

European Studies at Oxford

*Whose Europe? National Models and the
Constitution of the European Union*

Edited by

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and

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*Papers of a Multi-Disciplinary Conference
held in Oxford in April 2003*

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Preface

This small volume collects papers presented at a conference entitled “Whose Europe?: National Models and the Constitution of the European Union”, held in Oxford on 25-27 April 2003. The event brought together scholars involved in the field of European Studies at Oxford University, scholars from outside Oxford and participants in the Convention on the Future of Europe. It was actively planned as a multi-disciplinary assembly. A more detailed account of the intellectual framework is supplied in the Introductory Chapter. Suffice it to say here that the event generated a rich and vigorously constructive debate and discussion, both in formal and informal settings. We could not resist the attempt to capitalise on the intellectual energy that was released over that April weekend in Oxford, and to that end we are delighted to be able to publish this collection under the auspices of “European Studies in Oxford”, the consortium of eight Oxford institutions listed on the back cover of this publication. It consists of relatively brief but to-the-point papers written by participants shortly after the event, and in the shadow of the final outcome of the Convention process. We are enormously grateful to all contributors for their help.

We are also happy to express our gratitude to supporters of the event. The event was dependent for its success on the contributions of the European Studies Centre at St Antony’s College, the Europaeum and the Department of Politics and International Relations. Support was also provided by the Institute of European and Comparative Law.

The Convenors and Steering Committee were Vernon Bogdanor (Department of Politics and International Relations & Brasenose College, Oxford), Andreas Busch (Department of Politics and International Relations & European Studies Centre, St Antony’s College, Oxford), Anne Deighton (Department of Politics and International Relations & Wolfson College, Oxford), Pierre Dubois (HEI, Geneva), Robert Evans (Faculty of Modern History & Oriel College, Oxford), Paul Flather (Europaeum & Mansfield College, Oxford), Michael Freeden (Department of Politics and International Relations & Mansfield College, Oxford), Timothy Garton Ash (European Studies Centre, St Antony’s College, Oxford), Robert Gildea (Faculty of Modern History & Merton College, Oxford), Vera Gowlland-Debbas (HEI, Geneva), José Harris (Faculty of Modern History & St Catherine’s College, Oxford), Ruth Harris (Faculty of Modern History & New College, Oxford), David

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Whose Europe?

National Models and the Constitution of the European Union: Introduction

KALYPSO NICOLAIDIS *and* STEPHEN WEATHERILL

The European Convention on the Future of Europe submitted the results of its deliberations to the Thessaloniki Summit in June 2003. The aim of our conference, held at the end of April 2003, was to provide a contribution to the debate a couple of months before the end-game by bringing together the many scholars involved in different facets of European studies at Oxford University, scholars outside Oxford and participants in the Convention. It was decidedly and determinedly multi-disciplinary as it sought to link perspectives on Europe informed by history, political science, sociology, political theory and law, as well as literature and linguistics.

We started from the premise that a European constitution—or a Constitutional Charter, or Treaty—cannot and should not reproduce at the European level the constitutional logic of the nation-state in general, nor of any state in particular. At the same time—and this may be the fundamental tension afflicting this whole exercise—national political cultures constitute the fundamental historical and conceptual building blocks for constitutional thinking in the EU. National traditions, myth, practices, assumptions, collective likes and dislikes constrain and inspire in fundamental ways the designs of the Convention. Thus, while the EU should not become a “state writ large”, in practice, the design of its institutions has been and continues to be inspired by “what we know”.

This is as inevitable as it is perilous. We do not want to re-invent the (constitutional) wheel but we cannot neglect the novelty of the vehicle to which we would attach wheels. We proposed to explore how national “models” have inspired a possible European Constitution—and how in turn the EU as a polity can and should diverge from such models. We wished to ask what kind of lessons, positive or negative, can be drawn from national historical trajectories; how European elites and citizens themselves tend to project their respective models onto the European

level and how this inspires their positions on specific questions; and how the role of the State and of the Constitution are approached in different ways across countries and cultures, a divergence which in turn creates variation in the political language and expectations of European polity-building among present and future participating States.

We were anxious to concentrate in particular on three of the core themes of the Convention. These were, first, modes of representation, second, allocation of powers and subsidiarity, and, third, citizenship for a polity of peoples. Although we could not sensibly aspire to have each national model formally represented in our panel presentations, we hoped to see a wide variety of national perspectives, and in this quest we felt ourselves proved gratifyingly successful. While these were the three themes on which we wished to focus in order to disentangle some of the intricacies and hidden, even unconscious, assumptions of the debate about constitutional models for Europe, we separated the proceedings of the conference into distinct sessions. That is reflected in the introductory overview provided below, which is sub-divided into five. That separation is here designed to help the reader to grasp the ambition and context of the several papers collected in this publication. Each of the conference sessions enjoyed its own particular points of emphasis and its own distinctive internal dynamic, but each was intended to be connected to a broader inquiry into the adaptability and aptitude of national models in the emerging European constitutional debates. In this sense the overall output of the conference was both richer and greater than the sum of its parts and we hope the same is true of this collection of papers.

A Constitutional moment?

This is not a classical constitutional moment, to say the least. No civil war, no revolution, no great upheaval has preceded it, nor the need to lay the grounds for historical reconciliation. Incrementalism is (for good or ill) our platform. The European constitution has been in the making for the last half century. Indeed, the Convention on the Future of Europe was not even explicitly labelled a “Constitutional Convention.” Yet it produced the building blocks of a Constitution for Europe, or more modestly a “constitutional treaty”—notice that the nomenclature is instructively diverse, even imprecise. At the same time, we may be tempted to argue that the war in Iraq during last phase of the Convention has significantly changed this equation—creating the much needed

“constitutional crisis” for some, or reasons for caution and humility for others. A string of questions present themselves. What can we learn from the “constitutional moments” of the past? Can the historical “big bangs” which established constitutions in the past be reproduced in a period of peaceful change for a European constitution? *Should* they be? To what extent can we extrapolate from State to non-State entities, from national to post-national constitutional moments? When have Constitutional debates of the past succeeded in moving from bargains over specific interests to conversations about the common good? Is democratic debate and broad participation necessary to the legitimacy of such exercises, at least in our times? And if so, how does the Convention of 2002—2003 measure up? Finally: is a foundational myth a necessary condition of constitution-making that will endure?

Craig emphasises that the current process is driven by a combination of impulses, including the desire to address questions of institutional and substantive reform, simplification, and pursuit of wider legitimacy to be secured through use of the Convention model. On the latter point he is concerned to emphasise that the spirited approach adopted by the Convention, including its quest to generate a complete and coherent text, should by no means be taken for granted. The readiness of some Member States to install more prominent politicians once the Convention process picked up momentum may itself provide evidence that its eventual high profile was not fully foreseen. This in turn nourishes rich fare for the familiar inquiry into the influence and limits of intergovernmentalist strains in the EU. For *Craig*, the Convention has already done enough for it to be apt to regard this as a constitutional moment—one at which Treaty reform was emancipated from the orthodox model of commencement and conclusion under the auspices of the intergovernmental conference.

Schmitter finds the current interest in ‘constitution-making’ underpinned by no founding moment on the scale of Philadelphia, and expresses a preference for the Monnet method—‘petits pas, grands effets’. He examines the *process* of crafting a constitution in today’s Europe and finds it flawed. The motives for constitution-making are weak. For him the prospect of enlargement and, even more so, the alleged ‘democratic deficit’ strengthen the case for simplification and piecemeal reform, not a ‘constitution’ writ large. Moreover, the impetus for constitution-making is feeble. Radical change is not unavoidable, for current arrangements have not demonstrably failed, nor is there a *demos* calling for a constitution (though he admits that in the past many

States were similarly demos-deficient at the time of adopting a constitution). And the making of the constitution has been pitched at a level too remote from the citizens. Here Schmitter has a specific remedial suggestion—ratification in a polity-wide referendum, which, moreover, should occur at the same time in all Member States. He predicts a high turnout, approval and consequently an important source of legitimation. But he concludes by observing that the process of European integration will continue independently of the outcome of the current constitution-making endeavours.

Cohen provides a panorama of European integration stretching across the entire post-(Second World) War period. He uses the Cold War to connect the Hague Congress of 1948, both result of and contribution to its emergence, with the Convention on the Future of Europe, both result of and contribution to its termination. He adds intra-European civil war (most obviously in the former Yugoslavia) and the menace of international terrorism as new dangers that form a background to the Convention's deliberations. He identifies three consistent themes in devising a 'Future' for Europe and treats them as provocations to compare the 1948 Congress and the 2002-03 Convention—European identity, European constitution and the Federal Prospect.

However one judges the nature and purpose of a constitutional moment, and however bullish one chooses to be about the descriptive and normative potential of comparison, the presence of such a moment does not dictate what shall be made of it, nor does its absence preclude sustained, even renewed, institutional and constitutional ambition. In this sense the debate about the 'constitutional moment' is a springboard to interrogation of more detailed implications of the quest to devise a workable set of constitutional arrangements for Europe. And here too the national model or, more properly, national models are available as beguiling sources of comparison and contrast—for good and for ill.

Whose Europe? National Models and Narratives of Projection

Few doubt that the EU is not and cannot be built on the model of the European nation, state or nation-state. Nevertheless, elites and peoples in Europe have often tended to project some of the features of their own national models onto the European project, be it broad constitutive characteristics like the rule of law, the role of the state, federal structures or democratic practices, or be it specific policies and institutions. Some

national models seem to lend themselves to such “narratives of projection” better than others. In this vein one may, for example, contrast Germany and the UK. Germans tend to relish projecting their federal model on to the European plane, while the British fear a ‘Westminster-Europe’ above all. Narratives of projection give shape to, condemn or legitimise transfers from the national to the European sphere.

This section of the conference examined various national “models” and their relevance to the EU. We wished to understand what we could learn from such implicit or explicit narratives both from a historical perspective (how have they traditionally projected what features of their national model?) and normatively (which features of which countries would indeed appear relevant for the reform of the EU?). Is it fruitful to refer to national “models” and in what way? Are we concerned to reject them, adopt them piecemeal or combine them? Or are national models most relevant for understanding the mental maps of elites designing and publics ratifying a European constitution?

In the discussions at the conference we encountered a rich variety of narratives on offer to us in Europe. In fact our discussions highlighted at least four different categories of narrative. First, *positive narratives* or *narratives inviting transplant*, whether offered wholesale (e.g. German federalism) or piecemeal (e.g. the French dual executive head). Positive narratives often inspire the discourse of European federalists who ask how the EU will eventually acquire the general features of the nation-state and thus generate its own myth of creation. Political community should be based on identity. When, they ask, will Europeans hear their *appel du 18 juin*? What is clear is that such assumptions that there should be a European *demos* are the most fundamental expression of positive narratives of projections.

