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Citation

Voermans, W. J. M. (2005). Saying No to a European Constitution: Dutch Revolt, Engima or Pragmatism. Retrieved from <https://hdl.handle.net/1887/11317>

Version: Not Applicable (or Unknown)

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Note: To cite this publication please use the final published version (if applicable).

Saying No to a European Constitution: Dutch Revolt, Enigma or Pragmatism?

by Theo A. J. Toonen, Bernard Steunenbergh and Wim Voermans

On 1 June 2005, the Dutch voters said no to the ratification of the "European Constitution" with a clear majority of 62% (at a turnout rate of 63%). To many domestic as well as international observers, this result came as a surprise. After describing the run-up to the Dutch referendum and the campaign for it, this contribution reviews the various explanations that have been presented to explain the outcome and tries to put the events in a broader context. On the basis of these findings for the Dutch case, the authors formulate a perspective on how to move on from here with the European constitutionalisation process.

Am 1. Juni 2005 lehnten die niederländischen Wähler die Ratifizierung der „Europäischen Verfassung“ mit einer deutlichen Mehrheit von 62% (bei einer Beteiligung von 63%) ab. Für zahlreiche nationale wie internationale Beobachter kam dieses Ergebnis unerwartet. Nach einer Darstellung der Vorgeschichte des Referendums und der eigentlichen Kampagne überprüft der vorliegende Beitrag die unterschiedlichen Erklärungen für den Ausgang des Plebiszits und stellt die Ergebnisse in einen erweiterten Kontext. Auf Grundlage dieses Befundes entwerfen die Autoren eine Perspektive, wie der Prozess der Europäischen Verfassungsgebung fortgesetzt werden könnte.

I. Introduction

On 1 June 2005, the Dutch people could decide on the "European Constitution" in a referendum.¹ While 63% of the registered electors participated in this referendum, a majority of them voted no. To many, the Dutch no in the referendum about the "European Constitution" came as a shock. To others, it was not so much a surprise as merely unexpected, particularly in terms of the high voter turnout and the amount of participants rejecting the proposal that the Dutch government submitted to their approval. No one – except the wishful thinkers who opposed the government in general or already belonged to the no-camp in advance – would at the outset of the referendum campaign have full-heartedly predicted the

1. Among the various publications concerning a European constitution, see Grimm, D.: Does Europe Need a Constitution?, in: Gowan, P./Anderson, P. (eds.): *The Question of Europe*, London, 1997, 239–258.

outcome as it actually turned out to be. Predictions of a negative vote were usually qualified as being of a "fifty-fifty chance" or coupled with an expectation of a low turnout, perhaps even too low for the referendum to be valid.

Many observers, particularly those outside the Netherlands, seemed to have expected a landslide in favour of a yes from those "European minded", "internationally oriented", "well-organised", "anti-European sceptic" Dutch, although it is fair to say that – perhaps because of this preconceived idea – the international media and correspondents were among the first to pick up the surprising robustness of the anti-sentiments and the surging momentum of the no-advocates during the campaign. They were, in fact, alerting many of the Dutch media to the fact that something remarkable might be about to happen.

In the months passed so far, it has only begun to be evaluated by scholars, although public debate on the meaning of the no-vote on the "European Constitution" had seemingly ended. The latter occurred only for a few months, if not weeks, after the event. In the media, the "quarrel" on the aftermath by the end of the summer had already been reduced again from headlines to small messages in the margin, at best page 3 news and the subject of only an occasional letter to the editor by one European expert or the other. In a few weeks time, public discussion of an event that in its evolutionary context was quite revolutionary dwindled from daily news to business as usual.

Remarkably, little serious, let alone effective, "politics of blaming" has occurred.² Only the Dutch governmental communication people in charge of "media management" during the campaign – not of the referendum communication campaign itself – rounded up their counterparts from the press when the plot became clear and made sure that the reconstruction of events in a Dutch national quality paper (*NRC*) signalled the message that it was surely not their fault. The journalists reported how some Directors of Communication – the "spin doctors" of Dutch government – informally gathered at a restaurant in The Hague six days before the referendum and concluded that the yes-camp would lose. "They raise their eyes to heaven when they pass in revue the statements (on the need for European integration and the ratification of the draft treaty) of their ministers. [...] There is no communication whatsoever that can cope with that."³

2 Only in July some newspaper commentators indicated that the cabinet campaign contributed to the no-vote. *Koelé* and *Peeperkorn* argued that, according to a confidential report commissioned by the Dutch government, the cabinet's yes-campaign actually did cause more harm than good (*Koelé, T./Peeperkorn, M.*, in: *De Volkskrant* of 18.07.2005, 5).

3 *Giebels, R./Kalse, E./Versteegh, K.*: *Als we het nou maar beter uitleggen: hoe de Ja-campagne nooit van de grond kwam*, in: *NRC, Zaterdag Bijvoegsel*, 04.06.2005, 39 (authors' translation).

Is the lack of public attention to the question of where to go from here a reflection of the consensual nature of Dutch politics? Is it a measure of the political priority of Europe in Dutch politics? Is the outcome of the referendum a new Dutch Revolt? And if so, is this against Europe or against the national government? Is it to be seen as an anomaly, an unfortunate mistake, a no that is not really a no? Is it the outcome of an ill-executed mission, or perhaps a "normal accident" in the context of the Dutch handling of European affairs?

In section II, this article briefly presents an overview of the preparatory process, the decision to organise a referendum in the Netherlands, and the development of the referendum campaign. Section III reviews the dominant explanations for the failure of the referendum that have so far been put forward in the media and among academics. In section IV, we discuss why it is difficult to arrive at a satisfactory explanation unless one puts the events surrounding the referendum in the broader context of a long-term perspective of how the Netherlands over time has domestically handed, organised, and managed European affairs. Thus, presented as part of the larger "pattern of Europeanisation" evident in a country very loyal to the integration process, the referendum outcome in the Netherlands might be understood as a consistent element of a broader case. In section V, we formulate some lessons to be learned from this generalised perspective about where we ought to go from here, both in the Netherlands as well as within the broader European constitutionalisation process.

II. The Referendum

The Dutch referendum was held on 1 June 2005. The high turnout rate of 63% surprised many observers and was interpreted as a success for the initiators of the event, which also silenced all who uttered doubts about the enterprise. Nevertheless, a majority of voters (62%) rejected the proposed Constitutional Treaty. By comparison, on 20 February 2005, 77% of the Spanish electors approved it (with a turnout of 42%), while the French on 29 May 2005 had voted against ratification with 55% (and a turnout of 71%).

