CONSTITUTIONALIZATION OF THE EUROPEAN UNION, SO FAR AND BEYOND

Conf. univ. dr. RADU CARP
University of Bucharest, Political Sciences Faculty

The coming of a "constitutional age" in this moment of the European integration is somehow surprising. No one did predict it[1], either from the political leaders' side, or from the authors that regularly deals with this issue. Enlargement, the Euro, the Lisbon Agenda (subsequently transformed into a strategy), the means of putting into practice a common foreign and security policy, the improvement of the Schengen area were defined as top priorities few years ago. It is not our purpose to see why the necessity of having a constitution was included on the agenda. The current answer is that the institutions laid down by previous treaties were not able to work in a Union of 25 or more Member States, but this is, in our view, only a reason behind the decision to draft a Treaty establishing a Constitution for Europe. A pressure from inside was crucial and we don't know yet who had the initiative – if indeed we may speak about "Framer(s) behind Framers". In the first part of the 90's, the dominant trend was rigid: as Constitutions are typically the products of states, it is inappropriate to draw a written Constitution for a non-state polity.

The document that emerged from the long-lasting debates of the Inter-Governmental Conference is, as many comments emphasized (e.g., Ralf Dahrendorf[2]), not a constitution. The EU policy-makers chose to use an ambiguous language in writing a "Treaty establishing a Constitution" – an expression which, from the legal point of view, does not exist. There is no single definition of such a species in the whole literature dedicated either to treaties or to constitutions. Neither the provisions of the new Treaty, nor the European Convention / IGC debates do illuminate us at all. Consequently, everyone can guess what such an expression may be. The real issue at stake is the proportion between constitutional norms and norms like those included in the previous treaties. It is impossible to use an adequate method of interpretation for such a document – we are inclined to use the traditional methods of interpreting a constitution, but in fact the majority of articles of the new treaty have equivalents in former treaties underlying the EU polity.

Nevertheless, the Treaty is based on an assumtion that marks a shift with the past philosophy underlying the hierarchy of EC law, namely the supremacy of the EU Constitution in relationship with the Member States internal legal order. According to Article I-6 of the new Treaty, "The Constitution ond law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States". Traditionally, the hierarchy of EC norms was established not by legal documents, but by jurisprudence of the Court of Justice of the European Communities (subsequently, the Court of Justice of the European Union). From the moment when the new Treaty will have legal effects, a "real normative pyramid"[3] will be in place. The new Treaty will encourage the emergence of what we may call *"acquis constitutionnel"* derived and separate from the *"acquis communautaire"*.

One cannot overestimate the language used by the above-mentioned Article I-6, a language that is used by other provisions of the Treaty. It speaks – in a wishful thinking manner – about a "Constitution", without mentioning the whole title of the document. The same symbolic strategy is used as regards the structure of the document that was clearly intended to be a constitutional one. The first part deals with institutions, the second part with fundamental rights and the third part it's

---

[1] Neil Walker, *The EU as a Constitutional Project*, The Federal Trust, online paper 19/04.
[2] Ralf Dahrendorf, *The Constitution of Europe*, Project Syndicate, Institute for Human Sciences, July 2004.
[3] Elena Simina Tănăsescu, *Sur la possible constitutionnalisation du droit communautaire*, Analele Universităţii din Bucureşti, seria Drept, No. I/2004, p. 18.

about EU policies. A tricking method of abusing the constitutional language: in fact, the document is agreed not by an *assemblée constituante* but by "High Contracting Parties" – the national governments of the Member States. It is to be ratified by national parliaments and in some countries by referenda, organized at national level. These referenda will be in reality a way of endorsing the existing governments or the ones who participated in the final act of Intergovernmental Conference in June 2004. Not underestimating the intellectual potential of the EU citizens, everyone will have some difficulties to express a clear "yes" or "no" vote, because of the new treaty sophisticated structure. The issue will be more complicated if the governments decide to hold a referendum not only on the Treaty text, but also on the 36 Protocols, 2 Annexes and 2 Declarations (concerning provisions of the Constitution and Protocols annexed to the Constitution) annexed to it[4] which clearly shows that there is no unitary version of what an "EU Constitution" shall be. Even more risky, this method is nevertheless more democratic – in fact, the only one that may impose certain democratic standards for the future EU as the most elaborate expression of a polyarchy.