Obviously, we also have *negative or antithetic narratives* that are meant to provide a counter-inspiration for the EU. Thus for instance, the history of shifts from confederation to federation remind us of the kind of history we do not want for Europe. For the British (most of all, perhaps, for the English), a Europe made on the model of Westminster, as centralised and powerful as their own kingdom, is exactly what needs to be avoided at all costs. And this strain of British thinking is not alone in questioning the applicability for Europe of direct parliamentary accountability of the type familiar in the nation-state context. Among scholars, many criticize the very idea of a ‘democratic deficit’ as locked in an inaccurate projection of national models of representative democracy. It is an appeal for conceptual clarity that begins the paper

contributed by *Bogdanor*. He employs Wheare's "federal principle" and finds the EU complies with the chosen definitional criteria. And he compares it with federal systems elsewhere. Nonetheless he prefers to treat Wheare's criteria as necessary but not sufficient, and declines to treat the EU as federal for want of characteristics including exclusive central authority over diplomacy and defence and adequacy of financial resources. And it is emphatically not a state, though, for *Bogdanor*, it is a constitutional order of States. The Treaty of Rome exemplifies the federal principle without creating a federal State and the closest comparator is, in *Bogdanor's* opinion, the German *Zollverein*, created for predominantly commercial reasons in 1834. On the institutional plane he finds no true analogy between the European Parliament and a domestic legislature, since the European Parliament does not represent one people. This leads him to the conclusion that remedies to the perceived democratic deficit rooted in handing greater power to the European Parliament are misconceived. He considers mooted reforms, finding many to carry assumptions of an acquisition of Statehood for the Union, but he regards the creation of a missing common consciousness among peoples, becoming a people, of Europe to be an essential pre-condition to a move to a majoritarian system of decision-making at European level.

We also have a third category of *Post-hoc narratives of projection* which somehow convey the altogether more subtle message that Europe has been the future of the nation-state just as in Jean Ferrat's "la Femme est l'avenir de l'homme". What Europe has become—or *may* become—has the capacity to affect our presentation of the past. *Soysal* reports findings from research into the depiction of 'Europe' in schoolbooks. She finds that Europe is portrayed in terms more diffuse than would be normal in State- or nation-building narratives. Its identity is composed of a set of universal principles such as democracy, human rights, and gender equality which are inapt to found a coherent collective identity. So Europe may never end up with a consistent and specific narrative and we should not expect the emergence of a European *demos* in the conventional statist sense. But at the same time national histories are increasingly situated in a European context and *Soysal* has discovered evidence of historical transformations subject to portrayal as part of a natural evolution towards the inevitable creation of a future 'Europe'.

And finally we encountered a fourth kind of virtual narrative—*inspiration*. These perspectives do not seek to translate existing State systems to European level (cf *positive narratives*, above). Instead they ask how

different levels of governance, each engaged on an iterative quest to manage diversity, can achieve this while escaping orthodox State-centric patterns. *Conway* locates his examination in the context of a “post-unified Europe” and points to the challenges of stabilising the structure that has been devised, now that the previously remorseless propulsion towards ever closer union has been checked by, *inter alia*, the pressures of enlargement and increasing anxiety to respect diversity. He alerts us to the plurality of national models on offer, but promotes the virtues of one of the more neglected—the Belgian. “Europe’s first and indisputably most successful post-national state” aims not to build unity but to manage disunity. His examination reveals complexity, even undeniable inefficiency and indecisiveness, as necessary elements in the success of the Belgian experiment. Belgium, like the EU, has no “patriotic euphoria or historical solidity”, and Conway encourages us to consider whether the constructive evasion of simple forms of political architecture practised in Belgium might offer a pointer for the EU.

Who does What? Allocation of Power, from National Devolution to European Subsidiarity

There is a long-held fear of “creeping competences” in many European quarters. It is frequently asked with anxiety, even hostility, how far the EU will push its brief in the name of building a single market and beyond. What are the bounds of the development of “common” policies of all kinds (from asylum to defence)! As a result, the question of allocation of competence or powers has been at the top of the Convention agenda. But because most competences are shared and in any case need to be exercised flexibly and dynamically, simply creating competence lists cannot deal with the issue adequately. Rules may matter, criteria may matter, but so too the associated institutional architecture plays a vital role in sustaining a trustworthy balancing of power. The Convention has accordingly revisited the formulation and operationalisation of the concept of subsidiarity introduced in the Treaties at Maastricht a decade ago. What should it say and who should police it? What modes of governance are best appropriate in the spirit of subsidiarity? Here we planned to revisit these well trodden questions from the point of view of national models, including how relationships between state and various layers of regional powers were originally defined and then adapted by different polities in Europe and what such histories bring to the European debate. If the EU is to be seen not only as multi-layered but

also multi-centred entity, what can we learn from the traditional centre-periphery relations negotiated over centuries in the various member states? And how can subsidiarity at the European level relate to more recent devolution efforts at the national level?

The history of the nation-State tells a tale of national centralisation and regional peripheralisation. What does this mean for the EU? *Loughlin's* examination of the way in which the EU has affected the function and aspirations of regional entities is conducted against a background of diversity in basic political architecture among the Member States and reveals changing patterns over time dictated *inter alia* by dominant political ideologies. He finds effective regional 'mobilisation' to have stalled at the time of the preparation of the Amsterdam and Nice Treaties but he outlines the aims and strategies of the constitutionally stronger regions and the Committee of the Regions at the Convention. He finds they fared poorly but predicts that 'mobilisation' by actors representing particular regional concerns will be reinforced into the future.

Wyatt provides a legal analysis of the principle of subsidiarity. He demonstrates how the legislative dynamics of the process of European integration tended to generate an ambitiously broad interpretation of the scope of competence, most of all under the Treaty provisions governing the harmonisation of laws and also the "residual" provision, now found in Article 308 (previously 235). In recent years this tendency has awakened increasing levels of scepticism, not least as a result of the elimination of the State veto in most areas of EC activity, and *Wyatt* shows the possibilities and limitations for exercising legal control over this 'competence drift'. Asserting that the exercise of competence should comply with the demands of the subsidiarity principle is exposed as largely "procedural mantra" rather than a means of securing reliable constitutional supervision. *Wyatt* finds that neither the political nor the judicial institutions have been willing to embed the essence of subsidiarity into their culture. He fears that this is because subsidiarity is reckoned to run counter to the historical trajectory of the process of European integration (and, one might add, to the process of integration *within* States in Europe until the last twenty years) but he responds by insisting that effective protection of local decision-making competence constitutes a vital element in (re-)assuring citizens of their effective involvement in and benefit from the EU.

How then do the imperative of sub-national regionalisation and supranational subsidiarity relate with one another? Paradoxically

perhaps, if modes of decentralisation at the national level were to be reproduced by the EU to the benefit of the State in Europe, then States would be strengthened against their own regions. In the true spirit of subsidiarity, the EU should not intervene in the internal game between intra-state levels of governance, or, if anything, it should strengthen lower levels of governance. If national parliaments are to perform a “subsidiarity check” under a new European constitution, one might usefully ask whether they should not themselves consult with sub-national elected assemblies.

De Areilza’s reflections on the debate about competences encourage him to regard it as one directed at achieving a system of checks and balances to which not only the Union but also the Member States should be treated as subject. He identifies a trend within and surrounding the Convention which is over-eager to laud the virtues of re-nationalisation of power. *De Areilza* argues that the *de jure* and *de facto* confinement of State power should be accepted at the normative level so that its limitation can be set alongside the limitation of Union power on a basis of mutually reinforcing symbiosis. He makes a vigorous case for ensuring that any initiatives to catalogue competences pay due attention to the need for the degree of flexibility and functional sensitivity that has characterised the operation of the system hitherto, and insists that the (political and judicial) institutional context of competence demarcation will be and should be of central importance. Like *Wyatt*, *De Areilza* has little positive to say about the performance of the subsidiarity principle in EU practice thus far.

Weatherill surveys the chase for reliable methods for policing the limits of Union competence, including subsidiarity, and seeks to show how they work in combination with attempts to legitimate the exercise of power in areas that do fall within the Union’s competence. The Charter of Rights, Citizenship, of course the Parliament and even the Convention itself as a source of legitimacy perceived to be superior to the IGC may be taken as emblems of the need to legitimate European-level decision-making other than by reliance on State approval in Council. That is, the process demands a Union possessing more rigorously limited powers but also a more accountable and legitimate Union. This may, however, create traps in so far as the model of the State is taken as the most relevant benchmark and in so far as the assumption of separation between States and Union, rather than mutual reinforcement, takes too deep a root. This anxiety is close to that of *De Areilza*. Finally, *Weatherill*’s support for the regularly voiced appeal for *clarification* of

the EU's mission but scepticism about the full implications of the beguiling case for *simplification* of its institutional architecture might have thematic connection with the approach of *Conway*.

The Laeken Declaration referred to the tension between ensuring that a redefined division of competence does not lead to a creeping expansion of the competence of the Union and maintaining a system that precludes the European dynamic being brought to a halt. The conclusion reached in our deliberations was that the institutional context is vital to the management of this tension—which means not simply the active involvement of the European political and judicial institutions, but also those at central and regional levels in the Member States. The issue is one that besets many States, but finding a model for paying more than lip service to *unity in diversity* in the EU requires a judicious appraisal of national narratives displaying strikingly diverse trajectories. However, a common thread is that the issue of division of powers should not be perceived as a zero sum game. This is shared competence but, properly modelled, it is simultaneously the notion of central action acting to empower, not diminish, the peripheries.

Who speaks for Europeans? Models of Representation from the state to the EU

In 1953, a Committee emanating from the ESCE wrote a draft constitution for Europe which envisaged a tripartite mode of representation: a Council representing member states, a European Parliament representing national Parliaments, and an Assembly representing European peoples directly. The EEC that was finally created retained only the first and second modes, but two decades later proceeded to do away with the second in favour of the third. And another two decades later, the Convention revisited both the role of national parliaments (compensating in effect for the loss of the second mode through the institutionalisation of COSAC and the new procedure for *ex ante* review of the subsidiarity principle) and also the balance between Council and Parliament in the European construct. At stake is the balance and relationship between state-based and people-based representation, functional and territorial representation, direct and indirect representation. What can national choices in this regard teach us for Europe? What insight can we gain from examining specific national proposals at the Convention? Under what conditions have which modes of representation prevailed historically? What modes of representation best serve participatory

and accountability purposes? And how can we ensure that European citizens feel “represented” at the European level?

Busch identifies severe problems in constructing a system of European-level decision-making capable of taking account of the direct input of all affected constituencies that will not simultaneously become enmired in delay and inefficiency. Institutional re-shaping may contribute to improved democracy in the Union but only and inevitably in an imperfect fashion. Accepting that Europe comprises peoples, not a people, *Busch* finds the EU lacking a tolerance of the type of functioning majoritarian democratic practices that would be and are accepted in a State. (At this point his analysis deserves comparison with those of *Conway*, *Bogdanor*, *Pasquino* and *Nicolaidis* in this collection). He proceeds to advocate patterns of differentiated integration as a route to escape the impasse, thereby to improve the EU’s outputs. More generally, this paper has evident associations with the conference’s thematic concern to look beyond typical State models of legitimation in plotting a future for the Union.