The referendum was quite a unique event in the Netherlands. It was based on a law introduced into the Dutch governmental system not too long ago,⁴ which in

⁴ The Temporary Referendum Act (*Tijdelijke referendumwet*) entered into force on 1 January 2001 and expired on 1 January 2005. No regular referendum was organised during the four-year period in which the Act was effective. After the official expiration date its mechanism, system and procedures were used to accommodate the referendum on the "European Constitution".

the meantime has been withdrawn, not as an outcome of the vote on the Draft Constitution, but as part of a broader political debate about the pros and cons of a (new type of) referendum as a tool within Dutch policy-making. It is, however, interesting to note that the experience with the referendum on the "European Constitution" as a whole – at least publicly – is identified as a positive event, stimulating debate on subjects hardly discussed before among the general public and revealing a "gap" between political elites and masses that would have remained hidden under other circumstances.

This seemingly masochistic evaluation of the organisation of a referendum as an unprecedented part of a (lost) ratification process can only be understood in a broader context and larger set of political developments. The plebiscite on the "Treaty establishing a Constitution for Europe" (TCE) was the first national referendum since 23 April 1798 (a constitutional referendum which took place after a failed effort one year earlier on 8 August 1797). The TCE referendum was, therefore, an essentially new phenomenon in modern Dutch national politics. Although proposed earlier, it was decided to organise and set the date for the plebiscite on the basis of a proposal initiated within Parliament and adopted by it in February 2005, only four months before the voting actually took place.

It was, indeed, a late start, not only in terms of the effort to organise a referendum, but for other reasons as well. It should be noted that the process of the Convention leading to the Constitutional Treaty over the period of 2002–2003 was largely neglected by the Dutch media, the Dutch public as well as by Dutch politics in general. Even the government did not pay much attention to this process, although – after a change in the governing coalition – it decided to not only send some elderly Statesmen, like the former Minister of Foreign Affairs *Hans van Mierlo*, to this Convention, but actually included some more European activist Members of Parliament in the delegation. It is fair to observe that the Convention was for a long time largely seen as a high-level study group engaged in a merely theoretical enterprise.

When the Chairman put the label "Constitution" on the product his group was in the process of creating, the Convention finally got some public attention in the Netherlands. But it is no exaggeration to say that the Laeken Declaration of 2001 calling for a larger involvement of the European citizenry in the integration process and one of the bases for the Convention leading to the Constitutional Treaty, had largely gone unnoticed by the Dutch general public, media and politics. From the viewpoint of the Dutch voter and public opinion, the whole subsequent process of the Convention was a black box and – in retrospect – a missed opportunity for public debate. But it is also fair for political leaders to say that such a debate in and of itself was unlikely to have aroused much public attention and interest at the time.

Debates on Europe had been tried before with little enthusiasm or response. In addition, the Netherlands was occupied with other issues: the implosion of the Purple Coalition of Prime Minister *Kok* at the end of its second term and the *Fortuyn* revolt heralding a massive shift in governmental politics. But even without this domestic turbulence, it remains highly questionable, whether the Convention would have received any more attention than it actually did.

The Dutch government signed the Constitutional Treaty in Rome on 29 October 2004 and, thus, committed itself to the ratification process. At the time there was some initial talk about submitting the proposal to a referendum. The Junior Minister of European Affairs (*Nicolai*), together with the Minister of Finance (*Zalm*), had earlier in this governmental term started to play up and politicise "Europe" externally as well as in the context of Dutch politics, largely on the basis of a Stability Pact Agenda and a justified political message that national interests should play a more significant role in determining the Dutch position in EU affairs. Until that point, Dutch European Policy was largely legitimised and formulated in terms of its being one of the Founding Members and, therefore, responsible for supporting the EU ideal. It had brought peace to the old continent and represented a highly effective process of European integration. The EU afforded the Netherlands a say in European and global economic processes on issues that would have surely affected it anyway. Moreover, the open economy of the Netherlands had clearly benefited from the creation of a Single European Market. Over a long period, European and Dutch interests have been seen and presented as parallel, complementary, and mutually reinforcing. Thus, "what is good for Europe is good for the Netherlands".

Several issues came together to influence the Dutch position on the EU in general and the proposed Constitutional Treaty in particular. The Netherlands had arrived at a position of net-payership to the Union while facing the economic need for another round of governmental fiscal cutbacks. Further, observations saw a slowing pace of implementation of the Stability Pact in nearly all the big countries – Germany, France, and Italy. And the government was being confronted with public and political questions regarding the entry of Turkey into the Union. To this list of motivations could have been added the inability of the government to implement the reforms implied by the Lisbon Agenda, if not for the fact that the Netherlands itself had not shown such a lukewarm involvement with this agenda. Several ingredients – like social inclusion as point of departure for social policy and work-first approaches in social assistance – were actually included in governmental reform approaches. But they had not been presented as "European" policies, but as local Dutch inventions by creative Ministers and Junior Ministers of Social Affairs.

Not only after October, but also after the February decision – on a surprise initiative submitted by three parliamentarians⁵ – to actually organise a referendum, anything resembling something of a campaign was slow to start. A Referendum Committee – conceived as an independent body, largely consisting of (legal) experts – was inaugurated with the task of providing a neutral explanation of what the Constitution was about, produce simplified information material on the purpose and content of the TCE, provide on a non-partisan basis resources to advocacy organisations representing the yes- and the no-camps. It is also important to note that the government stood back and was forced to adopt this essentially neutral stance by Parliament, most notably the proponents of the no-camp, which demanded a “fair campaign” on the basis of neutral information creating a “level playing field” for debate.

Nobody in the yes-camp full-heartedly seized the initiative to promote the Constitution. There was a combination of factors at work here. Although the government had signed the Treaty in Rome, it did not seize full responsibility for or “ownership” of this act. The State Secretary of European Affairs was probably wise in not attaching his political position – let alone that of the Cabinet as a whole – to the outcome of the referendum. Doing the opposite would have given the debate on the “European Constitution” a very strong domestic dimension. As a consequence, the government did not take the lead in promoting the proposed TCE. Indeed, the initiative for the referendum came from Parliament. A majority of political parties – including the Social-Democrats (PvdA) as the major opposition party – favoured ratification and were, therefore, expected to campaign for a yes-vote. *All of the parties involved, particularly members of government, treated the run-up towards the referendum as a “regular” election campaign.* In effect, this meant that they started the campaign only a few weeks before the actual event and only then tried to persuade voters for their position. One should not “peak” too early. Over much of the spring, leading Cabinet members reflected full confidence that – once they would get started – they would be able to persuade the voter. After all, they were supporting a good cause and Dutch voters were considered to be very European minded.

