

EXPLAINING THE FAILURE OF THE EUROPEAN CONSTITUTION: A CONSTITUTION-MAKING PERSPECTIVE

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It is the thesis of this paper that the main causes of the failure of the European Constitution result from bad preparation and management of a complex process of constitution-making for a union of states of continental proportions. This process includes the questions of the temporal aspect of constitution-making, the subjects of constitution-making, the strategy of constitutional ratification, the constitution-makers themselves, and finally the very text of the Constitution. Significant discussion on these questions is missing, which is wrong, because these constitutional causes of failure should be instructive for a possible future European constitution-making process. The crucial reasons for the failure of the European Constitution are elaborated as certain preliminary propositions. In the author's opinion, the principal errors of the European constitution-making are evident in the beginning of the constitution-making process in the moment not suitable for the constitution-making, in the ambiguity of the document regarding its constitutional or treaty character, in creating the document completely unintelligible to a common citizen, in making the Constitution without vision and ambition, in the complete absence of any strategy of constitutional ratification, in insisting on direct involvement of the people in the acceptance of the Constitution, which was contemplated legally and politically principally as an international treaty, and in a poorly managed media presentation and defence of the Constitution before the European public. The most important of them is an ambivalent approach of the European constitution-makers to the method of ratification of their Constitution. The

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next most important error is that they have not made use of comparative experiences of constitution-making of other federal unions.

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INTRODUCTION

In February 2002 in Brussels the Convention on the Future of Europe started and it declared very soon that it would aim at making a comprehensive European constitution, or at least a constitutional treaty.¹ Following the finishing of the preliminary draft of the Constitution in June 2003², and the hardly achieved agreement of the European Council on the final constitutional proposal which would be sent to the Member States for ratification in October 2004, this most significant, comprehensive and longest constitution-making process of the European Union³ seems definitely to be stuck on the final obstacle - the acceptance of the people in the referendums in France and Holland.

¹ The official name of the Convention's document is 'The Treaty on establishing the Constitution for Europe', but most often the document is called "constitution" or "constitutional treaty".

² On the Constitution for the European Union and the Convention on the Future of Europe see especially Siniša Rodin, *Ustav Europe - individualna prava umjesto demokracije i federalizma* (The Constitution of Europe - Individual Rights instead of Democracy and Federalism), *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 51, No. 1, 2001, pp. 153-156; Branko Smerdel, *Temeljni problemi ustavnog izbora u Europskoj uniji - Pokušaj preliminarne prosudbe rezultata Konvencije o budućnosti Europe* (Fundamental Problems of Constitutional Choice in the European Union - An Attempt at Preliminary Assessment of the Results of the Convention on the Future of Europe), *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 53, No. 3-4, 2003, pp. 509-527; Robert Podolnjak, *Dvije ustavne konvencije: Sličnosti i razlike između Philadelphije i Bruxellesa* (Two Constitutional Conventions: Similarities and differences between Philadelphia and Brussels), *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 53, No. 5, 2003, pp. 1115-1188. See also many valuable articles dedicated to the Draft Constitution in the thematic first issue of *European Constitutional Law Review*, Vol. 1, January 2005.

³ See Mathias Jopp and Saskia Matl, *Die Europäische Verfassungsvertrag als Höhepunkt im Prozess der Konstitutionalisierung der EU- eine Einführung*, in Jopp and Matl eds., *Dere Vertrag über eine Verfassung für Europa: Analysen zur Konstitutionalisierung der EU*, Nomos, Baden, 2005, pp. 15-41.

After more than three years' work on the European constitutional project, the prevailing opinion is that the "constitution is dead".⁴ According to *The Economist*, "the decisive French and Dutch noes have killed the constitution stone dead".⁵ For comparison, the highly successful American constitution-making process, as remarked by the distinguished historian Jack Rakove, lasted less than two years, taking into account the period from the unsuccessful convention in Annapolis in September 1786 until the ratification of the Constitution by the 11th state New York in July 1788.⁶

"The death penalty" to the European constitution was brought in two referendums in the interval of a few days. In France, the Constitution lost when the majority of about 55% voted against it on May 29, 2005, and then on June 1 the people in the Netherlands, with even greater majority (61.6 to 38.4%) voted against the document. As Article 447 of the Draft prescribes that the Constitution has to be ratified by all the Member States, in accordance with their constitutional requirements, it is clear that the Constitution cannot come into force in case of non-ratification even by a single country.⁷ In the case of earlier treaties of Maastricht and Nice there were repetitions of referendums (in Denmark and Ireland) to save these treaties from failure, but now there is not much speaking of putting the Constitution, in its present shape, once again before the French and Dutch people.⁸ There are some politicians,

⁴ This remark of the British opposition politician Liam Fox after two referendums would be very soon accepted by many European politicians and analysts in numerous EU member states. See *The Future of the European Constitution*, House of Commons Research paper 05/45, 13 June 2005, p. 10.

⁵ *The Europe that died*, *The Economist*, June 4th 2005.

⁶ Rakove, *Europe's floundering fathers*, *Foreign Policy*, September/October 2003, pp. 28-38.

⁷ Just because of that some states, like Denmark, Ireland, Great Britain, Poland and others, suspended their plans for ratification for an unlimited period. As remarked sarcastically by *The Economist* "to insist that the Danes, Irish, Poles, British and others must still vote is like asking doctors to operate on a corpse in the vain hope of resurrecting it". *The Europe that died*, *The Economist*, June 4th 2005.

⁸ The then Austrian chancellor Wolfgang Schüssel suggested in an interview that the Constitution could be put again to a vote in France and Holland in two years' time. In that period, according to his opinion, European politicians could try to answer numerous criticisms to the citizens in these countries, and referendums would be held probably in a different political landscape. See *Austrian leader suggests re-run of EU constitution polls*, *EUObserver*, 16 Aug 2005.

especially in Germany, Austria, and other countries, which have ratified the Constitution, insisting on the continuation of the ratification process. However, there are equally strong voices in France, the Netherlands, and some other countries definitely dismissing the Constitution as it stands now and refusing to continue with ratification or to repeat it in France and/or the Netherlands. The probable result of these differences would be, in my opinion, a *status quo*, which means a semi-ratified Constitution.⁹ British *The Economist* was the first to predict failure of the European constitution, so I accept its opinion on the possibility of the ratification of the existing constitutional text: “(S)ticking with the whole constitution and nothing but the constitution will make it even harder to rescue any of its useful bits. It would surely be easier to try to carve up the corpse for the organs, rather than to try to jolt the whole thing lumberingly back to life”.¹⁰

In numerous comments following the referendums in France and Holland, it could be read about many reasons and causes that influenced the people in these two countries to vote against the Constitution.¹¹ In the special report for the House of Commons made in June 2005 there are the following reasons given for the negative opinion on the Constitution:

⁹ On numerous options debated in political and scientific circles across Europe after the Constitution’s ratification standstill, see Udo Diedrichs and Wolfgang Wessels, *Die Europäische Union in der Verfassungsfalle? Analysen, Entwicklungen und Optionen, Integration*, 28. Jahrgang, October 2005, pp. 287-306; Daniel Göler and Mathias Jopp, *Die europäische Verfassungskrise und die Strategie des ‘langen Atems’*, *Integration* 2/2006, s. 91-105; Peter Häberle, *Juristische und politische Konsequenzen des doppelten Neins von Frankreich und Holland zur EU-Verfassung*, Vortrag am 16. Jun. 2005., Walter Hallstein Institut für Europäisches Verfassungsrecht, FCE 5/03 and the contributions submitted on the symposium “The Future of constitutional process of the EU” organized in October 2005 by the European Parliament’s Committee on Constitutional Affairs (available at (http://www.europarl.eu.int/meetdocs/2004_2009/organes/afco/afco_20051013_1500_symposium.htm)).

¹⁰ Back from the dead, *The Economist*, January 7th, 2006. In the article with the same title *The Guardian* says, “the EU is divided over ministering the last rites to its failed constitution, or resurrecting it in some form next year”, *The Guardian*, December 22, 2005.

¹¹ See Grainne de Burca, *After the Referenda*, *European Law Journal*, Vol. 12, No. 1, 2006, pp. 6-7; Editorial Comments, *Common Market Law Review*, Vol. 42, 2005, pp. 905-911; and collection of articles on negative referenda on EU Treaties in *European Constitutional Law Review*, Vol. 1, No. 3, 2005, pp. 335-428.

- erosion of national sovereignty and national identity,
- general uneasiness with the EU,
- amount of legislation from Brussels and the increasing number of policy areas,
- Turkish accession to the EU,
- Anglo - Saxon economic liberalism reducing the focus on “social Europe”,
- globalisation,
- loss of national influence in Europe,
- EU integration going too fast,
- EU influence over issues close to citizens,
- the EU is undemocratic,
- the euro.¹²

The post-referendum survey of the main reasons of *pro at contra* voting of French citizens shows that the most important reason for the ‘yes’ vote has been based on the consideration that the Constitution is essential for pursuing the European construction. On the other hand, the main reasons for the ‘no’ vote have been based chiefly on national and/or social themes such as: the Constitution will have negative effects on the employment situation in France (relocation of French enterprises and loss of jobs), poor economic situation in the country, draft Constitution is too liberal and/or is not social enough, opportunity to vote against the president of the Republic and the government etc. As regards the key element, which determined how they voted, the French citizens were divided between those favouring European integration and those thinking foremost of the economic and social situation in France.

What is especially important for me is one of the survey’s findings that the opinion on the actual text of the European Constitution motivated only one fifth of all voters in France.¹³ The post-referendum survey in Holland shows some similar findings. The primary motivation of the ‘yes’ voters was - the same as in France - the essential role of the Constitution in pursuing the European construction. However, motivations of the ‘no’ voters were different in Holland. The most important reasons for voting against the Constitution were the lack of information, loss of national sovereignty, opposition to national government

¹² The Future of the European Constitution, House of Commons Research Paper, 05/45, 13 June 2005, p. 14.

¹³ The European Constitution: Post-referendum survey in France, Flash Eurobarometer 171, June 2005, pp. 16-20.

and expensiveness of Europe.¹⁴ Some analysts think that the Dutch voters have used the referendum to express their opposition to rapid European integration (the euro, eastern enlargement, the start of negotiations with Turkey), because of the feeling that small states are losing their influence in the EU and especially because of large financial contributions of Holland to the EU budget. The same as in France, the opinion on the text of the Constitution was the key element for only one-fifth of the Dutch voters.¹⁵

All these reasons and many others have influenced the decision of voters in these states. Partly, they are common to all the states which have held a referendum - a significant number of citizens opposed the latest 'eastern enlargement' of the EU, so that referendums in certain countries were partly referendums on past enlargement and at the same time referendums against the future enlargement (Turkey). Many citizens have voted against the Constitution showing in that way their deep distrust or disagreement towards the EU institutions and policies. Predominantly, citizens were motivated by the internal political situation, specific in each country, and less by the so-called 'European themes'. Only a small proportion of all voters did in fact vote 'yes' or 'no' thinking primarily of the text of the Constitution.

Because of that, we may have the impression that the very Constitution is not to be blamed at all. It just came as a symbol of people's dissatisfaction with their government and the economic situation in their country, or their distrust towards a distant supranational bureaucracy. It would be wrong, in my opinion, to search for the failure of the European Constitution in these causes, because they are only indirectly related to the Constitution. For example, opposition of citizens to the entry of Turkey in the EU does not have to be the reason of their voting against the Constitution, because that document does not change the rule that each Member State still has the veto on accession of new states to the EU.¹⁶

It is the thesis of this paper that the main causes of the failure of the European Constitution are resulting from bad preparation and management of

¹⁴ The European Constitution: Post-referendum survey in The Netherlands, Flash Eurobarometer 172, June 2005, pp. 16-20.

¹⁵ Dutch nees up, *The Economist*, June 4th 2005.

¹⁶ Article I-58 of the draft Constitution prescribes that the European Council must unanimously adopt the decision on the acceptance of the new Member State, and the conditions of admission have to be settled in the agreement of the candidate state and Member States. This agreement has to be ratified by all Member States, according to their constitutional requirements.

a complex process of constitution-making for a union of states of continental proportions. Those causes are directly related to the process of creation of a constitution. They include the questions of the temporal aspect of constitution-making, the subjects of constitution-making, the strategy of constitutional ratification, the constitution-makers themselves, and finally the text of the Constitution. On these questions significant discussion is missing, which is wrong, because the constitutional causes of the failure should be instructive for a possible future European constitution-making process. These, in my opinion, crucial reasons for the failure of the European Constitution will be elaborated as certain preliminary propositions. These propositions could be seen also as a piece of advice to future European constitution-makers.

