

**Avbelj, Matej (ed.): The Future of EU Constitutionalism.** Modern Studies in European Law, vol. 116. Oxford/London/New York/New Delhi/Sydney: Hart Publishing 2023. ISBN, 978-1-5099-6290-7 (paperback), 256 pp. \$ 40.56

## Introduction

*The Future of EU Constitutionalism* is an excellent collection of essays discussing the potential and challenges of the EU's constitutional setting. The volume offers a refreshing account of European Union (EU) constitutionalism through an analysis of EU common values, its formal, economic, and social constitution and sovereignty in light of challenging events of the past decade such as Brexit's strike against European integration, the Covid-19 pandemic, threats to EU core values of rule of law and Russia's invasion of Ukraine.

The book's reflection leans against the backdrop of the 2021 Conference on the Future of Europe. The Conference's methodology combined a digital platform with in person events hosting debates held by Citizens' Panels<sup>1</sup> (European and National) and civil society. The European panels were organised through lottery selections of residents weighted by criteria to ensure accurate representation of EU diversity from a gender, geographical, educational and socio-economic standpoint. One third of the 200 panellists was between 16 and 25 years of age.<sup>2</sup> National panels were organised by Member States. The Panels held their discussions in small groups and plenary sessions and, in the end, produced a final report.<sup>3</sup>

In June 2022, the Commission adopted a Communication to follow up on the Conference's recommendations. Some panels' ideas require reforms to be implemented.<sup>4</sup> In November 2023, the European Parliament adopted a resolution asking the European Council to call a convention for the revision of the Treaties, pursuant to Art. 48 TEU.<sup>5</sup> As of early 2024 the item was not yet on the Council's agenda.<sup>6</sup> The Parliament's reform proposal includes

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<sup>1</sup> European Citizens' Panels, <<https://wayback.archive-it.org/12090/20230417170950/https://futureu.europa.eu/en/assemblies/citizens-panels>>, last access 21 January 2025.

<sup>2</sup> Conference on the Future of Europe: European Citizens' Panels Panels' Guide, <Guide link>, last access 21 January 2025.

<sup>3</sup> Conference on the Future of Europe, 'Report On The Final Outcome' (May 2022), <report link>, last access 21 January 2025.

<sup>4</sup> European Commission, 'Conference on the Future of Europe Putting Vision into Concrete Action', 17 June 2022, COM(2022) 404 final, at 3.

<sup>5</sup> European Parliament, Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, 2022/2051(INL).

<sup>6</sup> Ralf Drachenberg, Annastiina Papunen, Rebecca Torpey and Christoffer Nielsen, 'Key Issues in the European Council: State of Play in March 2024', European Parliamentary Research Service, March 2024, at 24, <[https://www.europarl.europa.eu/RegData/etudes/STUD/2024/757805/EPRS\\_STU\(2024\)757805\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2024/757805/EPRS_STU(2024)757805_EN.pdf)>, last access 21 January 2025.

creation of conditions for some of the Conferences' panels' recommendations to be implemented (e.g. in the area of public health an expansion of EU competences would be needed)<sup>7</sup> and institutional reforms to empower the Parliament, increase the Council's transparency and the Commission's accountability as well as strengthening the role of social partners.<sup>8</sup> Additionally, it 'calls for the strengthening of instruments for citizens' participation in the EU decision-making process within the framework of representative democracy'.<sup>9</sup>

Meanwhile, the Commission committed to support Citizens panels as a regular method of deliberation, albeit at its discretion. Since December 2022, five panels have taken place on food waste, virtual world, learning mobility, energy efficiency, and tackling hatred in society.<sup>10</sup>

To sum up, the Conference left a legacy in terms of Europeans' engagement, and a lukewarm strengthening of participatory democracy is part of a Treaty Change proposal. Paul Craig admonished us against dismissing the 2003 Convention as a failure because 'the Constitutional Treaty never attained legally binding status, but its substance lives on through the Lisbon Treaty'.<sup>11</sup>

Irrespective of the fate of the Treaty Change proposal, the Conference left open questions that constitutional scholarship is thrilled to address. This is where *The Future of European Constitutionalism* intervenes.