Pasquino begins his paper with a prediction of maintenance of the Union’s basic institutional *status quo*. He proceeds to explore patterns of *representation* for the Union. He shows how federal assumptions about the nature of European state-building would provoke attention to both Parliament and Council as proper sites for representation of the peoples, but he then questions whether this should be regarded as a correct transplant. The Union is not performing tasks that run in parallel to those of a modern State. Nor, in *Pasquino*’s view, is the way ahead blocked by the absence of a European *demos*. Instead what is lacking is a homogenous European political class able to speak for the citizens of the Member States. For the time being *Pasquino* urges us to treat, and to accept, the next Treaty as simply one more step in a visibly complex process embedded within which one may discern general features such as commitment to political accountability and legal protection of individual rights.

Who are We? Citizenship for a Polity of Peoples

It has become a cliché to argue that the European Union is a post-national, post-Westphalian, even post-modern polity. Yet institutional and policy debates and decisions do not always reflect this insight and the requirement of building the EU as a polity of peoples. Witness the views expressed on the democratic deficit and democratic legitimacy in

the EU which often consider the constitution of a “European demos” if not as a prerequisite, then at least as an aim of European integration. Here again, we can use as our starting point an exploration of how European polities in the form of nation-states have attempted to manage (with differing degrees of success) the tension between the one and the many. How for instance have national constitutions and institutions accommodated the diversity of groups (peoples?) in their midst? The accommodation of the intriguing phenomenon of multiculturalism is politically, socially and culturally challenging for European states—how then to project that debate on to the EU plane? But this is where the national analogy finds its most stringent limit, for perceptions of people and peoples evoke different assumptions and expectations in the wider terrain of “Europe” when contrasted with old and some not-so-old States. Maybe then we need to turn to the now defunct model of empires? And beyond models, a community of European peoples needs to imagine itself as an irreducible plurality and find the ways to express this commitment in practice. Should the Constitution of Europe start off as such: “We, the Peoples of Europe...”?

Magnette presents a sober account of the Convention outcomes, noting that no radical re-working of the provisions concerning Citizenship has been attempted. He approves. Magnette portrays European Citizenship as distinct from national citizenship and as unavoidably complex. States have vertical relationships with “their” citizens. He describes the distinct phenomenon of the *ius cosmopolitanum*—the relationship between citizens of a State and the other member States—as a horizontal relationship which is characteristic of multi-national polities, and which may be identified in the EU in concrete shape in the rules of free movement and non-discrimination. This connects to the EU’s broader mission to tame the capacity of States to harm “others”, an anxiety with shuddering resonance in the shadow of Europe’s grim pre-1945 history, while also potentially challenging the more vaingloriously universalist pretensions of the EU itself.

Nicolaidis makes a vigorous case in favour of the need to respect and to promote ‘persistent plurality’ among Europe’s component peoples. She regards the consequent embrace of sharing of identities, rather than pursuit of a common identity as essential to understanding what it is to speak of democracy in the EU context—most of all it is reflect on a new form of emergent democracy which will inevitably (and damagingly) be rejected if it is assessed with reference to Statist benchmarks. So the debate between those who oppose the idea that there can be a Euro-

pean *demos* and those who would embrace it is shown to operate on a distinct plane from this ‘third way’ which envisages European *demoi*. A *demoi-cracy* is not ‘predicated on a common European public space and political life’, but prefers ‘a model of informed curiosity about the political lives of our neighbours and mechanisms for our voices to be heard in each other’s forums’. She then reflects on how this perspective informs some of the ideas emerging from the Convention, echoing Weiler’s regret at the loss of ‘constitutional tolerance’, before offering the concluding suggestion that the novelty of the EU constitution should be detected in its rejection of the orthodox assumption of constitution-making, which is that it reflects or seeks to create a single constituted *demos*—a rejection that even yet remains too implicit and tentative.

Conclusion

It is plainly correct to diagnose a certain confusion about what to “do” with the EU, now that it has broken its bonds as a machine for the delivery of economic integration and has gradually accumulated state-like constitutional and institutional features, while performing ever wider functions. Fundamental questions about the nature, purpose and location of democratic legitimacy are attracting different types of response designed to cope with and, perhaps, restrict, halt or even reverse seepage of power to European level. Several contributions to this collection emphasise the complexity of the current arrangements and, illuminatingly, express reservations not merely about whether that complexity *can* be dispelled, but also about whether it *should* be dispelled. Pragmatic simplification and piecemeal institutional reform may not now be treated as a sufficient outcome to the current process precisely because expectations have been pitched at constitutionally more exalted level. Yet truly radical recasting of the nature of the system seems precluded by absence of a sufficiently explosive constitutional moment and an (associated) inadequate demand for such alteration among citizens and political elites. In tracking what might lie and what should lie between these extremes, our overwhelming anxiety is to emphasise the perils that lurk in a borrowing of State models that pays inadequate regard to the distinct needs and aspirations of the building of a European Union. It is this perceived risk to which our Conference project was explicitly directed—the risk inherent in the question floated in the Laeken Declaration whether “simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in

the Union”. We feared and, having observed the Convention’s outcome, we still fear that this question might be answered in tones and terms that too readily adopt existing models found in (some) States as the appropriate route to a new—but in fact old—constitutional Future for Europe. Were that to occur, the institutional and constitutional novelties that have served the European union so well for so long would be quelled. And the compelling logic of the entity that is not itself a State, nor ambitious to become one, yet which transforms and improves the conduct and, indeed, the nature of its participating States would be shattered.

To offer a concrete example, if we ask whether the Commission, or at least its President, should be elected—and, if so, by whom—then we should proceed to think carefully about just what function we envisage for the Commission. The case for election is strong if one assumes the need for the Commission, or at least its President, to be validated according to some variant of the democratic processes normal in European States, as Prime Ministers are. However, the case is far less strong if one conceives of the Commission as responsible for performing defined tasks of management and administration, in which case it should be answerable for its ability to do the job effectively. Indeed requiring it to seek periodic popular support (in some forum or other) might divert it from doing its properly on behalf of the whole Union and lure it instead to satisfy powerful private or public interest groups. As a minimum we should be wary about arguments that assume the Union should be inevitably legitimated in the same way as States are legitimated: but so too we should be suspicious about arguments that assume that the fact that the Union is not a State is enough to dispose *tout court* of the need for elements of accountability. We can do much more in the terrain lying between these poles. And, after all, it is only the provisional that lasts.

But this cannot be permitted to regress to an argument by political and intellectual elites that we should proceed with “business as usual” in the European Union, however successful the prosecution of that business might have proved to be since the 1950s. None of our contributors make that case. Even where appreciative of the current arrangements and critical of both the feasibility and desirability of radical alteration, they seek active engagement with the pattern of the debate in the belief that the shaping of the Union cannot foreclose deliberation. This is where we have tried to make a contribution, in Oxford in late April 2003, and in this collection. In general we have tried to draw on national experience and expectation, as well as on national apprehen-

sions and reluctance, but to do so overtly—to track what informs the debate about constitutional futures without making ill-judged or even unconscious assumptions rooted in national practice. It is probably inevitable that we shall borrow from national patterns, yet we must strive to borrow while thinking hard about the consequences of taking on loan models, concepts, symbols and even language that frequently can and should play distinct roles when transplanted from States to the EU. The Convention on the Future of Europe itself was deliberately and ambitiously constituted of interest groups reflecting a plurality of “Europes”. That vision of wider engagement deserves fulfilment.

Reflection on the nature, purpose and contested existence of a constitutional moment and, broader still, of a foundational myth cannot help but provoke. There might have been a period in which the reunification of Europe could have constituted a vibrant foundational myth (or, more accurately, a re-foundational myth), when fragments of the Berlin Wall were eagerly collected as living memory all round Europe. Indeed we may have had a constitutional-moment in the making since fall of Berlin Wall, but, if so, it has indubitably run out of steam in the interim. Perhaps, however, all is not lost! As Bronislaw Geremek remarked, since constitutional moments are constructed, along with the myths to which they give rise, why can they not be reconstructed *ex post facto*? An attempt to answer to this question leads to another question: who is this constitution for? Who have the stakeholders of constitutional moments been in the past? And would this diagnosis be relevant?

A first answer to the question “who is this constitution for?”: it is for the citizens of Europe. Historians astutely remind us that most constitutional moments have not been politically correct in this sense. Constitutions were usually written by the elite for the elite. This might tell us something about the risk of exaggerating the connections between State-building, constitutions and the existence of popular support when we survey the past. We cannot lightly take this route today. But we can reflect on the ‘*demos* problem’ in this context. An absence of a European *demos* is damaging to ... what, exactly? To be sure it is damaging (but in a historical perspective not necessarily fatal) to a project that conceives of constitution-making in the EU as an exercise in building a (new and big) State on the conventional Western model. But it is less obviously damaging to projects that conceive of the EU as a framework within which to shape mutually reinforcing systems of governance, backed at European, State and regional level by varying (but potentially shifting) types of allegiance. This line of thinking may

be enriched by portrayal of a European sense of identity rooted not in the traditional trappings of nationhood but instead in more diffuse notions such as respect for human rights, political accountability and solidarity within a community of others. And, more radical again, the absence of a European *demos* may be taken to deserve celebration and to clear the way to the elaboration of a more welcoming attitude to plural identities.

Second answer: the constitution is for the weak. Let us take the EU project to be a complement rather than a replica of its component nation state projects. Activists in transnational social movements join cosmopolitan lawyers in the belief that the rule of law in general and, even more so, Constitutions should be meant and designed above all for the protection of the weak. This may be seen as part of a fundamental insight about EU: that its most valued function may increasingly be that of *empowerment*. This means empowerment of those individuals who have a muffled voice domestically, of regions that have historically been crushed on the altar of the nation, of smaller or new Member States who for so many centuries have fallen prey to the European concert of nations. Accordingly this new Europe proclaimed by a new constitution ought to be focused on social and civic inclusion within the Union and, from beyond current borders, on enlargement. And it should be seen as a process of addressing how best to secure effective and fair exercise of power in Europe, and not as a zero-sum game of distributing and re-distributing parcels of power to self-interested rival actors.

Third answer: it is for the rest of the world. This perspective can lead to two radically different visions. On the one hand it would regard the constitution as asserting a collective European identity against or at least vis-a-vis *the other*. The other might be the United States. This is dangerously sharp-edged, and attracted *inter alia* Polish and British anxieties in our discussions: and yet perhaps, looking from West to East instead of East to West, Europe is already becoming America's *other*. The other might be Islam. This was treated as chilling. The other might be Europe's bloody past. Or the other might be globalisation, or at least the global power of multinational enterprises. Or it might be millions of faceless individuals from the South vying to cross our borders in search of a better life and against whom we need to build a 'better' fortress-Europe through common border guards and surveillance technologies. But there is another vision of building Europe for the rest of the world. That reflects on a Europe developing a powerful rationale for its role in the world—that of a strong, purposeful and emancipatory civilian

power. Such a Europe would be extroverted and inclusive, generous and assuming and it would give itself a Constitution as a declaration of and for its global vision.