The crucial mistake of the European constitution-makers (both in the Convention and in the Intergovernmental Conferences) lies in their ambivalent approach to the method of ratification of their Constitution: majority of them have insisted on the new constitutional terminology and quality of the document, but at the same time they did not have courage or cleverness to devise a ratification procedure suitable for this kind of document. Instead they left to each Member State to choose its own way to ratify the Constitution, which decision has resulted in the disastrous choice by the French and Holland's politicians. The next most important mistake of the European constitution-makers, in my opinion, was that they did not make use of comparative experiences of constitution-making in the other federal systems, notably American and Swiss, regarding their solutions to the problem of ratification of the constitution in a union of many member states. Had they done that, they would probably have arrived at some different solutions, especially as to the constitutional ratification procedure.

PROPOSITION NO. 1: THE MISSING EUROPEAN “CONSTITUTIONAL MOMENT”

My first proposition is that the process of European constitution-making did not happen in a truly constitutional moment, i.e. in the period that would be generally favourable to constitution-making.¹⁷

¹⁷ When we speak of the “constitutional moment” it should be pointed out that it does not have to be a short, instantaneous period. It might last even for a few years.

The theory of ‘constitutional moments’ has been formulated by Professor Bruce Ackerman, who had in mind the American constitutional history. His theory of ‘constitutional moments’ supposes that the process of ‘higher law-making’ or constitutional politics occurs in the “moments of grave crisis”¹⁸, or in the crucial transformative periods in the development of a society.

Compatible to the theory of ‘constitutional moments’ is a theory that would like to prove that the time element in constitution-making is crucially important, i.e. that there are certain periods in the political development of a society when it is ripe to engage in the process of constitution-making. Professor Edward McWhinney was the first one to elaborate this thesis in his classic work *Constitution-making*. He has argued that the “successful acts of legal codification” almost invariably occur in or immediately after a period of “great public excitement”, when there exist “a certain climate of popular political consensus”. These periods are especially characterized by great political crises: post-war reconstructions (be it after victorious war or great military defeats), political or social revolutions, successful wars of national self-determination and independence and similar social and political transformations.¹⁹ Similarly, Kenneth Wheare finds the origins of modern constitutions, almost without exemption, in the wish of the people to make a fresh start.²⁰

Numerous examples confirm these theses. In the American case, the Articles of Confederation were proposed, debated and accepted during the war of independence. The Constitution of 1787 resulted from military, diplomatic and commercial weaknesses of the Confederation, but also because of internal political upheavals in certain states. Afterwards, three very important constitutional amendments, ratified after the Civil war, inaugurated what many analysts call ‘the second republic’. In Germany, all the important acts of constitution-making resulted from some political or military upheaval - in 1849 after the revolution, in 1871 after German unification, the Weimar Constitution of 1919 after the defeat in the First World War, and finally the Basic Law of 1949, after another military catastrophe. Each significant period of political development in France was accompanied by a constitution, which marked that era - from

¹⁸ Bruce Ackerman, *Our Unconventional Founding*, University of Chicago Law Review, Vol. 62, No. 2, 1995, p. 476.

¹⁹ Edward McWhinney, *Constitution-making: Principles, process, practice*, University of Toronto Press, Toronto, 1981, pp. 14-19. See also Jon Elster, *Forces and Mechanisms in the Constitution-making Process*, Duke Law Journal, Vol. 45, 1995-6, pp. 370-1.

²⁰ Kenneth Wheare, *Modern Constitutions*, Oxford University Press, London 1951, p. 9.

the first Constitution of 1791 to the Constitution of the Fifth Republic. Of course, we must not forget the latest wave of constitution-making in all post-communist democracies of central and Eastern Europe. We could find many more examples.

If this is so could we, in the case of European constitution-making, speak of the 'European constitutional moment', analogous to the American one of 1787? Could we speak of the European crisis that could be stimulative in the process of constitution-making? Is Europe in an era of a new beginning, which demands defining new constitutional rules? There has been at no time a scholarly and political consensus achieved on these questions.

Thinking of this 'constitutional moment' in modern Europe, of this new beginning, some analysts find it in the admission of ten new countries to the EU.²¹ It is the greatest enlargement of the European Union up to now as to the number of new Member States. At the same time we can speak, in the words of Timothy Garton Ash, of the greatest 'enlargement of freedom', of the most successful project of the EU since the time of WW II. We should also have in mind that this project is not finished, and that this logic of enlargement still works like a magnet on numerous European and quasi-European countries. Where are, actually, the final borders of the EU? No one can answer that at this moment. How many states, at the end, might be Member States of the EU? According to some predictions, we could have as much as 32 or even 34 states in the Union.²²

Other analysts of the newest European constitutional project will argue that we could in no way speak of a classical constitutional moment, because

²¹ Vernon Bogdanor, The new Constitution: Does Europe need it?, National Liberal Club, May 17, 2004., available at <http://www.cfr.uk.Events/Seminars%20and%20Lectures/Transcript/doc>. Some would even insist that "the *raison d'être* for the constitutional treaty was EU enlargement". See Susan Watkins, Editorial: Continental tremors, *New Left Review*, No. 33, May-June 2005, s. 14.

²² In addition to then 25 existing Member States and four candidate states (Bulgaria, Rumania, Croatia and Turkey) Garton Ash expects that in the next twenty years, some other Balkan states (Serbia, independent Montenegro, possibly Kosovo) and former states of the Soviet Union (Ukraine and Byelorussia) could become members of the EU. He thinks even possible that in the near future there comes to a break-up of several existing Member States (and so we could have Flandria and Valonia instead of Belgium, or separation from the existing states (e.g. Scotland or Baskia). See Timothy Garton Ash, *Free World: America, Europe, and the Surprising Future of the West*, Random House, New York, 2004, pp. 191-192.

it was not preceded by any war, revolution, or some other social upheaval. So it is doubtful if “the historical ‘big bangs’ which established constitutions in the past (can) be reproduced in a period of peaceful change for a European constitution”.²³ It was also perceived that the European constitution was created “without much popular or other enthusiasm and it is not going to constitutionalize ordinary politics”, but what is even more important, without the blessing of a constitutional moment we could hardly expect “creating union and identity”.²⁴

It is paradoxical, actually, if we look at the ‘eastern enlargement’ of the EU as a real constitutional moment, suitable for creation and ratification of the European constitution, that this event has played a very negative role in the mood of citizens of the “older Member states” towards the Constitution. In all surveys of public opinion in the ‘older’ Member States the enlargement of the Union was one of the major reasons of antagonism towards the Constitution, and, as I said earlier, the referendums in several states were partly disguised referendums on ‘eastern enlargement’, and at the same time referendums of opposition to the future enlargement (Balkans, Turkey, Ukraine).²⁵ Besides this, it should be pointed out that the enlargement, as a possible trigger of the

²³ Kalypso Nicolaidis and Stephen Weatherill, *Whose Europe? National Models and the Constitution of the European Union: Introduction*, European Studies at Oxford, 2003, pp. 6-7. See also Ingolf Pernice, *The Draft Constitution of the European Union: A Constitutional Treaty at a Constitutional Moment?*, in Pernice and Maduro eds., *A Constitution for the European Union: First Comments on the 2003 - Draft of the European Convention*, NOMOS Verlag, Baden-Baden, 2003, pp. 13-21.

²⁴ Sajo, *Constitutional Enthusiasm towards the European Constitution?*, p.1. See also Philippe C. Schmitter, *Constitutional Engineering by ‘Process’ not ‘Product: Which Europe will come out of the Convention*, in Nicolaidis and Weatherill, *Whose Europe?*, pp. 28-30.

²⁵ Public survey in the EU countries in the spring 2005 showed that in several ‘older’ Member States (EU-15) there existed a very sceptical mood for further enlargement of the EU. Only 32% of the examinees in France and 45% in the Netherlands said they approved of further enlargement, which explains the influence of this theme on voters later on in the constitutional referendums. However, in many other ‘older’ Member States, like Germany, Austria, Luxemburg, Finland, Denmark and the UK, only the minority of examinees would say that they approve of further enlargement. On the other hand, the citizens in ‘newer’ Member States approve of further enlargement in much higher percentages. See Eurobarometer 63, Spring 2005, *Public Opinion in the European Union*, July 2005, p. 27.

constitution-making process, has not, unfortunately, served as a cause for constructive adjustment of the EU institutions to the conditions of a much larger number of Member States. A partly different institutional framework of the EU (composition of the European Commission, the president of the European Council) has not been well accepted in a larger part of the Union, especially in the smaller states, and that would have a reflexion on the reception of the Constitution in the Europe's public. It is clear, then, that the enlargement of the EU constituted, against all expectations, an anti-constitutional moment.²⁶

There is still another paradox. Namely, that in the first phase of the constitution-making process, dominated by the political elites, we had a constitution without a constitutional moment, and today, after several referendums (especially in France and the Netherlands) and intense debate in the public about the 'European project' in numerous countries, we have a constitutional moment, but the constitution is missing.²⁷

The absence of the constitutional crisis or a genuine constitutional moment in Europe at the beginning of the 21st century does not mean that an attempt at ratifying a European constitution would be unsuccessful in advance regardless of other factors, but it means that the constitution-makers cannot expect a positive climate around the constitution-making process. There would be no consensus in the public regarding the necessity and the content of a constitution. The opponents of such a constitution would be more easily mobilized than its probable supporters. In such a situation, a popular referendum would not be a good idea. A constitution made without the help of a constitutional moment would require low-profile ratification. Therefore, I would prefer a more pragmatic solution - parliamentary ratification wherever possible. First of all, I would recommend a symbolic declaration of the European Parliament accepting the Draft Constitution and afterwards quick ratification by national parliaments, perhaps with an additional condition of a 2/3 majority of all representatives voting for the constitution to be valid. According to the national constitutional requirements only in Ireland and Denmark there would be nece-

²⁶ On the enlargement of the EU as a possible constitutional moment and motive of constitution-making see more in Robert Podolnjak, *Stvaranje europskog ustava kao 'kvaziustavni trenutak'* (The Creation of the European Constitution as a 'Quasi-Constitutional Moment'), *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 55, No. 6, 2005, pp. 1423-1460.

²⁷ See Kalypto Nicolaidis, *UE: Un moment tocquevillien*, *Politique étrangère*, No. 3/2005, p. 499.

ssary to conduct a popular referendum. The problem of the possible rejection and the possible solutions would be discussed later on.

PROPOSITION NO. 2: THE FUNDAMENTAL AMBIGUITY OF THE EUROPEAN CONSTITUTION

Already in the first comments of the draft of the first 16 articles of the European constitution, published in February 2003, it was concluded that it was an ambiguous document in view of its basic character, i.e. whether it was a treaty or a constitution.²⁸ In the process of adoption of the EU constitution this confusing terminology would prove to be very important.

As indicated by the analysts of the European constitution, this document was substantively not different from all the other treaty changes in the history of the EU.²⁹ Looking at the Articles of the Constitution and the principles of its ratification we would not find anything revolutionary. What was revolutionary

²⁸ The author of the Editorial comments in the distinguished *Common Market Law Review* would be one of the first to comment this ambiguity of terminology of the document worked upon by the Brussels Convention: "The February text, like the October one, refers to a 'Treaty establishing a Constitution for Europe'. Elsewhere, it refers to 'the Constitutional Treaty' and the 'Constitution'. This terminology can either be considered to be elegant - or a fudge. It is elegant in so far as it is deliberately ambiguous: it combines the elements of a Constitution and a Treaty. However, if Europe is indeed to have a Constitution, then it would gain immensely in terms of legitimacy and transparency by acknowledging this fact openly, by calling the basic document 'The Constitution of Europe' or some such name. This would send a powerful symbolic message to Member States, their Parliaments and courts, and to the outside world, but above all to the citizens of the EU. It would declare unambiguously the creation of a new polity...The relationship between the Constitution itself and the Treaty in which it is contained also needs to be examined and considered. This raises a basic question: which is the fundamental text - the treaty or the Constitution? If it is the former, then one recognizes the public international law nature of the EU and the primary role of the Member States. If it is the latter, one is clearly sending a message that the Union derives its legitimacy from a Constitution - one to which all its citizens could subscribe". See Editorial comments - The sixteen articles: On the way to a European Constitution, *Common Market Law Review*, Vol. 40, 2003, pp.268-9.

²⁹ See Bruno de Witte, *Treaty Revision in the European Union: Constitutional Change Through International Law*, *Netherlands Yearbook of International Law*, Vol. 35, 2004, pp. 51-84.

was only the language of this particular treaty reform - 'constitutional convention', 'constitution-makers', 'constitution' or 'constitutional treaty'.

Before, only judges and scholars spoke of European treaties as a 'constitutional charter', but since the Laeken Declaration this constitutional terminology has been accepted by numerous politicians as well.³⁰ Joseph Weiler especially emphasizes the crucial meaning of the new terminology: "The defining feature of Europe's new constitution is a word, an appellation. It is not the content of the Treaty establishing a Constitution for Europe that gives it epochal significance but the fact that an altogether run-of-the-mill treaty amendment has been given the grand name of Constitution".³¹

There are a number of characteristics of the document indicating that it is partly a treaty, and partly a constitution. The following characteristics indicate the treaty nature of the EU constitution:

- the length and detail of the document,
- the right of each Member State to withdraw from the EU,
- unanimity in the process of amending the document,
- the possibility that some Member States integrate more quickly or comprehensively than others,
- the source of legal authority is not "we the people" but the Member States³²,
- the people will not ratify the Constitution through conventions or in a referendum.

