ECJ's acceptance of the Treaties as a constitution is entirely self-supporting. There is no authority for the interpretation of Community law as a material constitution, let alone a formal one. This may be an unduly legalistic complaint but one that continues to exercise the minds, for example, of the judges of the German Federal Constitutional Court. The problem is conceptual: the ECJ assumes a single European legal order with Community law at the apex to which national laws must give way in the case of conflict. The German Constitutional Court, in contrast, does not assume the supremacy of Community law but accepts its validity because the German constitution says so in Article 23 para. 1 (Eleftheriadis 1998: 265). Thus, the

*Maastricht* (5) decision by the German Constitutional Court rejects not only the doctrine of unconditional supremacy of Community law over national law but also the view that a European constitution could rest over the *Grundgesetz*.

[14] More generally, Dorau's book gives the impression that the debate was solely a German concern. This impression is enforced by his use of almost exclusively German literature, or by purporting to analyse the relationship between "European and national constitutional law" and then only discussing the position of the *Grundgesetz*. Dorau turns a blind eye to the wider European debate (which he says he cannot take into account for reasons of space) and, less forgivably, the ideological case against a European constitution: see, for instance the debate between Mancini (1998) and Weiler (1998), as well as Wallace (2000); Zielonka (2000).

[15] Dorau appears to inflate the significance of a set of common beliefs and attitudes, i.e. a European constitutionalism. True, Germany has been particularly interested in the debate over a constitution for Europe in recent years. On a legal level the stance of the German Constitutional Court has led to much academic commentary on the constitutional question. On a political level the debate is in no small part due to the activism of Germany's Foreign Secretary, Joschka Fischer, who gave two keynote speeches on the subject, one before the European Parliament on 12 January 1999 and the other one on 12 May 2000 at the Humboldt University in Berlin. (6) But in other Member States the debate has been lagging behind and, looking at the EU as a whole, the role of constitutionalism is still modest. As Neil Walker warns: "...political constitutionalism is incremental in character, and so does not risk stillbirth in the face of the objections of the anti-constitutionalists" (1996: 283). The challenge is to "develop an agenda for the construction of a constitutional identity for a novel political order which draws upon structural principles which are equally capable of resisting reversion to the old sovereign state and progression to a new sovereign superstate" (Walker 1996: 288). While Dorau draws out aspects of historical fact that are held in common by European states, he does not conceive of a model of integration that is flexible enough to unite the existing Member States and embrace any future ones.

[16] In the same way that Dorau assesses the existence of a constitution and of a constitutionalism too highly, he also overrates the democratic qualities of the EU. Dorau has no truck with old-school constitutional heavyweights such as Paul Kirchhof and Dieter Grimm for whom the democracy deficit in the EU is not institutional but structural. For Kirchhoff the absence of a homogenous *Staatsvolk* is responsible for the absence of democracy in Europe. Grimm stresses that democracy requires at least a collective identity and a system of communication, i.e. common language (Grimm 1995: 589). Dorau is surely correct in arguing that these views are based on prejudice rather than empirical experience. Switzerland, India, Belgium and Canada are oft-cited examples of democratic states whose linguistic diversity has not precluded a collective identity (Dorau at 82f).

[17] However, dismissing the view that the EU could never be democratically legitimated obviously does not mean that the EU is already a democracy. And yet in his attempt to distinguish himself from Kirchhof and Grimm, Dorau does exactly that. By accepting the legitimacy of the EU's institutional structure at face value Dorau can embrace Winfried Kluth's thesis that the EU already enjoys double democratic legitimation: i) through the representatives of the citizens in the European Parliament (EP), and ii) through the representative of national governments in the Council of Ministers (Kluth 1995: 87; Dorau at 87). Kluth's thesis rests on the democratic qualities of the institutional structure of the EU. And yet it is precisely the intricate institutional structure (much more so than the structural difficulties) which is widely regarded as insufficiently democratic. Dorau's conclusion at once overrates the role of the EP (it does not possess the full powers bestowed upon a federal assembly) and completely ignores the central role of the Commission in the decision-making process. Had Dorau's analysis of the EU's institutional structure been as rigorous and critical as his analysis of Kirchhoff and Grimm's arguments, his conclusion would surely have been different. It is not reasonable to bemoan the absence of a clearly identifiable European people. It is, however, reasonable to bemoan the absence of clearly identifiable rules of decision-making and representation.

### **3. What kind of constitution does the EU need?**

[18] Dorau's ambitions in this respect are modest and realistic. He advocates "a systematisation and consolidation of existing constitutional law of the EU". The primary objective of such a constitutional document would be to emphasise and to convey the protections already guaranteed by the EU, namely the rule of law, fundamental rights and democracy (at 165). A secondary objective would be the progressive development of those principles within the constitutional framework of the EU. In practice the constitutional document would include

1. a revised version of the Charter of Fundamental Rights proclaimed in Nice in December 2000;
2. a clear delimitation of competencies between the EU and the Member States (to which should be added the regions);
3. a transparent explanation of the institutions and procedures in the EU.