Whichever answer one prefers—and they are not mutually exclusive—the European constitutional process may come closer to its national precursors than many would have hoped or expected. In spite of the uniqueness of the Convention method, the Convention plainly fell far short of full and active engagement with the broader political and civic body of interested European citizens—and even less with interested citizens from beyond Europe. From the perspective of promoting social inclusion and broader opportunities for empowerment, there were fine words but an increasing impression of the reassertion of the power of the big countries. And, on the external plane (beyond enlargement), the Convention felt extraordinarily introverted.

Nevertheless, the Convention stands for a freshness in constitutional modelling. There is still a chance that its influence may endure and tip the process into one of a truly historic magnitude as the post-Convention process develops. A Europe-wide debate may be entered—or, at least, one may anticipate the horizontal interpenetration of national debates. That may contribute to a glimpse of the possibilities of a common European political culture that enriches, but does not replace, national political discourse. Philippe Schmitter's advocacy of ratification of the new text across Europe *on the same day* offers one example of a concrete idea motivated by this ambition. By the end of the Convention this proposal had become a favourite among many Conventioneers. There are, to be sure, many possible fresh and imaginative ideas that may use the Convention as a model and an encouragement to break the prevalence of the alienating closed-doors intergovernmental conference. And perhaps constitutional moments and foundational myths are after all best adorned and duly celebrated with hindsight.

When is the Time Right?

Historical Big Bangs and Peaceful Reform

PAUL CRAIG

Why Now?—The reasons are eclectic, and linked, no single reason being determinative.

The four issues left over from the Nice Treaty for discussion at a future IGC were never completely discrete. Issues concerning competences, and the status of the Charter of Fundamental Rights, resonate with other issues concerning the horizontal institutional balance of power within the EU, and also with the vertical distribution of authority as between the EU and the Member States. It became clear that the ideal of simplification of the Treaties could not realistically be accomplished without considering substantive modification in the existing Treaty provisions. Given that the four issues were not discrete, the key question was the institutional format for discussion of the broad range of topics going to the heart of the future of Europe.

Considerations of legitimacy and democracy then came into play in the decision to establish the Convention on the Future of Europe. If a broad range of issues was to be discussed, if this round of Treaty reform was not simply to be a further episode in tinkering with the Treaties, then the idea that the result, whatever it might be, should be legitimated by a process of input from a broader constituency than hitherto, assumed greater force. Hence the decision to establish the Convention with its present composition.

The Laeken Declaration was itself crucial for understanding the way in which the process of Treaty reform has developed. It was one thing to establish the Convention with a composition designed to enhance the legitimacy of the results that it produced, whatsoever these might be. The Laeken Declaration gave, however, the formal imprimatur of the European Council for the ‘blowing apart’ of the issues left open post-Nice. These issues may, as stated above, have always been the tip of the iceberg. The Laeken Declaration was nonetheless fundamental in making this explicit. The initial four issues post-Nice became the ‘headings’

within which a plethora of other questions were posed, which raised virtually every issue of importance for the future of Europe.

There was an element of ‘traditional reform fatigue’, leading to the desire for more root and branch re-consideration of issues central to the future of the EU. The Treaty reform process had hitherto been frequent, but not surprisingly driven by the needs of the moment, whether these were the reform of the single market, EMU, or the institutional consequences of enlargement. The realisation that the issues left over from Nice raised broader concerns going to the very heart of the future of Europe coincided with a growing feeling that there should be a more fundamental re-thinking of the institutional and substantive fundamentals of the EU.

The Convention on the Future of Europe, once established, developed its own institutional momentum and vision. The key state players in the European Council that agreed to the creation of the Convention may well have had their own perceptions as to the way in which it would operate, and the effect (or lack of effect) of any conclusions that it would reach. This will be considered more fully below. It must nonetheless be recognised that the CFE once created had its own vision, or visions, which shaped the way in which it operated. Most fundamentally, the key players within the Convention developed the idea that they should, if possible, produce a coherent document, and that this should take the form of a Constitutional treaty that would address the major issues set out in the Laeken declaration. This was not a foregone conclusion and we should not let the benefit of hindsight blind us in this respect. The Convention might have contented itself with producing ‘interesting working papers’ on the issues spelled out in the Laeken declaration, which would then have been taken up or not as the case might be by the forthcoming IGC. The Convention might have opted for a completely separate Basic treaty, the equivalent of Part I of the present draft Constitutional treaty, leaving the wealth of other treaty provisions to be dealt with by the IGC reform process. The fact that they the Convention opted for the more ‘adventurous’ route was its choice.

The Convention Deliberations

This is not an exegesis on how satisfactory the Convention deliberative process has been. It is rather meant to highlight certain key features of the Convention deliberations that relate to the more general questions posed by organisers of this Conference for this session. These features

can be presented in a temporal frame, in the sense of considering their impact over the life of the CFE itself.

The organisation of working groups was clearly a central early step to the attainment of the CFE's goals. The time limit within which the CFE had to consider the plethora of issues assigned to it by the Laeken Declaration was very tight. This was even more so once it became clear that the key players at the CFE wished to produce a 'complete Treaty'. Working groups were therefore a necessary step if the tasks were to be completed within the designated time, although whether this proves to be possible remains an open question.

The subject matter, to be dealt with by the working groups, constituted a political choice. To be sure some of the groups naturally 'chose themselves', such as that dealing with competences, and that dealing with rights. The choice of subject matter for other working groups was less obvious. It was, for example, not pre-ordained that there would have to be a working group on legal personality. Nor was it pre-ordained that there would not be a working group on the Community Courts, consideration of which has been relegated to a hastily convened Reflection Group that has only considered a very limited number of issues. Perhaps the most significant political choice was not to establish a working group on the vexing issue of the inter-institutional distribution of power. This has been left to the plenary sessions, in large part because of its very centrality and the controversial nature of the options on the table. Time will tell whether this was a wise move. The rationale for leaving this matter till relatively late in the day was that to consider it earlier might have jeopardised progress on less controversial matters. The very fact that consideration of this issue was delayed meant that the CFE could nonetheless present a draft Constitution, evidencing the progress that had been made on a range of matters. This thereby enhanced the sense of progress and the feeling that a new Constitutional Treaty might be a reality. To be balanced against this is the fact that the delay in considering such central issues has meant that there might not be enough time to secure agreement on the final package of proposals.

The publication of the early version of the Draft Constitutional Treaty was a clever political move by the key players in the CFE. To be sure there was much in this early draft that was unclear or ambiguous. The initial draft represented an exercise in outlining constitutional architecture in which the main 'rooms' in Part I of a treaty were identified, even if the content thereof was left undecided. The extent to which the 'rooms' had content at all varied considerably. The 'room' dealing with

the institutional balance of power in the EU was empty. Those dealing with competences and rights had some 'furniture'. The publication of the draft Constitutional Treaty was astute nonetheless, irrespective of problems with particular articles. The CFE could claim that this was only a draft and invite comments. The existence of the document lent force to the idea that a Constitutional Treaty would indeed emerge from the Convention, a matter which was, as stated above, not pre-ordained ahead of time. In this sense it served to acclimatise the key state players to the fact that something real might indeed emerge from the Convention, while allowing time for their comments, positive or negative, to be considered and defused.

The realisation by the key state actors that the CFE might well produce a hard-edged Constitutional Treaty has led to some intergovernmentalisation of the CFE process. This is readily apparent in the way in which certain Member States have changed their representatives to the CFE, installing high profile players such as foreign ministers and the like, in place of their original members. It is apparent also in the way in which state actors have intervened in a deliberate manner from outside the Convention in order to influence the proceedings therein. The Franco-German proposals concerning the location and nature of the EU presidency provide a classic example of this. It would nonetheless be mistaken to view these developments as making the CFE just another IGC in disguise. State actors are and always have been part of the CFE. The fact that key state players have come to recognise that the deliberations and conclusions of the CFE might be more important than they initially believed, and therefore that they wish to have greater or more direct input, does not mean that the state players have a monopoly in the discursive and deliberative process.

The closing stages of the CFE have in fact seen a centralisation of initiative of a rather different kind. The working groups have been disbanded, their job done. The initiative has passed to the Praesidium and the Secretariat responsible for the drafting of the detailed articles of the Constitution. This centralisation of initiative has been enhanced by the very limited time scale within which amendments can be made, normally a week. It has been further enhanced by the fact that the choice of which amendments to take seriously, out of the very many that have been tabled, lies very much in the hands of the Praesidium. This is likely to be even more the case as the time limits for the completion of the CFE get closer. These pressures have led to articles being drafted that are unclear, and unsatisfactory.

The Reception of the CFE Treaty by the IGC

It must be recognised that the process of reform in the EU presently under consideration in the form of the CFE has to be judged, both formally and substantively, against the fact that the ultimate decisions will be taken by the IGC in 2003-2004. The key issue is therefore how far the Constitution will be open to change, or even rejection by the IGC itself. This is difficult to predict, and views on this issue change as events both within and outside the Convention unfold.

The early view, at the time of the Laeken declaration, was that the deliberations of the CFE would be no more than the starting point for the discussions in the IGC. This was in line with the view that the Member States themselves would hold the reins of power in grand constitutional moments.

This view was, however, subtly modified over the ensuing months when it became clear that the CFE was intent on producing a Constitution, and moreover one that would encompass not only the constitutional aspects of the EU, but also the many other substantive Treaty provisions, and relating these back to the constitutional fabric of Part I. It came to be felt that it would be difficult for the IGC to reject such a document in its entirety, and moreover that even tinkering with particular provisions might be more difficult than originally thought.

There has, however, been a further turn of the wheel. Whether the second scenario really held true depended crucially on whether the CFE was able to produce a completed Constitution, and the extent to which it proved to be contentious.

It is interesting to speculate on the fit or absence thereof of the CFE, and its likely reception by the IGC, with the liberal intergovernmentalist view of the EU. It is clear that *prima facie* the very existence of the CFE and its function does not fit well with the liberal intergovernmentalist view of Treaty development. It is of course open to those of this persuasion to argue, as they have done on other occasions, that there were rational state interests in the establishment of this mechanism for Treaty reform. They could maintain that the Member States felt that the gain in legitimacy by allowing this mode of Treaty reform outweighed the loss of control thereby entailed as compared with the normal IGC process. They might argue that the increasing intergovernmentalisation of the CFE is a testimony to the desire of the Member States to maintain control. They might argue that the Member States will, in any event, maintain significant control through the forthcoming IGC. Their firm

belief in the dominance or monopoly of state interests in the process of EU reform means that a rationale for institutional change and ordering that accords with state interests can always be fashioned, whether this be in relation to the power accorded to the Commission or the ECJ in the original Treaty. The reality is that in this ‘constitutional moment’ there has been input from state actors, but that other institutional actors such as the Commission, and the EP have also been important.

