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Europe's Evolving 'Constitution'

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He has also held visiting professorships at the Universities of Tokyo, California, and Cairo, and regularly provides training on refugee law to academic, nongovernmental, and official audiences around the world. Among his more important publications are a leading treatise on the refugee definition, *The Law of Refugee Status* (1991); an interdisciplinary study of refugee law reform, *Reconceiving International Refugee Law* (1997); and most recently, *The Rights of Refugees under International Law* (2005), from which this essay is excerpted.

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Europe's evolving 'constitution'

The following essay is an updated excerpt based on the keynote address the author delivered at the ninth International Conference of the European Union Studies Association last year in Austin, Texas, at which he was awarded EUSA's Lifetime Contribution to the Field Prize. Stein was the first lawyer to receive the prize, which had been awarded three times previously. The complete address appears in the summer 2005 issue of EUSA Review, Vol. 18, No. 3.

Eric Stein

by Eric Stein

Let me start with a quotation the source of which you may or may not recognize.

"[There is a form of society], in which several states are fused into one with regard to certain common interests, although they remain distinct, or only confederate, with regard to all other concerns. In this case the central power acts directly upon the governed, whom it rules and judges in the same manner as a national government, but in a more limited circle. Evidently, this is [not] a federal government, but an incomplete national government, which is neither exactly national nor exactly federal but the new word which ought to express this novel thing does not exist."

While you contemplate the likely author, let me read one more passage from the same sources: "The human understanding more easily invents new things than new words, and we are hence constrained to employ many improper and inadequate expressions."

It may come as a surprise to you—as it has to me—that the author is none other than the 19th century French aristocratic traveler, Alexis de Tocqueville, describing one of the categories of his model of composite states, and—what is even more astounding—his prophesy of the predicament which we have been facing in dealing with European integration. This is what Professor Neil MacCormick has said about the European Community: "Here we have not merely a new legal system, but maybe even a new kind of legal system. . . . We have remained, as it were, bewitched with the paradigm of the state and its law. . . ." We are "juristic pre-Darwinians," unwilling to welcome a new species, any "novel interlopers into our judicial consciousness." In fact, we still insist on translating solutions developed within the state to the novel phenomenon and using state nomenclature. This, in a sense is a natural tendency since the state is, so to speak, the only show in town if one looks for a model, and international law is of little help.

I shall mention some more or less egregious examples of the "translation" conundrum. Take the world "demos." Demos, I am told by my colleague in classics, meant anywhere from 6,000 to 13,000 Athenians, free and male, who met in an assembly (Ekklesia), first in the Agora and later in the place with the intriguing name Pnyz. What, please tell me, has this picture to do with the situation of the peoples in the European Union member states or with the non-existent European people? Yet demos and demoi have become embedded in the vocabulary of EU scholarship.

Another—and perhaps more serious example—is the term "identity." National identity in the ethnic-cultural-historic-territorial sense is—sociologists tell me—a well established category. But, the so-called "European identity," to the extent that it exists today, is an entirely different cup of tea, and we should have another name for it. If nothing else, the babble of 20 languages and the prospect of Turkey's admission to the Union makes a mockery of any reliance on ethnicity or history.

In an interesting research project, the British sociologist Yasemin Soysal examined how Europe is portrayed in school books and debates about school curricula in the United Kingdom, Germany, and France, and her conclusion illuminates the problem. She points out that what she calls European identity differs considerably from the national type of identity which is deeply rooted in history, cultures, or territories. She found that history schoolbooks may glorify Europe's Roman, Catholic, or even Greek origins as remarkable European achievements; but these origins are less and less offered within a religious or ethnic narrative, and increasingly in the more abstract form of the universal principles they contain; what holds Europe together, in schoolbooks, she concludes, is a set of civic ideals and universalistic principles.

I would agree that these ideals and principles, along with common expectations, European Union law, Walter Hallstein's "Rechtsgemeinschaft," and the drafting of an EU constitution, provide the foundation for an evolving identification with "Europe." In other words they provide the foundation for a European identity, if I must use the term, in the absence of a better word for a new phenomenon.

My third example of the translation problem is applying the "democracy-accountability" concept to Union institutions. Let me just mention the approach taken in the recent draft constitution; that document incorporates the present form of the so-called dual accountability, that is the accountability of ministers in the European Council to national parliaments and the European Commission accountability to the European parliament elected by the peoples in the individual member states. The accountability of ministers to their parliaments remains illusory in most member states, but the constitution would have sought to increase the role of the European parliament as a means of improving accountability.

