
This book, stemming from a 2003 expert meeting on the (then) Draft for a European Constitutional Treaty, and published in 2007, contains eleven essays on different aspects of the idea and praxis of the constitutional system of the European Union. The eleven essays are divided into four parts: the first part deals mainly with the problem of constitutional preambles and focuses on the separation of church and state in the European Union. It contains just one essay, by Cliteur. The second part (containing essays by Kinneging, De Hert, Ten Napel and Van Bijsterveld) deals with various aspects of the constitutional system of the European Union. The third part, containing essays by Cuyvers and Nieuwenburg, deals with the specific problem of democracy in the Union and part four (with essays by Voermans, Sap, Zoethout and Lawson) focuses on some specific organs of the Union: the legislature, the (new) permanent President of the European Council and the Court of Justice.

In some ways, the publication of this book came at an inconvenient moment. Most of the essays clearly show that they were originally written or at least conceived under the impression that the Constitutional Treaty would come into force and then had to be adapted after the referenda in France and the Netherlands. But they were finished (and published) before the Treaty of Lisbon had taken concrete shape and form. This gives at least some of the essays in the book a certain “vagueness” that was perhaps unavoidable because it was not clear what the constitutional text to be commented on exactly looked like, but could perhaps have been prevented by postponing the publication by a year or so.
This does not mean that this book lacks merit. Far from it: most of the essays are thorough and well-researched, albeit not always very original. Cliteur’s essay on the preamble of the draft-Constitutional Treaty is a learned, but for connoisseurs of his opinions on the matter not very innovative defence of the laicist State. Kinneking’s essay, in which he compares the European legal framework with the US Constitution and finds the latter a more attractive example, is also not very original: comparisons between Europe and the United States are not lacking in number and scope.

The scope of this review is by necessity rather limited. I shall therefore reserve a more detailed discussion to the two essays that I consider to be the most original in this book. The first one is by De Hert. In his “Europe in the 21st Century and the First 18th and 19th Century” he argues that the problem of Europe might not be that it is (becoming) too federal, but that it is not federal enough: or, to be more precise, that the European Union works with a model derived from the wrong kind of federalism, namely the German model of cooperative federalism instead of the US model of dual federalism. Since there is (neither under the Nice Treaty nor under the Constitutional Treaty) no hard core of national sovereignty that is structurally outside the scope of European law, there is no guarantee, De Hert argues, that the European Union will not slide towards a unitary model; the majority of Member States are themselves unitary States and of the federal ones only Belgium contains strong autonomous regions and communities. The inclusion in the Constitutional Treaty of a Charter of Rights does not preclude that: on the contrary, according to De Hert it threatens the legal plurality of Europe by giving Europe a constitution that is based on just one model (the rights-and-values-centred constitution of which the German Basic Law is the classic example), whereas the Member States have a whole variety of constitutional models. It even threatens the very freedoms it wants to guarantee by protecting just some rights (thereby raising the question whether other rights are less worthy of protection) and protecting citizens from infringements of rights which are only conceivable if one were to assume that the European Union has powers that were never conferred on it – thereby kindling the suspicion that Europe might have them after all (which is of course the classic Hamiltonian argument against a Bill of Rights in the US Constitution).

An original contribution to the ongoing European debate is also to be found in the essay by Cuyvers, “The Aristocratic Surplus”. Using the classic Aristotelian division of legitimate States into Monarchies, Aristocracies and Polities, he analyses the European Constitution (both under “Nice” and under the Constitutional Treaty) and concludes that the Aristocratic element is by far the strongest in the constitutional system of the EU; only the European Parliament can be clearly traced back to the Polity (of which, according to Aristotle, democracy is the perversion). This means that Europe is predominantly governed by the few, not by the many. While this is not inherently bad, Aristotle himself already argued that mixed systems of government tend to be far more stable than pure ones. And whereas on the one hand, Cuyvers argues, the logic of democracy has become more and more persuasive, leading to the genesis of the democratic citizen that De Tocqueville foretold, the aristocratic surplus of the Union has also become stronger and stronger. This conflict of trends is one of the origins of the democratic deficit of the Union, according to Cuyvers, and it cannot be solved by simply increasing the powers of the European Parliament. The problem is not that the European Parliament is not democratic enough, but that it is surrounded by organs that are without exception aristocratic in nature. The way to solve this is to make other European organs more democratic (for example: letting the Commission be elected by national parliaments) or to decrease their influence on the whole of the framework (for example: removing major parts of regulation from the Treaties and altering these into secondary legislation, thereby decreasing the influence of the ECJ on the constitutional framework).