Conclusion

If the phrase constitutional moment is to be taken seriously then it should not be regarded as causally dependent on crisis, nor upon the ultimate success of the initiative.

The Iraq war may well have revealed the limits and problems of an EU foreign policy strategy, and it may have some ultimate impact on the shaping of EU competence in this area. It does not however determine, in and of itself, the appellation of constitutional moment to the attempts to frame a Constitutional Treaty that has far-reaching implications for all areas of EU policy.

The phrase ‘constitutional moment’ is warranted irrespective of the ultimate outcome for the following reason. It is clear that the phrase would be warranted if the CFE proves to be successful in introducing a Constitutional Treaty that introduces wide-ranging institutional and substantive change, involving a novel institutional format and wider participation than before. The phrase is, however, equally warranted if the enterprise proves a failure or has only a limited impact. The discussion of EU reform in terms of a Constitutional Treaty is now a reality. How far this becomes a political and legal reality depends on the type of factors mentioned above. Should the initiatives fail entirely and we revert to the ‘normal strategy’ of IGC piecemeal reform, we will still have witnessed a constitutional moment. The attempt to fashion a broader-ranging Treaty reform, involving a wider-range of participants than hitherto, would not and cannot be forgotten. It would remain as a testimony to the limits of the reform process, and would have significant reverberations for the future of the EU.

Constitutional Engineering by 'Process' not 'Product'

Which Europe will come out of the Convention?

PHILIPPE C. SCHMITTER*

In all the speculation about how to 'engineer' the appropriate institutions that will define *la finalité politique* of the European Union, the emphasis has almost exclusively been on **product**, and not **process**. That is, focus has been on what the European Union's eventual constitution or constitutional treaty will (or will not) contain, and not on how its constitutionalisation should proceed. The debate has centred on what to put into the document, rather than how to bring it about. At his most exalted moment of hubris, Giscard d'Estaing referred to the Convention as 'our Philadelphia,' thereby, implying not only the product but also the process. Since no process could be further removed from the Philadelphia Convention of 1789 than the Convention meeting in Brussels, we can only wait and see if the final product will generate the same level of consensus among its drafters, and reach the same degree of legitimacy to the citizens of Europe.¹

Unlike Philadelphia, the 'Convention on the Future of the Union' cannot take advantage of a so-called 'founding moment'. The EEC/EC/EU has been in existence for more than forty years, and has already undergone several 're-foundings'—each based on successive treaties. Granted, the process of its ratification (see below) could be designed differently, in a way that would bring the citizenry of Europe as a whole into the process. But if ratification only involves the usual cumbersome and nationally differentiated process of treaty ratification, the EU's constitutionalisation will not be perceived as a distinctive 'founding moment'.

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¹ In one aspect, the Convention does resemble its Philadelphia forerunner. In both cases, a group was delegated to produce relatively minor changes in the existing rules of the game and these representatives arrogated to themselves the right to produce an entirely new document, i.e. a fully-fledged constitution.

Let us, therefore, examine what will or will not be included in the draft document to be produced by the Convention and subsequently examined by an Inter-Governmental Conference, and concentrate our attention on three core questions about process: Why? When? How?

Why does the EU need a constitution now?

The standard answer seems to be that Eastern Enlargement will make existing arrangements un-viable and likely to produce perverse effects if relationships are not set by a constitution. First and foremost, I suspect, in the minds of the present EU members is the potential dispossession of the original six countries of their quasi-constitutional right to control the content and pace of the integration process. Under qualified majority voting, they will still be able to veto initiatives supported by all the new member-states, but they will not be able to pass measures of their own without the support of a significant number of these newcomers. Franco-German agreement, previously the lynchpin of all policy initiatives, will no longer suffice. As far as I can judge, no one seems convinced that EU-15 is so manifestly dysfunctional that its institutions have to be overhauled, much less radically changed. Fears of the potential for deadlock in EU-25 or EU-27 are driving the process.

However, politicians are notoriously unreliable when they act in anticipation of trouble, rather than re-acting to real and serious conflicts. The opportunity that they will reach agreement on such fundamental matters based on what are bound to be quite different visions of the future, is much less than if they were to wait until the EU decision-making process was clearly stalemated or threatened with collapse. In such a crisis, faced with a much worse alternative, the elites of the twenty-five or twenty-seven member countries would be much more likely to reach a higher level of consensus on new rules of the game, and their respective citizens would subsequently have more compelling motives for ratifying such a consensus. As it presently stands, I frankly wonder if EU citizens might not be so unconvinced of the need for such a constitution that they will not even bother to turn out to vote for it.

As for the second reason often invoked to explain why the EU needs a constitution, namely the so-called 'democratic deficit', I can find no unambiguous evidence of its existence. There are no mass organizations clamouring for 'regime change' of any kind, much less for a thorough democratisation of the EU, at the present moment. No doubt there are multiple signs that its institutions are so complex that normal citizens

(and, for that matter, many academic specialists) cannot understand how they function and, therefore, why its directives should be obeyed. But this source of dissatisfaction and potential de-legitimisation does not provide a warrant for constitutionalisation—just good reasons for simplifying existing rules and introducing piece-meal reforms.

When should the constitutionalisation of the EU take place?

Part of the answer has already been hinted at—only when the polity is in such manifest crisis that its rulers are threatened with a dramatically worse alternative. From this perspective, the EU at this stage in its institutional development neither needs, nor would be prepared to absorb such a large-scale change in its basic rules of the game. In a comparative historical perspective, none of its member states was able to find the ‘political opportunity space’ for a major overhaul of ruling institutions in the absence of revolution, *coup d’etat*, liberation from foreign occupation, defeat in international war, armed conflict between domestic opponents, sustained mobilization of urban populations against the *ancien régime* and/or major economic collapse.² The fact that they all (with one exception) have written constitutions, and that this is a presumptive *sine qua non* for an enduring democracy, does indicate that at some time this issue will have to be tackled—if the EU is ever to be democratised definitively—but not now!

So far, the EU has not been functioning so badly with its *pastiche* of treaties converted into a quasi-constitution.³ Moreover, as the circulated drafts before and during the Convention testify, the advocates of constitutionalisation are not in agreement about what rules and institutions it should contain. Each has his or her preferred format based on perceptions of previous performance at the national level in Europe and North America. These range from a loosely linked confederation to a tightly coordinated federation—and include all the intermediate points along this continuum. Moreover, the *conventionnels* have no reason to be confident that any of these formats will have the same (presumably beneficial) impact when applied to the supra-national level. The massive

² The only country I have discovered that managed to undertake a (successful) constitutionalisation in the absence of such factors is Switzerland. It introduced quite substantial ‘federal’ reforms in 1874 and, more recently, unobtrusively completed a major simplification of its (amendment laden) constitution without any sign of crisis.

³ Articles by Weiler and Mancini, see list of references.

shift in scale, the greater heterogeneity of identities and interests, the wider range of development levels and, most of all, the unprecedented process of gradual and voluntary polity-formation all conspire to make the contemporary outcome much less predictable than the earlier national efforts.

The second (alleged) imperative determining the timing of constitutionalisation is the prior existence of a *demos* clamouring for recognition and self-government. If the constitution is expected to found a democracy, the assumption is that this is only possible if there already exists a population with a strong, overarching identity that is prepared to recognize each other as equals and to share the inevitable sacrifices and redistributions that a democratic regime would require. Since it is widely recognized that it is impossible to use the mechanisms of democracy to decide who the *demos* is, it would seem to follow that one should wait until it emerges 'under other auspices' (war, revolution and marriage seem to have been the most common) before making the effort to give 'it' a definitive set of institutions and rights. No one (that I know of) has claimed that a Euro-*demos* presently exists. Therefore it must be premature to give 'it' a constitution. As one who is predisposed against EU constitutionalisation, it is tempting to add this to my other arguments. However, even I have to admit that this argument is not convincing. With very few exceptions, most of the countries of Europe began their respective processes of democratisation and granted themselves a constitution long before they had a *demos* in anything but the most minimal sense. There was no singular and consistent identity among the French in 1871 when they agreed (by one vote) on the institutional format for the Third Republic; nor were there many Swiss when the 23 previously quite autonomous cantons gave themselves a federal government in Bern. Even in those (few) cases of 'delayed state-building' that only managed to produce a central and constitutional government after a protracted struggle for national independence, it seems an exaggeration to claim the prior existence of a strong common identity within acceptable borders. After all, it was d'Azeglio who proclaimed at the foundation of a 'unified' Italy: 'Abbiamo fatto l'Italia, basta fare gli italiani.'

So, I can see no *demos*-prerequisite impeding the democratisation of the European Union. It will be the daily practice of open, free competitive politics that will eventually produce a Euro-*demos*. Moreover, its citizens already know that they share a common fate. They have had many common (if largely unfortunate) experiences during the past

century and most of them have had by now over forty years of living together in a security community and increasingly interdependent economic system. The history of European integration itself has provided a sufficient basis of mutual recognition, trust, reciprocity, respect for the law and sense of solidarity to give to its participants, governments as well as citizens, a sense of continental, civic and constitutional patriotism. The problem, therefore, is not whether they can form a democratic polity, but how and when they should do it. My argument is that they should do so gradually by introducing piecemeal and modest reforms in existing practices using existing instruments, and not try to do it *tutto e subito* by drafting and ratifying a constitution. I am still convinced—even after observing the impressive record (so far) of the Convention—that it would have been preferable to proceed Monnet-style with *petits pas, grands effets*, and only after practising these reforms would the time come to constitutionalise what the EU was already doing.

How should the EU draft and ratify its constitution?

The standard formula—used most recently and effectively in the cases of Spain and South Africa—is the election of a constituent assembly specifically for the purpose of drafting a constitution, followed by a polity-wide referendum for the purpose of ratifying it. The first opportunity has been missed. The Convention was not popularly elected, nor was the European Parliament converted into a constituent assembly. While most of its participants have been selected (by national governments) or indirectly elected (by national parliaments and the European Parliament), they come from a wide range of political forces and social origins. Whether the European citizenry will perceive them (and the myriad of spokespersons and experts who have intervened in their deliberations) as ‘representative’ remains to be seen. Considerable effort seems to have been expended to make its deliberations accessible and transparent, but the activities of its Presidium have been much less open and more opaque.⁴

My preference would have been for a process that would not have begun until a Europe-wide referendum had indicated that a large majority of citizens wanted to change the *modus operandi* of EU institutions

⁴ On the mix of public and less public procedures, see Jo Shaw, ‘What’s in a Convention? Process and Substance in the Project of European Constitution-Building’, unpublished paper, 2003.

from a treaty to a constitutional basis—thereby losing the unit veto that is currently available to each of their countries, and creating a supra-national state. This would have been part of a broader set of reforms that would have included regular referendums attached to each election of the European Parliament and set by the EP itself. Obviously, this opportunity has been lost. Even if the Convention were to fail to produce a ratifiable document, it seems dubious that such a direct democratic procedure would be invoked to re-start the process in the future.

