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*European studies*

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**‘The Assent of the People is Not Necessary to the  
Formation of a Confederation’: Notes on the Failure of  
the European Constitutional Referendums**

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Summary

It is the thesis of this paper that the main causes for the failure of the European Constitution result from the bad preparation and management of a complex process of constitution-making for a union of states of continental proportions. The crucial reasons for the failure of the European Constitution are elaborated as certain preliminary propositions. The first proposition 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. The next and related proposition is that there are powerful political reasons to avoid popular ratification of constitutional documents, especially in federal unions. The argument is that a referendum 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 means to point out that there could be significant problems with constitutional acceptance when that constitution has to be ratified by some sort of direct involvement of citizens (by people’s conventions or referendum). The third argument is that the European constitution-makers’ ambivalent approach to the method of constitutional ratification and the complete absence of a ratification strategy, resulting in the compromise procedure of ratification “in accordance with their respective constitutional requirements”, was extremely detrimental from the standpoint of ratification. The final error is that they have not made use of comparative experiences of constitution-making of other federal unions.

*Key words:* European Union, European Constitution, referendum, constitution-making



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## Introduction

In Brussels, February 2002, the Convention on the Future of Europe started and it declared very soon that its aim was to make a comprehensive European constitution, or at least a constitutional treaty.<sup>1</sup> Following the finishing of the preliminary draft of the Constitution in June 2003, and the hardly achieved agreement of the European Council on the final constitutional proposal to be sent to the Member States for ratification in October 2004, this most significant, comprehensive and longest constitution-making process of the European Union (Jopp and Matl, 2005) seems to be stuck on the final obstacle – the acceptance of the people in the referendums in France and the Netherlands.

More than five years after the beginning of the Convention of the Future of Europe, the prevailing opinion is that the EU constitution is dead or at least in a deep coma. 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 11<sup>th</sup> state, New York, in July 1788 (Rakove, 2003).<sup>2</sup> As Article 447 of the Draft Treaty prescribes, 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. The British *The Economist* was the first to predict the 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” (“Back from the dead”, January 7<sup>th</sup>, 2006).

Many analysts have been trying to explain the failure of the European Constitution. Some found it in the domestic politics of France or the Netherlands, or in the discontent of voters in these countries with the processes of the European integration (Eastern enlargement and the possible Turkish accession to the EU, the Euro, general uneasiness with the EU, Anglo-Saxon

<sup>1</sup> 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".

<sup>2</sup> However, we could also say that the American constitution-making process ended in December 1791, with the ratification of the first ten amendments (the Bill of Rights).

economic liberalism, etc.). I would rather say that the main causes of the failure of the European Constitution are to be found in the bad preparation and management of a complex process of constitutional ratification for a union of states of continental proportions. My first proposition is that in the normative sense there is no reason and need for the people to be directly engaged in creating a confederal union or in the amending of its fundamental documents. As the European constitution makers did not conceive their Constitution (or constitutional treaty) to be a transformative document changing the European Union from a confederal union of states to a federal state (or federation), as was the case in the United States in 1787, there was no theoretical or even practical reason to argue for a popular referendum for ratification of that document.

My next and related proposition is that there are powerful political reasons to avoid popular ratification of constitutional documents, especially in federal unions. The argument is 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 means to point out that there could be significant problems with constitutional acceptance when that constitution has to be ratified by some sort of direct involvement of citizens (by people's conventions or referendum), especially at a supranational or federal level.

My third argument is that the European constitution-makers' ambivalent approach to the method of constitutional ratification and the complete absence of a ratification strategy, resulting in the compromise procedure of ratification "in accordance with their respective constitutional requirements", was extremely detrimental from the standpoint of ratification. They did not propose one ratification procedure binding for all member states. In that case they could have opted for a standard parliamentary ratification (avoiding all references to the 'constitutional' content of the document they have elaborated), or they could have insisted on popular acceptance, but in that case choosing the most favorable rules for the successful ratification. They did neither. A majority of them insisted on the new constitutional terminology and quality of the document, but at the same time they did not have the courage or cleverness to devise a ratification procedure suitable for this kind of document. Instead, they let each Member State choose its own way to ratification, which decision resulted in the disastrous choice by the French and Dutch politicians. Leaving to each Member state to pursue the ratification according to its constitutional requirements was actually the worst possible compromise.

Last but not least, the European constitution-makers did not make use of comparative experiences of constitution-making in 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 solution, especially

as to the constitutional ratification procedure and the strategy of ratification of the Constitution.

