



Statewatch: Viewpoint

The Constitution is Dead: Long Live the Constitution: an EU state in the making

What would happen if all the libraries and state archives were burned down and all copies of the constitution lost? This question was posed by Ferdinand Lassalle in his famous speech on the "Essence of Constitutions" delivered in Berlin in 1862.(1) The answer is, nothing. The "real constitution", that is the state's "actual relations of force", its institutions and its army, would still exist. It would continue its usual stately path: "A king whom the army and cannons obey - this is part of a constitution!"

The founding father of German social democracy formulated his question one and a half centuries ago in the context of the debate on the Prussian constitution. The same question, albeit slightly modified, could now be applied to the EU constitution: what will happen, now that French and Dutch citizens have rejected the "Treaty on a Constitution for Europe" in their national referenda last year? The answer: the constitutional treaty, several hundred pages long plus annexes, has disappeared from the EU's political agenda. However, although the text is as dead as the proverbial dodo, its content is alive and kicking. This is because to a large extent, the rejected EU Constitution reflected the sad constitutional reality of the EU which the Treaty was supposed to wrap in a legitimating veneer.

The internal market, the centrepiece of the EU, in Lassalle's words "is a part of a constitution". Market freedoms - the free circulation of goods, capital, services and persons (labour) - are the basic rights of the EU. They are infinitely more concrete than the vague rights charter in the second part of the Constitutional Treaty and they are taken seriously by the EU institutions. Although the Services Directive (which seeks to open Europe's service sector for more competition and is named after the former European Commissioner Frits Bolkenstein who introduced it.) was reduced in size after strong protests by trade unions and some left-wing parties, the market liberalisation of social services remains one of the Commission's central programmes.

Another "part of a constitution" is the EU's militarised external border policy, the basis of which was laid down at the end of the 1990s: the building up of "capacities" for military and civil (police) "crisis management" including the deployment of "battle groups" is already well established. The Military Proliferation Agency has already been established and in the final version of the constitutional text was renamed the "defence agency". Article I-43 (3) would have given the EU's military-industrial complex a constitutional status: the agency should support the creation of "capacities" through the promotion of new technologies and ensure the necessary industrial basis. The start of the agency's activities, however, did not require the sanction of the constitutional article; a "Common Action", passed in July 2004 by the Council of Ministers(2) sufficed. At that point, the Constitutional Treaty had not even been signed. The fact that it will not come into force has only a minor effect on the EU's common security and defence politics. The six-monthly reports of the rotating EU presidencies announce steady progress - in the extension of "capacities", in regular training and, of course, in operational missions. The most recent is taking place in the Congo.(3)

Constitutional Treaty or not, continuity exists in the EU's justice and home affairs politics. The main buzz words from the relevant chapter of the constitutional text (part III chapter IV) have by no means been made redundant by the text having been "burnt". The

Commission and Council of Ministers continue working at the "gradual introduction" of an "integrated border control system at the external borders" which equips restrictive asylum and immigration policies with teeth and claws. The European border control agency (Frontex) has commenced its work and common operation teams are assisting national border guards off the Canary Islands to fight the "illegal immigration" of African refugees.(4) The controversial Asylum Procedures Directive, with its two-fold safe third country and country of origin provisions, has been passed and a list of "safe" third countries is being drafted. New electronic anti-migration instruments - in particular the Visa Information System (VIS) - are being set up.(5)

"Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions", says Article III-270 of the draft EU Constitution. This principle already underlined the framework decision of 2002 on the EU Arrest Warrant. The Council has almost completed the related framework decision on a European Evidence Warrant, which will allow Member States to issue a warrant instructing another Member State to collect and hand over evidence wanted in criminal proceedings in the issuing state. In the face of all this mutual recognition, the rights of the accused remain largely ignored. The meagre Commission proposal dealing with this matter was trimmed even further during the Council of Ministers negotiations.(6)

The same applies to the draft framework decision on data protection, which was intended to lessen the impact of the "principle of availability" which is to guide the future data exchange between police forces.(7) Data protection can wait, according to some powerful Member States, provided that the "free market" of police data and its "availability" across borders is guaranteed as soon as possible.

"On with the show!" would be a good slogan for EU justice and home affairs ministers. Central to their quest is the text of the Hague Programme, adopted at the EU summit in November 2004, which provides a detailed task list and implementation deadlines for justice and home affairs policies for the next five years.(8) The Constitutional Treaty should hereby "serve as a guideline for the aspired aims", says the five-year plan of the otherwise market-obsessed EU. Now the guideline will not, as originally planned, come into force at the end of 2006. But that is irrelevant: the related "review" which, on occasion of the otherwise inconsequential "change of legal basis", was supposed to check if the plan had also been put into practice by then, will simply not be carried out. The real constitution of the EU was not up for discussion anyway.

The wrong question of sovereignty

The EU is growing together, and not only at the economic level by way of an expanding internal market, but also and especially in the traditional core areas of state sovereignty: at the military level, in internal security matters and with regard to external border control.

The EU only possesses formal and independent remits concerning the latter point. Although it does not (yet) have its own border police, the Member States' border guards already control the external borders "in common interest", with common instruments (the Schengen Information System and soon the VIS) and under the coordination of a common "agency". For those who want to enter Europe as refugees or immigrants and who lack necessary loose cash, the EU has long become a connected territory that does not begin at the external borders that are partially lined with barbed wire and walls. The EU's external borders are dynamic - they reach from buffer states, whose police and military act in the EU's interest against "illegal immigrants", to the inner heartland of the Member States, where "third country foreigners" are subjected to strict controls.