Some high profile public opinion leaders, however, decided not to delay. While not yet necessarily opposing a yes-vote, they merely began asking some “tough questions” about how and why some provisions were added to the Constitutional Treaty. Clear and to the point answers were infrequently provided by leading politicians, parliamentarians and members of government alike. By lack of a

5 This decision was based on an unexpected initiative of the MPs *Karimi, Dubbelboer and Van Ham*. For this proposal and decision, see *Kamerstukken II, 2004/05, 28.885*.

designated stage and scenario for the debate, the most visible part of the debate took place only at the margin of other news events. General statements on Europe were presented as answers to specific questions. When asked for reactions to general statements in the media about the Constitution and its implications, politicians got themselves into technical details or responded in terms of even more general statements about the importance of Europe, signalling little actual knowledge about a process and event that they in effect had largely neglected as not being part of their prime political responsibility. As a result, the position of the pro-camp became a bit unreal. It was claimed that "the Netherlands would place itself outside the European order" and, "economically speaking, the lights would go out" by voting no. The statement that Europe had been effective in preventing war was in the media easily translated into that "the minister predicted a European war in case the proposed constitution was to be rejected". The advice of the Minister of Foreign Affairs on the need for gathering more knowledge and information about Europe and the meaning of the TCE was interpreted to the public as saying "that those who felt uninformed should rather not vote at the referendum".

This provided the general background in which step-by-step, a very well prepared no-camp took over the initiative and from March onward gradually pushed the yes-camp more and more into a defensive position. Two smaller parties played a crucial zealot role in mobilising the media and boosting the confidence of the no-camp. On the left, the Socialist Party (SP) promoted with remarkable proficiency the old neo-Marxist story on the evils of international capitalism and Europe as the big business conspiracy against the working class, "the normal people" when this concept was disconnected from its steely Marxist-Leninist jargon. This provided a persuasive story about the dangers of building a European "super state" and everything that would follow from it in terms unchecked political control, exploitation of "legitimate interests", endangered local and regional labour markets, and massive bureaucracy. The narrative suitably made the underlying motives of those in favour suspect as representing deep self-interest rather than high ideals.

On the other side of the political spectrum was the orthodox protestant Christian Union, ringing bells based on their detailed knowledge of the ins and outs of the text of the proposed Constitution and the broader European context in which it had to be understood. They had clearly read and studied the script which the Convention had produced. Their being factual and to the point on detailed aspects of the text was enough to take advocates of the yes-camp off guard. When needed, they could discuss an issue at a deeper level than could proponents. The thorough Christian Union campaign – against "Catholic Europe"? –

insured that, after the referendum, the Protestant Bible Belt once again would become politically visible, this time as the regional stronghold of the no-camp.⁶ It also neatly complemented the more populist campaign of the SP with a degree of credibility about factual knowledge which was rarely displayed by the yes-camp. This was only matched by those Members of Parliament who had participated in the Convention. But they, of course, were readily criticised as having "vested interests" in defending their proposals and were more than once purposely drawn into discussions of technical details no layman was ever able to judge.

This combination of competences, with the increasing support of analytically minded public opinion leaders still only asking the questions, made it likely that the much anticipated entry into the debate of the Populist Party List *Pim Fortuyn* and the Neo-Conservative *Geert Wilders* – who had recently split off from the Conservative Party (VVD) mainly because of the support of this party for the "Turkey dossier" – did not have the impact on the nature of the debate that was anticipated. The first group was totally invisible while the second was mainly remembered for the full orange coloured outfit *Wilders* was wearing once he decided to get in his bus to campaign. As a consequence, Turkey and international migration played less of a role in the campaign than anticipated – or hoped for, depending on one's point of view. Indeed, it is noteworthy that support for entry of Turkey into the EU is still slightly higher in the Netherlands than in most other member states.

On balance, but largely driven by the opposition of the no-camp, the overall debate was in retrospect more about the ins and outs of the "European Constitution" and the credibility of the "articles of faith" surrounding its interpretation, anticipated impact, and expected implementation than many would have guessed at the beginning of the year. But this is not to say that the campaigns for and against the ratification of the Constitutional Treaty had been an in-depth exegesis of the legal texts and all of the appendices belonging to the formal file of the proposed EU Constitution.

III. Explaining the No-Vote

Many explanations have been offered to clarify the actual outcome. The European Commission was among the first to produce some findings in the form of a Flash

6 De Volkskrant of 03. 06. 2005, 2.

Eurobarometer.⁷ The survey concluded that, as was the case in France and Spain, younger voters were less mobilised to vote than the older population. Also, the younger the voter, the more he or she was opposed to the Constitution. Over half (54 %) of Dutch citizens aged 18 to 24 did not vote, and almost 50 % in the category aged 25 to 39 abstained. Manual workers and the self-employed were more likely to abstain than were other occupational groups, and people living in rural areas had a lower rate of abstention (31 %) than those living in small or large towns. People claiming that they did not have the necessary information to make a choice were far more likely to have abstained (41 %) than those who felt sufficiently informed. One in two voters indicated that they did not feel sufficiently informed before they actually voted on the Constitution. A majority (51 %) of those voting yes felt they had all the necessary information to make a decision, while among those who voted no a majority of 54 % claimed that they were not sufficiently informed. According to the survey, the top five of motives to vote yes were as follows:

- Ratification is essential in order to pursue the European construction (24 %),
- strengthens the feeling of a European identity (13 %),
- strengthens the role of the Netherlands in the Union/the world (13 %),
- is essential for the smooth running of the European institutions (12 %), and
- is a first step towards/symbol of a political unification in Europe (10 %).

The fifth argument was *ex aequo* with considerations that the Constitution would foster economic co-operation in Europe and strengthen the EU over the US. The top five motives for voting no were as follows:

- lack of information (32 %),
- loss of national sovereignty (19 %),
- opposition to the national government (14 %),
- Europe too expensive (13 %), and
- being against Europe/European construction/European integration (8 %).

1. Enigma?

In nearly four months time, broad public support for the Constitution had turned into an effective "no". Trend data indicate that since the early 1970s the Dutch population was generally more enthusiastic about the European Union than many other countries. By the end of 2004, three out of every four Dutch citizens judged

7 Eurobarometer: The European Constitution: Post-referendum Survey in the Netherlands, Brussels, 2005 (Flash Eurobarometer 172).

EU membership to be "a good thing", more than the Germans (60%) or the French (56%). The same survey indicated that 73% of the Dutch supported a Constitution for Europe.⁸ But this support was effectively not granted to the version submitted to voters in the June referendum. Support for Europe and integration in general remained. However, the reported decrease in support for a Constitution in May/June 2005 – with the campaign in full swing – was substantial: a 20% loss.⁹ Obviously many people had by then developed second thoughts based on the ongoing discussion on the version of the Constitution presented to them as the fulfilment of this general wish for a more integrated Europe.