[19] The idea underpinning the constitution would not be the underhand creation of a federal state but rather the clear representation of the two constitutive pillars of the EU: the Member States and the citizens of the EU. In the long run, such a short and accessible document might even generate some sort of "European constitutional patriotism" (at 106). In other words, a user-friendly and value-oriented constitution will meet the integrative function that Dorau ascribes to it.

[20] Dorau's insistence on a Charter of Fundamental Rights as part of the constitution stems from his historical perspective by which Europe is constructed as a "community of values and fate" (at 161). Rather than situating the EU in a post-1945 context, Dorau examines the idea of "Europe" and illustrates the age-old impossibility of identifying geographical, political, Christian, or cultural unity. Nonetheless, he counters, the dialectic of a European-wide political and cultural evolution has thrown up certain milestones, such as renaissance and humanism, reformation and counter-reformation, secularisation and enlightenment, political and industrial revolutions, which have helped to form a common history and to forge a European identity. Today this "cultural magnetism" (Habermas 2001: 8) distinguishes itself from other cultures through the primacy and inviolability of human rights, the principle of the rule of law, the autonomy of science and the arts, as well as industrialisation based on the free market as the central force behind economic progress (Dorau at 152). These common values have, according to Dorau, sowed the seeds of a (weak) European identity. This European identity would be strengthened by a constitution which referred to the values held in common. In contrast, a purely formal and functionalist connection between the Member States would not lead to deeper supranational solidarity amongst peoples.

[21] Dorau's historical determinism and finality stand out against the views of other commentators who have noted a constitutional vacuum and a degree of political uncertainty as to how the fate of the EU should be sealed. While the individual Member States may have been able to form a national interest, the EU suffers from "corporate uncertainty" (Ward 1996: 165). Weiler too has noted the absence of a proper constitutional debate. In his view "what Europe needs...is not a constitution but an ethos and telos to justify, if they can, the constitutionalism it has already embraced" (Weiler 1997: 266).

[22] Similarly, Habermas argues that the path-dependence of constitution making need not necessarily result in a constitution for Europe. "The real challenge is not to invent something 'new', but rather to identify a new format to safeguard the great achievements of the Nation state beyond national borders..." (Habermas 2001: 4). The importance of a formal constitution is superseded by the importance of defending "the substantive living conditions, the educational opportunities, the leisure and the space for social creativity that give a sphere of private autonomy its value and utility and are the preconditions for effective democratic participation" (*ibid.* ).

[23] The question whether a constitution is vital for the EU or whether there are other, substantive, concerns which should be accorded primacy is a matter on which reasonable people may disagree. Yet if Dorau's claim that there is a set of identifiable common European values is allowed one has to ask oneself what is gained from writing them down in a single document. Would a constitutional document really bring about an increase in solidarity as he claims? Apart from the more speculative side of his argument relating to a European constitution, the practical side of his argument regarding the clear delineation of powers can also be thrown into doubt. The German *Länder* would like to see a catalogue of competencies that would save them from future losses of political authority to the EU. However, Dorau does not address the intricacies of the effective delineation of competencies in a dynamic legal system. He does not deal with the related debate over the correct interpretation of Article 308 TEC (ex Article 235 EC). The tension between the principle of enumerated powers and the doctrine of subsidiarity on the one hand, and the ability of the European legal system to adapt to social changes is ignored. To illustrate the point: if the EU is responsible for the completion of the internal market then Council legislation and ECJ jurisprudence will inevitably touch upon such areas as labour law, social insurance, pension schemes, health and safety which have not explicitly been transferred to the EU level.

#### **4. Conceptual difficulties**

[24] Clarity of concepts and definitions would greatly assist in the generation of a European constitutionalism. Fundamental concepts of subsidiarity and federalism, for instance, tend to be misunderstood in states, such as the UK and France, which are not themselves federally structured (Seurin 1994: 630). On a standard German view the notions of "subsidiarity", "federalism" and "EU constitution" are ways to define and limit central powers and competencies. As Ruud Lubbers once remarked, "I respect subsidiarity. As you know, for the Germans, the word for this is federalism" (cited in Ward 1996: 165). In contrast, on a standard UK view "federalism" implies handing over a catalogue of competencies to the EU, resulting in the loss of national sovereignty, whereas "subsidiarity" means the exact opposite, namely limiting central powers, and is jumped on by anti-federalists as a panacea for better division of labour between the Member States and the EU.

[25] The link between "federalism" and "EU constitution" is not accidental—but not one that Dorau extracts either. On the contrary, by refusing to engage in a debate about federalism, but nonetheless advocating a constitution, Dorau silently reinforces fears of a European superstate rather than dispelling them. And crucially, by focussing only on Germany's thinking with respect to an EU constitution Dorau does not contribute to a European constitutionalism which is the pre-requisite for a constitution. This is a shame since, arguably, the EU and its Member States could benefit from Germany's federal experience.

