

Federalism, Sovereignty, etc.

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Draco Preamble, Articles I-1, I-9 and I-17¹

For the first time in history, the aspiration to ‘an ever closer union’ between European peoples (not states) was laid down in the Treaty of Rome of 1957. The same idea has now found expression in the preamble to the *Draft Treaty Establishing a Constitution for Europe*: ‘Convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny’. However, as is usual in politics, the precise meaning of this formula is left unclear. Can pride of national identity and history go together with the forging of a common destiny? Without trying to answer this question, this short article looks at whether (a) European history, (b) the wording of the proposed treaty itself and (c) the international context can give some clues as to where forging a common destiny between the peoples of Europe might lead in a constitutional sense. Will the Union develop into a more or less centralised entity that resembles a state or will it remain the rather loose and open conglomeration of states it presently is?

EUROPEAN HISTORY

After the decline and fall of the Roman Empire, the confused mixture of Roman and German legal rules gave birth to three relatively independent systems of law: canonical law, private law and public law. Canonical and private law must here be left aside. In the course of the process of state formation the system of public law split up into two: law *within* states, i.e., constitutional law, and law *between* states, i.e., public international law. Although undoubtedly

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¹ All references in the text are to the Convention’s Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution’s provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

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these systems influenced each other during their development, they grew more and more apart as the states consolidated. The 19th and first half of the 20th centuries were the high tide of sovereign territorial states and of the development of constitutional law. International law, on the other hand, remained stagnant for a rather long time, not moving very far from the principle of *pacta sunt servanda*. It only began to develop slowly at the end of the 19th century. Perhaps the most interesting facet of the *Draft*, from an historical point of view, is that it proposes a treaty (international law) to establish a constitution (constitutional law). The transition from international law to constitutional law, however, will not be completed even after the eventual ratification by all the contracting partners, because the constitution can only be amended by treaty (Article IV-7).

All European states came into being as conglomerates of small medieval domains. Most of these states were welded together by powerful ruling houses, with one notable exception: the Swiss republic. The Dutch provinces were already reasonably united before the Northern part rejected monarchical rule. Although religious and linguistic differentiations played a role in the process of state formation, most of the states that came into being and survived the struggles amongst each other were more or less religiously and linguistically mixed. Without exception but with varying success, the rulers strove to strengthen and centralise their states, based on an ever-growing bureaucracy. Success in this respect depended upon the strength and continuity of the ruling house, the geographical and international situation and the degree of linguistic and religious homogeneity. Some monarchical rulers proved to be rather strong indeed, but since the introduction of formal constitutions beginning at the end of the 18th century, monarchical rule has been on the decline. The few monarchies that still exist in Europe are mainly ceremonial. One can observe a similar trend with respect to the formal decentralisation of the states. In the 19th and first half of the 20th century the picture is still rather mixed, but after the Second World War formal centralisation generally grinded to a halt or was reversed. Most European states are by now either decentralised unitary states with increasing autonomy for the regions or federations with historically or linguistically defined Member States. In the United Kingdom, devolution is well under way, and even in France a tendency towards decentralisation is discernable.

The trend is, however, not solid but ambiguous. As far as I can see, important legislation generally still takes place, and perhaps increasingly so, at the central level, while implementing the laws is left to the regional governments. This raises a first question: how real or fundamental is this historical trend of decentralisation? How will democracy and accountability follow the increasing distance between legislation and administration or implementation?

THE WORDING

So much for the historical evolution concerning the existing European states. What does the *wording* of the proposed treaty itself reveal about the future of the Union? Firstly it should be pointed out that, although the *Draft* (Article I-2) determines that the Union shall be open to all *European* (my emphasis) states, which respect its values and are committed to promoting them together, the members of the Convention refrained from defining Europe. The values on which the Union shall be founded, i.e., respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights (Article I-2) are without any doubt a product of the European Enlightenment but are by now, in principle, adopted by many states beyond the conventional borders of Europe. Because a generally accepted definition of Europe does not exist, the conclusion must be that the Union is in principle open to all states that accept its values. The notions ‘Europe’ and ‘European’ in the context of the *Draft* have historically been understood and do have a function but cannot lead to the inclusion or the exclusion of a state.

Secondly, the notions of ‘people’ and ‘state’, which in the late 19th century converged into the notion of ‘nation-state’ – wisely not used in the *Draft* – have not been disentangled by the members of the Convention. Will the citizens of each Member State together keep forming a people? Will the citizens of the Union together form something like a European people too, leading to a sort of European state, or can a people exist independently? In any case, the notion ‘the peoples of Europe’ in the preamble of the *Draft* (repeated in the Charter’s preamble, part II) does not reappear in the text of the proposed constitution itself.

The venerable notions of ‘sovereignty’, ‘confederation’ and ‘federation’ and their derivatives that have been so important in the history of the states and the states-system in Europe have not been used in the *Draft*. Part of the problem with ‘federation’ is that while to British ears ‘to federate’ sounds like ‘to centralise’, to Belgian ears it sounds like ‘to decentralise’. A fundamental reason to shy away from using ‘sovereignty’ is that the concept of state is changing. Although many political scientists and constitutional scholars maintain that the state as such is alive and kicking, it is my conviction that it has lost a good deal of its vigour. Because of international economic and financial entwining and the loosening of the grip states have on their citizens, the high tide of what has been called the sovereign state is probably past. And sovereignty will not return in a European veil.

In a certain sense, the notions mentioned above are replaced by the less laden terms of ‘competence’, ‘subsidiarity’, ‘proportionality’ and ‘flexibility’ as these

are used in Articles I-9 and I-17 of the proposed Constitution. The principles of subsidiarity and proportionality regulate the limits and proportions of the conferral of competences to the Union by what formerly might have been called the Member States of a confederation or a federation. It is striking that 'subsidiarity' in the proposed constitution is clearly meant as a safety belt against wilful centralisation and that the flexibility clause (Article I-17) provides only a very laborious way to get around subsidiarity if this is proven necessary. Unanimity of the Member States and consent of the European Parliament are required in this case.

INTERNATIONAL CONTEXT

States are being formed and reformed in an international setting. All European constitutions came into being by a concurrence of internal and external developments. The European Union is, according to the proposed constitution (Article I-11(4)), striving to be a player on the scene of world politics. The main external powers are the United States of America and Russia. During the Cold War, the position of the Western European countries was much like an American protectorate, institutionalised by the North Atlantic Treaty Organization. The margins for the Western European countries to conduct, alone or together, an independent foreign policy have been narrow, so they hardly felt the need to co-ordinate their policies independently from the United States nor did they feel the need to spend enough money to build a defence force equal to that of the United States. Now that the threat of the Soviet Union has disappeared, it will be a long time before Russia resurges as a military and economic power. The European Union is deeply split over the course that American imperialism, benevolent or otherwise, seems to take.

Even if the Union would succeed in creating its army, this would not be equal in the foreseeable future to that of the United States. The only weapon that might in the long run allow Europe to be on par with the United States, in a world in which perhaps economic strength is becoming equally important as military force, is the Euro. But as long as all members of the Union do not adopt the Euro – the position of the United Kingdom is essential – and not backed by a strong political authority, this remains wishful thinking.

QUESTIONS

1. The centralising trend that characterized the history of European states has come to a halt. What is the nature of modern decentralisation? Can a union of states each tending to decentralise, yet move towards centralisation?

2. Can notions such as citizens, subsidiarity, flexibility and proportionality replace those of people(s), sovereignty and federalism?
3. What change of the international context is needed to force Europe out of its present hybrid status between international and constitutional law?