Soon after the referendum, however, research made clear that it would be hard to explain the outcome of the referendum as a sign of declining support for Europe. To the contrary, analyses of Eurobarometer and the Dutch Social and Cultural Planning Bureau (SCP) made clear that public support in the Netherlands for Europe was among the highest within the EU. Indeed, the Netherlands has had a rather stable pattern of support ever since the 1970s (70%), peaking at its highest level in the early 1990s (nearly 90%) in the aftermath of the "Europe 1992" campaign, sliding to an all-time low at the beginning of the new millennium (near 60%), but steeply increasing again since 2003/04 back to almost 80%. In many other countries (Belgium, Germany, France, Luxembourg, and the United Kingdom), the recent trend shows a steady decline in support.¹⁰

Comparison with other countries holding referendums on the European Constitution is instructive. French public opinion was the most critical of Europe, and in several respects there was more support for Europe in the Netherlands than in Spain.¹¹ The idea that the no-vote stemmed from ignorance or being uninformed is also not supported by the trend information collected by Eurostat. Although (tested) overall knowledge about Europe is not very high in general for all countries, according to the reported figures on both objective (do people know answers to questions on Europe) and subjective (do people feel that they are well-informed about Europe) knowledge, it was certainly not lower in the Netherlands than in Spain and France. Again, the opposite was true. In addition, the respondents showed interest in the sense that they would have liked the media to pay

⁸ Eurobarometer 62 (2004); the corresponding figure for France being 70%. Aarts, K./van der Kolk, H.: Understanding the Dutch "No": the Euro, the East, and the Elite, Research Paper Submitted for Publication, Enschede, October 2005.

⁹ Eurobarometer 63 (2005).

¹⁰ Sociaal en Cultureel Planbureau (SCP)/Dekker, P./Edderveen, S. (eds.): Europese Tijden: de Publieke opinie over Europa, Europese Verkenning 3, Bijlage bij de Staat van de Europese Unie, 2006, 13.

¹¹ Ibid., 16.

more attention to Europe. Contrary to the Spanish population, the Dutch do not feel that the media reported too often and too positively about Europe. In the three countries about the same proportion of the population made its mind up to vote yes or no in the last week before the referendum (25 % in the Netherlands and Spain; 21 % in France).

The researchers of the SCP concluded that it is impossible to explain the outcomes of the three referenda with the combined set of variables generally used and accepted to measure public support, knowledge, and commitment. The figures vary, but do not amount to a pattern sufficient to explain why two countries voted against and one in favour of ratification. Thus, one has to start looking for internal matters determining external behaviour.

2. Too Fast, Too Much?

Figures show that since late 2004 support for the European integration process is growing again in the Netherlands, after the dip in 2003 and early 2004, which was probably caused by a post-Euro syndrome. Also, the debates about the lagging implementation of the agreed upon Stability Pact, at least in the strict Dutch advocacy and understanding of this Pact, had its impact. It is interesting to note that the item in the regular monitoring of public opinion scoring the highest is actually the question on the degree which respondents feel that they have been well-informed about Europe. The figure jumps from 41 % in fall 2004 to 50 % in spring 2005, with the earlier scores in the previous two years (2001 and 2002) only in the (low) 30 % level.

In a different survey monitoring the developments of public opinion during the campaign, it was observed that curiosity about Europe at large had not been increasing over that period, and support for the idea that one is properly informed about the EU and its operation declined rather than increased. Respondents increasingly indicated that they were following the news and considered themselves informed about the Constitution. Once more, knowing more about the Constitution contributed to an awareness of knowing less about the EU and its operation. All in all, various research reports show that the no-vote cannot be attributed to a lack of information nor to being disinterested. Of the yes-voters, 6 % were not able to motivate their choice in an open-ended question. The comparable value for no-voters and the undecided was 4 %. These are not large numbers, but the difference is statistically significant in favour for those who voted no.

Clearly, the referendum did something to the self-perception of the Dutch population in terms of being properly informed. But this did not only not change

levels of general support for Europe, but also not affect the image that Europe is moving too fast – a still frequently noted popular explanation of the no-vote. Over a long period of time, the perceived and the desired speed of EU integration has been measured. For the Dutch population, the desired speed of European integration lies well above the perceived velocity.¹² But there has been a convergence since the end of the 1990s with perceived and desired speed ranking equally. The indicated desired velocity of integration has been rather stable since the early 1990s. On the basis of these figures, it is hard to conclude that a large proportion of the Dutch population had the opinion that European integration was going too fast. On top of that, people thinking that integration was going too fast were significantly more in favour of a Constitution than those not sharing this opinion.¹³

Speed or its perception does not provide a convincing explanation for the no-vote. The same applies for other popular explanations, such as considering Europe as “too far, too expensive, and too meddlesome”. There has been some marginal increase in the number of people observing in the developing EU a loss for Dutch cultural identity. But at the same time, the number of people afraid of this observed development has decreased. So has the number of those fearing a loss of power for the smaller member states in the future development of the EU. The number of people who think that Europe will cost them more money has in the past year decreased (from 74% to 63%). This is still substantial, but not correlated with the preference for or against a Constitution. The numbers of those perceiving the EU as a bureaucracy has increased in recent times. But all in all, these figures do not point to a long-term build-up of a Dutch bubble of discontent and resistance to European integration which finally found an outlet in the June referendum. Thus, one has to start looking for more short-term explanations.

3. Political Irrationality?

The campaign was highly dynamic and full of surprising turns, although it was conducted within a relatively short time frame. At its peak and in full swing, the campaign lasted for only four weeks. But even the broader time span of three months in which the issue was on the table seems short enough for it to have been caught-up in the hype of momentum – in this case, working in favour of the no-

¹² *Ibid.*, 22.

¹³ *Ibid.*

camp – or other “psychological processes” standing in the way of a more rational judgement.

Political debate was indeed intense. The referendum generated a kind of broad public and often emotional debate that the Netherlands has seldom seen, particularly with regard to “Europe”. Public opinion went through rapid shifts. Did the Dutch voter know much or little about the content of the Constitution submitted to ratification? *Aarts* and *van der Kolk* concluded upon the basis of a study quizzing voters several times during the campaign on factual knowledge about the subject and the content of the Constitution that the level of actual information and knowledge at the outset of the campaign was modest, but increased sharply during the campaign. At the beginning of the campaign, a minority was aware of the fact that the accession of Turkey within ten years is not regulated by the TCE. Only at the end of the campaign did a majority know the right answer. All in all, the campaign had made “Europe” a familiar subject of conversation. Although by far not everybody had a full understanding of the content of the Constitution or the ratification process in other countries, basic knowledge about the subject of the referendum and the state of affairs in other countries became widely shared.¹⁴

The analyses also made clear that the role of the cabinet in the process as a whole was negatively evaluated. At the end of April, 38% of the population was reported to think negatively about the role the government played in the campaign. By 21 May, this increased to 59%. Even among those being favourably oriented towards Europe and intending to approve the Constitution, a majority were negative about the role of the government. Political leadership did not come from Dutch civil society organisations either. Many of these simply stayed out of a discussion that they considered being highly controversial. The role of the “leading elite”, to the degree it existed, was diffused and largely played by a considerable variety of independent opinion leaders and newsmakers. And, of course, in the broader debate there were many European events that could be singled out as sound bites, juicy news items, or even interactive TV events with public ballot positions “for the callers”, etc.

Detailed discussions in “focus groups” with people who voted against the Constitution in June – organised in August – contributed to the image that the no-vote was the outcome of an intensely felt, but rather broad perspective about developments affecting people in general.¹⁵ Research identified an overall negative feeling about the direction in which the Netherlands was developing. The EU

¹⁴ *Ibid.*, 28.