On the other hand, some characteristics would point in favour of the constitutional nature of the document:

- the document establishes complex organs of government,
- it grants that government vast authority to control the lives of Europeans

³⁰ Thomas Christiansen, *Constitutionalizing the European Union: The Power of Language*, EU Constitution Project Newsletter, July 2004, pp. 7-8

³¹ Weiler, *On the power of the Word: Europe's constitutional iconography*, *International Journal of Constitutional Law*, Vol. 3, No. 2/3, 2005, p. 173.

³² The preamble of the European constitution speaks nowhere of people as a subject of constitution making. Because of that Larry Siedentop shall, some time before the end of the Brussels' convention, suggest the following text of the preamble: "We, the peoples of Europe adopt the following constitutional treaty for encouraging a more perfect, voluntary union of our nation-states..." See Siedentop, *We the people do not understand*, *Financial Times*, June 4, 2003. Any similarity with the preamble of the American constitution is not accidental.

- by legislating 'harmonized' statutes directly applicable to the individuals in many areas of community life,
- the proposed constitution, finally, declares to be a constitution, not a treaty.³³

The crucial question in the constitutional law sense, then, is whether the European Convention has proposed a treaty, a constitution, or, in Giscard's words, a constitutional treaty.

Numerous scholars would argue that there are two basic criteria of a 'true' constitution. The first is, whether the amendment procedure in the new constitutional document insists on the unanimity of all Member States for adoption of the constitution or whether it allows that the amendment is adopted by a certain qualified majority, and the second criteria relates to the type and measure of popular involvement in the process of adoption of the constitution.³⁴ Some scholars think that there is still another important distinguishing characteristic between an international organization and a federal state. The question is who has the power of amending the document. According to the existing treaties, Member States are the only "masters of the treaties". If the future amending procedure would change in the way that future amendments would depend on the formal proposal of the European Convention and/or the

³³ See Stephen G. Breyer, *Competing Models in the Proposed Constitution*, in Esther Brimmer ed., *The European Union Constitutional Treaty: A Guide for Americans*, Center for Transatlantic Relations, Washington, 2005, pp. 37-8.

³⁴ According to Joseph Weiler, "unanimity, embodying the principle of sovereign equality and consent is typically a hallmark of internationalism, not constitutionalism". His thesis is that "almost any Europe-wide plebiscite which calls on the peoples of Europe, *as such*, to approve the constitution would be of huge legal and political significance and transformative of current European constitutionalism". On the other hand, he thinks, approval of the constitution by the peoples of Europe in their status as national communities would affirm only the constitutional status quo, no matter what the document says. Weiler essentially follows Madison's theses elaborated in the Federalist No. 39 (See Isaac Kramnick ed., *The Federalist Papers*, Penguin Books, 1987, pp. 256-7, 259). See J.H.H. Weiler, *A Constitution for Europe? Some Hard Choices*, *Journal of Common Market Studies*, Vol. 40, No. 4, 2002, p. 565. But, differently than Weiler, Madison never thought that the fact that the American Constitution was adopted as a federal act, as an act of sovereign states, means that it should not be called a constitution. For Madison it meant only that the American Constitution is a constitutional compact. Most of the American Founding Fathers saw no contradiction in the phrase "constitutional compact" which is very similar to the "constitutional treaty".

European Parliament then, according to this opinion, the essential shift to a formal constitution would be made.³⁵

However, even German analysts, very much devoted to the federal principle in constructing the European Union, could not agree on the constitutional or treaty nature of the Convention's document.³⁶ Joschka Fischer had argued even before the Convention that "however you name it - Constitution, Treaty, or whatever - in fact it will be a Constitution".³⁷ But, the former judge of the German Constitutional Court Prof. Dieter Grimm, would categorically claim that the European constitution "is not a real Constitution". It is only an international treaty (*ein völkerrechtlicher Vertrag*), changing in no way the legal nature of the EU as it was defined by the Treaties of Rome. What is confusing for the European public and leads it to believe that the European Convention really made a constitution is the indisputable fact that by the EU treaties many functions were taken over, which in the Member States are in the constitution's domain. Nevertheless, what indisputably separates a constitution from a treaty is, according to Grimm, "the principle of legitimacy". The constitutions arise from the citizens as the source of all public power. They emanate from the people, or by mandate of the people, or could be at least attributed to the people. In this sense, says Grimm, the European constitution is not a genuine constitution.³⁸

Ralf Dahrendorf would similarly claim that "the strange document" called the European Constitution "is technically not a constitution", because it nowhere declares "We, the people of Europe...". So, for him it appears that the EU is producing a document that claims to be far more than it actually is.³⁹

In France and the U.K. the treaty dimension of the document would also be emphasized. The French delegate to the Convention Robert Badinter stated

³⁵ See De Witte, Simplification and Reorganization of the European Treaties, *Common Market Law Review*, Vol. 39, No. 5, 2002, pp. 1282-3.

³⁶ See Jürgen Schwarze, The Treaty establishing a Constitution for Europe - Some General Reflections on its Character and its Chances of Realisation, *European Public Law*, Vol. 12, No. 2, 2006, pp. 199-211.

³⁷ Fischer's speech at the EUI in Florence on 17th January 2002, available at <http://www.iue.it/About/News/Pdf-files/Fischerspeech.pdf>.

³⁸ Dieter Grimm, *Der Vertrag*, *Frankfurter Allgemeine Zeitung*, Nr. 109, 12 May 2005, p. 6.

³⁹ Ralf Dahrendorf, Comment: The Constitution of Europe, *Daily Times*, January 5, 2005.

that the Convention negotiates an international treaty, not deliberating about a constitution.⁴⁰ Gisela Stuart, the British member of the Convention's Presidency, would clearly stress: "To me this is a treaty that will come into force when it is ratified by all the Member States. Whether or not it calls itself a constitution, its mechanism of ratification is that of a treaty - end of story".⁴¹

It is evident then that the acceptance of the constitutional terminology in the Convention's document, although an important step in the history of European integration, would have more political and symbolic than legal significance. The constitutional vocabulary used by the Convention was not an exercise of constitutionalization, but only of constitutional rewriting and formalization.⁴²

The problem was that the Eurosceptics fought against the European Constitution exactly because of its constitutional ideas and terminology, as the new name would suggest and strengthen the claim that the European Union is moving towards a sort of a super-state, namely a centralized statal polity.⁴³ On the other hand, by calling the newest European treaty 'a constitution', much higher expectations of the European citizens that this document would

⁴⁰ The Future Shape of Europe, Keynote Lecture by Senator Robert Badinter, The Law Society, March 10, 2003, available at <http://www.fedtrust.co.uk/Media/Badinter.pdf>.

⁴¹ The Convention on the Future of Europe: proposals for a European Constitution, House of Commons, Research Paper 03/23, March 2003, p. 48. The British understanding of the nature of the new constitutive document of the EU is perhaps best elaborated in the draft constitution submitted to the Convention by its delegate Peter Haine. This "unofficial" British proposal, made by the working group headed by Prof. Alan Dashwood in its first article defines the nature of the EU: "The Union shall be established as a constitutional order of sovereign states. The Member States have chosen in some measure to exercise their sovereignties in common, through the institutions of the Union, under the conditions laid down by this Treaty." In the commentary of this article would be stated that this article clearly conveys the idea that by adhering to the Union, the Member States have not divested themselves of their sovereignty in whole or in part, they have chosen to "pool" aspects of their respective sovereignties by exercising those aspects in common, through the institutions of the Union. See Draft Constitutional Treaty of the European Union and related documents, CONV 345/01/02 REV 1, October 16, p. 13.

⁴² See Juliane Kokott and Alexandra R uth, The European Convention and Its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?, *Common Market Law Review*, Vol. 40, No. 6, p. 1320.

⁴³ See especially the pamphlet of British Eurosceptic David Heathcoat-Amory, *The European Constitution and what it means for Britain*, Centre for Policy Studies, London, 2004.

strengthen democracy, efficiency and responsibility of the European institutions, were not fulfilled.

It is fair to conclude that the constitutional terminology of the European Convention was therefore of no value to the EU Constitution. Just the opposite - this constitutional vocabulary would mobilize against the document all the opponents of European integration seeing in it the first symbolic step in the direction of the creation of some future European federal state. However, on the other hand, the Constitutional treaty did not get on the “constitutional legitimacy”, in particular because it did not look as a constitution (more on that in another section). What is more important, declaring ‘The Treaty on establishing the Constitution for Europe’ to be a ‘Constitution for Europe’ required in some countries, politically if not legally, a popular referendum. And that is exactly what has happened in France and the Netherlands.⁴⁴ However, the European constitution-makers could not accept, when discussing the ratification procedure at the Convention, that the document they have been preparing requires direct popular acceptance. A large minority insisted on ratifying the Constitution “as usual”. Because of that the Convention did not specify a unique ratification procedure that would emphasize the role of the people at the level of the EU, and would be as much as possible advantageous from the standpoint of the probability of Constitution’s ratification. The question that has to be answered by the European constitution-makers is: What is the point of declaring a document to be “a constitution”, and not “a treaty”, and then proceed as usual - to ratify this “constitution” exactly in the same way as all the treaties were ratified before it. It is a mistake that the American founding fathers did not make - they knew that the document they had drafted could not be named ‘a constitution’ and then ratified according to the same procedure as the confederal treaty called the Articles of Confederation (but even they opted for representative conventions rather than a popular referendum).

I would recommend naming the document a “Basic Treaty” or “Basic Charter” or “Basic Law” (it is still the official title of the German Constitution). A

⁴⁴ Analysing why President Chirac decided to submit the European Constitution to a popular referendum, as that was not constitutionally prescribed, Joachim Schild finds out that “the treaty reform and especially symbolically highly burdened labelling of the project as a ‘Constitution’ would have its costs in the internal policy, in case of not asking the sovereign”, especially after the announcement of the constitutional referendum in Great Britain. See Schild, *Ein Sieg der Angst - das gescheiterte französische Verfassungsreferendum*, *Integration*, 3/2005, p. 188.

new name for the fundamental document of the EU would give an added value to the Convention's document, but it would not require popular ratification.

PROPOSITION NO. 3: THE CONSTITUTION COMPLETELY UNINTELLIGIBLE TO A COMMON CITIZEN

At the end of his study of constitution-making Prof. Edward McWhinney gives "some rules of constitutional prudence for contemporary constitution-makers". Among those 15 rules, I emphasize the first two:

Rule 1 Keep the constitutional charter short. A constitution is neither a municipal ordinance on sewers and drains, nor a master planner's detailed blueprint for a new community welfare programme.

Rule 2 Keep the language of the charter clear and non-technical. The charter is intended to be read and understood by ordinary citizens, and not simply by constitutional specialists and Supreme Court judges."⁴⁵

It is doubtless that the European constitution-makers did not follow these rules, although the President of the European Convention Giscard d'Estaing insisted that "in style, the Constitution should not resemble a legal document or the kind of international treaty which attempts to anticipate any possible misinterpretation or trickery". Instead, the Convention "must produce a clear, interesting and creative text", because "the poetry of a constitution is in some ways the calligraphy of history".⁴⁶ At the end, the result of the European Convention will not match Giscard's demands. The European Constitution is a document of 448 articles, more than 60 accompanying protocols and declarations, and more than 470 pages in the Official Journal, which in many ways goes beyond the conventional images of the extent of a constitution. It is not surprising that an American Supreme Court judge would write that "the most striking characteristic of the proposed European Constitution is its length, about 75,000 words, compared with the American Constitution's approximate

⁴⁵ Edward McWhinney, *Constitution-making: Principles, process, practice*, pp. 133-4.

⁴⁶ Cit. according to Elisabeth Defeis, *A Constitution for the European Union? A Transatlantic Perspective*, *Temple International & Comparative Law Journal*, Vol. 19, No. 2, 2005, p. 382.

7,500".⁴⁷ Therefore it is not strange that the European constitution referendum voting would be compared with the fictive referendum on the reproductive cloning, where each citizen would receive the textbook on molecular biology of 500 pages.⁴⁸ After the French referendum failure Prof. Jo Shaw said that "(p)erhaps the decision to submit to popular vote in nearly half the Member States a document such as the Constitutional Treaty will go down as one of the biggest political blunders committed by political leaders during the history of the EU". It was clearly a "severe case of constitutional delusion".⁴⁹

This political blunder is even greater, because numerous constitutional experts, some politicians, and several members of the European Convention have been proposing for years much better solutions for systematization of the existing EU treaties. Generally, they all proposed separation of the treaty texts in two parts. The first part would be the so-called basic treaty, a kind of constitutional nucleus, which would include the goals and principles of the Union, the institutional framework and the rights of the citizens. The second part would include all the other articles of the existing treaties, relating to the specific policies of the European communities and the EU. Some of the variants also included different ways of ratification of these two parts: all the Member States would still ratify the basic treaty unanimously, but the second part would be ratified by some super-qualified majority in the Council, with the assent of the European Parliament.⁵⁰

There is no question that the existing text of the Treaty establishing the Constitution of Europe, which has 448 articles, should have been separated in two parts. The 'constitutional part' would contain Part I (which is in the final draft without a name, but in the first draft of the Constitution this part was named as 'the Constitutional structure'⁵¹), and Part II (which includes

⁴⁷ Stephen G. Breyer, *Competing Models in the Proposed Constitution*, p. 37.