Now that we are nearing the moment when the Convention's draft document will be distributed to the public and sent to the Inter-Governmental Commission for discussion and (probable) amendment, the issue of eventual ratification has surfaced.⁵ On this procedural issue, there is a clear historical preference, namely, ratification in a polity-wide referendum. Experience suggests that, provided the drafters have arrived at a consensus (especially one ratified by a constituent assembly or ordinary parliament), the general public tends to turn out in large numbers to approve such referenda overwhelmingly. For the EU, this would have to entail a simultaneous and binding vote on an identical text in all member states—which itself would set an important precedent and, above all, ensure that the attention of the public would be focused exclusively on the constitutional issue. Unfortunately, this seems to depend on prior changes in the national constitutions of several member states—most importantly, that of Germany. However, any deviation from this format could have serious negative consequences. A non-binding referendum would not be taken as seriously or, if it were, holding it would seem hypocritical. Participation levels would be lowered, and the usual temptation might arise (as observed in previous referendums on EU treaties) to append other, strictly local or national issues to the referendum. It is imperative for purposes of legitimisation that the ratification process be uniform and that it be focused exclusively on the Euro-constitutional issue. If that means waiting until a few member states change the neces-

⁵ I am presuming that there will be only one draft. In my *How to...* book, I suggested that there should be two of them: one designed to minimize the future state-ness and policy expansion of the EU, and the other to endow it with an enhanced state capacity and federal powers—with an overlap in terms of rights and obligations. The ratification then would have comprised of the citizenry in each country choosing between the minimalist and maximalist versions—or choosing “neither of the above.” The Declaration of Laeken left open the possibility of the Convention offering multiple options, but from its very inception Giscard d'Estaing has oriented efforts toward the production of a single, consensual document.

sary enabling provisions—so be it. The worse possible outcome would be to try to ratify the constitution according to the usual, nationally diverse procedures and to discover that the citizenry of Europe does not even care enough to turn out for the occasion.

Conclusion

The answer to each of the questions—Why? When? and How?—is unequivocal. The process whereby the EU has decided to give itself a constitution or constitutional treaty has, so far, strayed far from the ideal path: the motives are not convincing; the impetus is weak; the moment has been missed; the timing is off; the participants may be wrong; and the ratification procedure is likely to be deficient.⁶ My unavoidable conclusion is that the Convention's constitution or constitutional treaty will not succeed either in forging a widespread consensus among European citizens, or in generating greater legitimacy for EU institutions. This is not because the **product** itself is deficient—indeed, we do not yet know what its form and substance will be. It is because the **process** whereby the document is being produced and may be ratified seems deficient to me. I hope that I am wrong—if only because so much effort has gone into the crafting of the document and such high expectations have been generated in some quarters concerning its benevolent 'founding' impact. I am, however, confident that whatever the outcome, the process of European integration will continue—with or without a constitution.

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⁶ For a more optimistic assessment that also focuses on process rather than product, but more on the processes internal to the Convention and less on the external ones determining the motives, timing and strategy that brought it about, see: Jo Shaw, 'Process, Responsibility and Inclusion in EU Constitutionalism', *European Law Journal*, 9/1, (February 2003), pp 45-68

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The Future of Europe: Past and Present

From the Hague Congress to the Convention on the future of Europe

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We all know the famous warning by Sir Winston Churchill at the end of the Congress of Europe of May 1948: 'I only wish to say that I think I must prepare you for something very serious indeed. I am going to speak French!'

For my part I am going to speak English, and so allow me to start with an anecdote. While in Oxford one of the things I have tried to improve is my command of written English. I must confess that, after long and painstaking efforts to write in the Queen's English, in a moment of despair, I decided to try one of these very engaging translation softwares, in order, I thought, to translate English effortlessly into French and French into English. What came out was a disappointment and a surprise. It turned out that the French word 'fédération' was automatically being translated by the English word 'union'. Of course, one might think that this could be the key to all the misunderstandings between the French and the English about Europe. But in this case, the theory that software can sometimes be truly bad is not to be excluded.

However, while looking for an image approximating the process of institution-building from the Congress of Europe to the present Convention on the future of the European Union, this translation might be an amusing one: whereas the 'input' has always been 'Federation', the 'output' has always been (and might always be) 'Union'. The future of Europe has always been thought of as a federation, but what came out of the multiple efforts to make a real federation out of it has always been an 'ever closer union'. In that sense probably, Europe is a Utopia. The final political resolution of the Hague Congress, to avoid any translation problem of this type, concluded with a very diplomatic synthesis (I translate here from the French text): 'The Congress considers that such a Union or Federation will have to remain opened to all nations of Europe living under a democratic regime.'

And it is true that the Hague Congress has always been described as

an inaugural clash between the unionists (mainly the British delegates) and the federalists (mainly the French delegates), the echoes of which will resound throughout European integration history. And one wonders if the present Convention on the future of the European Union is not another episode in this ongoing clash. The Hague Congress could also be considered the outset of a six-year period (ending with the rejection of the European Defence Community in 1954) which could be described as the first attempt to build a Federal Europe. The failure of this first initiative closed the federal chapter of European integration history for quite a long time, a chapter now being reopened with the Convention. The question is to learn if this is really the outset of what could be described, in the future, as a successful attempt to build a Federal Europe.

As an ultimate result of this six-year campaign, from 1948 to 1954, we Europeans have gone through a lot of commemorations over these past four years. The fiftieth anniversary of the Council of Europe in 1999 (one of the direct institutional results of the Hague Congress), the fiftieth anniversary of the Schuman Declaration in 2000, and subsequently of the treaty creating the European Coal and Steel Community in 2001. However, I have the feeling that three of these anniversaries will be left aside or even forgotten. The first is the signature of the treaty creating the European Defence Community in Paris, exactly fifty years ago, on 27 May 1952. The Treaty was later to be rejected by the French Parliament. The second one is the gathering of an *ad hoc* assembly on 10 September 1952, which was to proceed to the creation of a European Political Community. The third one is linked to the fiftieth anniversary of the treaty creating the European Coal and Steel Community, but it is in fact rather a funeral than an anniversary, because Article 97 of the treaty stated that it was 'concluded for a period of 50 years from its entry into force.' The date of its expiry is precisely the 23rd of July, 2002. Now, if we are asked how the 'future' of Europe was seen then and now, surely one first and fundamental differences appears if we recall that Article 312 (ex Article 240) of the Consolidated version of the Treaty establishing the European Community and Article 51 (ex Article Q) of the Consolidated version of the Treaty on European Union was that the Convention should simplify this by stating that 'this Treaty is concluded for an unlimited period.' There is no end to European Union. European Union is made to last forever. And this is the destiny of a utopia.

This is the general context of celebration of the past in which the 'Convention on the Future of the European Union' was decided by the

European Council of Laeken, in December 2001, so as to prepare the next Intergovernmental Conference which is, in turn, to decide on the 'future' of Europe. 'Fifty years ago', as the President of the Commission, Romano Prodi, put it in the speech he delivered at the inaugural meeting of the Convention, on February 28, 'clear-headed, courageous and far-sighted men succeeded in embarking on a totally new course.' As the President of the European Parliament, Pat Cox, put it in turn in his own speech: 'Fifty years ago, a generation of European leaders, after a devastating war that divided our continent, saw all too clearly what was, but they were prepared to dream of what could be.' And the Convention is filled with a sentiment of success for what European Union has become: 'You, the representatives of the States, institutions and peoples of Europe', says Romano Prodi, 'have come together in this Convention today because integration has been more successful than we could ever have hoped.' The sentiment of success was mixed with a sentiment of fear for what it might soon become, after the enlargement. 'If we fail', said the Chairman of the Convention, former French President Valéry Giscard d'Estaing at this same inaugural meeting, 'we will add to the current confusion in the European project, which we know will not be able, following the current round of enlargement, to provide a system to manage our continent which is both effective and clear to the public. What has been created over fifty years will reach its limit, and be threatened with dislocation.'

What makes the continuity between the Congress and the Convention, and in a sense justifies today's comparison, is that they both belong to the opposite ends of a single historical time, and this is the Cold War. Just as the Congress was a direct result and contribution to the emerging Cold War, the Convention is a direct result and contribution to the end of the Cold War: 'Now that the Cold War is over...' states the Laeken Declaration. The end of the Cold War, as a matter of fact, has had two immediate consequences (or causes) that need not be evoked: the reunification of Germany, and the freedom to choose their government for the peoples of the Eastern countries of Europe. And this is exactly what the Laeken Declaration assumes:

'Fifty years on, however, the Union stands at a crossroads, a defining moment in its existence. The unification of Europe is near. The Union is about to expand to bring in more than ten new member States, predominantly Central and Eastern European, thereby finally closing one of the darkest chapters in European history: the Second World War and the ensuing artificial division of Europe.'

In a sense the Convention is here to answer the historical promise made some fifty years ago, at the Congress of Europe, by Winston Churchill himself: ‘We must aim at nothing less than the union of Europe as a whole, and we look forward with confidence to the day when this will be achieved.’

In fact the end of the Cold War brought a new type of danger to the fore. If there is little doubt that the Congress is entirely related to the fear of an emerging danger, there is also little doubt that two emerging threats make the general background of the Convention, both resulting from the end of the Cold War: civil or international war on European soil (and this of course refers to the wars in the former Yugoslavia), and civil or international terrorism after the Eleventh of September. To quote the Laeken Declaration: ‘Following the fall of the Berlin Wall, it looked briefly as though we would for a long while be living in a stable world order, free from conflict, founded upon human rights. Just a few years later, however, there is no such certainty. The eleventh of September has brought a rude awakening.’ Let me also quote the Communication from the Commission on European Governance, issued a few days before Laeken and called *Renewing the Community Method*: ‘The attacks on 11 September have highlighted the vulnerability of democracy and freedom. Only integration can enable Europeans to have an influence on the world, provided that they speak with a single voice.’

This general context matters if legitimacy, or at least a justification, is to be found in the continuity between our present conceptions of the future of Europe and its past history, or more precisely, the past conceptions of its future. Did not the Schuman Declaration, for instance, proclaim that the European Coal and Steel Community should be the ‘first step towards European Federation’? However, and even if this question may seem odd in the first place, why should we refer to the ‘past’ and why should we not recall the ‘future’ as seen some fifty years ago, even if the question may seem odd? After all, one might wonder, hasn’t anything changed since 1948? What future does Europe have today that was not dreamt of yesterday? This is the question I will ask, and of course not answer, in what remains an exercise in historical comparison. What I mean is that, in a certain sense, the equation put by Sir Winston Churchill on the very first day of the Congress of Europe at The Hague in May 1948 remains, today, the issue that the Convention on the future of the European Union has yet to deal with. Churchill put it thus:

‘It is impossible to separate economics and defence from general

political structure. Mutual aid in the economic field and joint military defence must inevitably be accompanied step by step with a parallel policy of closer political unity. It is said with truth that this involves some sacrifice or merger of national sovereignty. I prefer to regard it as the gradual assumption by all the nations concerned of that larger sovereignty which can alone protect their diverse and distinctive customs and characteristics and their national traditions’.