¹⁵ *Anker Solutions: Kom naar de Camping! Tijd voor een Reality Check. Eindrapport Focusgroepen Buitenlandse Zaken, Amsterdam, September 2005.*

dimension was seen as an extension of this. The mood was as follows: We have nothing against European integration, but the EU is not functioning well. But when push came to shove, it was a basic lack of trust between Dutch politics and the population that became the designated battle ground on which Europe lost its Constitution.

By the time the focus groups were organised, *Blair's* plea for a reality check – albeit yet another politician's speech – to the European Parliament could be interpreted as the way forward.¹⁶ Particularly welcomed was his appeal for realism and rejection of a dismissive reaction towards heartfelt concerns and worries on the part of European citizens inherent in the ongoing modernisation process or their ability to understand the complexity of policy problems. That Europe should concentrate more “on the improvement of the lives of people” is the resonating message with which the British Prime Minister had little difficulty in linking with Dutch voters as represented by the focus group panel.

It is interesting to note that the higher educated part of the respondents in particular have for a relatively long time struggled with their European identity. Responses in focus groups initially picked-up a kind of political correctness – a logic of appropriateness – which indicated a feeling that they “ought to know about Europe”, but in fact did not. Knowing about Europe carried a sense of duty; you have to know about it and you should not really be against it. This fact was often gradually admitted after the “coming out” of other participants, causing a chain reaction. The overall image of Europe as bad, a picture which is substantiated by reference to such easy targets as subsidies not making sense and not helping, abuse of office, red tape, the monthly moving of the European Parliament, etc.

Most of the lower educated participants showed no problem in expressing their lack of interest in politics in general and European affairs in particular. The “negative mood” on Europe turns out to have become an easily spread virus. Higher levels of education do not provide as strong of a knowledge filter in the form of a reality check for Europe as the ready projection of a broad spectrum of various sorts of evil onto the EU. Europe, the EU, nor the Dutch political leadership gave proponents much in the way of ammunition to rebut intensely uttered feelings, leaving them more often than not empty-handed in a vigorously developing debate. And indeed, many of the higher educated in the course of the process changed their positions from a reluctant support for the Constitution to an effective no in the referendum.

¹⁶ *Ibid.*, 24.

All in all, this analysis provides the ingredients for the conclusion that the outcome of the referendum was the conjunction of a number of circumstances. There was no bursting out of a long-felt dissatisfaction, nor did proponents go any deeper into the subject matter than did the no-voters. Rather, a combination of low political trust – in political leaders, but perhaps also in political self-efficacy – in combination with a highly dynamic process of public opinion-making seems to have contributed to a sudden politicising of the question of Europe, with outcomes hard to predict, let alone “control”.¹⁷

4. Constitutional Tradition?

So, did the leaders do it, or rather, fail to do it? This is hard to say without paying attention to the institutional context and constitutional tradition in which they were bound to operate. There was a stark contrast between the European Constitution – strong on symbols, principles, and constitutional rhetoric – and the Dutch Constitution – austere, sober, and functional. The Netherlands operates within the evolutionary constitutional framework inherited from the European revolutionary year of 1848. As such, it is a country with one of the oldest current constitutions in Europe.

Among the range of types of constitutions that the Dutch constitutional scholar *Constantijn Kortmann* has defined, running from the theological constitution up to what he calls the “logical” constitution, the European and the Dutch Constitutions are almost on the opposite end of the scale.¹⁸ This explains why to some degree the “European Constitution” caused a sort of a “culture shock” in the

¹⁷ SCP/Dekker, P./Edderveen, S. (eds.), *op cit.*, 39.

¹⁸ Kortmann distinguishes five types of constitutions. The first type is the *theological constitution* – referring to a Supreme Being, religion or creed as the basis or goal of the constitutional order. The second one is the *psychological constitution*, appealing to emotions like nationalism or commonwealth and enshrining evocative principles and symbols. The third type is the *social-economical constitution* which tries to install some form of economical and social justice and social programme. Constitutions like these (elements are to be found in the Spanish and Portuguese Constitutions) most of the time enshrine social fundamental rights as well. The fourth type is the *historical constitution* which is centred on the historical origins and constitutional *acquis* of a nation (e.g. like the one in the US or Norway). Typical for constitutions like these are the different historical constitutional layers that – obsolete as they may be – are still present in the constitution. The fifth and last constitutional type is the *logical or functional constitution* which does not do any more than enshrining the basics of the constitutional arrangement of a state without any reference to external concepts of morality, ethics, religion, of *economical theories*. It is obvious that all of the existing constitutions are mixtures of all of these types. “Pure types – to my mind – do not exist”. Kortmann, C. A. J. M.: Uit of in de Grondwet? [Outside or in the Constitution?], in: *RegelMaat*, 3/2002, 75–82.

Netherlands. The suspicion that the TCE met in public debate arising from this shock was not mitigated, but rather aggravated by the historical lack of constitutional debate in the Netherlands. Dutch citizens are not used to discuss their Constitution. The last time they did so dates back to 1917, when a political conflict between the religiously-inspired parties, liberals, and the social democrats that had dragged on for decades was finally resolved by a constitutional trade-off. In contrast, the handful of constitutional reforms adopted since then has been quite technical in nature.

Prudence and gradualism characterise the political and administrative culture surrounding constitutional development. Thus, much happens behind the screens of governance. In this respect, the workings of the Convention were treated as the Dutch tend to treat all constitutional projects. Constitutional change was not the domain of high politics in the Netherlands. Even the substantial modernisation of the Dutch Constitution in 1983 did not generate widespread public debate. Indeed, it went almost unnoticed. Opportunities for public debate on proposals for revising the national Constitution is further diminished by the Dutch tradition of allowing periodic elections for Parliament to coincide with the "second reading", thereby submitting the result of the first reading of the revision of the Constitution to the electorate. In recent history, discussions on proposals for constitutional revision in the second reading have always been overshadowed by the political issues of that moment and by party programmes and candidates.

The Dutch Constitution, though a rigid and written constitution, is unwritten in the heads and hearts of the Dutch people. This explains why Dutch inhabitants – as was demonstrated in the run-up to the referendum – know next to nothing about the actual content of their national Constitution. Some commentators quite cynically joked that, although the Dutch voters during the referendum campaign complained that they were not adequately informed on the content of the "European Constitution", they were still a good deal better informed about it than about the Dutch one. Poor knowledge of the national Constitution did in some strange way cause some confusing and alarming misunderstandings. A lot of Dutch voters, for example, seem to have been appalled by the fact that European law has priority over Dutch law. To some commentators and to a lot of Dutch voters, this was seen as a threat to Dutch identity and a sure sign of the imperialistic nature of the European Union. What was little known then (and when it was known resulted in considerable indignation) was that the Dutch Constitution has ever since 1953 had a provision enshrining the priority of international and EU law (Art. 94).