In addition, however, the constitution text included three other innovations: first, a "participatory model," defined as a structured, systematic dialogue between the institutions and the civil society. A spokesman for civil society argued that this could either be a potential "milestone" for a change in decision making, or just "a blast of hot air" ending again in mere consultation. Professor Jo Shaw shared the latter skeptical view. According to the second innovation, the national parliaments would be given an opportunity to give their opinion on proposed Union legislation, clearly an effort to advance the subsidiarity principle. And finally, an elaborate provision for a popular initiative aimed at inducing the commission to act where it has failed to act.

Lastly, in this litany of translation troubles, are the terms "constitution" and "constitutionalizing." The use or misuse of these concepts is startling. I have seen references to Constitutio Westphalica and a Westphalian constitutional moment. But let me go back just to the aftermath of World War II—halcyon days of international institution building. The basic documents of international organizations founded at the time, such as the International Labor Organization and the World Health Organization are named "Constitutions." Allow me to mention a talk I gave back in 1955—just half a century ago—while I was on the staff of the State Department Bureau of United Nations.

I questioned the use of the term "constitutional" with reference to the United Nations. The U.N.—I said—was a loose association of sovereign states in a world fundamentally dominated by power considerations and we could not analyze its problems in terms of an orderly community, operating under a rule of law. Today, I would suggest a similar caution in the current academic debate about "constitutionalizing" the World Trade Organization.

The same year, in 1955, I was part of a working group of officials, facing a blank sheet of paper, with a mandate to make a first draft of a basic document for a new international organization which was to deal with the novel nuclear energy problems. This was at the time when the vision of a new, post-war world order had begun to fade. I don't remember which one of us in the working group had the good sense of calling the new creature modestly "an agency" and its basic document a "statute" rather than "a constitution." The International Atomic Energy Agency was eventually established in Vienna and it has emerged as an important player in the nuclear nonproliferation campaign.

And this brings us chronologically to the birth of the judicial "constitutionalization" saga in European integration. It is, to add a touch of drama (with a grain of salt) a story of a dark

conspiracy and outrageous collusion, engineered by a coven of judges and lawyers against unsuspecting governments. It started, you will recall, with a trivial controversy over import duties—the notorious VanGend en Loos case—which the Dutch court referred to the European Court.

In 1962-63 I was spending some months in Brussels with the legal service of the commission at the invitation of its director general, the brilliant and influential Michel Gaudet, formerly of the Conseil d'Etat. I was able to sit in the meeting of the legal service lawyers that was to work out a formal opinion of the commission in the VanGend case for submission to the Court of Justice. In the fascinating debate, advocates of the "constitutional" approach argued with the traditional internationalists. I must confess that—looking at the text of the treaty—I did not see an alternative to the internationalist position. In the end, led by the director general, the "constitutionalists" prevailed. The conclusion, written in the commission brief and accepted by the court, was that it was the Court of Justice, not the national court, that decides whether a Community treaty provision had a direct effect in the legal orders of the member states and the court would apply the most liberal criteria of interpretation: the spirit, general scheme, and wording. In the court's vision, the Community treaty is not an ordinary treaty. The Community constitutes a new legal order "for the benefit of which the states have limited their sovereign rights within limited fields, and the subjects of which comprise not only member states but also their nationals and that imposes obligations upon, and confers rights upon individuals as part of their legal heritage."

I do not know which one of the judges on the European Court was the principal co-conspirator with Gaudet-cabal. But at any event, it is the commission rather than the court that deserves the credit (or the blame) for the basic idea of "constitutionalizing" the EC Treaty, a move designed to replace the international law canon with public law concepts—all this on the basis of rather scant provisions of the Community treaty.

The result, as evidenced by subsequent European Court decisions, has been to turn the broad Community treaty obligations addressed to governments and the principles which were to be implemented by the political institutions, into directly effective provisions enforceable by interested individuals. The "vigilance of the individuals," as the Court put it, along with the reduction of the unanimity requirement in the council have made the common and the single markets a reality.

The second act in the constitutionalization drama was the equally well known *Costa v. E.N.E.L.* case. It originated in an obvious collusion between a Milan justice of the peace and Costa, a local attorney, who hated the nationalization of the public utility in his city. Costa sued to question the payee of his monthly electric bill and the justice of peace managed to push the case before the Italian Constitutional court and the European Court of Justice. The European court seized this opportunity, passed up in VanGend, to establish the general principle of "precedence" of Community law over national law and it claimed the last word in any conflict between the two legal orders. So, the broadly defined direct effect of Community law in the national legal orders, the principles of supremacy, preemption, and implied powers and the crucial case law on foreign affairs powers—along with the expansion of the unique system of judicial review and enforcement of Community law—have become the foundation of the "supranational" or proto-federal legal order, so aptly envisaged by de Tocqueville.

On this foundation the court has built further constitutional-type general principles, such as a broad definition of European citizenship and the protection of basic human rights of individuals against acts of Community institutions. The court has fashioned its own human rights doctrine from the constitutional traditions of the member states and from the European Convention on Fundamental Rights. Incidentally, the court's solicitude for individual rights is in a stark contrast with its persistently restrictive interpretation of the individual's direct access to the court. This widely criticized interpretation was to be partly "overruled" in the draft constitution.