⁴⁸ Paul Virilio, *Das betäubte Volk*, *Die Zeit* 25 May 2005.

⁴⁹ Jo Shaw, *After the referendums: Change or continuity in the legal and constitutional orders of the European Union?*, *EU Constitution Newsletter Special Issue July 2005*, The Federal Trust, p. 7.

⁵⁰ See e.g. the proposal of the "three wise men" in the Report to the European Commission on the institutional implications of enlargement (Richard Von Weizacker, Jean-Luc Dehaene and David Simon, *The Institutional Implications of Enlargement: Report to the European Commission*, p. 12., available at (http://europa.eu.int/igc2000/repoct99_en.pdf).

⁵¹ See the Preliminary Draft Constitutional Treaty, CONV 369/02, October 28, 2002, pp. 2 and 8.

the Charter of fundamental rights), with the articles of Part IV (ratification and amending the Constitution). In this variant, the ‘constitutional part’ of the Constitution would have altogether 126 articles, like an average national constitution. Remaining 322 articles from Part III (policies and functioning of the Union) would form a separate organic law, possibly with a different ratification procedure. It was exactly this part of the Constitution, as remarked by some pedantic French analysts, which contained numerous terms not usually found in a constitution.⁵² This third part of the Constitution provoked the largest debates and most misunderstandings in the public, especially in France, although it contained mostly articles from the existing EU treaties.

After the failure of the constitutional referendum in France, the President of the European Convention Valéry Giscard d’Estaing would blame President Chirac for it. One of his accusations was that the citizens were confused, because they were asked to vote for the entire Constitution, including all earlier treaties in force for decades. The crucial turning point for the destiny of the Constitution in France, in his opinion, was Chirac’s decision to send to each French voter the complete Constitution, together with the third and longest part. D’Estaing tried to convince Chirac not to do that because “it is not possible for anyone to understand the whole text”, but he, allegedly, would not listen.⁵³

PROPOSITION NO. 4: THE CONSTITUTION ‘WITHOUT VISION, WITHOUT ENTHUSIASM, WITHOUT SOUL, WITHOUT AMBITIONS’

Introducing his plan of the constitutional reform of the Confederation to George Washington on the eve of the Philadelphia Convention, James Madison wrote: “Temporising applications will dishonour the Councils which propose them, and may foment the internal malignity of the disease, at the same time they produce an ostensible palliation of it. Radical attempts although unsuccess-

⁵² B. Cassen would “discover” that the word ‘bank’ appears in the Constitution 176 times, ‘market’ 88 times, ‘liberalization’ or ‘liberal’ 9 times, ‘competition’ or ‘competitive’ 29 times, ‘capital’ 23 times etc. See B. Cassen, *Lažna debata o Evropskom ustavu* (The False Debate on the European Constitution), *LE MONDE diplomatique*, February 2005, p. 4.

⁵³ *European Charter Architect Faults Chirac for Its Rejection*, *The New York Times*, June 15, 2005.

ful will at least justify the authors of them.”⁵⁴ Washington’s opinion was the same: “My wish is that the Convention may adopt no temporizing expedient, but probe the defects of the Constitution to the bottom, and provide radical cures, whether they are agreed to or not”.⁵⁵

Before the actual beginning of the constitution-making process, the author of the constitutional outline indicated the impropriety of short-term or palliative solutions. Madison’s plans of the radical reform of the Articles of Confederation have been accepted, in principle, almost by all delegates in Philadelphia. In the Convention the opinion has prevailed, stated by James Wilson, that regarding the power of it, the Convention is authorized to conclude nothing, but to be at liberty to propose anything.⁵⁶ Having adopted such a view the Philadelphia Convention made a constitution that is even today regarded as a masterpiece of constitution-making.

The Brussels Convention did not avail itself of a possible potential of a constitutional assembly, opting for “further gradual development instead of a ‘constitutional revolution’”.⁵⁷ It is indisputable that the Draft Constitution of the European Convention is far behind the level of the Philadelphian Constitution. And it would not be correct to compare these two constitutional documents if it has not been done by the European constitution-makers themselves.

The former President of the European Commission Romano Prodi in his first comment (usually the most honest) has said that the European Constitution “lacks the vision and ambition”.⁵⁸ A French scholar would state similarly that the European constitution is a “project without vision, without enthusiasm, without soul, without ambitions”.⁵⁹

⁵⁴ The letter to Washington, April 16 1787, in Marvin Meyers ed., *The Mind of the Founder: Sources of the Political Thought of James Madison*, University Press of New England, Hanover, 1981, p. 66.

⁵⁵ Clinton Rossiter, *1787: The Grand Convention*, W.W.Norton & Co., New York, p.120.

⁵⁶ Farrand, *The Records of the Federal Convention of 1787*, Yale University Press, New Haven, 1966, 1;253.

⁵⁷ Juliane Kokott, Alexandra R  th, *The European Convention and Its Draft Treaty Establishing a Constitution for Europe*, p. 1318.

⁵⁸ Tidying up or tyranny, *The Economist*, May 29, 2003.

⁵⁹ A. Mattera, *  ditorial - Les zones d’ombre du projet de Constitution dans l’architecture institutionnelle de l’Union : la composition de la Commission. La Convention touche au coeur du projet europ  en*, *Revue du droit de l’Union*, 2003, No. 1, pp. 5-12.

There were in the document indeed too few of those solutions that could be considered long-lasting, and visionary. It has been correctly predicted by some analysts that it is wrong to disturb one pragmatic arrangement, which has evolved in Europe in past few decades, with “an idealistic scheme for greater democratic deliberation and high-profile constitutional revision, which was then oversold to the European public”.⁶⁰

The fact is that the European constitution-makers did not follow Madison’s thinking, and so they gave up all more radical solutions, even when the majority in the Convention preferred these solutions, because of the fear that the Intergovernmental Conference would not accept these propositions. Here are only a few examples. Just at the beginning of its work, the Brussels Convention had not clearly declared that it was going to make a constitution. Instead, it allowed that the product of its deliberations could be perceived by some as a constitution, by others as a treaty, or as a mixture of these two concepts, namely a constitutional treaty. In lieu of making a constitution understandable to a plain citizen, the Convention had made a document that was completely unintelligible. Instead of elaborating a new concept of representative democracy on the European level, taking into account different models of parliamentary and presidential government, the Convention satisfied itself with little shifts in the framework of the existing semi-parliamentary system.⁶¹ The greatest novelty in the institutional framework, arising out of the Convention’s proceedings, is the President (or Chairman) of the European Council, a sort of the President of the Union. But, instead of thinking how to elect this president by the people or indirectly by some kind of an electoral college composed of the members of European and national parliaments (as has been suggested by some delegates), or in some other way compatible with the modern principles of representative

⁶⁰ Andrew Moravcsik, Europe works well without the grand illusions, *Financial Times*, June 14, 2005.

⁶¹ Anne Peters was first to bring the notion of the ‘semi-parliamentary’ system to the EU. Evaluating the achievements of the draft Constitution especially regarding the creation, composition and powers of the European parliament she would say that “a crucial point seems to be that there are no genuinely European elections on European issues, fought at a European level, to install and remove European governments solely on the basis of political disagreement. This means that effective popular control of European government (consisting of the Commission and the Council) via parliamentary election or referendums does not exist” (footnotes omitted). See A. Peters, *European Democracy after the 2003 Convention*, *Common Market Law Review*, Vol. 41, No. 1, 2004, p. 68.

government, the Convention satisfied itself with the election of this president by the chiefs of states and governments inside the European Council.

Whence the American constitution-makers have given to their president democratic legitimacy (at first indirectly by the election of electors by the state legislatures, but very soon by electing the President *de facto* by the people themselves), and have created an institution which would symbolize the unity of new nation, the European constitution-makers have given to their president no democratic legitimacy at all.⁶²

Instead of writing a constitutional preamble that could indisputably point to the double foundation of the EU, as a community of peoples and states of Europe, from the existing text it is hard to understand who actually the constitution-making subject is.

The American Constitution, as it is often stated, have endeavoured to install a lasting institutional order, which could withstand the challenges of the future, and which could forever decide the prospect of republican (democratic) government in the world. The European Constitution, as recently stated by George Bermann, "is written with the unspoken understanding that the institutions it is setting up are transitory, that they are far from optimal, and that it would be desirable to change them right now if political realities allowed it."⁶³

The paradox of the European constitution-making lays in the fact that the revolutionary method of constitution-making by a constitutional convention has, contrary to all expectations, produced a "simple reform"⁶⁴, or "a pragmatic reform of existing institution".⁶⁵

Such a "pragmatic reform" could not provoke awakening of 'constitutional patriotism' of the EU citizens. Just the opposite, in all those states where it has

⁶² As propounded by Kokott and R uth, "President of the European Council ... will not be accountable to any Parliament and whose democratic legitimacy is, therefore, more than doubtful". Juliane Kokott and Alexandra R uth, *The European Convention and Its Draft Treaty Establishing a Constitution for Europe*, p. 1337.

⁶³ George A. Bermann, *Europe's Never-Ending Constitution*, available at <http://www.project-syndicate.org/commentaries>.

⁶⁴ Oliver Beaud, *Der Entwurf einer Verfassung f ur Europa - verfassungsrechtliche Betrachtungen aus franz osischer Perspektive*, *Forum Constitutionis Europae*, Walter Hallstein Institut, FCE 6/03, December 2003, p. 1

⁶⁵ J. Schwarze, *Ein pragmatischer Verfassungsentwurf. Analyse und Bewertung des vom Europ aischen Verfassungskonvent vorgelegten Entwurfes eines Vertrag  uber eine Verfassung f ur Europa*. *Europarecht*, Jul-August 2003, pp. 535-73.

been prescribed by the Constitution or by the law that the Constitution has to be approved in a referendum, we have witnessed exceptional uncertainties about the prospect that the citizens would not even care to vote, not to speak of voting for the Constitution.

The surveys of public opinion in France, conducted during March 2005, almost shocked the French political elite showing that the majority of citizens would not vote for the proposed Constitution, and what was even more disturbing, that the majority thought the rejection of the Constitution would not represent a serious stroke for the European construction.⁶⁶ Of course, such a constitution could not pretend to bring closer the European peoples to the attainment of a “European dream”, notwithstanding some statements that the constitutional solutions are heading in this direction.⁶⁷ The European Constitution would forever stay, as baptized by Andrew Moravcsik, “the unsung constitution”.⁶⁸

PROPOSITION NO. 5: THE ASSENT OF THE PEOPLE IS NOT NECESSARY TO THE FORMATION OF A CONFEDERATION

The next proposition I would like to elaborate is that in the normative sense there is no reason and need for the people to be directly engaged in the creation of a confederal union or in the amending of its fundamental documents.⁶⁹ This thesis was actually stated for the first time by the American antifederalists during the great ratification debate on the proposed Philadelphia Constitution. Criticizing the proposed ratification of the Constitution by the people’s conventions the leader of the antifederalist opposition in the Virginia’s ratification convention Patrick Henry explained why popular ratification is not needed:

⁶⁶ French ‘non’ in the lead ahead of the Constitution referendum, *EU Observer*, 29 March 2005.

⁶⁷ See e.g. Juliane Kokott and Alexandra R  th, *The European Convention and Its Draft Treaty Establishing a Constitution for Europe*, pp. 1315-45.

⁶⁸ Moravcsik, *The unsung constitution*, *Prospect*, March 2004, p. 80.

⁶⁹ For a contrary argument advocating a mandatory referendum for any new contract and quasi-constitutional steps in the EU requiring the consent of majorities in all Member States for its ratification see Heidrun Abromeit, *Democracy in Europe: Legitimising Politics in a Non-State Polity*, Berghahn Books, New York, 1998.

“The assent of the people in their collective capacity is not necessary to the formation of a federal Government. The people have no right to enter into leagues, alliances, or confederations: They are not the proper agents for this purpose: States and sovereign powers are the only proper agents for this kind of Government. Show me an instance where the people have exercised this business: Has it not always gone through the Legislatures? I refer you to the treaties with France, Holland, and other nations: How were they made? Were they not made by the States? Are the people therefore in the aggregate capacity, the proper persons to form a Confederacy?”⁷⁰

In the terminology of the 18th century American constitutional polemic the terms ‘federal government’ and ‘confederation’ had the same meaning, so Henry was using them as synonyms. The Articles of Confederation were ratified by the state legislatures, and therefore Henry was right.