IV. Gaining Perspective

If we try to explain the outcome of the referendum as a one-time "rational choice" of the Dutch constituency, it does not take us very far. None of the explanations is completely satisfactory or would merely lead to the conclusion that the no-vote was either an enigma or, in reality, not really a no after all. The Dutch Referendum Study 2005 surveyed a sample of the electorate.¹⁹ It concluded that many Netherlanders still supported European integration, but they increasingly find that the form it has taken is questionable if not utterly disliked. The Dutch have consistently expressed support for the EU. It is the form that the integration process has taken, not the idea itself, which was becoming increasingly disliked and rejected.

The surveys indeed show a clear gap between the opinion of the electorate and the viewpoint of the dominant political parties in the Netherlands on European topics. The no-vote on the referendum was inspired by this difference in opinion on European matters, not by domestic affairs or by a general and diffused discontent of the electorate with Dutch government or Dutch politics in general. Unless one thinks that there is only one (best) way to build Europe – and that this one way was represented by the proposal that came out of the Convention – the positive interpretation of the outcome from a European perspective is that at the referendum the Dutch electorate took an independent stand in a European debate. This stand, whatever the consequences, was clearly differentiated from the usual member state position as represented by the national government. The Dutch electorate – with its no-vote – thus entered a European political space for the first time as an independent actor. For the first time ever, a European conscience, one independent from the nation-state's policy positions *per se*, has emerged and manifested itself in the opinion and behaviour of Dutch citizens.

True Europeans should be happy with the result that no other factors seem to account for the outcome of the referendum. Europe has not turned out to be less relevant or subordinate to other social and political issues. The public's *demonstrated lack of trust largely referred to the role of the Dutch government as a trustee and reliable informant for the European argument, a role the government played very poorly by any standards.* Yet, despite the generally felt degree of relief about the clarity and decisiveness of the outcome even within the yes-camp, the referendum was not been used by the majority of voters as an axe to bring down the government. The debate was effectively on Europe and the desirability

19 Aarts, K./van der Kolk, H. (eds.): *Nederlanders en Europa: het referendum over de Europese Grondwet*, Amsterdam, 2005.

and need for the proposed Constitution. While not always conducted on the basis of the political and social narratives that European experts or the elite might want to employ, the no-campaign was based on a perceived European reality by those advocating rejection of the Constitution. At worst, the Dutch electorate was saying that government should not do what is "good for Europe", but what is best for the interests of those they represent. Indeed, it seems that doing so would only bring the Dutch government in step with the rest of Europe.

At an institutional level, the outcome of the Dutch referendum might, therefore, be interpreted as gigantic step forward, which – unfortunately for proponents – has led many people to vote against the proposed Constitution. It is unlikely that more or better information or yet another campaign on Europe – as initially proposed by Dutch Parliament in the aftermath of the no-vote – would have altered anything. The no-vote cannot simply be pushed aside as an unfortunate mistake. The referendum may be perceived as a debacle, but only a debacle for those acting on an assumption of a preconceived "permissive consensus".²⁰ This attitude has indeed characterised the attitude of the Dutch public on Europe and European policies ever since the 1950s. Support for the EU is in different countries and among different groups based on different motives, not necessarily connected to the instrumentalities of the integration process, but often linked to emotions, events, or desires embedded in the history or self-image of peoples and countries.²¹

In the Netherlands, "permissive consensus" has been mistaken for unconditional, longstanding "Dutch public support for Europe".²² The reality is different. Europe has largely been ignored or at least taken for granted. Indeed, as the SCP researchers observed, "lack of knowledge" is stressed in several polls as the argument to abstain or to vote against ratification. The argument certainly has a legitimising effect, like the "no time" or "not asked" options often evaluated in non-response analyses. But we agree with the SCP researchers that these answers also reflect a lack of involvement and participation. There has hardly ever been a

20 *Best, E.*: In Search of the Lost Constitution: The EU between Direct Democracy and the Permissive Consensus, in: *EIPASCOP*, 2/2005, 5–14.

21 *SCP/Dekker, P./Edderveen, S.* (eds.), *op cit.*, 11.

22 In this respect the no-vote in the Netherlands somehow resembles the "tax revolt" in many US states at the end of the 1970s and the beginning of the 1980s. Starting with Proposition 13 in California (1978), several other US states were confronted with "no" to higher (property) taxes from voters in referenda. Finding an explanation for this sudden change in voter behavior was rather complicated and pointed to symbol politics or comprehensive single-issue politics. See *Lowery, D./Sigelman, L.*: Understanding the Tax Revolt: Eight Explanations, in: *American Political Science Review*, 75/4 (1981), 963–974, and *Lowery, D.*: Interpreting the Tax Revolt: A Review of the Literature and an Alternative Explanation, in: *State and Local Government Review*, 14/3 (1982), 110–116.

true European debate in the Netherlands. Indeed, until the campaign for the Constitution, there was hardly an active interest in Europe. As in many other member states, Europe has been close to citizens, but only as a resource, subsidy, and negative or positive symbol, not as an institution. It is not necessarily the electorate that should be blamed for this attitude. The outcome of the referendum signals the gradual awakening of national interests. Not only Dutch public opinion, but also the media, politics, and the academia have paid very little attention to European integration in general. It was not until business interests, the implementation of directives or issues of net-contributorship entered the scene that social science and public law researchers started to pay attention to Europe.

There is an abundant collection of complaints about the lack of political interest of Parliament in EU affairs over a long period of time by European policy advocates, Dutch ministers or other executives having to deal with a European dossier. From time to time – usually when something had gone wrong yet again – parliamentarians had to pay attention. But they then often complained, or more likely simply observed that Europe was not an important issue among the electorate, and, therefore, not very appealing politically.²³

Europe was yet another case of “letting government govern”. It was seen this way by both the government and the electorate. Europe has been a subject for specialists: those in Parliament, Government, bureaucracy, science, and society.

Lack of involvement and paying little attention has thus for long been confused with “support for Europe”. This permissive consensus lasted largely throughout the strong build up of the European integration process since the late 1980s, throughout the 1990s, and into the very beginning of new millennium. It generated some opposition in observations about the sloppy implementation of the Stability Pact – which is an economic “constitutional issue” and a token test of trust in European institutions in itself – and in observations about the inability of various member states to carry out generally needed economic and social reforms deemed necessary for achieving a healthy economic constitution. The buck stopped, however, at the referendum.

The Dutch government is and has been among the staunchest supporters of the building of a Single European Market and the sublimation of this in its logical consequence of a Monetary Union. When presented with several competing characterisations, the dominant opinion among the electorate is no longer that

23 Voermans, W.: Nederlandse wetgevingsprocessen in de communautaire toekomst [The Dutch Legislature in the EU's Future], in: Jorna, M. et al. (eds.): De betekenis van de Europese Conventie voor de wetgevingspraktijk, The Hague, 2004, 85–86.

the EU "is an institution stimulating international trade for the open Dutch economy", but "an institution costing too much and threatening both our jobs and our social security". Figures like these at best indicate that there is a gap between the opinion of the Dutch voter and at least large parts of its political establishment in Parliament as expressed by party positions and official governmental policy. It is even hard to say whether this gap has increased over time since the referendum was the first occasion on which researchers found reason to ask the question and compare the mass and elite opinion.

