

A Reflection on the Debate over the European Constitution

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¹ «Phi Delta Kappan», 31, September 1949, pp. 23-33. Speech to the Second National Conference on UNESCO, Cleveland, Ohio, 1 April 1949, available online at <http://www.udhr.org/history/114.htm>.

² *Introductory speech by President V. Giscard d'Estaing to the Convention on the Future of Europe*, 28 February 2003, available online at <http://european-convention.eu.int/docs/speeches/1.pdf>.

³ The main treaties are the Treaty establishing the European Coal and Steel Community, Paris, 1951; the Treaties of Rome establishing the European Economic Community and European Atomic Energy Community, 1957; the Treaty on European Union, Maastricht, 1992; the Treaty of Amsterdam, 1997; the Treaty of Nice 2001; plus the Merger Treaty, 1965; the Single European Act, 1987; and the accession to the treaties by new members in 1973, 1981, 1986, and 1995.

⁴ To illustrate the point, the Convention's original draft of the second paragraph read «Drawing inspiration from the cultural, religious and humanist inheritance of Europe, which, nourished first by the civilisations of Greece and Rome, characterised by spiritual impulse always present in its heritage and later by the philosophical currents of the Enlightenment, has embedded within the life of society its perception of the central role of the

Eleanor Roosevelt said, «in an international document you must try to find words that can be accepted by the greatest number of people», in reference to drafting the Universal Declaration of Human Rights. Commenting on the famous formula «All human beings are born free and equal in dignity and rights», she said, «there were other people around the table who wanted it expressed in such a way that they could think in their particular way about this question [...]» but in the end, «these words were agreed upon because they stated the fact that all men were born free and equal, but they left it to each of us to put in our own reason»¹. I think it would be wise to remember these words when discussing the absence of Christianity from the Preamble for the European Constitution.

The debate on the omission of Christianity prompted me to take a closer look at the whole Draft Preamble. After reading it, I asked myself several other questions: does it have the form of a preamble to a constitution or the form of a preamble to another in a long line of treaties? Based on its content, does it have more to say about Europe's past, about its present or about its future? And from its style, does it belong to the States or the peoples (or people) of Europe?

The first question recalls the pains Valéry Giscard d'Estang² took to describe the purpose of the Convention on the Future of Europe as being to draft a «Constitutional Treaty». On looking at the text, this hybrid construction is most clearly seen in the Preamble's closing words: «Grateful to the members of the European Convention for having prepared this Constitution on behalf of the citizens and States of Europe. Who, having exchanged their full powers, found in good and due form, have agreed as follows». The last sentence is shared nearly word for word with the other treaties of European integration going back to the Treaty of Paris in 1951 establishing the European Coal

human person and his inviolable and inalienable rights, and of respect for law», while revised draft of the second paragraph reads «Drawing inspiration from the cultural, religious and humanist inheritance of Europe, which, always present in its heritage, has embedded within the life of society its perception of the central role of the human person and his inviolable and inalienable rights, and of respect for law». Though the revision does much to reduce the specific weight of the past in the Preamble, the syntactic structure of the sentence, does much to give the reader the impression that the new Constitution is predicated on Europe's past.

⁵ Both the notion of that the sovereign or government should be subject to a higher or fundamental law as implicit in the New Testament injunctions to «obey God rather than men» (Acts 5:29) and «render to Caesar the things that are Caesar's, and to God the things that are God's» (Mark 12:17), and the notion of government based on a contract or covenant, as seen in the fundamental contribution of puritanism to English constitutionalism, are deeply entwined with Europe's Judeo-Christian heritage.

⁶ This can be seen in the following examples: from the Treaty of Paris, 1951, «Recognizing that Europe can be built only through practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development»; from the Treaty of Rome creating the European Economic Community, 1957, «Resolved to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe»; from the Treaty of Maastricht, 1992, «Recalling the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe; [...] Resolved to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including, in accordance with the provisions of this Treaty, a single and stable currency».

and Steel Community up through that of Nice in 2001, and so the document reads much more like a treaty than a constitution³.

In the body of the Preamble, in addition to the controversial second paragraph on the historical roots of European unity that originally included the Enlightenment but omitted Christianity, the first, third and fourth paragraphs all look to Europe's past for the basis of the values that the Union embodies, and so leaves the reader with the impression that the project is more centered in the past than the present or the future⁴. Furthermore, as the debate over Christianity's place in this heritage illustrates, Europe's past can be as divisive as it is unifying (however, whatever the outcome of the debate, the essential role of Europe's Christian heritage in the very notion of constitutionalism cannot be erased⁵). As Mrs. Roosevelt would say the values are widely shared and unite Europeans, but the reasons why they are shared are diverse and divisive.