However, the constitution-makers had accepted Madison’s view that the Articles were defective exactly because the federal treaty, inasmuch as it was accepted by the state legislatures, did not have legally higher status than any other state law. The Articles of Confederation, as a mere treaty “between governments of independent states”, were continuously violated, and that opened up the possibility of its termination. Madison was convinced that “in the case of a union of people under one Constitution” this possibility was out of question and because of this he thought that it was necessary to base the new Constitution on the acceptance by the people. In the Convention Madison said that the crucial difference between a league and a treaty, in relation to a constitution, was in the fact that the former was based only on the legislatures, and the latter on the people: a league is a treaty between state governments, and a constitution is ‘a union of people’. Beside this, as the new Constitution “would make essential inroads on the State Constitutions”, Madison considered that “it is indispensable that the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves”, because the people were “the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased”.⁷¹ The new system, based on the approval of the people would

⁷⁰ The Antifederalist: Writings by the Opponents of the Constitution, ed. by Murray Dry, University of Chicago Press, Chicago, 1985, p. 304.

⁷¹ Farrand, The Records of the Federal Convention, 1;122-3, 2;92-3, 476.

therefore eliminate all possible controversies and doubts about the legitimacy of the proposed Constitution. However, it should also be stressed that there were significant ‘tactical’ reasons to avoid the ratification by the state legislatures, because the constitution-makers considered them to be ‘losers of power’ in the new system.

In the nationalist interpretation of the creation of the American Constitution its acceptance by the people’s conventions will always be seen as a crucial feature which separates the new federal system (later called federation), resting on the acceptance of a single American people, from the earlier Confederation, resting on the treaty between state legislatures.⁷² The states’ rights interpretation, on the other hand, would emphasize the constitutional ratification by the consent of state peoples, as sovereign political communities.

However, the question is: Could these experiences of the American constitution-making be applicable in the making of the European Constitution? First, I would like to stress that I see the European Union, taking into consideration all of its unique features, as a union of states, with predominantly characteristics of that species of the federal system usually called a confederation, and such a definition of the EU is accepted by a majority of scholars.⁷³

⁷² As one of the supporters of this thesis Herbert Storing claims: “The provision for ratifying the Constitution rested, in the main, on the...assumption that the American states are not several political wholes, associated together according to their several wills and for the sake of their several interests, but are, and always were from the moment of their separation from the King of England, parts of one whole. Thus constitutional change is the business of the people, not of the state legislatures, though the people act in (or through) their states. As one nation divided into several states, moreover, constitutional change is to be decided, not by unanimous consent of separate and equal entities, but by the major part of a single whole - an extraordinary majority because of the importance of the question”. See Storing, *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution*, University of Chicago Press, Chicago, 1981, p. 13.

⁷³ I would point out the representative sample of scholars treating the EU as some sort of a confederation. For Elazar the EU looks ever more as “the model post-modern confederation” (Elazar, *The New Europe: a Federal State or a Confederation of States?*, *Swiss Political Science Review*, Vol. 4, No. 4, 1998, pp. 119-138). Alexander Warlaigh calls EU “the structural confederation” (Warlaigh, *Better the Devil You Know? Synthetic and Confederal Understandings of European Unification*, *West European Politics*, Vol. 21, No. 3, 1998, pp. 1-18). John Kincaid claims that EU works as “confederal federalism, namely, as a confederal order of government that operates in a significantly federal mode within its spheres of competence” (Kincaid, *Confederal Federalism and Citizen Representation in the European Union*, *West European Politics*, Vol. 22, No. 2, 1999,

If the American constitution-makers were troubled by the fact that the Articles of Confederation did not have legally higher status than ordinary state laws, and because of continuing breaches of the confederal treaty by several states, the European constitution-makers have not been faced with this kind of problems. What is always fascinating for analysts of European integration is an extraordinary constitutional discipline characterizing the Member States of the EU, in comparison with other examples of federal unions.⁷⁴

As a motive of popular adoption of the constitution remains the wish to make the European integration project more legitimate, i.e. that the EU in this way outgrows the frames of a confederation, or a mere treaty between the states, exactly as it was proposed by Madison in Philadelphia in the case of the United States.⁷⁵

pp. 34-58). For Andrew Moravcsik the EU seems to be “more confederal than federal” (Moravcsik, *Federalism in the European Union: Rhetoric and Reality*, in Howse and Nicolaidis, *The Federal Vision*, OUP, Oxford 2001, p. 176). Joseph Weiler thinks that the EU is “a combination of ‘confederal institutional order and ‘federal’ legal order” (Weiler, *Federalism without Constitutionalism: Europe’s Sonderweg*, *ibid.*, p. 58). The most profound theoretician of confederalism today Murray Forsyth thinks that the EU is best understood as an “economic confederation” (Forsyth, *Unions of States*, Leicester University Press, Leicester, 1981, p. 183). Michael Burgess concluded that “the most accurate description of the contemporary EU remains that of a confederation but it is certainly more than a mere ‘economic confederation’” (Burgess, *Federalism and European Union: The Building of Europe, 1950-2000*, Rutledge, London, 2000, p. 265). And the notion of ‘*Staatenverbund*’, used by the German Constitutional Court in its famous opinion on the constitutionality of the Treaty of Maastricht, which is also almost impossible to translate, shows that the EU is essentially a ‘union of states’ (*Staatenbund*), and not a ‘federal state’ (*Bundesstaat*). On various understandings of the essence of the term *Staatenverbund* see in Manfred H. Wiegandt, *German International Integration: The Rulings of the German Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops*, *American University Journal of International Law*, Vol. 10, 1994-1995, p. 895.

⁷⁴ Especially interesting is the study of Leslie Friedman Goldstein about the processes of federalization, i.e. of the reasons why the sovereign Member States of the EU have, as a rule, more easily accepted the verdicts of the European Court of Justice than the American states accepted the decisions of the Supreme Court in the first 70 years after the ratification of the Constitution. See L. Friedman Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context*, The Johns Hopkins University Press, Baltimore, 2001.

⁷⁵ The former judge of the German Constitutional Court Dieter Grimm has brought the thesis that the European Constitution was not important because of its legal function,

“Europe’s constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos”⁷⁶ - this remark of Joseph Weiler seems to me to be the basic reason and motive of initiating the European constitution-making process. Such a ‘constitutional demos’, in his opinion, exists in contemporary federations (American, Australian, German, and Canadian), although at the time of the creation of these federal unions, and nations as well, such a ‘constitutional demos’ perhaps did not exist, because the legal presupposition of the existence of a constitutional demos does not have to be confirmed in the political and social reality. The example of the United States in the decades before the Civil War, or the contemporary examples of Canada or Spain, as pointed out by Weiler, show that the legal presupposition of a unitary nation is contradicted by the social reality of multiple ethnic groups or nations, which do not share a feeling of commonness, and which do not constitute a political community essential to a constitutional compact. In Weiler’s thinking the creation of a constitution has to be connected with the existence of a constitutional demos, i.e. with the presence of a single *pouvoir constituant*, consisting of the citizens of the federation in whose sovereignty a specific constitutional arrangement is rooted.

When the European Constitution would be formally ratified by a ‘European constituent power’, which assumes any kind of all-European constitutional plebiscite, this act would be, in Weiler’s view, of huge legal and political importance and transformative to the present European constitutionalism. In case of such an all-European constitutional referendum, according to Weiler, the EU would become “a federal state in all but name”.⁷⁷ On the other hand, the approval of the Constitution by the peoples of Europe “in their status as national communities, will affirm the constitutional *status quo*, independently of the content of the document”⁷⁸, i.e. as he will explain in another place, “if a ‘constitution’ be anything other than a European constituent power, it will be

but because of its “anticipated collective and emotive benefits and thus its integrative value”, as other possible integrative factors (like nationality, language, religion, history, culture or common enemy) do not exist. See Grimm, Integration by constitution, *International Journal of Constitutional Law*, Vol. 3, No. 2/3, 2005, pp. 193-208.

⁷⁶ Weiler, In defence of the status quo: Europe’s constitutional Sonderweg, in J.H.H.Weiler and Marlene Wind ed., *European Constitutionalism Beyond the State*, Cambridge University Press, Cambridge 2003, p. 9.

⁷⁷ *Ibid*, p. 7-9.

⁷⁸ Weiler, *A Constitution for Europe? Some Hard Choices*, p. 566.

a treaty masquerading as a constitution”.⁷⁹ This means that even in the case of constitutional referendums in all of the Member States, but based on each state’s separate decision to hold the referendum, and taking into consideration each state’s decision separately, it would be still an intergovernmental treaty.⁸⁰

The fact is that today in Europe there does not exist such a ‘constitutional demos’ needed for the creation of a federal state - European integration assumes at all times a constitution without the traditional political community which would be defined and proposed by that constitution. As remarked by the French philosopher Etienne Balibar, the European Constitution “presumes to be resolved what is in fact in question: the nature and existence of the constituent power on the European level”.⁸¹

In the United States during the confederation period there existed a significant part of the political elite (the Federalists), assuming that there already existed a single American nation created in the War of Independence, and because of that there existed the basic presumption to entrust the American people the role of a *pouvoir constituant*. However, the other part of the same elite (‘the Antifederalists’) thought that it was more correct to assume the existence of 13 different nations. In today’s Europe, there is no dilemma on the same issue - there are no ‘Federalists’ as the politically relevant part of the elite in several Member States that would base the European Constitution on a European constitutive power. Just the opposite, the dominant attitude, elaborated as early as 1993 by the German Constitutional Court in its Maastricht opinion, is that a union of democratic states and peoples, as is the EU, finds its democratic legitimacy in acts of the national parliaments, as representatives of each single people.⁸²

⁷⁹ Weiler, In defence of the status quo, p. 7. In the latest work, Weiler would modify this judgement: “But what international treaty in Europe can claim to have been ratified by popular referendum in more than half the member states? One need not be a card-carrying legal realist to understand the impact that this outcome will have on the ensuing constitutional conversation, including constitutional adjudication. The process will have become a constitutional process of ratification, and the peoples of Europe will have spoken, at least in some sense, as a *pouvoir constituant*.” See Weiler, On the Power of the Word, p. 181

⁸⁰ This opinion was shared by all American states’ rights theoreticians in their interpretation of the ratification process of the American Constitution.

⁸¹ Euro-elites desperately seeking demos, Spiked-politics 21 February 2005.

⁸² See the decision of the German Constitutional Court BVerfGE 89, 155 (184) - Maastricht.

The debate about legitimating the European process of integration has been characterized for years by the assumption that it is possible to transfer on the European level, and accommodate to it the constitutional principles associated with the state level. The non-existence of affinity or mutual understanding between the EU institutions and the citizens is always emphasized, but as asked by Antje Wiener, “why should it matter at all, if the Euro-polity is not expected to turn into anything akin to a nation state?”⁸³

If, then, there are today no indications of a possible European constitutive power, the whole project of formalization and rationalization of the contemporary European confederation in one document should have been divested of any constitutional rhetoric and the need to legitimate that document directly by the people.

The most important question, in my opinion, is whether some kind of international democracy is possible and whether there is a possibility to democratically legitimate the EU in the same way as the national states. Robert Dahl has recently stated this question, and he does not find real the possibility that international systems develop basic political institutions of modern representative democracy.⁸⁴ Even in the EU, which has gone further than any other international organization in the development of democratic institutions, and is actually the only supranational polity debating about ‘democratic deficit’, there are exceptional obstacles in developing of a democratic framework.⁸⁵

Even if the European constitution-makers could agree on some basic democratic principles common to the constitutions of several Member States, as

⁸³ Antje Wiener, *Finality vs. Enlargement: constitutive practices and opposing rationales in the reconstruction of Europe*, in J.H.H.Weiler and Marlene Wind ed., *European Constitutionalism Beyond the State*, Cambridge University Press, Cambridge 2003, p. 188.

⁸⁴ Robert A. Dahl, *Is international democracy possible? A critical view*, in Sergio Fabbrini ed., *Democracy and Federalism in the European Union and the United States*, Routledge, London, 2005, pp.194-204.

⁸⁵ On this Eric Stein says: “Today in Europe, modern democracy appears in a great variety of systems in which the voice of an individual citizen is heard in varying ways and degrees. It ranges from the ‘omnipotent Parliament in Westminster to the republican-presidential system in France, the consensual pattern in Switzerland, the strong regionalism in Spain, and the federal variants in Germany, Austria and Belgium...It is not surprising that the builders of the new Community would look to their own systems for a specification of the general principle (of democracy).” Stein, *International Integration and Democracy: No Love at First Sight*, *American Journal of International Law*, Vol. 95, 2001, p. 524.

e.g. people as a fountain of all power, majority government, responsibility of all public institutions, separation of powers, independent judiciary, it is the question how these general principles would be operationalized in a supranational system, in the sense of constitutional choices between the presidential or parliamentary (or semi-presidential) system, different models of separation of powers, models of judicial review, electoral systems etc.