Of course, the material for such an exercise is wider and richer than I could describe in a short paper, and so I have arbitrarily chosen to underline some of the main features of the debates of both the Congress and the Convention, and have tried, even if artificially, to relate them to one another. Obviously a lot of the questions raised at The Hague in 1948 now seem obsolete. They seem to belong to the past, and mainly, one must say, because the process of integration itself has answered so many of them, such as: the German question (meaning the question of its sovereignty); the Ruhr question (meaning the common exploitation of its resources); the question of customs limitations; the question of free convertibility of currencies, and so forth.

One of the expectations that emerged from the debates of the Congress was finally achieved very recently. That is, a common European currency. Even then, however, when the prospect of a ‘European currency’ was raised by the Economic and Social Committee, Sir Arthur Salter quickly responded:

‘It is quite obvious that anything like complete unification of currency could only be the counterpart of something very much more like, very near, a political union of the area within which that currency was to be unified.’

A number of the questions raised today by the Laeken Declaration, on the other hand, for which the Convention has to find some answers, arise from the process of integration itself. And there are altogether about sixty question marks in the Laeken Declaration, such as the following:

‘How should the President of the Commission be appointed: by the European Council, by the European Parliament, or should he be directly elected by the citizens? Should the role of the European Parliament be strengthened? Should we extend the right of co-decision or not? Should the way in which we elect the members of the European Parliament be reviewed? Should a European electoral constituency be created, or should constituencies continue to be determined nationally?’

The chairman of the Convention, President Valéry Giscard d’Estaing,

summarized the Laeken Declaration, in his inaugural speech, with a categorisation of the questions that have yet to find answers:

‘We shall have to seek answers to the questions raised in the Laeken Declaration. They fall into six broad groups: fundamental questions on Europe’s role; the division of competence in the European Union; simplification of the Union’s instruments; how the institutions work, and their democratic legitimacy; a single voice for Europe in international affairs; and, finally, the approach to a Constitution for European citizens.’

With this paper I hope to introduce the European debate to a few elements of d’Estaing’s above quote. I will therefore look into three major issues as to the Future of Europe which, in my view, remain after fifty years of integration. I will use them to go on with the comparison between the Congress and the Convention. They are: European Identity; a European Constitution; and the Federal Prospect.

A European Identity

One of the main concerns at The Hague, and probably what attracted most attention to the Congress, was to define Europe not only as an economic, social or political goal, but also as a cultural reality grounded on a common heritage:

‘Believing that this true unity, states the final resolution, even in the midst of our national, ideological and religious differences, consists of *a common heritage of Christian civilisation*, of spiritual and cultural values and a common loyalty to the fundamental rights of man, especially freedom of thought and expression.’

Of course, nowadays, or so it seems, such a reference to Christendom would probably removed from any official statement, even if one sometimes wonders if it has entirely disappeared from the ‘ideological’ horizon of what we generally understand as ‘European Identity’. Could European Union agree, for instance, to welcome a member state which is not predominantly of ‘Christian civilisation’? On the contrary, the reference to Human Rights and Fundamental Freedoms remains a central piece to the definition of this identity. One of the direct results of the Congress was the signature of the Convention for the Protection of Human Rights and Fundamental Freedoms in 1950. During the Congress, the French leader of the European Union of Federalists, Alexandre Marc, as a rapporteur, proposed a vote in favour of such a Convention rather than a simple declaration of rights: ‘A declaration is

not enough’, he said. ‘From a juridical point of view, a declaration is not legally binding. We therefore propose to lean this declaration upon a Convention, signed by all the member States of a European Union or Federation, hence legally compulsory.’ And one of the issues the present Convention has to deal with is precisely the place of the newly adopted Charter of Fundamental Rights of the European Union of December 2000. ‘Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty’, says the Laeken Declaration. A Charter that was drafted by a Convention which served as a model for the present one, and was adopted with the Nice Treaty.

These fundamental values, on which Europe is meant to be built, suddenly sounded differently after the recent presidential election in France. As the Duhamel Report on the constitutionalisation of the Treaties, written by the Committee on Constitutional Affairs of the European Parliament, stated in October 2000, just after another election in another of the European member States:

‘Respect for fundamental rights within the European Union has become a major political issue, not only owing to the Charter of Fundamental Rights, but also because of the concern to which the inclusion of an extreme right-wing party in the government of one of the Member States has given rise. The political responses to that event have included proposals from many quarters to strengthen the measures provided for in Article 7 of the Treaty on European Union. Such developments confirm the fact that the Union is today founded on a system of shared values, namely, peace, liberty, equality, tolerance, solidarity, justice, human rights and democracy, which are enshrined in most national constitutions in the Member States and the applicant countries. Respect for and furtherance of those principles are the European Union’s *raison d’être*. Given their importance, it is therefore only logical for them to be set in stone in a European Constitution and for this to be made a priority.’

We should recall that Article 7 above mentioned of the Treaty on European Union specifies that:

‘1. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to

submit its observations. [Article 6(1) defines the Union as “founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”] 2. Where such a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.’

At The Hague, a very eminent French Professor called René Courtin raised an interesting hypothesis that might, one day, be considered:

‘Europe can only survive and develop in a democratic frame. We then ask for the creation of a European Court, which will have to intervene in every litigious case, if the fundamental rights of the human person were violated by a totalitarian Government. In that case, we thought of the possibility that, on the initiative of the Council of Europe, measures can be adopted including the constitution of a European armed force to constrain the recalcitrant State to organize free elections.’

And what if, as a very notorious French extreme right leader recently declared would happen if he was elected, one of the member States wants to withdraw from the Union?

A European Constitution

Shortly after the beginning of the Hague Congress the question of a Constitution for Europe was put aside by Winston Churchill himself, with the explanation: ‘It would not be wise, in this critical time, to be drawn into laboured attempts to draw rigid structures of constitutions’. Of course, most speakers claimed that a Constitution should be drafted by a European Constituent Assembly, like the French Paul Reynaud and Edouard Bonnefous, who wanted to ‘convene as fast as possible a European Constituent Assembly to propose to the [*national*] parliaments a European Constitution.’ Harold MacMillan, on his part, quickly objected to the project that he was not prepared to ‘write constitutions in the air’ He went on, ‘It is quite easy to write constitutions. What is difficult is to make them effective and durable.’ Some others objected that the project was facing practical impossibilities, like André Noël, a member of the French Parliament:

‘There is a major impossibility. We would have, in this Assembly,

French representatives elected according to proportional representation, sitting next to British representatives elected on a majority basis. They would not represent the same part of the population. The major currents of ideas of Europe would not be represented in a similar way, because, in certain countries, the representatives would be elected on a proportional basis whereas in the others, they would be elected on a majority basis’.

On the contrary, a European Constitution seems to be one of the objectives laid down for the Convention by the Laeken Declaration or at least by some of the members of the Convention. As Valéry Giscard d’Estaing quickly put it:

‘It was in the light of all these aspects that the Laeken European Council decided to create the Convention on the Future of Europe, of which you are members, assigning to it the task of preparing for the reform of Europe’s structures and, if we prove equal to the task, setting us on the path towards a Constitution for Europe.’

However, if you read carefully the Declaration on the Future of the Union, as annexed to the Treaty of Nice, from which originates the entire process resulting in the present Convention, you will understand that the issue of a Constitution for Europe was not raised by the Intergovernmental Conference itself. Four matters were actually raised:

‘How to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity; the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice [...]; a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning; and the role of national parliaments in the European architecture.’

The Laeken Declaration itself is very careful about the words that usually make people angry (please appreciate the formulation):

‘The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?’

Of course everybody will recall the proposals made by German Foreign Minister Joschka Fischer in May 2000. French President Jacques Chirac himself stated in June 2000 that it would be necessary first to ‘reorganise the Treaties so as to make their presentation more consistent

and easier to understand for the general public. Then, to define clearly the allocation of powers between the different levels in Europe. On completion of that work, which will no doubt take a few years, the governments and the peoples would be asked to vote on a text which could then be enshrined as the first European Constitution.' Valéry Giscard d'Estaing more clearly stated during the inaugural meeting: 'We have to give ourselves a Constitution, which marks the birth of Europe as a political entity.'

It is rather important to note that, amongst the sixteen delegates of the European Parliament to the Convention, seven are members of the Committee on Constitutional Affairs, many of whom signed the Report on the constitutionalisation of the treaties of October 2000. They include: Olivier Duhamel himself, rapporteur, and a famous Professor of Constitutional Law in France who was elected on the list of the French Parti Socialiste, and member of the Group of the Party of European Socialists; Johannes Voggenhuber, Vice-Chair of the Committee, a German Green; Jens-Peter Bonde, Danish founder of the People's Movement against the European Community in 1992 (who signed a 'minority' opinion rather than the report); Andrew Duff, a British Liberal; Sylvia-Yvonne Kaufmann, German Partei des Demokratischen Sozialismus; Alain Lamassoure, French member of the European People's Party, who was at that time a substitute for François Bayrou; Inigo Mendez de Vigo, Spanish Partido Popular, who is presently a member of the Praesidium of the Convention; Ms Teresa Almeida Garrett, also a member of the Praesidium; Carlos Carnero Gonzaler; the Earl of Stockton (whose name I have not discovered); Reinhard Rack; and other members of the Committee and alternate members of the Convention

The Duhamel Report concluded that the European Parliament:

'Considers that the existence of a European Constitution would have the twin advantages of providing the citizens of Europe with a reference text and simplifying the rules governing the European institutions, which is essential'

The Report considers that the European Parliament also:

'Stresses that the future Constitution must clearly and strongly state: the common values of the EU; the fundamental rights of European citizens; the principle of the separation of powers and the rule of law; the composition, role and functioning of the institutions of the Union; the allocation of powers and responsibilities; the subsidiarity principle; the role of European political parties; the objectives of European integration.'

And, finally, suggests that the European Parliament:
‘Proposes that, once the European Parliament has given its assent, the adoption of the Constitution be made subject to a referendum held simultaneously in all the Member States which have opted for this ratification procedure.’

The Federal Prospect or the Federal Vision

It is an irony of history that, after fifty years, the federalization of Europe should be put forward at the Convention by a British representative of the European Parliament, Andrew Duff, in his personal contribution to the debate:

‘In this and subsequent contributions I will be proposing certain articles of a comprehensive draft constitution for a Federal Union of states and peoples. Together they are designed to form a model for a constitutional treaty of no more than twenty articles, in accordance with which the existing Treaties will then have to be rationalised, simplified and reduced in order to conform.’

Duff further specifies that:

‘The model of Federal Union is advanced in, one hopes, helpful contradistinction to alternative models such as the United States of Europe, European Union of States, Federation of Nation States and Confederal Europe.’