Despite lacking a constitutional ambition, the Conference was an experiment – the first of its kind in the EU – of supranational level deliberation, allowing EU residents to advance proposals for legislative reforms in key EU law areas such as health, climate change, environmental protection, social fairness, digital transformation, Rule of Law, migration challenges, security, and EU's democratic foundations and processes.<sup>12</sup> This is probably why the authors decided to use it as the volume's symbolic starting point. In this sense, *The Future of EU Constitutionalism* inherits the spirit of *The Rise and*

<sup>7</sup> European Parliament, Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, 2022/2051(INL), at 14.

<sup>8</sup> European Parliament, Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, 2022/2051(INL), para. 11.

<sup>9</sup> European Parliament, Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, 2022/2051(INL), para 12.

<sup>10</sup> 'European Citizens Panel, Citizens Engagement Platform, <[https://citizens.ec.europa.eu/european-citizens-panels\\_en](https://citizens.ec.europa.eu/european-citizens-panels_en)>, last access 21 January 2025.

<sup>11</sup> Paul Craig, 'Treaty Amendment, the Draft Constitution and European Integration' in: Nick Barber, Maria Cahill, Richard Ekins (eds), *The Rise and Fall of the European Constitution* (Hart Publishing 2019), 51-72 (67).

<sup>12</sup> Joint Declaration of the European Parliament, the Council and the European Commission on the Conference on the Future of Europe of 10 March 2021, 'Engaging With Citizens For Democracy – Building a More Resilient Europe', 2021/C 91 I/01, (4).

*Fall of the European Constitution*,<sup>13</sup> a widely read work that offered a reflection on EU's Constitutional aspirations against the backdrop of the unratified Draft European Constitution.

Whereas the 2003 Convention was a defining Constitutional moment, the 2021 Conference's mandate was void of references to 'an explicit big C project', as the volume's editor Matej Avbelj points out (p. 3). Nonetheless, it represented the 'latest attempt to reset the European project' as Neil Walker points out (p. 13). The book answers the question of what future does EU constitutionalism have, considering the delicate balance it managed to achieve until now notwithstanding the lack of a proper constitutional arrangement? Given its unique nature, EU Constitutional ambitions are at the same time an allure and a burden as argued by Walker. However, to fully embrace its Constitutional ambition the EU must first address underlying political questions and activate social processes, as policy generation typically precedes explicit constitutionalisation (p. 24). The substantive part of the book, summarised in the following paragraph, does just that. It is composed by seven chapters dealing with EU common values, the formal, social and economic constitution, and sovereignty.

### **The Past and Present of European Constitutionalism**

Alun Gibbs and Matej Avbelj start by exploring EU's common values.

Gibbs wonders whether the EU can cultivate common values (p. 25) to solve the uncertain status of its political form (p. 29). The 'political sense of sovereignty' (p. 31), connected with the material conditions of the Constitution, was suppressed in favour of a legalistic account of sovereignty and this for Gibbs is at the core of EU's legitimacy crisis, showing post-sovereignty claims are ill adapted to describe the EU's reality (p. 30). Early Court of Justice of the European Union (CJEU) case law echoed the development of the modern state and a conception of sovereignty (pp. 32-33), but the EU's political form remained undetermined. Consequently, EU common values have not been construed around a shared political experience (p. 33). Changing this requires 'imagination, dialogue and reflection' (p. 34).

Matej Avbelj details the deep fissures within European common values (p. 36). The migration crisis and the rule of law crisis exposed a lack of solidarity within the EU and showed how fragile it can be (p. 45). In turn, the Covid-19 pandemic crises brought Member States closer together (p. 45). The EU thus requires a 'deepening of its social, economic, security, defence, public health, and therefore political and democratic foundations' (p. 48) through a

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<sup>13</sup> Craig (n. 11), 67.

formal constitution making process, that would allow to overcome value fissures by openly debating, and solving, them.