Furthermore, there is exceptional diversity of citizens inside this international system - in their historical experiences, identities, cultures, values, loyalties, and languages. This opens the question of the creation of political culture that would induce citizens to support their political institutions during the conflicts and crises. In the end, as propounded by Dahl, "the nature of many international decisions makes it extremely difficult and even impossible for most citizens to provide their informed consent to the decision".⁸⁶ Citing the example of the USA, Dahl says that even federalism cannot survive the deep economic, social, cultural, and geographic cleavages, as existed between North and South in the first half of the 19th century. Although it is difficult for me to accept Dahl's claim that the inhabitants of the US already by 1790 in a great majority considered themselves to be Americans, and had the feeling of common nationality very soon after the creation of the Union.⁸⁷ When, then, it is impossible to imagine democratic institutions, as existing on the level of nation-states on the level of international organizations too, it is impossible to think of the EU as a new federation in creation, not even as a federation of nation-states.

In that sense the referendums on European treaties or on the proposed Constitutional treaty are completely unnecessary and inappropriate in a confederal system such as the EU is, and would remain even after the possible acceptance of the Constitution.

International treaties, concluded every few years between the Member States (from the Single European Act of 1986 to the Treaty of Nice of 2001 there have been four such treaties) are the result of complicated intergovernmental agreements, often after awkward negotiations, and compromises which are usually the result of such negotiations are difficult to explain to the wider public in several states. Nevertheless, the chiefs of states and governments who have reached the deal inside the European Council could guarantee that this agreement will

⁸⁶ Robert A. Dahl, *Is international democracy possible?* p. 200.

⁸⁷ *Ibid.*, p. 202.

be ratified by the parliament in each state, because governments can usually count on the majority support in the legislature. Moreover, the European treaties have been often ratified in parliaments by the consensus of the most important majority and opposition parties. On the other hand, plebiscitary voting of the citizens has proven to be very perilous, and it is hardly to be expected that any new treaty will be simply and quickly accepted if its ratification depends on the direct voting of the citizens. Besides that, it is difficult to decide in a referendum simply with 'yes' or 'no' when you are often confronted with complex compromises, resulting from intergovernmental bargaining.

The Union should develop its own version of democracy, compatible with the confederal nature of the system. The example given by Stein is a possibility of giving a greater role to the national parliaments in the control of the European institutions, and especially of EU legislation.⁸⁸ Laeken Declaration would also specify a potential role of the national parliaments in the enforcement of the principle of subsidiarity. The Brussels Convention has spent a lot of time debating this issue, and its solutions on the role of national parliaments in the new institutional architecture of the EU, although perhaps not the best could be considered positive.⁸⁹

PROPOSITION NO. 6: THE VOTING OF THE PEOPLE BETTER FITTED TO PULL DOWN THAN TO BUILD UP CONSTITUTIONS

Oliver Ellsworth, one of the members of the Connecticut delegation in the Philadelphia Convention, would argue, in one of debates on the ratification article of the Constitution that he did not like "these conventions", because "they were better fitted to pull down than to build up Constitutions". His colleague from Massachusetts Elbridge Gerry would similarly anticipate that "great confusion...would result from a recurrence to the people. They would never agree on any thing".⁹⁰

Both of them, as their like-minded colleagues in Philadelphia, had in view the experience of the state of Massachusetts, where the people barely in the

⁸⁸ Stein, *International Integration and Democracy: No Love at First Sight*, *American Journal of International Law*, Vol. 95, 2001, p. 524.

⁸⁹ See Robert Podolnjak, *Dvije ustavne konvencije*, pp. 1169-72.

⁹⁰ Max Farrand, *The Records of the Federal Convention*, 1;335, 2;90.

third try had approved the Constitution, as the first in an American state. How great has been the scepticism of the American constitution-makers about the people's involvement in deciding on the Constitution shows the fact in the last decision-making on the issue: there were as much as four (of ten) delegations at the time in Philadelphia against the ratification of the Constitution by the conventions.⁹¹

The argument that the voting of people is more suitable for pulling down than to build up Constitutions is similar to the former - that the people should have nothing with confederations. However, the former argument starts from the normative proposition that the people should not ratify confederal treaties, and the latter wants to point out that there could be significant problems with the constitutional acceptance, especially in federal unions, when that constitution has to be ratified by some sort of direct involvement of citizens (people's conventions or referendum).

I would like to recall that the American federal Constitution has not been accepted by referendum in several states, as it is the usual method today when a constitution is submitted to the people for acceptance in numerous countries, but by the people's conventions. In these conventions the delegates of particular districts have not often authentically represented the views of their constituencies, nor have electoral districts had the same number of electors (it is a well-known fact that the 'Federalist districts, mostly at the coast, and the commercial areas of the USA, have been over-represented in some state conventions). Certain historical researches of the voters divisions *pro et contra* the Constitution indicate that the opponents of the Constitution might have had a minimal majority across America, that in four states they had a significant majority, and in another two a minimal majority.⁹² This actually means that the American Constitution, which needed for ratification the acceptance of at

⁹¹ Ibid., 2;476.

⁹² See Jackson Turner Main, *The Anti-federalists: Critics of the Constitution 1781-1788*, W.W.Norton & Co., New York, 1974, p. 249. Although they dispute these data about the Antifederalist majority in some states Riker and Fink state that the Antifederalists had a majority of delegates in five or six state conventions (respectively the people as in the case of Rhode Island). This would be enough to preclude the acceptance of the Constitution, but for the fact that a certain number of delegates had not changed sides during the convention proceedings. See Evelyn Fink and William Riker, *The Strategy of Ratification*, in Grofman and Wittman ed., *The Federalist Papers and the New Institutionalism*, Agathon Press, New York, 1987, p. 227.

least 9 of 13 states, maybe would never have been ratified had the decision-making been by the direct voting of the people (as had been the case with the Constitution of Massachusetts), and not by the indirect voting in the people's conventions.

It is often forgotten that, taking into account all the glorification of the principle of popular sovereignty in America, after the problematic and hazardous experience with the adoption of the Constitution of Massachusetts and the federal Constitution, the praxis of constitutional conventions in the USA and in several states was very rare in the next half a century of the American constitutional history. Until 1812, there was no state outside New England willing to submit its draft constitution to popular approval. By the end of the 1830's 34 state constitutions had been adopted, but only six by popular approval.⁹³ Moreover, it was not conforming to the principle of popular sovereignty that the amendments to the federal Constitution were, as a rule, adopted by the state legislatures (all except one).⁹⁴ We could ask ourselves: if the state legislatures usually decided on the amendments to the US Constitution, why it would be undemocratic to let the parliaments of the Member States decide on the EU treaties, or even EU 'Constitution'?

Numerous politicians in the EU are sceptical about the European referendums, because, as they say, the 'European issues' are 'too complex'. "When we ask voters a European question, the answer is either no, or yes by only the narrowest of margins. That should be telling us something". Those are the words of an official of the European Commission after the lost referendum in Sweden over the Euro.⁹⁵ An unknown German official once said that German citizens because of the higher price of bananas would probably have rejected the Rome treaties of 1957, starting the process of European integration.⁹⁶ This is not surprising taking into consideration how little citizens know of the EU. A research of the British Foreign office conducted in 2001 discovered that a

⁹³ See Daniel T. Rodgers, *Contested Truths: Keywords in American Politics since Independence*, Basic Books, New York, 1987, pp. 86-7, 236.

⁹⁴ The only amendment submitted to the popular conventions was the XXIst, ratified in 1933, which nullified the XVIII Amendment ratified in 1919, forbidding the production and sale of alcohol in the USA.

⁹⁵ Voters can be such a nuisance, *Economist*, 18 Sept 2003. The French politicians have forgotten that the French electorate barely ratified the Maastricht treaty (with only 51% of 'yes' votes).

⁹⁶ Europe should vote, *The Economist*, 25 Sept 2003.

quarter of the British do not know that their country is a member of the EU, and 7% have thought that the US is one of the Member States. In Germany, one survey has showed that 31% of examinees have never heard of the European Commission.⁹⁷

European politicians wanted by a constitutional convention and with public debate on the Draft Constitution to contribute to familiarising of the European citizens with the process and the goals of European integration. However, it has been shown in the end that this 'great democratic experiment' was useless, because the abstract constitutional polemics and the referendum campaign have given the perfect forum to different groups of anti-globalists, anti-immigration parties, and to all kinds of anti-establishment grumblers. In the case of the European Constitution, the referendum has proved to be "a potentially dangerous instrument of direct democracy".⁹⁸

The German Professor Jürgen Schwarze was, to my knowledge, one of rare commentators of the European Constitution arguing against the idea of its ratification by the referendum at the time of the making of the Draft Constitution by the Convention on the Future of Europe. He as early as in 2003 wrote that the Draft was a "too complex document", and therefore unsuitable for referendum voting. In his opinion, the European Constitution would "achieve its legitimacy better by its convincing content and by its continuous acceptance in practical politics and by the people". Schultze declared himself against the possible amendments of the German Basic Law (*Grundgesetz*), which would allow carrying out the referendum on the EU Constitution in Germany, thinking instead that the existing ratification procedure (two-thirds majority in both houses of the Parliament) was "sufficient to meet the demands of democratic legitimation". He would prophetically conclude: "In view of the destiny of all visionary but failed constitutional drafts in the past I come to the conclusion the concept of pragmatism offers the best chances for realization, even in situations when there is a need for fundamental reforms such as the present".⁹⁹

Should we, then, in the adoption of treaties or, for that matter the Draft Constitution, consider the possibility of popular referendums? A serious investigation carried out before the starting of the ratification process, shows that

⁹⁷ The great debate, *The Economist*, 12 June 2003.

⁹⁸ Larry Siedentop, A crisis of legitimacy, *Prospect*, No. 112, July 2005.

⁹⁹ Schultze, Guest editorial: The Convention's draft treaty establishing a Constitution for Europe, *Common Market Law Review*, Vol. 40, 2003, p. 1044.

the referendum option has some significant shortcomings, and that popular involvement in the adoption of the Constitution does not have to mean that the problem of the 'democratic deficit' would be solved.¹⁰⁰

National referendums on the EU issues belong, in principle, to the category of the so-called 'sovereignty referendums' (*Souveränitätsreferenden*), a sub-species of the constitutional referendums. Those referendums are not rarity - after 40 EU referendums in 22 states until November 2004 they have become "the solid part of the European integration instruments". Among them, there have been 9 negative, and 31 positive referendums. These referendums could be separated in two groups. The first group consists of referendums in which citizens decide on accession to the specific form of European integration (the European Community, the EU, or the 'Euro-zone'). Those referendums, starting in the 1970's, have become today, despite different constitutional obstacles and traditions, almost inevitable in the process of accession of candidate states to the EU. The reason for this is a conviction that it is democratically doubtful to transfer certain sovereign powers to another level without asking the sovereign. The second group of national referendums includes popular voting on the continuation, or intensification of European integrative efforts, in the form of new treaties and amendments thereof.¹⁰¹ There were altogether nine such 'integrative referen-

¹⁰⁰ See Auer, Referenden und europäische Öffentlichkeit - Nationale Volksabstimmungen über die Verfassung für Europa: Erfahrungen, Rechtgrundlagen, Perspektiven, Zeitschrift für Staats- und Europawissenschaften, 4/2004, pp. 580-596.

¹⁰¹ In the perspective, Auer thinks possible a third species of national EU referendums, which would be related to the deciding on the accession to the EU of new countries (e.g. Turkey). Similarly, another scholar would divide European referendums in two groups. In the first group are referendums whose "focus was essentially on whether to 'belong' to the Union". The second kind of referendums is those related to a "process of becoming", with focus on the specific goal of further integration. The last such a referendum, before the referendums on the European Constitution, was the Swedish referendum in 2003 on the Euro. His conclusion is that referendums on 'belonging' are not problematic, because in no state (or a candidate state) there is not evident such a critical mood to opt for seceding from, or refusing to accede to the EU. However, referendums on further integration are evermore hazardous, as evident from the experiences with the treaties of Maastricht, or Nice, with the Euro or the European Constitution. Therefore, in the EU there is not inherent 'Euroscepticism' in the sense of opposing the membership in the Union, but a kind of 'federal scepticism', in the sense of further integration leading to a possible federal Europe. See Lee Miles, Editorial: The Paradox of a Popular Europe, *Journal of Common Market Studies*, Vol. 42, Annual Review, pp. 1-8.

dums', starting with the referendums in Denmark and Ireland on the Single European Act 1986/7. The referendums on the EU Constitution belong to this category. It is this category of national EU referendums that is 'problematic'. That is because these referendums are implemented according to the national law, but they significantly affect the success of the supranational enterprise. It means that the citizens of each country decide not only on their approval of a particular project, but also on the destiny of that project, despite the opinion of the citizens in all the other Member States. Taking into consideration that the EU treaties could be changed only unanimously, the possibility that citizens in only one country stop a particular integrative project is real.