*The assent of the people is not necessary to the formation of a confederation*

The first argument 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.<sup>3</sup> 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 Virginia's ratification convention, Patrick Henry explained why popular ratification is not needed: "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?" (Dry, 1985: 304)

In the terminology of the 18<sup>th</sup> century American constitutional polemic the terms 'federal government' and 'confederation' had the same meaning and 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 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. Madison said in the Convention 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 gov-

<sup>3</sup> 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 Abromeit, 1998.

ernments, 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” (Farrand, 1966, 1; 122-3, 2; 92-3, 476). The new system, based on the approval of the people would 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 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.<sup>4</sup> 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 predominant characteristics of the kind of federal system which is usually called a confederation. This definition is generally accepted by the majority of scholars.<sup>5</sup>

<sup>4</sup> 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” (Storing, 1981: 13).

<sup>5</sup> A representative sample of scholars treating the EU as some sort of a confederation: Elazar sees the EU as “the model post-modern confederation” (Elazar, 1998). Alexander Warlaigh calls it a “structural confederation” (Warlaigh, 1998). John Kincaid claims that it works as a “confederal federalism, namely, as a confederal order of government that operates in a significantly federal mode within its spheres of competence” (Kincaid, 1999). For Andrew Moravcsik the EU seems to be “more confederal than federal” (Moravcsik, 2001). Joseph Weiler thinks that it is “a combination of ‘confederal institutional order and ‘federal’ legal order” (Weiler, 2001) The most profound theoretician of confederalism today Murray Forsyth thinks that the EU is best understood as an “economic confederation” (Forsyth, 1981). Michael Burgess con-

The American constitution-makers were troubled by the fact that the Articles of Confederation legally did not have higher status than ordinary state laws and by continuing breaches of the confederal treaty by several states. The European constitution-makers did not have to face these kinds 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.<sup>6</sup>

The motive for the popular adoption of the Constitution remains the wish to make the European integration project more legitimate i.e., to help the EU outgrow the frames of a confederation or a mere treaty between states; exactly as Madison proposed for the United States in Philadelphia.<sup>7</sup>

“Europe’s constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos” (Weiler, 2003: 9) – this remark from Joseph Weiler seems to me to be the basic reason and motive for 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, it 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 pre-Civil War decades, 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 pres-

cluded 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, 2000: 265).

The almost impossible-to-translate notion of ‘*staatenverbund*’, used by the German Constitutional Court in its famous opinion on the constitutionality of the Treaty of Maastricht, 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 Wiegandt, 1994-1995.

<sup>6</sup> 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 (Friedman Goldstein, 2001).

<sup>7</sup> 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, 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 (Grimm, 2005)

ence of a single *pouvoir constituant*, consisting of the citizens of the federation in whose sovereignty a specific constitutional arrangement is rooted.

If the European Constitution is 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 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” (Weiler, 2003: 7-9). However, 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” (Weiler, 2002, 566), as he explains in another place, “if a ‘constitution’ be anything other than a European constituent power, it will be a treaty masquerading as a constitution” (Weiler, 2003: 7). This means that even if all Member States held constitutional referendums, but the decision to hold one was arrived at individually by the states, the Constitution would be still an intergovernmental treaty.<sup>8</sup>

The fact is that in today’s Europe such a ‘constitutional demos’ necessary for the creation of a federal state does not exist – European integration at all times assumes a constitution without the traditional political community which would be defined and proposed by that constitution (for a contrary opinion see Backer, 2002; Mancini, 1998; Habermas, 2001). As the French philosopher, Etienne Balibar observes, 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” (Euro-elites desperately seeking demos, Spiked-politics 21 February 2005).

During the Confederation period in the United States a significant part of the political elite (the Federalists) assumed that a single American nation was created in the War of Independence, and therefore they held the basic presumption that the American people should be entrusted with the role of a *pouvoir constituant*. However, another faction 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 such dilemma – ‘Federalists,’ who would base the European Constitution on a European constitutive power, do not form a politically relevant part of the elite in the several Member States. Just the opposite, the dominant attitude, as elaborated in as early as 1993 by the German Constitutional Court in its Maastricht opinion, is that a union of democratic states and peoples, like the EU finds its democratic legitimacy in acts of the national parliaments, which are representatives of each single people (BVerfGE 89, 155 (184)).