Most of the political parties that supported the yes-camp have by now openly agreed that they themselves were surprised by how they had misread the opinions of their constituencies and about the size of the gap between their policy position and the opinion of their electorate. But this does not explain why this gap has come about or what should be done about it. Does it, for example, imply that the government should have been less co-operative in the European process preceding the signing of the Draft for a Constitutional Treaty in Rome?

Several political parties – including that of the Prime Minister – are already in the process of adapting their opinion to the – perceived – position of their voters. This is, of course, the way it is supposed to be in a representative democracy, if only as a matter of political survival. From a perspective of public choice, popular sovereignty is a great good and, of course, in political terms the electorate is always right. But is this the end of the story? Seeing political will as an exogenously determined independent variable does not leave EU proponents much choice other than to find ways to bypass the electorate by claiming that there will be "no more referendums", that "this is no subject for a referendum", or by incorporating elements of the proposed constitution into a series of piecemeal adjustments of European Treaties, i.e. "doing it secretly", or at least outside the immediate reach of "direct democracy". The only other alternative is to wait and hope for enlightenment or a deeper insight among Dutch voters to develop at some point in the future. There is, of course, little chance that this will happen in and of itself, unless one is willing to wait for a very long time indeed.

Any gap or distance between electorate and representatives, however, is a two way street. From an institutional perspective, preferences are not given – certainly not in a process like this. The outcome of the Dutch referendum could easily be studied as a case of *highly dynamic preference formation*. Large parts of the Dutch electorate in the process seem to have replaced their revealed preference for a logic of European appropriateness by a stated preference for a European logic of consequence.

The surprising outcome of the referendum might also be interpreted as part of a broader pattern. Other unexpected rebuffs of Dutch European policy, albeit less

dramatic, have occurred, and they seem to have followed a by now familiar pattern, one also reflected in the case analysed here. Many seem to have forgotten that the famous Treaty of Maastricht was preceded by "Black Monday". Briefly, before the famous summit, representatives of the Dutch Presidency travelled to European capitals only to find out that their internally and carefully prepared design for a Federal European Treaty – may we call it a preliminary draft for a Constitution? – was totally disliked and was likely to be rejected within just a few days before the meeting opened. Those who were supposed to support it were not involved in the drafting of the document. In the early 1990s, when studying the implementation of EC directives was not yet a big deal, the Netherlands found itself systematically among the laggards within the implementation process. Not surprisingly, those having to carry out the implementation – at the time the national departments and advisory bodies – were not involved nor represented in the negotiation process leading to decisions on the directives. Implementation problems were, therefore, bound to occur.²⁴

In the middle of the 1990s, two talented young ministers almost got into deep political trouble over the so-called Securitel case. The responsible ministries had "forgotten" to bring legal changes to the attention of the European Commission – a required standard procedure. But they were uninformed largely because they had not been involved up-front in the design of the process. By the second half of the 1990s, the Netherlands got into serious trouble over inappropriately used ESF funding. Again, there were no wrong intentions, let alone corruption. Rather, severe technical violations of European accounting guidelines stemmed from an inability to involve the relevant executive parties from the bottom-up, in this case local and regional governments, labour market institutions, and regional oversight institutions.

By the beginning of the new millennium, the Netherlands is once again wrestling with the implementation and compliance question, largely for the same reasons as before. And then the referendum occurred. It turned out to be a recurrence of the same institutional pattern. Those needed to make the implementation of the policy process – ratification – work, in this case the citizens, were not involved and were largely ignored in the preparation of the Dutch position on Europe. The politicians in-charge were not informed in detail and with compassion about problems the "executors" – voters in the referendum – were experiencing, nor about the detailed ins and outs of the European proposals. After all, the advisors and communication specialists anticipated no problems beyond figuring

²⁴ Toonen, T.A.J.: Europe of the Administrations: The Challenges of '92 (and Beyond), in: *Public Administration Review*, 52/2 (1992), 108–115.

out how to celebrate a landslide victory. Again, the political bill for this miscalculation was served in the process of carrying out European commitments.

In all of the earlier cases, the Dutch administrative system knew how to repair things. They are proficient. They do not easily make the same mistake twice. Single loop learning is well organised. But interactive double loop learning, let alone deuterio learning – “learning how to learn” – turns out to be much less developed and brought into routine practice. Part of the recurrent problem is that – unlike, for example, the situation in Denmark and the United Kingdom – Parliament is hardly politically involved and committed to these processes of handling European policy-making in the stage of preparation and seeing to it that relevant interests are selectively but duly represented in designing Dutch European policy. The typical response to these kinds of institutional failures is to depoliticise the issue, whereas the response should be the other way around via politicising European decision-making. Only in that way the “Europe of the administrations” will be able to give interactive EU policy-making the priority which – in the Netherlands – it should already have had long ago.²⁵

“Structural politicisation” of Dutch European policy-making is necessary to overcome the *ad hoc*, uncontrolled, and unexpected “sudden politicisation” identified in both the referendum and the earlier cases reviewed here. In a reaction to the outcome of the plebiscite, the Dutch State Council (*Raad van State*), as the highest advisory council on institutional matters to the government, has taken up this line of argument by stressing the mutual interdependencies among the various levels of European decision-making and calling for a strengthening of political control and direction at the level of government and Parliament.²⁶

Is all of this only relevant to the Netherlands? Why should the rest of Europe bother? After all, they are stuck with a stagnated ratification procedure and a Draft Constitution and probably could not care less about a series of mistakes made in the Dutch context.

V. How to go from here?

Communication and learning are dynamic and interactive processes. In the context of Europe, they are also political processes. In the Netherlands, the process leading up to the Constitution and to European integration more generally has

²⁵ *Ibid.*

²⁶ Advies Raad van State en nader rapport, Kamerstukken II, 2005/06, 29.993, nr. 22.

been treated as a high brow, largely technical and legal project, one that is often too complex for the average person to comprehend and, therefore, better to be left to specialists. It was certainly no easy subject for a plebiscite. Many will see this idea confirmed by the outcome of the Dutch referendum.

We would like to offer a different perspective on the basis of the actual Dutch experience as represented by the case analysed above. Let us leave aside the question of whether the Dutch saved other governments from a similar embarrassment further on in the timetable of the ratification process. More importantly, if anything, the analysis of the Dutch Referendum case might exemplify the argument that without "the mediatory structures from which the democratic process lives, the Community would after its full constitutionalization be a largely self-supporting institution, farther from its base than ever. [...] A European constitution would not be able to bridge the existing gap and would consequently disappoint the expectations associated with it."²⁷ The way forward is, therefore, not to try to find as quickly as possible some alternative form or forum in which the ratification process might still be continued after the dust has settled. Constitution-making is not a deterministic process. There is choice in institutional variety, not merely one way in which the European project might be realised.