[26] Drawing on Germany's experience, a federal EU might preserve the sovereignty and equality of its Member States as a matter of principle. Competence would lie primarily with the Member States, and the federal (European) polity would have competencies only in those areas that have been specifically granted by the Member States and enshrined in the constitution. As Seurin surmises, "the very meaning of federalism lies in the founding of a union based on a formal constitution based on a text that cannot be altered without the agreement of the member states, and that regulates relationships between the central or federal institutions and those of the member states" (1994: 627). According to this view, a constitution for the EU, far from undermining the sovereignty of nation-states, would in fact recognise its fundamental role and importance. As von Bogdandy puts it, "a federal polity finds unity in plurality" (2000: 28).

[27] Dorau makes assumptions about the EU being a nascent federalist structure worthy of a constitution when its federalist nature has yet to be established. For Dorau a short and snappy constitutional document is needed to foster European integration. Such a foundational document is now in the making by the constitutional convention under the aegis of Valéry Giscard d'Estaing. But arguing that the adoption of a written constitution is necessary for deeper integration places the institution of the constitution over and above structural or systemic concerns. Clarifying the nature of the multi-faceted EU, with its federal, supranational, intergovernmental and infranational components comes prior to the debate about what constitution to give Europe. However, the nature of the EU's political system, and challenges to it through enlargement, are only secondary to Dorau's thesis.

[28] In contrast, von Bogdandy's conception of the EU is more subtle and sophisticated. He picks up on the dualistic nature of federalism and argues that whereas "the external nature of the Union has, to a large extent, developed along the lines of federalism [...] the internal, i.e. organizational, framework is characterized by polycentrism and fragmentation to such an extent that it is unlikely that unifying forces will lead to the emergence of a state" (2000: 28). The image of the EU as "supranational federalism" contains simultaneously "a normative perspective that allows a dynamic interpretation and a vision for further political development" whilst abstaining "from proposing an ultimate aim or organizational set-up of the union..." (at 50). By combining supranationalism (determined by the powers of the Commission, Council and ECJ) and federalism (encompassing the pluralistic facets of the Member States) von Bogdandy reveals a significant integrative potential at the structural level of the EU. On balance, both Dorau and von Bogdandy face the same challenge, namely "finding unity in plurality and preserving plurality in unity" (von Bogdandy, at 52). However, von Bogdandy's conceptual approach is ultimately more edifying and enlightening.

[29] To wrap up the review, Dorau's book is clearly structured and lucidly written, which is at once its strength and its weakness. The summary of EU law plus ECJ judgments plus academic opinion gives a rounded picture of the constitution debate when the debate is really quite frayed. Dorau seems more concerned with capturing the present (German) state of the debate than asking challenging questions or engaging in constitutional theory. He prefers to cite Court judgements as well as academic opinion as his exposition unfolds, either in support of or in opposition to his argument. His argument (that a constitution is needed to increase integration) is a political rather than a legal one, and his approach is cursory rather than critical. He refrains from a deep analysis of the highly vexed questions at stake. There is value in Dorau's methodology. He takes the reader effortlessly through quite complicated questions and highlights the most pressing concerns by citing senior commentators in the field before pulling together the various strands in a concluding paragraph. But ultimately, his book reads like an up-to-date account of the constitution debate rather than a critical discussion of it.

[30] Dorau does not sufficiently address the tension between the aspiration to European unity on the one hand and the desire to safeguard the independence of the Member States on the other. His historical sections, his analysis of German constitutional law, and his positivist account of Community law are strongly geared towards deeper and wider EU integration. But other accounts (as well as other examples, such as the messy Nice summit in December 2000) show how deeply embedded the notion of the nation-state is among the Member States. The other side of the European coin will undoubtedly remain a countervailing force in the process.

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#### For more Information:

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- \*\* (\*\*) Many thanks to Jochen von Bernstorff for his critical comments.
- (1) Case 294/83, *Parti Ecologiste 'Les Verts' v. European Parliament* [1986] ECR 1339.
  - (2) Official Collection of Decisions by the Federal Constitutional Court [Bundesverfassungsgericht] 22 BVerfGE 293, at 296.
  - (3) Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.
  - (4) Case 6/64, *Costa v. ENEL* [1964] ECR 585.
  - (5) Official Collection of Decisions by the Federal Constitutional Court [Bundesverfassungsgericht] 89 BVerfGE 155; English translation in [1994] 1 CMLR 57.
  - (6) See hereto, e.g. the contributions to a special symposium organized by Christian Joerges, Yves Mény and Joseph H.H. Weiler at the European University Institute and Harvard's Jean Monnet Chair: "What Kind of Constitution for What Kind of Polity: Responses to Fischer", available at: <http://www.....>; see also German Law Journal, Special Issue 1 September 2001: European Constitutionalism: Quo Vadis?, available at <http://www.germanlawjournal.com> (search: European Constitution).