In an expansive mood, the court called the Community treaty a "constitutional charter," and it tended to construe the Community powers—and its own jurisdiction—quite broadly in the early years when the Community legislation was scarce and there was a need to fill in the gap by judge-made law. The court was criticized on that score. There is some evidence that as Community legislation multiplied, the court has inclined toward a less expansive definition of Community powers in both the internal and external spheres of its activities; but this assessment is contradicted for instance by the court's more recent bold interpretations of gender equality. Also, the court continued to fill in gaps in the treaty system, for example by the path-breaking holding on member state liability for damages caused to individuals by member state breach of Community law, and the liberal use of the concept of "cohesion," and of

the very general treaty provision calling for cooperation in the Community. The court's jurisdiction has been extended along with the competences of the Union by successive amendments of the constituent treaties and it would have been further expanded in the constitution for Europe. It is too early to estimate the impact of the principle of subsidarity, but it is interesting that only in October 2000, for the first time in its history, the court arguably struck down a Community law for lack of Community competence.

So much for the constitutionalizing process which appeared to reach its climax in the drafting of the treaty extablishing a constitution for Europe. This is what the president of the European Parliament, Josep Borrell Fontelles, had to say about the magic of the word "Constitution" at the signing of the document in Rome in October 2004:

"The word 'Constitution' . . . carried political and symbolic weight. We should stand by our choice of this word, as we Europeans know how significant it is. In the past, the word 'Constitution' has been a point of departure when dictatorships have fallen. It has helped to bring a new dawn of democracy to Poland, to France, and to my own country, Spain, not so very long ago."

This is a telling explanation why the Europeans, having created "a new thing" in de Tocqueville's words, refuse to find a truly new name for it even though it has features incompatible with the standard pattern of a national constitution. As a treaty, it had to be ratified by all member states through national treaty making processes, and it provided for a right to withdraw from membership, and in its Part III, it dealt in massive detail with policies and voting formulae. But the first and second parts have all the trappings of a national basic law. The official title, "Treaty Establishing a Constitution for Europe," clearly distinguishes between the treaty as a form and constitution as a substance (Lenaerts). At the end of the day, the European Council of Heads of State and Government recognized the inherent ambiguity and spoke of a "Constitutional Treaty."

At any rate, the constitution seemed to represent a new phase in the half-a-century integration process which has been marked by a persistent tugging, with the connivance of the hesitant governments, at the umbilical cord that ties the new creature to the international law "Grundnorm."

In concluding, I shall take the liberty to lapse again into a bit of personal musing. There is in all of us a need for a vision that would help us "escape the two-dimensional, stale image of the world." For me, it was the first idea of the new post-war international order centered on the United Nations. As I mentioned earlier, I worked in the State Department Bureau of United Nations (later significantly renamed the Bureau of International Organization). I started there in 1946. By the early 1950s, I became disillusioned with the unfulfilled vision of the UN. At the same time, dispatches passing over my desk reported about the novel, strange structure rising in Luxembourg. There is in all of us—as Dr. Freud tells us—a longing for returning to the locale and dreams of our childhood. To see my old Europe attempting to shed its old ways for a new art of governance was an appealing prospect.

Clearly, these thoughts and feelings have been at the foundation of my positive attitude toward European integration for more than half a century. Professor Trevor Hartley, who emphatically rejects the constitutionalist theory, has written that I apparently was the first to put that theory forward. Yet it was the court itself that first enunciated the theory in its VanGend and Costa opinions. The basic concept has been elaborated by scores of scholars, most recently by Professor Daniel Halberstam [of the University of Michigan Law School] in his captivating theory of "recalibration" of the position in the Union of individuals as citizens, consumers, officials, judges.

There has been, needless to say, articulate opposition to such theories by realists, neo-functionalists, and intergovernmentalists of different hues. Clearly, the Union, an evolving creature with an ambition for a self-referential basis, does not fit readily into the crystalline, positivist, anti-constitutionalist world. I readily confess my membership in the constitutionalist club—but with an important caveat. I expect that the Union will become a premier player in the world arena, but I have consistently disagreed with the idea of some "constitutionalists" that the Union will or should or could become ultimately a centralized federation, a "superstate." [New York University Law] Professor J.H.H. Weiler has made the case against that goal more forcefully than I could. He points to the negative, exclusionary features of such a form, to the absence of a truly constitutional foundation and to the pervasive differences between the peoples of the member states I mentioned earlier.

As of September 2006, 15 of the 25 member states have ratified the Treaty Constitution; it was defeated in the popular referenda in France and The Netherlands and its future is uncertain.