

## **Jessica Koch: Extra Time to Think: Political and Legal Options after the Double 'No'. The European Union in the Process of Constitutionalisation**

The double 'no' of the citizens of France and the Netherlands to the EU constitutional treaty brought the crisis of Europe to light. That it was the French and the Dutch of all people who voted against a more citizen-friendly Europe should make us think, even though there certainly were reasons for their 'no'. Those reasons include not only discontent and distrust towards the course steered by Europe, policy-making over the heads of the citizens, fear of foreign infiltration, and the debate about the potential accession of Turkey to the EU but also, as a result of all this, the spectre of pay and social dumping, fear of globalisation, and the loss of national identity threatening from a European superstate.

Most of the 15 member states have by now ratified the constitution, but next to France and the Netherlands, there are other problem candidates that still have not done so, such as Great Britain, Poland, and Czechia. The referendum which failed in June 2005 was at first followed by a phase of 'reflection' in which the situation was analysed. The summit of June 2006 decided that the fears of the citizens should be considered and a detailed discussion with them conducted and evaluated afterwards. However, the plan to develop a timetable to pave the way for the constitutional treaty had to be postponed, the 'phase of contemplation' going into extra time. Now, the German presidency of the Council is to submit a report by 2007, which is to serve as a basis for all future resolutions.

Without a constitutional treaty, the status quo will persist for the time being, the Union's legal framework for action being safeguarded in the EC and EU treaties. In view of the eastern enlargement, however, the EU urgently needs a reform of its contractual foundations – a fact that is not denied even by the keenest critics of the constitution.

Now, what comes next? To some member states, the constitution is already dead, to others it has merely been shelved. At this point, it is worthwhile to take a look at the options discussed with respect to the future of the constitutional treaty as well as the consequences which the implementation of these options would have for European integration.

Some governments propose retaining the constitutional treaty and continuing the ratification process. Yet this path, which is endorsed by the German federal chancellor, requires a fresh start in France and the Netherlands where, however, an unaltered version of the draft would certainly be rejected again. It can only be hoped that the pressure of the numerous states that already ratified the draft will induce a change of mind in those countries which said 'no' before. Another possibility would be to retain the treaty and add a protocol, declaration, or charter, as was done when the Danes said 'no' to the Maastricht Treaty or when the Irish rejected the Treaty of Nice. While an opt-out clause in the form of a protocol would not solve the problem, a 'declaration on the social dimension' might move the French to say 'yes'. It would be the task of the editors of such a declaration to describe certain elements of the constitution in greater detail without, however, substantially expanding it.

An alternative to retaining the constitutional treaty could be to initiate follow-up negotiations to revise certain parts of the constitution. However, this might prove a can of worms, since new negotiations might endanger those compromises on reform steps that have already been reached.

What would also be imaginable are 'low-key' constitutional solutions, i.e. abridged versions of the constitution; in this context, several different approaches suggest themselves. On the one hand, various parts of the constitution might be differentiated further, which would save the

institutional and procedural reforms of the constitution. On the other, the French home secretary, Mr Sarkozy, suggested developing a slimmed-down version of the treaty, which would be tantamount to a limited revision of the treaties that are currently in force. Such a 'low-key' constitutional treaty would indeed permit implementing contractual reforms quickly but would put the compromise meanwhile reached about the entire treaty complex on the line again.

Another approach is the option of a 'Nice-Plus Treaty', i.e. further integration on the basis of existing treaties. Without the community's reform prerogative, states such as France and the Netherlands might thus obtain an opportunity to speak out in favour of European integration – on the basis of the Treaty of Nice. There are various ways to implement reform steps below the legal threshold of a treaty amendment. These include not only taking advantage of the leeway offered by the treaty and of the right of self-organisation to change the institutional practice but also making Council meetings public by altering the rules of procedure, dividing the Council into specialist councils and a general council and, finally, introducing petitions for a European referendum on the basis of inter-institutional conventions. The advantage of this option would be that it would permit implementing small integration steps without making changes to the treaty, thus helping to keep the integration and reform process from stagnating.

Finally, it would be worthwhile to think about forming a 'core Europe' as proposed by the Belgian Prime Minister, Mr Verhofstadt. In this model, which some people call the 'Europe of two speeds', more extensive cooperation within a certain group of member states is confronted by less extensive cooperation between other members, although the legal basis of cooperation within the first group is not clear. Due to the different involvement obligations of the member states, however, different speeds already exist within the EU, one example being the Euro zone. After all, a core Europe would only have a chance if at least the economic core states which also belong to the monetary union participated in it, France and the Netherlands being two of them.

But how do the European Commission and the European Parliament view this issue? It was the objective of the Commission to win back the citizens' trust in the policies of the Union by means of a communication policy with a focus on dialogue, which is laid down in 'Plan D for Democracy, Dialogue, and Debate'. In its strategy paper of May 2006, designed as a contribution to the Council summit in June of the same year, the Commission suggested to 'sort out the current problems with the constitutional treaty step by step'. In view of the 50<sup>th</sup> anniversary of the Treaties of Rome in 2007, it calls for a political declaration of commitment to European values and goals. Still, the Commission's position towards the EU constitution remains moot. It does favour the principles of the constitution, but it apparently does not intend to pose as an advocate of the project. The Parliament, on the other hand, took a much clearer stand when, in the beginning of 2006, it demanded in its resolution on a phase of reflection that the constitution should come into force no later than the European elections of 2009. Written by two MEPs, Mr Duff and Mr Voggenhuber, the report emphasised that without a reform of the institutions, it would be impossible to enlarge the EU further after the accession of Bulgaria and Romania and that, moreover, all citizens of Europe would have to be included in the process of shaping the future of the Union. On the other hand, the report clearly dismisses the idea of forming a 'core Europe'.

So far, none of the urgent decisions regarding the constitutional treaty and its future have been made, nor will they be made in the near future. Given the different positions on this issue, there is hardly any progress to be expected within the next two years. However, political players agree that the currently existing treaty cannot serve as a basis for an enlarged Europe in the long run. This being so, they are endeavouring to change the eurosceptic tenor which is widespread among Europe's citizens by making things more transparent, and to promote a more positive attitude

towards the constitution.

The goal of the German presidency of the council is to write a timetable for the roadmap of the next two years. In her policy statement of May 2006, the German Federal Chancellor, Angela Merkel, emphasised her will to lead the European constitution project to success. However, the German presidency will have to face the problem of having to conduct its policy at the time of the parliamentary elections in France and the Netherlands.

The constitutional crisis of the Union shows that a fundamental debate about the nature and the goals of European integration should in fact have taken place a long time ago. It is no longer possible to dodge commencing a detailed dialogue with the citizens about both content-related and geographical cornerstones of the Union or, indeed, repairing its weak points – the only approach that promises to overcome this crisis sustainably.