Because of Article 447, which prescribes that the Constitution has to be ratified unanimously, in accordance with the respective constitutional requirements of the Member States, each state has a veto on the Constitution. It might happen that a few thousand voters in one state prevent the ratification of the Constitution, despite the wishes of hundreds of millions of citizens in other Member States. And here is the American and Swiss experience with constitution-making most valuable.

The fact is that, as to the comparative experiences connected with the adoption of the federal constitution by the people (directly by referendum or indirectly through conventions) as possible exemplars or models for the adoption of the EU Constitution, there are only the experiences of adoption of the American Constitution 1787/88 and the Swiss Constitution in 1848. In the American case the constitution-makers have avoided the 'unanimity trap' (as enacted in the Articles of Confederation) by prescribing that the Constitution would come into force when ratified by at least nine states, and be valid only for the ratifying states. So, the American solution had escaped the possibility of veto of one or a few states, leaving at the same time to each state to choose freely whether it would become a member of the new federal system.

The solution of Swiss constitution-makers was different. After the short civil war a committee of the confederal assembly (Diet), composed of one member from each canton, worked out a draft of the federal constitution and submitted it to the people of each canton for approval. The Constitution was accepted in referendums in 15 and $\frac{1}{2}$ of cantons, and rejected in six and $\frac{1}{2}$ cantons. After receiving the results from the cantons, the Diet decided that the vast majority of the people had accepted the Constitution, and declared it to be ratified. Although the earlier constitution of the Confederation did not have a provision on its revision, it was thought that it could be revised

only by the unanimous consent of each canton. The Swiss constitution-makers departed from this 'unwritten rule', rejecting the principle of unanimity of cantons in the revision of or adoption of the new federal constitution. As judged by Auer this was "a revolutionary act, founded both on power and on the agreement by the cantons which had lost the war to take part in the new scheme of government".¹⁰²

Had the European constitution-makers had in view the American and Swiss experience with the adoption of the federal constitution, they would never have opted for unanimity as a condition for the EU Constitution coming into force, accompanied by the popular referendum as an instrument of ratification.

The fact is that numerous members of the Brussels Convention have been conscious of the possibility that the Constitution will not pass on the referendum hurdle in some states. The supporters of the popular referendum would submit to the Convention its proposal named 'Referendum on the European Constitution'. In it they would insist that "if the Constitution is to have real democratic legitimacy, then it ought to be put to the people of Europe in a Europe-wide referendum". To ratify the Constitution in some other way would, in their opinion, "simply reinforce the impression of a deep democratic deficit in Europe" and "it would also send a signal that Europe is not about the people but about the governing elites". According to the proposal, the referendum would be held on the same day as the elections for the European Parliament. In those states not having in their constitutions any provision on the popular referendum, at least a consultative referendum would be held. For ratification of the Constitution a double majority would be required - a majority of citizens and a majority of states. If the proposed Constitution would be rejected in any Member State, this state could repeat the referendum, regulate by a bilateral treaty with the 'new' European Union a special relationship, or simply secede from the Union.

In this way, two extremes are avoided: "no country can be forced under the new constitution against the will of its citizens, and on the other side one country alone cannot block the whole constitutional process by its veto".¹⁰³ The proposal is, essentially, similar to the one devised by the American constitu-

¹⁰² Andreas Auer, *Why Europe needs a stronger legitimacy than the existing treaties*, in Fabrice Filliez and Bruno Kaufmann ed., *The European Constitution: Bringing in the People*, The Swiss Department of Foreign Affairs, Bern, 2004, pp. 39-40.

¹⁰³ See *Referendum on the European Constitution*, CONV 658/03 of 31 March 2003.

tion-makers.¹⁰⁴ This proposal for an all-European referendum has been signed by 92 delegates of the Convention,¹⁰⁵ but in the end the existing ratification procedure was accepted, and because of that, as we know now, the destiny of the European Constitution was sealed. According to the double majority rule there is a great probability that the Constitution would be ratified - 14 member states have already ratified the document (having a small majority of the overall EU population), and what is even more important, in the Member States where the referendum was chosen as an instrument of ratification the majority of voters voted for the Constitution (26.6 to 22 million).

The whole historical experience with the direct popular voting on constitutions in the framework of a federal/confederal system, from the ratification of the American Constitution 1787/8 until the contemporary referendums on the European Constitution, confirms that it is no way certain that the people would accept the constitution, and that the ancient warning of Oliver Ellsworth - that people's voting is better fitted to pull down than to build up Constitutions - is still relevant today.

The European analysts are looking at the causes of negative voting in the referendums principally in the belief that the people actually vote on the internal political issues of their country, or on confidence to the government, or simply against further integrative projects. Although I cannot elaborate on a different thesis here, I would like just to indicate it. Perhaps, the causes of negative voting of the people, when we speak about federal/confederal unions, should be searched in the fear of the people of a still more remote supranational government, which will in many ways affect their lives, but which would be much harder to control than the existing national government. With this remote central, imperial, or supranational government there is inseparably connected the so-called 'democratic deficit', i.e. the whole spectre of problems linked to the implementation of representative or direct democracy. The opponents of the American Constitution - called wrongly 'Antifederalists' - were

¹⁰⁴ Nine states needed for ratification of the Philadelphia Constitution had a minimal majority of population of the US at the time. The Draft Constitution recommended by the European Commission followed a similar pattern proposing that the EU Constitution would come into force after the declaration of three-fourths of the Member States affirming the will of their people to stay in the Union. See European Commission, *Feasibility Study: Contribution to a Preliminary Draft Constitution of the European Union*.

¹⁰⁵ See Honor Mahony, *Ratification problems loom over Convention*, *Euobserver*, 31 May 2003.

principally against one strong central government, which reminded them of the former imperial British government. Contemporary 'Antifederalists' in France, the Netherlands, Great Britain, Denmark, or Sweden similarly look at the supranational institutions in Bruxelles. As simply put by Nils Lundgren, a Euro-sceptic member of the EP from Sweden: "People don't like these E.U. structures. They are too far away, not transparent and undermining democracy by moving too much of the decision making process from the national parliaments to the E.U."¹⁰⁶

Some superficial comparisons of ratification of the American Constitution 1787/88 with the French referendum 2005 show an impressive similarity. They show that the main centres of support for the American Constitution were in larger, urban and coastal environments, which were even in the 18th century America characterized by a higher level of commerce, education and cosmopolitan spirit, and that the opponents of the Constitution predominated in rural environment, isolated from the commercial areas. Much more detailed analyses of voting on the French referendum show that the majority of the people in large cities, such as Paris and Lyon, voted for the EU Constitution, and in rural areas the majority voted against it.¹⁰⁷ Does this pattern of voting, in the interval of more than two centuries, give sufficient ground for a claim that, generally, the support to a federal/confederal constitution be higher with the degree of urbanization, education, and openness of society? I cannot further elaborate on this hypothesis here, but I believe that there are enough indications present to justify further checking of my hypothesis.

¹⁰⁶ Closer Union or Superstate, *Time*, June 28, 2004.

¹⁰⁷ See Kalypso Nicolaidis, *The Struggle for Europe*, *Dissent*, Fall 2005, p. 14. Paul Hainsworth speaks about the voting division in 'two Frances' based on socioeconomic criteria: one was more urban, wealthy, integrated, educated and successful; whereas the other was more marked by socioeconomic decline, unemployment, marginalization or exclusion". On the French referendum see also P. Hainsworth, *France Says No: The 29 May Referendum on the European Constitution*, *Parliamentary Affairs*, Vol. 59, No. 1, 2006, pp. 105-108; Gilles Ivaldi, *Beyond France's 2005 Referendum on the European Constitutional Treaty: Second-Order Model, Anti-Establishment Attitudes and the End of the Alternative European Utopia*, *West European Politics*, Vol. 29, No. 1, January 2006, pp. 47-69.

PROPOSITION NO. 7: THE NON-EXISTENT STRATEGY OF RATIFICATION

It seems that the European constitution-makers did not consider something that could be called a strategy of ratification. I use the term according to the article of William Riker and Evelyn Fink on the strategy of ratification of the American Constitution, as devised by its proponents. Riker and Fink do not give their definition of the ratification strategy, but this definition, if we analyse their arguments, would encompass the choosing of the model of ratification, the speed of ratification, and the sequence of states in the ratification, acceptance of proposals of the opponents in a measure that would not affect the ratification in several states, specific argumentation in support of the constitution adapted to different states, and finally strong propaganda in favour of the constitution.¹⁰⁸

The American constitution-makers carefully deliberated which model of ratification might be the best and most advantageous for the ratification. The debates on the Convention witnessed the deep conviction of the Framers that the content was very important for the destiny of the Constitution, but more important was to ensure easier and more likely ratification. This is evident from the following discussion of Nathaniel Gorham, on the advantages of ratification by conventions over the legislatures:

“1. Men chosen by the people for the particular purpose, will discuss the subject more candidly than members of the Legislature who are to lose the power which is to be given up to the Genl. Govt. 2. Some of the Legislatures are composed of several branches. It will consequently be more difficult in these cases to get the plan through the Legislatures, than thro’ a Convention. 3. in the States many of the ablest men are excluded from the Legislatures, but may be elected into a Convention. Among these may be ranked many of the Clergy who are generally friends to good Government. Their services were found to be valuable in the formation & establishment of the Constitution of Massachs. 4. the Legislatures will be interrupted with a variety of little business, by artfully pressing, which, designing men will find means to delay from year to year, if not to frustrate altogether the national system. 5 - If the last art: of the Confederation is to be pursued the unanimous concurrence of the States will be necessary.”¹⁰⁹

¹⁰⁸ See Evelyn Fink and William Riker, *The Strategy of Ratification*, pp. 220-55.

¹⁰⁹ Farrand, *The Records of the Federal Convention*, 2:90.

In the end these arguments convinced the majority of delegates that the ratification by the people's conventions was a less hazardous procedure than the ratification by the state's legislatures.

In the European Convention such debates *pro et contra* of different models of ratification, from the standpoint of its easier and more secure adoption, as far as I know, are missing.¹¹⁰ Those members of the Convention favouring the ratification by referendum have been for this option having in mind the argument of greater democratic legitimacy, and not greater probability of its adoption. Have the Convention made an analysis of earlier 'European referendums', this analysis would indisputably show that the ratification of the constitution by popular referendum is much more hazardous than the ratification by parliaments.

One of the American constitution-makers would warn his colleagues during the Philadelphia Convention that in the making of a constitution "a little practical virtue is to be preferred to the finest theoretical principles, which cannot be carried into effect".¹¹¹ The European constitution-makers did not follow that recommendation, and neither did European politicians, insisting on the referendum option in their countries, even if this model was not constitutionally required. If the political elite in France and the Netherlands thought more about a practical virtue of parliamentary ratification, and less about the value of legitimacy of popular approval, we would not speak of the European Constitution as a 'political corpse'.

It is also indisputable that the European constitution-makers have made a huge mistake opting for the unanimous ratification of the Constitution. They should have proposed ratification by some qualified majority of Member States (e.g. four-fifths), as the American Framers had. At the beginning of the Convention James Wilson brought "the idea of not suffering a disposition in the plurality of States to confederate anew on better principles, to be defeated by the inconsiderate or selfish opposition of a few (States)", and therefore the ratification procedure had to be such "to admit of such a partial union, with a door open for the accession of the rest".¹¹²

¹¹⁰ As pointed out by Wojciech Sadurski (citing Bruno De Witte): "The main fault of the Convention was that it focused all its attention on the substance of the new Treaty and none on the process of adopting it". See Sadurski, *The Union must be political*, available at <http://www.neweuropereview.com/English/Sadurski-English.cfm>

¹¹¹ William Paterson, in Farrand, *The Records of the Federal Convention*, 1;258.

¹¹² Farrand, *The Records of the Federal Convention*, 1;123.

This attitude was accepted by the vast majority of delegates, concretizing it with the constitutional provision that the new Constitution would come into force when ratified by three-fourths of States of the existing Confederation, and be valid for those states only. It is important to say that with this provision the American constitution-makers did not want a 'partial union' and everlasting secession of those states not ratifying the Constitution. Instead, they calculated that the adoption of the Constitution in the first ten states would positively act on the acceptance of it in the other, more reluctant states, with the strongest opposition to the new federal system. It is the fact that the state of New York (whose delegation left Philadelphia), Rhode Island (whose delegation was not even present in Philadelphia, and whose citizens voted against the Constitution in the referendum) and North Carolina (whose ratification convention at first voted also against the Constitution) ratified the Constitution reluctantly, when it was already in force for the other 10 states. This shows that the strategy of ratification of the American constitution-makers has been correct.