According to Article IV – 443, the new Treaty may be revised by using a procedure very similar to the one had lead to the final version of this Treaty (a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission, which adopt a recommendation to a conference of representatives of the Member States – a new IGC). The Treaty may be revisec also by a simplified revision procedure, described in Articles IV – 444 – 445. It is not possible for the European Parliament or for the yet utopian "people of Europe" to revise the Treaty. It seems that, for long decades to come, the *assemblée constituante* at the level of the European Union will be more connected to executive(s) than to the legislature, a reverse path than the one at the national level.

During the workings of the European Convention the issue of where to include the fundamental rights in the Treaty has shown cleavages between different concepts of legal order. Finally, even some participants disagreed, the symbolic meaning won: traditionally, in almost every constitution the second chapter is dedicated to fundamental provisions of this Charter are addresed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law".

One of the results of the meeting of Heads of State or Government in Brussels, 17 – 18 June 2004 was the introduction of a new paragraph (7) to Article II-112: "The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States". In this respect, the new Treaty is different from a constitution, as the constitutional norms rarely give legal value to official interpretations. As a rule, the constitutions only define rights and indirectly give to the judiciary the whole freedom to interpret them, in accordance or not with international human rights instruments.

The hybrid nature of the new Treaty is to be seen also in the description of the EU institutions. If we take into account the whole picture, nothing has changed. The relationship between the main institutions remains unchallenged – the dual nature of the executive power and the prerogatives of the European Parliaments to control it are almost the same. The new weighting of national votes in the Council[5] or the new procedure used for appointment of the Commission members (Article I – 26) is only technical mechanisms which improves the functioning of an enlarged Union, without inducing a real constitutionalization process of these institutions.

---

[4] According to the Article IV – 442 of the Treaty establishing a Constitution for Europe, *The Protocols and Annexes to this Treaty shall form an integral part thereof.*

[5] See the *Protocol on the transitional provisions relating to the institutions and bodies of the Union*, annexed to the Treaty establishing a Constitution for Europe, Official Journal of the European Union, C310, 16.12.2004.

Up to now, more than ten Member States announced that they would hold a referendum and other states are still uncertain in this matter. The Treaty will not enter into force if one or more Member States fails to ratify in accordance with their national constitutional requirements. Ratification of the Treaty will be possible at least in 2006 and possibly well beyond. What will happen in the later case? Should Romania and Bulgaria accede on the basis of the Nice settlement, and ratify the Treaty later? Or should accession be delayed until the Treaty comes into force, so that the national accession referendums are conducted on the basis of the Treaty? We shall remind the particular case of Romania where, according to the Article 145[1] of the Constitution, introduced in 2003, a law adopted by the two Chambers of the Parliament will decide accession to the EU – consequently, a national referendum is not needed, but it may organized for that the accession acquires popular legitimacy.

There is a risk involved in the process of ratification. We have witnessed how difficult it was during the last IGC to achieve a compromise amongst a small number of men acting on behalf of their national governments. It will be more difficult to reach a successful ratification all across Europe: all the Member States shall agree and there is no room for debating the content of the Treaty. According to Jo Shaw[6], increasingly complex legal scenarios would arise if voluntary withdrawal occurred after steps had been taken by those Member States which had ratified the Treaty to agree to enter into a new Treaty without the non-ratifying state(s). The process of ratifying the Treaty may fail, due to the procedure adopted by the Treaty itself – which is not different from the previous experiences. A possibly failure of this process may be a first consequence of the fact that the question of treaty or constitution was alluded to at the beginning, namely at the 2001 European Council meeting in Laeken. In our view, we have to focus not on what the new Treaty really is, but on what European Union need to design for a better functioning. Despite the abandonment of the Maastricht pillar system and the creation of a legal personality for the EU (Article 1), the EU, from a legal point of view, will still have a hybrid nature, neither a political entity searching for a constitution, nor an international organization defined by a treaty. In some respects, with or without the new Treaty, the Union is based on rules with constitutional force and the adoption of the Charter of Fundamental Rights as a binding element of the EU legal order – even if, as we previously mentioned, there is not much similarity between the part two of the treaty and a chapter dedicated to rights included in a national constitution – will add a new constitutional dimension.

