

A Crisis is a Terrible Thing to Waste

From the Board

Europe's Constitution is in a state of coma, waiting for some shock from reality that may bring it back to life. Our business as law professors is not to think about such a shock, let alone to fancy creating one through our proposals. Instead, legal thinking should help politicians to grasp the occasion when it comes.

America's example is inspiring, if well considered. When the American federalists had obtained ratification of their Constitution in 1788, a gesture of conciliation to the defeated party, the anti-federalists, was in order. The first Congress of 1789 indeed adopted a set of ten amendments sought by the anti-federalists. In the form of additions to the original document, this *Bill of Rights* is still at the heart of the American Constitution. It points the way ahead for Europe.

The basis for the American balancing act was laid during the ratification procedures in the different states, where objections to the Constitution were expressed in the form of recommendations. It paved the way for the Bill of Rights. This failed to happen in Europe. Ratification procedures in France and Holland turned into inarticulate chaos. The two countries with pro-European peoples are now beginning to understand how their well intended refusals mostly serve the cause of less well intended opponents of integration. Their perplexity is a waste of opportunity. A crisis is a terrible thing to waste.

Action is needed which acknowledges and even expresses Europe's condition, while changing the situation. There is no hope, however, to change the size of the document or to steal past the forces of hesitation. Both are part of the European construct and its tradition. Nevertheless, the American example can help if it is well understood and if the differences are respected.

In the US, the conciliatory gestures to the Constitution's opponents, followed its consummation. In Europe, this is now precluded; concessions have to be made *before* ratification. This means that objections need to be turned into proposals for change right now.

Instead of directing these objections at changes in the present document, however, the proposals can be phrased as a set of *additions* to it. Just like in the US. This not only avoids breaking up the existing compromise, it provides a way to respect the approvals already given by the majority of peoples and states. And there are greater advantages.

Unlike the minor concessions made to the Danes and the Irish after their rejection of previous treaties, the 'bill of conditions' to be added to the Constitutional Treaty will attract debate not only in hesitant states but across Europe. It may lead to a powerful and limited statement understandable to all. This could, on the one hand, assuage fears of Europe's evolution by stealth. On the

other hand it could awaken Europe's idealists and bureaucrats from their federalist dreaming. It would leave the Constitutional Treaty's details intact and channel debate to fundamentals. A 'finality' of the European Union, the ideal phrased at the outset of the constitutional process but since forgotten, would be put into words.

What could this 'bill of conditions' contain? It could, for one thing, restate unambiguously that, *unlike the American states*, Europe's member states are forever to hold the centre of stage in the Union. That each government is to remain present in and part of the European executive. And that all member states together and individually (*including their peoples*) will keep being involved in all fundamental decisions. All of this is already implicit in the present constitutional document, but it needs to be established clearly and permanently.

It would even help governments to understand and defend their own positions better. The Dutch government is now reading the No vote as a 'fear of losing sovereignty'. At the same time it holds that the country is at present only 'semi-sovereign' anyway, due to the Union. This puts it into a double bind and misses the point. Holland is not losing out to Europe. As a member of the European Council the government is master of the country's fate to a greater extent than it would be outside this body. And it may carry and share greater responsibilities than it could on its own, if it accepts to do so instead of belittling itself. And if it invites the Dutch people to follow instead of to complain

The amendment debate, even if conducted as here suggested, is insufficient. To work, it needs to be backed by something that unblocks the presently hung situation and allows a restart, in France and the Netherlands to begin with. Short of crude historical upsets, only elections will provide the shock and the legitimacy necessary. Elections in turn will only help if the European Constitution has been made an issue.

It is probably already too late now for the French and Dutch elections in 2007 to provide the hinge factor. So we shall have to wait for the European elections of 2009.

In the meantime, let us propose an actual draft. Here it is, as originating from the Amsterdam Hogendorp Centre.

WTE/ HOGENDORP centre, February 2006

The European Bill of Conditions

**Draft
Protocol to be Annexed to
The European Constitutional Treaty**

The Member States of the European Union,

Considering that the conditions to the Union's further evolution need to be better expressed, have agreed as follows:

I. Member States are responsible for public order and security in their jurisdictions, subject to the Constitutional Treaty.

II. Member States are responsible for their social systems and for the levels and nature of social protection these provide.

III. Member States of the European Union conduct their foreign affairs and conclude treaties subject to their obligations under the Constitutional Treaty.

IV. Member States participate equally in the Union's executive bodies.

V. Member States are fully represented in the Union's legislature.

VI. Member States' citizens' rights shall not be abridged by the Union, subject only to qualifications under the Constitution.

VII. Member States' constitutions and the Union Constitutional Treaty are the foundations of the Union government.

VIII. Member States' and the Union's representative institutions and procedures secure democracy in the Union.

IX. Member States' courts are responsible for the application and interpretation of European Union Law in their jurisdictions, subject to their obligations under the Constitution.

X. Amendment of the Constitution is subject to agreement by the Member States including their peoples, as under their constitutional rules.