Formally, military and external policy as well as police and criminal law are only subject to intergovernmental cooperation. The EU does not have a foreign minister although the Constitution would have created this position. For the time being, the general secretary of the Council acts as a shadow minister whose remits now already include the coordination and development of military cooperation.

An EU home affairs minister does not exist either. The Standing Committee on Internal Security (COSI), which was to be set up under Article III-261 of the EU Constitution and brings together all EU police institutions (including the intelligence agency Joint Situation Centre - SitCen) may be created without this legal basis as well. For police forces, borders between Member States have increasingly lost importance. Although there is no interrelated police law at EU level, its reality has long been created. Firstly, the Schengen Implementation Agreement (SIA) laid down the initial premises for cross-border police methods within the EU. Secondly, in the name of the war on terror, the EU has drafted a mass of new decisions and framework decisions that are binding for Member States. Thirdly, the effectiveness of "soft law" can be seen in particular with the example of EU rules on demonstrations and sports events, which largely consist of existing recommendations and "guidelines". Fourthly, the network of bi- and multilateral agreements that are based on the SIA are by now surprisingly far-reaching. At times, Member States even grant their police officers mutual executive powers. Fifthly, on the basis of the "principle of availability", the internal borders between police data banks will fall in the near future as well.

The EU's police law might be a patchwork of holes but the EU is considerably more than a supranational organisation in which sovereign states work together only on selected individual questions. The EU is rather an (as yet) incomplete state. This is not altered by the fact that the second and third EU pillars are not "communitarised" and that the Commission, as a "European executive", plays a growing but not a decisive role. There is no "EU government"; it is the national governments who lead the Council (of Ministers). However, in this process they do not act independently but within an alliance. They create an EU legislation which strongly imposes on the national framework, whose implementation is binding at the national level and which is demanded and checked by the Council and the Commission.

The example of the EU Arrest Warrant clearly showed how small the remits of national authorities really are. When the framework decision was passed in June 2002, the then German red-green government coalition as well as the conservative-liberal opposition celebrated it as an "anti-terrorist measure". When the Legal Affairs Committee of the Lower House of the German Parliament had to implement the decision into national law, the party representatives discovered that this framework decision was shaking the foundations of Germany's Criminal Procedural Law. The result was an Implementation Act which was deemed unconstitutional by the Federal Constitutional Court. The court, however, did not dare attack the framework decision itself, in fear of a lawsuit being brought before the European Court of Justice.⁽⁹⁾ EU legislation annuls national restrictions and it is systematically being used by national governments to this effect. The former interior minister Otto Schily could circumvent yet another discussion on the introduction of biometric passports this way. An EU Directive, drafted with significant German involvement, was enough to realise an uncritical implementation.

For a new and different constitutional debate

The incomplete state of the EU does not only have a "democratic deficit" that can simply be redressed. Its legislative process favours the executive and it will continue to do so even if the Council decides in the near future to pass decisions by qualified majority voting in the third pillar with the involvement of the European Parliament (EP). This is not only ensured by means of the tight *acquis*, the legal "assets" of the Union, below which the EP cannot fall and which it is not allowed to fundamentally question. But this bias is also ensured by the Parliament itself, which is dominated by the conservative and social democratic state parties of Member States whose representatives, when push comes to shove, vote the way they are told to from home (cf. the directive on retention of telecommunication data).⁽¹⁰⁾ Under these conditions, stronger parliamentary control would only accelerate EU politics, it would not affect a fundamentally new orientation, nor democratisation. What is lacking in the EU is a critical public, which even at national level is scarcely visible.

Market liberalism, militarisation and the development of a repressive apparatus within and at the borders of the EU - these were the main objections of those who opposed the

Constitution. At least in France and in the Netherlands they succeeded in convincing the general public. Now Europe needs a new constitutional debate, one that tackles the "real" constitution of the EU.

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(this article first appeared in *Bürgerrechte & Polizei/CILIP* 84 (2/2006))

References

1. Ferdinand Lassalle, On the Essence of Constitutions, Speech Delivered in Berlin, April 16, 1862, published in *Fourth International*, vol 3(1), January 1942, pp 25-31.
2. OJ L 245, 17.7.2004.
3. See Presidency Report on ESDP, Council Document 10418/06, 12.7.2006.
4. See the Mark Holzberger in *Bürgerrechte & Polizei/Cilip* 84 (2/2006), pp 56-63.
5. See the Heiner Busch in *Bürgerrechte & Polizei/Cilip* 84 (2/2006), pp 29-43.
6. See *Bürgerrechte & Polizei/CILIP* 83 (1/2006), pp 86 ff.
7. See Tony Bunyan in *Bürgerrechte & Polizei/Cilip* 84 (2/2006), pp 21-28.
8. Council Document 16054, 13.12.2004, see also Norbert Pütter in *Bürgerrechte & Polizei/Cilip* 84 (2/2006), pp 9-20.
9. See *Bürgerrechte & Polizei/CILIP* 81 (2/2005), pp 87-89.
10. Holzberger, M.: 'Aktenberge bis zum Mond' in: *Bürgerrechte & Polizei/CILIP* 82 (3/2005), pp 59-67.