A constitution may be defined from two perspectives: *le sens materiel* and *le sens formel*. If we take into account the first perspective, we are in the presence of a constitution even if the rules are customs or part of the primary law, but these rules shall refer to the limitation of the powers and to the fundamental human rights. This was the sense of the Article 16 of the 1789 *Declaration of Men and Citizens Rights* ("every society where neither the guarantee of the rights is assured nor the separation of powers is determined does not have a constitution at all") and this is why United Kingdom and Israel does have a constitution even in the absence of an original *assemblée constituante*. We may conclude that not only the EU is based on quasi-constitutional rules, but also that it already has a constitution, *au sens materiel*. This is composed by the primary and secondary law (*acquis communautaire*), the precedents or the law made by the Court of Justice of the European Communities (subsequently, the European Court of Justice and, according to the new treaty, the Court of Justice of the European Union), as well as the national constitutions and the related jurisprudence of the national constitutional courts. The European Union is already defined by many elements of what Ingolf Pernice called "multilevel constitutionalism", a concept that was developed to explain the functioning of the Union "as a result of a process of establishing progressively a supranational level of public authority based on the national constitutions and binding them together into a single constitutional system: a divided

---

[6] Jo Shaw, *What happens if the Constitutional treaty is not ratified?*, http://www.fedtrust.co.uk/admin/uploads/PolicyBrief6.pdf.

power system to meet the challenges of globalization in the postnational era"[7]. The new Treaty may be seen as an intermediary stage between having an EU constitution *au sens materiel* and an EU constitution *au sens formel*[8]. The battle for a real, formal European Constitution is not yet conquered.

The last part of our analysis addresses a very sensitive issue: what is right now the European Union, with or without the Treaty establishing a Constitution of Europe? According to some opinions that we entirely share[9], it is a system of independent and coordinated governments that is a federal system of government. For political reasons, the members of the European Convention and subsequently the participants to the IGC had refused to endorse the formula initially proposed by the Presidium of the Convention, namely that the European Union exercice its powers "in a federal way".

But if the Union is already a federal entity, what kind of federalism is best fit to describe its functioning? Cooperative (the German model) or dualist (the US model)? In some areas, the EU fulfils the cooperative federalism criteria. It is characterized by a permanent dialogue between the executive of the Union (the European Council and the Council of Ministries) and those of the Member States. A balance between the two forms of executive power that have to be maintained ensures the coherence of this dialogue. Both forms of the executive do have legitimacy, but for different reasons: democratic, and historical respectively. In other areas, like Euro, it is the dual federalism (characterized by a definitive transfer of competences to the state) that describes the functioning of the Union. But these are only the two extremes that we may give as example. Between the two there is a whole variety of means for accomodating the powers of the Union with the powers of the states. Even without equivalent in any political entity of the world with a constitution, this system is not the most original part of the European Union. It is the Commission. Jean Monnet intention was to create an independent body of commissioners with executive prerogatives. If his method is still valid in an enlarged Union remains an open question.

There is a paradox involved in the current constitutionalization process. This will lead to a kind of parliamentarism or presidential regime (or a combination between the two) and will consequently weaken the role of the Commission. A result not certainly intended at the time when the Treaty of Rome has been drafted. No matter the ratification result, Europeans shall decide in a future not easy to foreseen: do they want an institutional *status quo* for their polity or a kind of super-state?

---

[7] Ingolf Pernice, *Multilevel constitutionalism in the European Union*, European Law Review, No. 27/2002, pp. 514-515.

[8] For a same argument, see Simina Tănăsescu, *op. cit.*, p. 17: „il est possible dans le futur pas très lointain qu'on assiste à la naissance d'une véritable Constitution européenne, cette nature juridique lui étant attribuée non seulement du point de vue matériel, mais aussi formel".

[9] Bernard Barthalay, *Monnet, le mot et la chose: 1954 – 2004*, L'Européenne de Bruxelles, No. 28/2004.