To begin with, simplification or transparency is indispensable for effective public debate. Otherwise, people will inevitably create subjective simplifications of their own, many of which will surely be ill-formed given a lack of rigorous testing through debate. Without an effective debate, one might have a Constitution, but no Europeans to willingly live by it. Proponents have often used the argument that the largest part of the proposed Constitution was a codification of existing European arrangements. Why not make this explicit?

"As long as the call for a constitution has to do only with the constitutional form of the existing legal bases for the European Union, to make its goals and structures more transparent for Union citizens, then this can be accomplished by separating the treaty elements that in a nation state are typically in the constitution from the numerous detailed regulations that have crept into the treatise alongside them. The 'core treaty' so formed would thus resemble a constitution in its external form."²⁸

To the extent that the proposed constitution concealed a call for institutional reform, a different approach is required. The functional need for the specific reforms, for the EU, for specific countries, or for the European system as a whole should be made clear to external public observers, not mathematical insiders or legal experts only. This will indeed imply that the European constitutional debate

²⁷ Grimm, D., op. cit., 257.

²⁸ Ibid., 255.

is set on its feet again.²⁹ The need for reform should be argued and carried out on functional terms. Why are they needed? An answer might discuss, for example, a policy that will "improve the lives of European citizens". Reforms can still be introduced by amending the Treaties without having to turn them into a Constitution according to the national pattern.³⁰ Eventually, they may well be included in the codification process of the core constitution. For such approach, a longer period of development has to be budgeted. Nice was not "nice", but it was not the end of the world either. Many values sought to be guaranteed by the proposed Constitutional Treaty are already embedded in the existing, unwritten European constitution and will not easily be lost.³¹ Working routines could develop into standard operation procedures within the status of unwritten law, to be included in the developing system of specific regimentation and bylaws as annexes to the codified core constitution.

One has to accept that the expansion of Europe sets limits to the ambitions to become a fully integrated political Union and that there is a variety of forms that integration might take. The nation-state model as an exclusive guide for European democratisation is not the way to go. All of the constitutional debates have clarified that without a European people to support and control it, the Union will be neither trusted nor accepted. It will only be neglected by the plural peoples of Europe. Any slight institutional resemblance to the old nation-state will put them on high alert.

One also has to accept that – under these conditions – Europe is basically a joint arrangement of member states bound by their mutual treaties. Initiatives to strengthen the role of national parliaments in cooperating on EU issues could strengthen representative democracy. The legal foundation that best fits an association of states is the treaty. European citizens will increasingly either find their own ways of directly participating in the process Europeanisation or choose the exit option. They are certainly not always willing to rubber stamp European deals made by unresponsive elites.

Constitution-building is not merely a legal act, but reflects the working practices in the various areas of EU policy. In the real, extant, and working constitution of the peoples of Europe, monetary and economic projects directly affecting their interests are considered the most vital and interesting parts of Europeani-

29 Hesse, J.J.: Die Diskussion um eine europäische Verfassung: Vom Kopf auf die Füße zu stellen, in: Bruha, T./Hesse, J.J./Nowak, C. (eds.): *Welche Verfassung für Europa?*, Baden-Baden, 2001, 63–87, here 63.

30 Cf. Grimm, D., *op.cit.*, 256.

31 Van Gerven, W.: De Europese Grondwet Teruggefloten. Wat Nu? [The European Constitution Called Back: What to Do?], in: *Rechtskundig Weekblad*, 69/5 (2005), 161–178.

sation. Under the given circumstances, the implementation of the Stability Pact, institutional economic reforms along the lines of the Lisbon agenda, and a robust process of dealing with new and proposed members of the Union – both at the level of new member states and as a result of international migration – all belong to the perceived constitution of the European system, whether or not they are legally incorporated into a formal constitutional framework.

These observations also highlight that “living” constitutions are made in the functional process. The Dutch Parliament has joined the wider initiative to embark on a joint project with other European parliaments to start incorporating the “subsidiarity test” as way to gain more political control over and earlier involvement within the European decision-making. For the Netherlands this is a first step in the direction of remedying the faulty institutional pattern identified earlier.³² Parliament and politics will have to become involved much earlier in the process. It is also an illustration of how provisions out of an unratified constitution may be incorporated into the day-to-day practice. Accordingly, however, one has to be aware that this move will face the same risks as the criticism or doubts that were uttered on the subsidiarity tests when they were still a heralded part of the proposed written constitution: staying empty symbolic gestures.

These risks can only be avoided by matching (functional) substance to (institutional) form. “Under the current technological and international conditions, the functional imperative of democratic will formation can scarcely be fulfilled in the nation-state framework; this is all the more true for Europe.” Inserting substance and functional performance into the debate on subsidiarity will provide “the flowing contents of a circulatory process that is generated through the legal institutionalisation of citizens’ communication. This is precisely how national identities were formed in modern Europe.”³³

The concept of subsidiarity has often been criticised as nebulous. The real problem is not the vagueness of this concept – compare all other great concepts for institutional design – but the fact that in the European context it has been too strongly linked to federalism and the idea of a strict division of labour – a catalogue of competencies – between different levels of government. In fact, subsidiarity as a design principle has a political, procedural quality, which “questions the need, possibility, and desirability of some kind of a blueprint as the basis for a ‘European constitution’.” Optimal subsidiarity relationships vary from situation

³² On the discussion concerning the role of the Dutch Parliament, see *Dijkstra G./Steunenberg, B.: Nederlands parlement grijp uw kans*, in: *Staatscourant* 235 of 06.12.2004, 5, and *Steunenberg, B./Dijkstra, G.: Europese Grondwet wijzig nationale politiek*, in: *Staatscourant* 122 of 30.06.2004, 7.

³³ *Habermas, J.: Reply to Grimm*, in: *Gowan, P./Anderson, P. (eds.), op. cit.*, 263–264.

to situation and are constantly changing”³⁴. In European history, the subsidiarity principle used to play a role in demarcating and linking the roles of states and churches in society and in people’s lives. Under modern – “de-confessionalised” – conditions, the search is for new values and standards for organisation and reform across different planes of European governance. This implies that the notion and concept of subsidiarity rather than to “federalism” has to be linked to “democracy”. Actually applying the subsidiarity test by parliaments – rather than merely talking about in constitutional terms – could contribute to a further political discussion and functional development of the actual working practices of European integration, not only at EU level, but also between the Union and its member states. Provided it is not going to be divorced from functional content, this could contribute to the pragmatic further development of rules that will become the “real” and “living” Constitution of Europe. As a case in institutional development, the Dutch referendum illustrates that adversity also leads citizens to take a stand in a European, rather than a national, political debate. In this way, also a no-vote contributes to the constitution of a European democratic space.

34 Toonen, T.A.J., *op. cit.*, 114.