The debate about legitimating the European process of integration has been for years characterized by the assumption that it is possible to transfer

<sup>8</sup> This opinion was shared by all American states’ rights theoreticians in their interpretation of the ratification process of the American Constitution.

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 Antje Wiener asks "why should it matter at all, if the Euro-polity is not expected to turn into anything akin to a nation state?" (Wiener, 2003:188).

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 legitimize 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 legitimize the EU in the same way as national states. Robert Dahl recently posed this question, and he did not find real the possibility that international systems develop basic political institutions of modern representative democracy (Dahl, 2005). 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 to developing a democratic framework.<sup>9</sup>

Even if the European constitution-makers could agree on some basic democratic principles common to the constitutions of the several Member States, as e.g. people as a fountain of all power, majority government, responsibility of all public institutions, separation of powers, independent judiciary, it is a question how these general principles would be put to work 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 an exceptional diversity of citizens inside this international system – in their historical experiences, identities, cultures, values, loyalties, and languages. This questions the creation of a political culture that would induce citizens to support their political institutions during the conflicts and crises. In the end, to quote 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" (Dahl, 2005: 200). Citing the example of the USA, Dahl says that even federalism cannot sur-

<sup>9</sup> 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, 200: 524).



vive the deep economic, social, cultural, and geographic cleavages that existed between North and South in the first half of the 19<sup>th</sup> century. Although it is difficult for me to accept Dahl's claim that the inhabitants of the US in a great majority considered themselves to be Americans already by 1790, and had the feeling of common nationality very soon after the creation of the Union (Dahl, 2005: 202). When it is impossible to imagine democratic institutions that exist on the level of nation-states to exist on the level of international organizations, it is also impossible to think of the EU as a new federation in creation, let alone 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 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 were four such treaties) are the result of complicated intergovernmental agreements, often after awkward negotiations. Compromises usually the results of such negotiations are difficult to explain to the wider public in several states. Nevertheless, the heads of states and governments who have reached the deal inside the European Council could guarantee that this agreement will be ratified by the parliament in each state because governments can usually count on the majority support in the legislature. Moreover, 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 one should not expect any new treaty to be simply and quickly accepted if its ratification depends on the direct voting of the citizens. Besides, 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 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, argued 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 similarly anticipated that "great confusion ... would result from a recurrence to the people. They would never agree on anything" (Farrand, 1966, 1; 335, 2;90).

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

approved the state Constitution for the third try.<sup>10</sup> Incidentally, Massachusetts was the first American state to do so. The extent of the American constitution-makers' skepticism about the people's involvement in deciding on the Constitution is shown by the fact that in the final vote on the issue there were as much as four (out of ten) delegations at the time in Philadelphia against the ratification of the Constitution by the conventions (Farrand, 1966, 2:476).

There is similarity between the argument that the voting of people is dangerous from the standpoint of the constitutional ratification and the earlier one, that the people should have nothing with confederations. The only difference is that the former argument is normative (people should not ratify confederal treaties), and the latter points to the political 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 point out that the American federal Constitution was not 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 often did not represent the views of their constituencies authentically, nor did electoral districts have 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, were 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 (Main, 1974: 249).<sup>11</sup> This actually means that the American Constitution, which needed the acceptance of at least 9 of 13 states for ratification, might never have been ratified had it relied on the direct vote of the people (as was the case with the Constitution of Massachusetts), and not by the indirect voting in the people's conventions.

With all the glorification of the principle of popular sovereignty in America, it is often forgotten that after the problematic and hazardous experience with the adoption of the Constitution of Massachusetts and the federal Con-

<sup>10</sup> That Constitution was drafted by John Adams, one of the greatest American statesmen.

<sup>11</sup> Charles Beard was the first to claim that it is "questionable whether a majority of voters participating in the elections for the state conventions in New York, Massachusetts, New Hampshire, Virginia, and South Carolina, actually approved the ratification of the Constitution" (Beard, 1986: 1913, 325). 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. This would have been enough to preclude the acceptance of the Constitution, but for the fact that a certain number of delegates did not change sides during the convention proceedings (Fink and Riker, 1987: 227).

stitution the praxis of constitutional conventions in the USA and in several states was very rare in the next half a century in American constitutional history. Until 1812, there was no state other than New England willing to submit its draft constitution to popular approval. By the end of the 1830's 34 state constitutions were adopted, but only six by popular approval (Rodgers, 1987: 86-7, 236). Moreover, the fact that the amendments to the federal Constitution were, as a rule, adopted by state legislatures (all except one)<sup>12</sup> did not conform to the principle of popular sovereignty. We could ask ourselves: if state legislatures decided on the amendments to the US Constitution, why would it be undemocratic to let the parliaments of the Member States decide on EU treaties, or even the EU Constitution?