Beside this, the American constitution-makers had very well devised and coordinated their activities in choosing the time and sequence of ratification in several states, although this was not easy in those times. So they carried out a quick ratification in some states, not letting the opposition organize (as in Pennsylvania and Massachusetts), they accomplished speedy and almost unanimous ratification in four small states (for which they correctly concluded that the membership in the new federal system was essential to their further survival), and for the end they left those significant states in which they expected the greatest opposition (Virginia and New York). In this way, the ratification convention in the most important and largest state Virginia, with strongly divided political elite on the issue of the Constitution, debated the Constitution at the moment when it was already accepted in nine states, which was the precondition of its coming into force. This fact was of great influence in Virginia, and later in New York, securing the adoption of the Constitution in those states, although it is even today the prevalent opinion that the opponents of the Constitution in these states were in the majority both in the electorate, and in the state ratification convention.

It could not be disputed that the Intergovernmental Conference was conscious of the possibility that the European constitution would not be unanimously ratified. In the last of 30 declarations which accompanied the Constitution it was prescribed: "The Conference notes that if, two years after the signature of the Treaty establishing a Constitution for Europe, four fifths

of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council”.¹¹³ The problem with this Declaration is that it does not specify a possible solution - the Constitution transferred simply the problem of non-ratification to the chiefs of states and governments, with no guidelines what to do in this case.¹¹⁴ In that sense, the Declaration no. 30 on the ratification of the Constitution gave neither a legal, nor a political solution for the situation of non-ratification in one or more Member States.

PROPOSITION NO. 8: THE ABSENCE OF THE EUROPEAN VERSION OF THE FEDERALIST

At the end of the Brussels Convention its president, in cooperation with both vice-presidents (Dehaene and Amato), published on the internet in November 2003 a shorter essay on the relations between the most populous and the least populous states of the European Union. In it they tried to prove that the ‘alleged struggle’ between the large and small states is based on “superficial understandings of the relations inside the European Union”, and that, with time, inside the Union there would be formed different groups of states, based on geographic, ideological, or economic criteria. By the way, the three of them would name their first essay “*The European Union Convention Papers No. 1*”, admitting they have chosen the name having in mind “*Federalist papers*”, written by *Publius*. The analogy was very significant - the three heads of the European Convention, mostly responsible for the final draft of the EU Constitution, would try, as Madison, Hamilton and Jay (although under the pseudonym) did, to explain to the European public why they should support the new Constitution. However, after this first essay, which obviously did not have the expected reception in the European public, d’Estaing, Amato and

¹¹³ Declaration on the ratification of the Treaty establishing a Constitution for Europe, Official Journal of the European Union, C310/464.

¹¹⁴ A German analyst claims that the Declaration was intentionally so ambivalent because no one wanted, with a more detailed regulation of an extraordinary situation (the failure of ratification in one or more Member States), to provoke a possible constitutional fiasco (a sort of “self fulfilling prophecy”). I find such an explanation not quite logical. See Jürgen Schwarze, *Der europäische Verfassungsvertrag*, *Juristen Zeitung*, 23/2005, p. 1130.

Dehaene published nothing more.¹¹⁵ In this way, the European Constitution was left without a kind of modern version of the 'Euro-Federalist'. I am not arguing that such a series of essays, published throughout Europe, would essentially contribute to the commitment of the European public *pro et contra* the Constitution, because even today there is a polemic going on in the US about how much the essays in *The Federalist* contributed positively to the ratification of the American Constitution in the several states.¹¹⁶ However, *The Federalist* will always be admired because numerous analysts have found in it "the whole theory of American constitutional government". These essays would seem to be "a window through which we may view the proceedings of the Philadelphia Convention and see how the system is supposed to work".¹¹⁷

There has been enough time, since the formulation of the Draft Constitution by the Brussels Convention, or since the preparation of the final proposal at the summit of EU leaders in June 2004 to write a similar, European version of *The Federalist*. The fact is that the European Constitution did not have a thorough, systematic, intellectually strong elaboration of its principles, which could be used by its proponents to convince the European public in the desirability and necessity of the ratification and which would be read with the same respect across the Union. There is no work today containing 'the whole theory of European constitutional government' and trying to explain "how the system is supposed to work". What has been published on the EU Constitution by the individual delegates would primarily be turned to the home public.¹¹⁸

Assessing retrospectively it seems that Larry Siedentop was right when he, a few years before the beginning of the greatest European constitutional project,

¹¹⁵ See The European Union Convention Papers: Relations between the most populous and the least populous states of the European Union, available at http://europa.eu.int/futurum/documents/other/oth131103_en.pdf.

¹¹⁶ See Larry Kramer, Madison's Audience, *Harvard Law Review*, Vol. 112, 1998-9, pp. 611-79.

¹¹⁷ Editor's Introduction, in *The Federalist*, ed. George Carey and James McClellan, Liberty Fund, Indianapolis, 2001, pp. XLVI-XLVII.

¹¹⁸ See especially the book written by the Finish delegate Kimmo Kiljunen, *The EU Constitution - A Finn at the Convention*, Publications of the Parliamentary Office, 1/2004, and two short pamphlets of British 'Eurosceptic' members of the European Convention: Gisela Stuart, *The Making of Europe's Constitution*, Fabian Society, London 2003, and David Heathcoat-Amory, *The European Constitution and what it means for Britain*, Centre for Policy Studies, London, 2004.

asked: “Where are our Madisons?”, and “Why has Europe failed to generate a debate which approaches, in range and depth, the debate which developed around the drafting of a Federal Constitution for the United States”.¹¹⁹ Now, after the failure of the European constitutional experiment these questions have still a greater weight.

CONCLUSIONS

The failure of the project called ‘the European Constitution’ should not be surprising. The European constitution-makers have made so many mistakes in the process of its creation that, objectively speaking, it was hard to expect a different result.

It depends mostly on the constitution-makers, in my opinion, what the product of constitution-making will be. They will not always be in a position to decide on the timing of the constitution-making (a constitutional moment), what the limits or qualifications of their work will be, or who will decide on their proposal. However, the constitution-makers, as has been shown many times in the history of constitution-making, can determine in many ways not only the content of constitution, but also the method of its ratification.

The errors of the European constitution-making are evident principally in

- the beginning of the constitution-making process in the moment not suitable for the constitution-making,
- the ambiguity of the document regarding its constitutional or treaty character,
- creating the document completely unintelligible to a common citizen,
- making the Constitution without vision and ambition,
- complete absence of any strategy of constitutional ratification,
- insisting on direct involvement of the people in the acceptance of the Constitution, which was meant legally and politically principally as an international treaty,
- poorly managed media presentation and defence of the Constitution before the European public.

¹¹⁹ Larry Siedentop, *Democracy in Europe*, Columbia University Press, New York, 2001, p. 27.

What is essential is that these errors are, in my opinion, very significant in explaining the failure of the European constitution. Had these mistakes been avoided, the result of the European constitution-making process could have been different and we would not speak today of a “dead” constitution.

It is true that the European constitution-makers, i. e. the members of the Convention on the Future of Europe, could not choose the timing of the constitution-making process. They could not avail themselves of the genuine ‘constitutional moment’, one of the essential preconditions of successful constitution-making. However, all other mistakes they had made could have been avoided. Some of these mistakes are related to the constitutional document (the text that is completely unintelligible to a common citizen and without vision and ambition), and others are related, generally speaking, to the process of adoption of the constitution (absence of constitutional ratification strategy, insistence on the popular ratification, feeble defence of the Constitution).

I would dare to say that avoiding just one, although fundamental, error in the constitution-making process, would have had huge consequences for the positive ratification of the European constitution. In the case of the European Constitution, the popular referendum has proved to be a dangerous instrument of democracy. There was, in my opinion, no need to bring into question the European constitution playing with a potentially very dangerous instrument of popular democracy, especially when there was no constitutional obligation to do so, and especially according to the rules most unfavorable for the ratification. If I could paraphrase the words of an American founding father - the European constitution-makers preferred the finest theoretical principles to a little practical virtue.

The most preferred option, in my opinion, would be parliamentary ratification wherever possible. The ratification process would begin with a solemn declaration of the European Parliament accepting the Draft Constitution (its name would have to be, of course, somewhat different, e.g. ‘Basic Treaty’ or ‘Basic Law’), which would then be sent to the national parliaments of the Member States. This would be followed by a quick ratification of the national parliaments, perhaps with an additional condition of a 2/3 majority of all representatives voting for the constitution to be valid. The Constitution would enter into force upon acceptance of 4/5 of the Member States, i.e. at least 20 of 25 countries. Only the second best option would be a popular referendum as a means of ratification, and only under certain conditions. These conditions are: to implement national referendums on the same day, preferably on the

same day as the European Parliament elections, and prescribing the principle of double majority (the majority of Member States and voters), and not higher a ratio, as a requirement for the Constitution to enter into force for the states ratifying the same.

Sažetak

Robert Podolnjak*

OBJAŠNJENJE PROPASTI EUROPSKOG USTAVA: USTAVOTVORNO GLEDIŠTE

Temeljna je teza rada da glavni uzroci neuspjeha Europskog ustava proizlaze iz loše pripreme i provedbe jednog kompleksnog procesa ustavotvorstva za savez država kontinentalnih razmjera. Taj proces uključuje pitanja vremenskog aspekta ustavotvorstva, subjekta donošenja ustava, strategije ustavne ratifikacije, ustavovoritelja i konačno sam ustavni tekst. O tim pitanjima nedostaje značajnija rasprava, što je pogrešno, jer bi ti ustavni uzroci neuspjeha trebali biti poučni za eventualni budući europski proces ustavotvorstva. Krucijalni uzroci neuspjeha Europskog ustava izlažu se u obliku određenih preliminarnih postavki. Prema mišljenju autora, prvenstvene pogreške europskog ustavotvorstva ogledaju se u započinjanju ustavotvornog procesa u trenutku nepogodnom za ustavotvorstvo, u neodređenosti dokumenta glede njegova ustavnog ili ugovornog karaktera, u stvaranju ustavnog teksta potpuno neprimjerenog razumijevanju običnog građanina, u stvaranju ustava bez vizije i ambicije, u potpunoj odsutnosti bilo kakve strategije ustavne ratifikacije, u inzistiranju na neposrednom sudjelovanju naroda u prihvaćanju ustava, koji je mišljen pravno i politički prvenstveno kao međunarodni ugovor, te u loše vođenoj medijskoj prezentaciji i obrani ustava pred europskom javnošću. Najvažnija među tim pogreškama je ambivalentan pristup europskih ustavovoritelja prema načinu ratifikacije ustava, a nakon nje nevažavanje komparativnih iskustava ustavotvorstva drugih federalnih saveza.

Ključne riječi: Europska unija, Europski ustav, ustavotvorstvo

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Zusammenfassung

Robert Podolnjak**

WARUM DIE EUROPÄISCHE VERFASSUNG SCHEITERTE -
DER VERFASSUNGSGEBENDE ASPEKT

Die Hauptthese dieser Arbeit besagt, dass die wichtigsten Ursachen für das Scheitern der europäischen Verfassung in der schlechten Vorbereitung und Umsetzung eines komplexen Verfassungsgebungsprozesses für einen Staatenbund von kontinentalen Ausmaßen liegen. Dieser Prozess umfasst die Fragen des zeitlichen Aspekts der Verfassungsgebung, des Subjekts der Konstitutionalisierung, der Strategie der Verfassungsratifizierung, die Verfassungsgeber und schließlich den eigentlichen Verfassungstext. In diesem Bereich ist eine relevante Debatte ausgeblieben, was ein Fehler ist, da diese konstitutionellen Gründe des Scheiterns für einen künftigen europäischen Verfassungsgebungsprozess äußerst lehrreich sein könnten. Die zentralen Ursachen des Scheiterns der europäischen Verfassung werden hier in Form einiger im Vorfeld zu beachtender Kriterien vorgetragen. Der Autor sieht die vorrangigen Fehler der europäischen Verfassungsgebung darin, dass der Verfassungsgebungsprozess zu einem hierfür ungünstigen Zeitpunkt aufgenommen wurde, dass das Dokument hinsichtlich seines Verfassungs- oder Vertragscharakters vage geblieben ist, dass der Verfassungstext sich dem Verständnis des gewöhnlichen Bürgers völlig entzieht, dass die Verfassung jeglicher Vision und Ansprüche entbehrt, dass nicht einmal ansatzweise eine Ratifizierungsstrategie konzipiert wurde, dass darauf bestanden wurde, die Bevölkerung an der Verabschiedung einer Verfassung zu beteiligen, die rechtlich und politisch in erster Linie als völkerrechtlicher Vertrag gedacht war, und darin, dass die Verfassung gegenüber der europäischen Öffentlichkeit in den Medien schlecht präsentiert und verteidigt wurde. Der schwerwiegendste Fehler war jedoch der ambivalente Ansatz der europäischen Verfassungsgeber bezüglich des Ratifizierungsmodus, gefolgt von der Nichtbeachtung vergleichbarer Erfahrungen bei der Konstitutionalisierung anderer föderativer Staatenbunde.

Schlüsselwörter: Europäische Union, Europäische Verfassung, Konstitutionalisierung

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