Mattias Wendel, Giuseppe Martinico, Sacha Garben address the EU's formal, social and economic constitution.

The contributions by Mattias Wendel and Giuseppe Martinico analyse constitutional conflicts within the EU through the lenses of the ruling by the German Federal Constitutional Court on the European Central Bank's Public Sector Purchase Programme of 2020 (PSPP). For Mattias Wendel the case was an instance of 'badly tempered constitutional pluralism' (p. 68) where political dialogue eventually served as a tool to resolve conflicts whose legal answer was missing. However, it may not be viable during a crisis of EU's core values, such as the rule of law (p. 69). In turn, Giuseppe Martinico argues that the PSPP episode was a confirmation of EU's federal nature. Leveraging American federalism theory, the author argues that the conflict was a healthy example of EU's cooperative federalism (p. 85).

Sacha Garben argues that before the EU drafts a 'big C' constitutional settlements, it ought to address three problems; the public support for the core constitutional authority claim upon which EU law is based, currently taken for granted; the status of social rights that, albeit having the same legal status as the Treaties, are left behind<sup>14</sup> (p. 99); the erosion of democratic legitimacy of EU legislation caused by the rise of intergovernmental decision making outside the ordinary legislative procedure of EU law (p. 100), especially when it involves fundamental rights of vulnerable persons (e. g. the Dublin Regulation) (p. 103).

Federico Fabbrini addresses the impact on Europe's Economic and Monetary Union of Next Generation EU, that required an enlargement of the European Commission's fiscal, borrowing and spending powers (p. 117) that would have been impossible without the pressure of responding to the Covid 19 crisis. While it is difficult to tell whether these changes will be institutionalised – e. g. the German Federal Court has ruled that NextGenerationEU (NGEU) cannot lead to the creation of a permanent instrument (p. 121) – path dependency theory opens the possibility that they may (p. 122).

Finally, Cormac Mac Amhlaigh, Daniel Augenstein and Katarina Vatovec focus on sovereignty.

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<sup>14</sup> Social rights protection challenges lie in implementation as well, argued by Cristina Fasone and Marta Simoncini, 'Fighting with Hands Tied? The European Social Fund and the Promotion of Social Inclusion', *Italian Journal of Public Law* 13 (2021), 478-510 (500). For a review of the implications of the CJEU case law on the freedom of movement, healthcare, higher education, collective labor law vis a vis an area like gambling see Vilija Velyvyte, *Judicial Authority in EU Internal Market Law: Implications for the Balance of Competences and Powers* (Hart Publishing 2022).

Cormac Mac Amhlaigh explains the resilience of EU constitutionalism despite the crisis. He does so through a political realist account of legitimacy, better than the traditional political moralist approach to EU legitimacy (p. 133). This account links legitimacy to the non-coercive capacity to respond to a demand of ‘securing of order, protection, safety, trust and the conditions of cooperation’ (p. 134), leaving room for disagreement, for example around models of liberal democracy (p. 137). In sum, it allowed the EU to resist through crisis because despite the challenges, it satisfies this supranational question.

Daniel Augenstein analyses how EU’s functional sovereignty connects with economic globalisation through sustainability requirements in EU’s internal market (p. 154) and human rights promotion by the EU through the global markets (p. 156). These instruments localise EU sovereignty internally and impose EU sovereignty externally. European citizens should reclaim the constitutional character of EU sovereignty to avoid the weakening of their States’ social protection system. Foreign citizens’ rights to claim democratic accountability in EU courts should be constitutionalised to balance EU’s expansion into foreign countries’ sovereignty (p. 158).

Katarina Vatovec closes the book mapping the historical development of the EU’s sovereignty. She illustrates how the Blocking Statute, EU’s response to extraterritorial application of foreign legislation providing secondary sanctions (p. 172), shows the importance of an affirmative EU sovereignty. Member States acting alone would not have been able to implement a similar legal measure domestically or have enough international influence (p. 178).