Numerous politicians in the EU are skeptical about European referendums because, as they say, 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 a European Commission official uttered after the lost referendum over the Euro was lost in Sweden ("Voters can be such a nuisance", *The Economist*, 18 September 2003).<sup>13</sup> An unknown German official once said that because of the higher price of bananas German citizens would probably have rejected the Rome treaties of 1957, which started the process of European integration ("Europe should vote", *The Economist*, 25 September 2003). This is not surprising taking into consideration how little citizens know of the EU. A British Foreign Office research conducted in 2001 discovered that a quarter of the British do not know that their country is a member of the EU, and 7% thought that the US is one of the Member States. In Germany, one survey showed that 31% of those questioned never heard of the European Commission ("The great debate", *The Economist*, 12 June 2003).

European politicians wanted to familiarize European citizens with the process and the goals of European integration by a constitutional convention and with public debate on the Draft Constitution. However, at the end it became clear that this 'great democratic experiment' was useless because the abstract constitutional polemics and the referendum campaign gave an ideal forum to different anti-globalist groups, anti-immigration parties, and to all kinds of anti-establishment grumblers. In the case of the European Constitution, the referendum proved to be "a potentially dangerous instrument of direct democracy" (Siedentop: 2005).

<sup>12</sup> The only amendment submitted to the popular conventions was the 21<sup>st</sup>, ratified in 1933, which nullified the 18<sup>th</sup> Amendment ratified in 1919, forbidding the production and sale of alcohol in the USA.

<sup>13</sup> French politicians forgot that the French electorate barely ratified the Maastricht treaty (with only 51% of 'yes' votes).

At the time of the making of the Draft Constitution by the Convention on the Future of Europe the German Jürgen Schwarze Professor was, to my knowledge, one of the rare commentators of the European Constitution arguing against the idea of its ratification by a referendum. As early as in 2003, he wrote that the Draft was a document “too complex” and, therefore, unsuitable for referendum voting. In his opinion, the European Constitution could have “achieve[d] its legitimacy better by its convincing content and by its continuous acceptance in practical politics and by the people”. Schultze was against the possible amendments of the German Basic Law (*Grundgesetz*), which would have allowed 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 prophetically concluded: “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” (Schultze, 2003: 1044).

Should we, then, in the adoption of treaties or, for that matter the Draft Constitution, consider the possibility of popular referendums? A serious research carried out before the starting of the ratification process showed that the referendum option had some significant shortcomings and that popular involvement in the adoption of the Constitution did not have to mean that the problem of the ‘democratic deficit’ would be solved (Auer, 2004a).

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 a rarity – after 40 EU referendums in 22 states until November 2004 they became a solid member of the European integration instruments. Among them, there were 9 negative and 31 positive referendums. These referendums can put in two groups. The first group consists of referendums in which citizens decide on accession to a specific form of European integration (the European Community, the EU, or the Euro-zone). Those referendums, starting in the 1970’s, have become almost inevitable in the process of accession of states to the EU, despite different constitutional obstacles and traditions. 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.<sup>14</sup> There were altogether nine such

<sup>14</sup> In perspective, Andreas Auer thinks a third species of national EU referendums possible, which would be related to the deciding on the accession to the EU of new countries (e.g. Turkey). Similarly, Miles divides 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 Constitu-

‘integrative referendums’, starting with the referendums in Denmark and Ireland on the Single European Act 1986/7. The referendums on the Constitution belong to this category. It is this category of national EU referendums that is problematic. This is because these referendums are implemented according to the national law, but they significantly affect the success of the supranational enterprise. This 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 EU treaties can 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. The American and Swiss experience with constitution-making is most valuable at this point.

The adoption of the American Constitution in 1787-88 and the Swiss Constitution in 1848 provide the only comparative experiences or models for the EU Constitution as adoptions of federal constitutions by the people (directly by referendum or indirectly through conventions). In the American case the constitution-makers 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 would be valid only for the ratifying states. So the American solution escaped the possibility of veto by one or a few states, while letting each state choose freely to become a member of the new federal system or not.