Looking back at the preambles of the earlier treaties, I think they are clearly superior to that of this Constitutional Treaty. In the spirit of the functionalist philosophy of Jean Monnet, each of the earlier preambles expresses concrete purposes for the Treaty it introduces, from placing key sectors of the economy under the High Authority of the Coal and Steel Community in 1951 to reinforcing the institutional basis of enlargement in 2001⁶. These declarations of intent clearly oriented the concerns of Europe towards resolving problems of its time and enabled each treaty to achieve success by fulfilling the declared ends and so to strengthen European integration. They grounded each new step in the process of greater integration in addressing present needs with new solutions.

The weaknesses of the body of the text are underscored when compared to with the brief quotation from Pericles' funeral oration which introduces the Preamble: «Our Constitution is called a democracy because power is in the hands not of a minority but of the whole people». It would be hard to find a more prestigious rhetorical model and the Preamble seems pale in comparison. While the Preamble is preoccupied with the past, Pericles speaks in a timeless present. Furthermore, he clearly uses language to reduce the distance between himself and his audience. He invokes the name of the «people» and emphasizes its comprehensiveness/inclusiveness by speaking of

⁷ For a well-known, but extremely interesting view of the role of the «other» in the Union see J.H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, working paper, available at <http://www.jeanmonnetprogram.org/papers/00/001001.html>.

⁸ Of the 28 nations that sent delegations to the Convention only 14 have preambles to their constitutions. Five use the first person plural to refer to the people or nation in the «We, the people of Ireland», «We, the Polish Nation – all citizens of the Republic», «We, the citizens of the Czech Republic», «we Slovenians», «We, the Slovak nation», while in Bulgarian Preamble «we» is used to refer to the Grand National Assembly. In the remaining eight either the «people» or the «nation» is directly or indirectly invoked as granting legitimacy of the Constitution. The failure to utilise the first person for its rhetorical effect in the preambles of France, Germany, Spain, Portugal, Lithuania, and Estonia may reflect the reluctance to use the first person in ordinary legislative discourse. Legislative texts, despite being excellent examples of performative language, rest on the authority of the speaker, the legislator. A necessary condition for explicit performative expression is the use of the first person, which is nowhere to be found in this kind of text; the performance is achieved implicitly with no mention of the lawmaker. So the explicit use of both the name of the source of legitimate authority, the «people», «nation», or «citizenry», and the use of first person must overcome well-established practice and deep prejudice in the drafting of law. This is so, despite the fact popular sovereignty is explicitly affirmed in nearly all European constitutions.

⁹ The Court of Justice first explicitly made this claim in the case of *Les Verts* in 1986 (Judgment of 23 April 1986 in Case 294/83 ECR 1986-4, p. 1365) and reiterated its position in 1991 (Opinion of 14 December 1991, ECR 1991-10, p. 6102) by declaring «the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law».

the «whole» people. While in the Draft Preamble speaks of «the peoples of Europe» and «Europe» as if they embody «the other» and fails to bring the Union any closer to the people of Europe⁷. Pericles also begins with the first person plural thus eliminating all rhetorical distance and effectively identifying with his audience, while in the body of the Draft Preamble «Europe» is «it» and «the peoples of Europe» is «their». The Convention seems to have been afraid to embrace the language of «We the People», or even of «We the Peoples», following the example established by the Preamble to the US Constitution, and followed in several of the constitutions of the members of the Union⁸. This kind of language would go a long way in bringing the Union closer to its citizens as had been called for in the Laeken Declaration.

The text would be the fourth major revision of the treaties since the fall of the Berlin Wall. The need to revise the treaties may be an index of the inherently international rather than supranational nature of the Union. Making the European Union not a new kind of federation but what is often called a «Union of Nations». Calling what is essentially a new treaty designed to meet the needs of enlargement a constitution may backfire. Since while the Constitutional Treaty claims to move the Union closer to its citizens, it is still substantially a creature of the sovereign States (a claim that is only reinforced by the failure the Intergovernmental Conference to approve the draft). And though the EC Court of Justice has long claimed Europe has a «constitution charter, the treaty»⁹, it did not use the term in the same way most of the citizens of the Union do.