### **Is Deliberative Democracy in the Future of the EU Constitution?**

Two points emerge as common themes, reading the volume. The need for grounding European Constitutional claims deeper into democratic legitimacy, and optimism in EU’s Constitutional future. I find plenty to agree with the authors on both points. However, I believe the book could have engaged more robustly with the topic of furthering deliberative democracy in EU constitutionalism, albeit its value remains unscratched by this mild point.

The volume does touch upon the relevance of deliberative constitutionalism for the European constitutional ambition in some points. Walker illustrates the unresolved tensions in the 2021 Conference, between its institutional and its bottom-up nature (p. 22), Mateji advocates for a Constitutional process that is ‘open, deliberate, explicit and inclusive’ (p. 49) and Garben proposes that after the Conference, a ‘reform movements should take the process of a constitutional project once again but this time with the EU’s core constitutional authority claim at the core of the public deliberation’ (p. 93). But, on the whole, I believe the book lost an opportunity to offer concrete

proposals on how to structure such a deliberative Constitutional Convention.

There is an established literature on deliberative democracy and constitutionalism<sup>15</sup> that address important questions such as: how to deal with conflicts in deliberative processes?<sup>16</sup> What is the role of civic and political actors?<sup>17</sup> Should we foresee a combination of deliberative and participatory tools?<sup>18</sup> How to promote agency for participants experiencing marginalisation?<sup>19</sup> Should involvement be compulsory?<sup>20</sup> These and more questions would arise in thinking about applying deliberative methods to constitution drafting at the EU level. A scholarly effort around a European constitutional process can start from this body of knowledge and develop it further.

### Conclusions

This book is a magnificent contribution to the EU constitutionalism commentary. Reading it is an opportunity to nurture scholarly thinking on the European Union as an aspirational constitutional project. Notwithstanding the uncertainty surrounding a Convention in EU's future, the book offers a refreshing suggestion that it is possible to embrace the spirit of incrementalism and adaptiveness that characterised the journey of EU Constitutionalism so far, without abandoning aspiration to a proper Constitutional arrangement.

*Elena de Nictolis, Rome*

<sup>15</sup> Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (1st edn, Cambridge University Press 2018).

<sup>16</sup> Amandine Crespy, 'Deliberative Democracy and the Legitimacy of the European Union: A Reappraisal of Conflict', *Pol. Stud.* 62 (2014), 81-98.

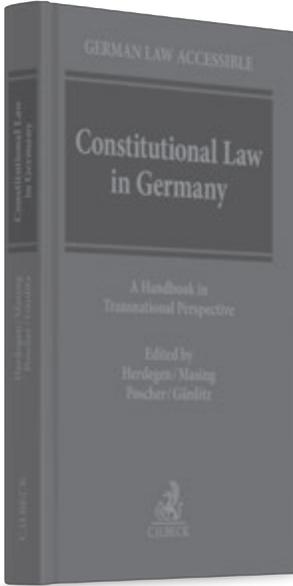
<sup>17</sup> Wojciech Ufel, Leszek Tadeusz Koczanowicz, Piotr Ferenski and Agata Tokarek, 'State of Democracy Debate', August 2022, EUARENAS.

<sup>18</sup> Proposed by Silvia Suteu and Stephen Tierney, 'Squaring the Circle? Bringing Deliberation and Participation Together in Processes of Constitution-Making' in: Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (1st edn, Cambridge University Press 2018), 282-294.

<sup>19</sup> Nicole Curato, 'Asserting Disadvantaged Communities' Deliberative Agency in a Media-Saturated Society', *Theory and Society* 50 (2021), 655-677.

<sup>20</sup> Eoin Carolan and Seána Glennon, 'The Consensus-Clarifying Role of Deliberative Mini-Publics in Constitutional Amendment: A Reply to Oran Doyle and Rachael Walsh', *I.CON* 22 (2024), 191-203.

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