The solution of the 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 15.5 cantons and rejected in 6.5 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 ratified. Although the earlier constitution of the Confederation did not have a provi-

tion, was the Swedish referendum on the Euro in 2003. His conclusion is that referendums ‘belonging’ are not problematic, because in a state (or a candidate state) a critical mood of a proportion that would result in secession from, or a refusal to accede to the EU would be evident. However, referendums on further integration are evermore hazardous, as evident from the experiences with the treaties of Maastricht or Nice, the Euro or the European Constitution. Therefore, there is no inherent ‘Euro-skepticism’ in the EU in the sense of opposing the membership, but a kind of ‘federal skepticism’, in the sense of further integration leading to a possible federal Europe (Miles, 2004).

sion 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. According to 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" (Auer, 2004b, 39-40).

Had the European constitution-makers had in view the American and Swiss experience, 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 were conscious of the possibility that the Constitution would not pass the referendum hurdle in some states. The supporters of the popular referendum submitted their proposal titled, "Referendum on the European Constitution" to the Convention. In it they insisted 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 should have been held on the same day as the elections for the European Parliament. In states where no provision existed for popular referendum, at least a consultative referendum would be held. A double majority would have been required for the ratification of the Constitution – a majority of citizens and a majority of states. If the proposed Constitution was rejected in any Member State, this state could repeat the referendum, regulate a special relationship with the 'new' European Union by a bilateral treaty, or simply secede from the Union.

This way, two extremes could have been 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" (Referendum on the European Constitution, CONV 658/03 of 31 March 2003). The proposal is, essentially, similar to the one devised by the American constitution-makers.<sup>15</sup> This proposal for an all-European referendum was signed by 92 delegates of the Convention ("Ratification problems loom over Convention", *Euobserver*, 31 May 2003), 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

<sup>15</sup> The 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, 2002).

double majority rule, there is a great probability that the Constitution would be ratified – 18 member states have already ratified the document (the majority of the overall EU population), and what is even more important, the majority of voters voted for the Constitution (26.6 to 22 million) in the Member States where the referendum was chosen as an instrument of ratification.

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 1787-88 to the contemporary referendums on the European Constitution, confirms that it is in no way certain that the people will 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.

European analysts are looking at the causes of negative voting in the referendums principally in the belief that 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 just like to indicate one. Perhaps, the causes of negative voting, when we speak about federal/confederal unions, should be searched in people's fear of the 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. Inseparably connected with this remote central, imperial, or supranational government is the so-called democratic deficit i.e., a whole spectrum of problems linked to the implementation of representative or direct democracy. The opponents of the American Constitution – incorrectly named, the Antifederalists – were 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 see the supranational institutions in Brussels similarly. As simply put by Nils Lundgren, a Euro-skeptic 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." ("Closer Union or Superstate", *Time*, June 28, 2004).

Some superficial comparisons of the ratification of the American Constitution in 1787-88 with the French referendum in 2005 show an impressive similarity. They show that the main centers of support for the American Constitution were in larger, urban and coastal environments, which were, even in the 18<sup>th</sup> century America, characterized by a higher level of commerce, education and cosmopolitan spirit, and that the opponents of the Constitution predominated in rural areas, 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 (Nicolaidis, 2005).<sup>16</sup> Does this pattern of voting with an interval of more than two centuries, give sufficient ground for the claim that generally the support to a federal/confederal constitution is higher with the degree of urbanization, education, and openness of society? I cannot elaborate on this hypothesis further here, but I believe that there are enough indications present to justify further checking of my hypothesis.

### *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 as William Riker and Evelyn Fink did in their article on the strategy of ratification devised by the proponents of the American Constitution. Riker and Fink do not give a definition of the ratification strategy, but this definition, if we analyze 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 favor of the constitution (Fink and Riker, 1987: 220-255).

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 demonstrated 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. 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 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, were missing.<sup>17</sup> Those members of the Convention favoring the ratification by referendum argued for greater democratic legitimacy, and not greater probability of its adoption. Had the Convention made an analysis of earlier European referendums, they would indisputably have seen that

<sup>16</sup> 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" (Hainsworth, 2006: 105-108). See also Ivaldi, 2006.

<sup>17</sup> 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" (Sadurski, 2005).



ratification of the constitution by popular referendum was to be much more hazardous than ratification by parliaments.<sup>18</sup>

One of the American constitution-makers warned 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” (Farrand, 1966, 1; 258). The European constitution-makers did not follow this 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 the practical virtue of parliamentary ratification and less about the legitimacy value of the popular approval, we would not be talking about the European Constitution as a ‘political corpse’.