The most interesting among the other essays (at least in my opinion) were those by Zoethout and Lawson, both dealing with the Court of Justice as a human rights court. Zoethout focuses on the increasing importance the Court will have after the entry into force of the Char-
Zoethout discusses the ways in which these new powers of the Court can be checked. She compares the ECJ with the US Supreme Court, a Court that also interprets a Bill of Rights and is also independent from the political branches. The most important features leading to legitimacy and accountability of the (decisions of) the Court are (according to Zoethout) the fact that the Court can base its decisions on the original intent of the framers, and the possibility of dissenting opinions of individual judges. Zoethout strongly suggests introducing the possibility of dissent into the procedures of the ECJ as well, in order to further legitimize the decisions of the Court, and to introduce a special human rights chamber within the Court to deal with the specifics of human rights interpretation. In the final essay of the book, Lawson tries to find an answer to the question what is the best “lodestar” to guide the European Union in its search for a human rights-based policy: the Charter of Rights, the ECHR, the constitutional traditions of the Member States or (other) international treaties. Lawson argues that the best lodestar is not always one and the same. Rather, Europe should let itself be guided by different human rights treaties and traditions under different circumstances: for instance, when the Union is dealing with foreign policy, the “international bill of rights” might be an appropriate instrument; when dealing with the Member States, less so. This, in itself, is not very surprising. Rather, Lawson’s essay is a very useful overview of the ways in which the ECJ and the ECHR have influenced one another and have generally reacted to each other’s decisions.

*Rethinking Europe’s Constitution* is, therefore, a solid contribution to the ongoing process of rethinking the shape and future of the constitutional framework of the EU and its dealings with its Member States. The major weakness of the book lies in the fact that it is somewhat incoherent. When reading the different chapters of the book, one is often struck by the idea that the fact that they are all part of the same book is more or less coincidental. There is scarcely any overlapping theme to *Rethinking Europe’s Constitution*. The authors do not react to each other’s essays – and sometimes that appears to be a missed opportunity. Zoethout’s essay on the growing powers of the Court after the coming into force of the Charter of Rights could have benefited from a confrontation with De Hert’s analysis of the Charter as threatening, instead of securing liberty; Voermans’s essay on the coming of age of the European legislature might have benefited from reflecting on the notions on aristocracy by Cuyvers; and so on. In this, the editor could have played a more active role in urging his authors to cooperate. As it stands, *Rethinking Europe’s Constitution* is more a compilation of separate essays than a composite book.

Of course, the essays can be criticized individually as well. To give just one example: in her essay on the ECJ in comparison to the US Supreme Court, Zoethout completely ignores the very political character of the nomination process of the Supreme Court’s members: this is a striking contrast to the almost complete absence of any political involvement in the nomination of the members of the ECJ. She also fails to make clear that, especially in its human rights-jurisprudence, the Supreme Court almost never uses an “original intent” approach, but mostly works with its “evolving standards of decency” approach, leading it far away from the literal meaning of the Constitution.

These and other remarks do not tarnish my appreciation for the book. As I already said, it forms a valuable addition to the ongoing discussion on the European polity: bringing together a Belgian and several Dutch authors, it is also a sample sheet of the opinions of expert legal scholars on the state of the Union in those countries in these strange “twilight years” between the demise of the Constitutional Treaty and the (possible) coming into force of its successor, the Treaty of Lisbon.

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