It is also indisputable that the European constitution-makers 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 did. 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” (Farrand, 1966, 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 an 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 its acceptance in the other, more reluctant states with stronger opposition to the new federal system. It is a fact that the

<sup>18</sup> Let me give just one example of the process of ‘constitutional learning’ of the European constitution-makers. Having in mind the unproblematic parliamentary ratification of the EU Constitution in each and every Member state to date, the failure of constitutional referendums in France and the Netherlands, and the fact that in four referendums on the Constitution up to date an overall majority of voters voted for the ratification; last year, some former members of the European Convention proposed a new method of ratification of the renegotiated European Constitution. According to Andrew Duff (borrowing Neil MacCormick’s idea) the modified Constitution should be ratified in the following way: first, a classical parliamentary ratification would take place in each member state, and afterwards the Constitution would be submitted “to a final, yet formal and single referendum across the EU. In this case, the national ratifications would establish the constitution on a provisional basis subject to confirmation by a (simple or qualified) majority of European citizens”. According to this procedure the European Constitution would have a much better chance of success. It looks even like a nice compromise solution between supporters of the parliamentary ratification and advocates of the direct involvement of the European citizens in the process of constitutional adoption. (Duff, 2006: 18). For a similar idea see Pascal, 2006.

states 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 also voted against the Constitution) ratified the Constitution reluctantly, when it was already in force for the other 10 states. This shows that the American constitution-makers' strategy of ratification was correct.

Further, the American constitution-makers very well devised and coordinated their activities in choosing the time and sequence of ratification in the several states, although this was not easy in those times. 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 estimated that membership in the new federal system was essential to their further survival), and they left those significant states in which they expected the greatest opposition to the end (Virginia and New York). This way the ratification convention in the most important and largest state, Virginia, with a 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 the prevalent opinion even today 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" ("Declaration on the ratification of the Treaty establishing a Constitution for Europe", *Official Journal of the European Union*, C310/464). The problem with this Declaration is that it does not specify a possible solution – the Constitution simply transferred the problem of non-ratification to the heads of states and governments with no guidelines on what to do.<sup>19</sup> In a sense, Declaration no. 30 on the ratification of the Constitution gave neither a legal, nor a political solution to the situation of non-ratification in one or more Member States.

<sup>19</sup> A German analyst (Schvarze, 2005: 1130) claims that the Declaration was intentionally so ambivalent because no one wanted to provoke a possible constitutional fiasco (a sort of "self fulfilling prophecy") with a more detailed regulation of an extraordinary situation (the failure of ratification in one or more Member States). I find such an explanation not quite logical.

## *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 is fair to conclude that the constitutional terminology of the European Convention was of no value to the EU Constitution. Just the opposite: this constitutional vocabulary mobilized all the opponents of European integration against the document seeing in it the first symbolic step towards the creation of some future European federal state. The Euro-skeptics fought against the European Constitution exactly because of its constitutional ideas and terminology: the new name suggested and strengthened the claim that the European Union is moving towards a sort of a super-state, namely a centralized statal polity (Heathcoat-Amory, 2004). Conversely, by calling the newest European treaty ‘a constitution’, the higher expectations of European citizens – that this document would strengthen democracy, the efficiency and responsibility of European institutions – were not fulfilled. The Constitutional treaty did not get “constitutional legitimacy”, in particular because it did not look like a constitution. 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. This is exactly what happened in France and in the Netherlands.<sup>20</sup>

When discussing the ratification procedure at the Convention, the European constitution-makers could not accept, that the document they were preparing requires direct popular acceptance. A large minority insisted on ratifying the Constitution “as usual”. Because of this the Convention did not specify a unique ratification procedure that emphasized the role of the people at the level of the EU, and which would be as advantageous as possible to the probability of the 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 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 by the same procedure as the confederal treaty called the Articles of Confederation was (but even they opted for representative conventions rather than a popular referendum).

<sup>20</sup> Analyzing why President Chirac decided to submit the European Constitution to a popular referendum, although he was constitutionally not bound to, Joachim Schild finds 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 (Schild, 2005: 188).

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 proved to be a dangerous instrument of democracy. There was, in my opinion, no need to jeopardize the European constitution playing with a potentially very dangerous instrument of popular democracy, especially when there was no constitutional obligation to do so, and when the rules applied were most unfavorable for the ratification. To paraphrase the words of an American Founding Father – the European constitution-makers preferred the finest theoretical principles to a little practical virtue.

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