One of the aspects of federalisation of Europe that should be addressed by the Convention, despite no matter what one may think of the potential results of such a Convention, concerns the division of competences in the European Union between the States and the Union. The Laeken Declaration states that:

‘A first series of questions that needs to be put concerns how the division of competence can be made more transparent. Can we thus make a clearer distinction between three types of competence: the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States? At what level is competence exercised in the most efficient way? How is the principle of subsidiarity to be applied here? And should we not make it clear that any powers not assigned by the Treaties to the Union fall within the exclusive sphere of competence of the Member States?’

Federalist logic would imply that the European Court of Justice, the oldest of all of the Union’s institutions, play the role of a Supreme Court vested with the power to define and determine over the years, on

the basis of an article of the constitution, the sharing of competences between the States and the Union. However, the Convention is composed of ‘representatives’ of various institutions, the member States, of course, including the representatives of candidates for accession, the national Parliaments, the European Parliament and to a lesser extent the European Commission. It may seem odd, given the fact that the task of defining a clearer division of competence between the States and the Union has been assigned to the Convention, that three of the four main European institutions, the Parliament, the Commission and in a certain way the Council itself through the representatives of the member States, and more still that the Economic and Social Committee, or the Committee of the Regions, have observers to the Convention, whereas the European Court of Justice does not have any representation or any observer (even if the Laeken Declaration states that the President of the Court of Justice, as well as the President of the Court of Auditors, ‘may be invited by the Praesidium to address the Convention’—now article 7 of the Rules of Procedure).

A member of the Convention, Erwin Teufel, a delegate for the German Parliament, proposed on his side a ‘mixed body for the purpose of monitoring the division of competences’ which should be both judicial and political, and eventually composed of parliamentarians from the European Parliament and the national parliaments, so that the Court of Justice should not be left alone to decide who does what in the European Union. As Lamberto Dini put it, the federal question remains to know who possess the “‘competence of competences’”.

Conclusion

I do not know why the three major European institutions suddenly decided that they had to make a statement. But the fact is that both the European Parliament and the Commission issued an official position on the Future of Europe that clearly marked their option in favour of a type of Federation (or at least that is how the press interpreted it). It is remarkable, however, that the sitting President of the European Union, and a voice for the member States, President Jose Maria Aznar of Spain, cautiously avoided uttering the two words ‘Constitution’ and ‘Federation’ while talking about the Future of Europe in his lecture at St Antony’s College in Oxford on 20 May 2002. I think this brings us back to my introduction. Whereas the ‘input’ once again is clearly ‘Federation’, the ‘output’ might very well once again be ‘Union’.

‘We are a Convention’, said Valéry Giscard d’Estaing. ‘What does that mean? A Convention is a group of men and women meeting for the sole purpose of preparing a joint proposal. The principle underlying our existence is our unity.’ That may be why, according to Article 6 of the rules of procedure, ‘the recommendations of the Convention shall be adopted by consensus, without the representatives of candidate States being able to prevent it. When the deliberations of the Convention result in several different options, the support obtained by each option may be indicated.’

Federalism and the Nature of the European Union

VERNON BOGDANOR*

The first step, surely, is conceptual clarity. What, exactly, is the federal principle? In his classic work, *Federal Government*, K.C. Wheare defines not federal government, but the federal principle. This principle is, he says, a legal principle. The federal principle implies a constitutionally guaranteed division of legal sovereignty between two layers of government divided territorially. Sovereignty is thus not confined to one government, but divided or shared between two.¹

Three things follow from this definition. The first is that it must be the constitution, rather than the national government, that is supreme; the second is that the process of amendment of the constitution cannot be unilateral; and the third is that there must be some independent arbiter of the constitution, usually a constitutional or supreme court, although in Switzerland this function is assumed by the referendum.

Wheare is analysing, it is important to note, a *principle*, and not a form of government; and it may be that, as he suggests, no single state fully exemplifies this principle. There is, perhaps, no real paradigm of federal government, which is a constantly evolving form of government.

The federal principle has a purpose. That purpose is to preserve a relationship, a relationship between distinct political units which have, as Dicey put it, in *The Law of the Constitution*, ‘a peculiar sentiment’, that of desiring union without seeking unity. ‘A federal state’, Dicey says, ‘is a political contrivance intended to reconcile national unity and power with the maintenance of “state rights”’.² The purpose of the federal principle is to secure this relationship, just as the purpose of marriage, presumably, is to secure the relationship of love. But does this ‘peculiar sentiment’ of desiring union without seeking unity, hold in the case of the EU?

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¹ K.C. Wheare, *Federal Government*, (4th edition, Oxford University Press, 1963), chapter 1

² A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, (10th edition, Macmillan, 1959), p. 143

The EU certainly meets the criterion Wheare lays down as satisfying the federal principle. There is a constitutionally guaranteed division of legal sovereignty between two layers of government divided territorially. Sovereignty is divided between the EU itself and the member states. The component units, the member states, retain, of course, very significant, if not preponderant, law-making powers, but these powers are **limited** by the Treaty of Rome and the amending treaties. Oddly, the powers of the Union itself are not at present so limited, except by the rather shadowy concept of subsidiarity introduced by the Maastricht Treaty. But, at present, the powers of the Union can be extended, seemingly almost indefinitely, by the Council of Ministers, acting unanimously on a proposal from the Commission, after consulting the European Parliament. Thus, residual rights seem to be with the European Union; and, in consequence, the European Union has moved into areas not mentioned in the Treaty of Rome, sometimes on the basis of no discernible principle. There is, in the European Union, no equivalent to a states rights clause such as the 10th amendment to the American Constitution or the 30th article of the German Federal constitution. Paradoxically, from this point of view, a federal constitution for Europe could restrict the power of the European Union and guarantee that of the member states, thus meeting some of the concerns of Eurosceptics. But, of course, since a federal constitution would also transform the European Union into a state, the losses from the point of view of Eurosceptics would be far greater than the gains.

The European Union has other characteristics in common with federal states. The Treaty of Rome, and the amendments to it, are supreme, both over the European level of government and that of the member states. Amendment of the treaty requires all of the member states to concur. It cannot be achieved by the Union acting on its own; and there is a court, the European Court of Justice, to which individuals have access, which can arbitrate between the powers of the Union and those of the member states.

The Commission, the only body in the Union constitutionally empowered to propose laws, is a federal institution in that it is independent of, and not dependent upon, the member states. It is significant that, while the federalists have always sought to strengthen the Commission by making it subject either to direct election, or election by the European Parliament, the Gaullists have sought to devalue it by breaking its connection with the European Parliament, eliminating its political role

entirely, and amalgamating it with the secretariat of the Council of Ministers, so turning it into a servant of the European Council.

In addition, the Union acts directly on its citizens irrespective of the individual approval of the component units, the member states; and it can, and frequently does, act through qualified majority voting in many policy areas. Its decisions do not require the concurrence of all of the member states. Thus the Union exercises a supreme authority previously exercised primarily by individual states, although it seems that such authority, contrary to what is often suggested, may also have been exercised by confederations in the past.

Furthermore, since 1979, there has been a directly elected Parliament whose members are not delegates of their member states, but representatives of the people reflecting different political ideologies. Thus, members of the European Parliament sit, not according to nationality, or according to the component units, but according to which of the transnational party groups they belong to. The implication, then, is that the Parliament represents not different peoples brought together into a kind of confederal Diet, but rather that it represents a single people divided by ideologies. It would thus seem to represent one people not many peoples.

Nevertheless, it would, for two reasons, be a mistake to call the Union 'federal', even though it seems to meet Wheare's criteria. The first reason is that Wheare's criteria may be necessary, but they are not sufficient. There are elements vital to federal government which he does not mention. One of these is stated by Duchacek in his book on *Comparative Federalism*. One of his 'ten yardsticks' of federal government is that the central authority must have exclusive control over diplomacy and defence.³ I know of no federal government where the central authority does not have this exclusive control, or where it lacks the coercive machinery which is the form in which most people in fact experience the power of the state. Thus, even if we were to call the EU a federation, it would be a federation of a very peculiar kind. It would be a commercial federation, but not a federation from the point of view of foreign policy and defence. Indeed, from the point of view of foreign policy and defence, it would not even be a confederation, since there is in practice no common foreign or defence policy. The term 'common foreign and security policy' seems indeed, in the light of the

³ I.D. Duchacek, *Comparative Federalism: The territorial dimension of politics*, (Holt, Rinehart and Winston, 1970), p. 207

Iraq crisis, a form of black humour, rather than a serious proposition. Thus, if confederations were only for the purpose of foreign policy and defence, the European Union would not even be a confederation, much less a federation, since it is primarily an economic union rather than a union for the purposes of defence or foreign policy. There are, however, examples of confederations for economic purposes, of which the prime example is the German Zollverein, discussed in further detail below. It is the Zollverein which constitutes, perhaps, the best analogy to the European Union; for there are only six main areas where the European Union has exclusive powers and these are competition, trade, the internal market, and, for those member states which belong to it, the single currency, interest rates and exchange rates.

A further element vital, surely, to a federal government is that the central authority should have command over sufficient financial resources to allow it to exercise effective authority over the component units. That, too, is lacking in the EU. It has no independent powers of taxation, and less than 2% of the public expenditure of the member states is spent by the European Union. There is no federal government known to me where the central authority does not have much greater command over financial resources.

The second reason why it would be wrong to define the EU as a form of federal government is even more fundamental. It is, quite simply, that it is not a state, even though it possesses some of the appurtenances of a state. It lacks features all states possess. It has, for example, neither a head of state nor a head of government. For it is the member states which remain the prime focus of democratic accountability. As Tony Blair put it in his Warsaw speech in October 2000:

‘The primary sources of democratic accountability in Europe are the directly elected and representative institutions of the nations of Europe—national parliaments and governments. This is not to say Europe will not in future generations develop its own strong demos or polity, but it hasn’t yet.’

The component parts of the European Union, the member states, still exist as states in the fullest legal and political sense, and are still perceived as such in the outside world. No amendment to the treaties can be enforced upon them without the wishes of their governments, each of which retains a veto.

We may therefore define the European Union as a constitutional order of states, or perhaps as a union of states. Thus, the preamble to the Treaty of Rome in stating that one of the aims of the Community

would be to create an 'ever closer union' probably referred not to the creation of a single state, but to the creation of a closer union between separate states, since 'ever closer union' was followed by the words 'among the peoples of Europe—to ensure the economic and social progress of their countries.' The separate states would retain their status as states in international law, and they would continue to conduct their own separate foreign and defence policies, unlike the component parts not only of a federation, but indeed of many confederations.

Thus, since federation is a form of government for a state, and the European Union is not a state, the European Union cannot be a federation. Interestingly, in December 1991, the draft Treaty on European Union presented to the European Council at Maastricht, opened with the words, 'This Treaty marks a new stage in the process leading gradually to a union with a federal goal.' But the words after 'process' were replaced, largely at British insistence, with the words 'create an ever closer union among the peoples of Europe where decisions are taken as closely as possible to the citizens.' Europe was, it seemed, still composed of peoples, and not of a single people.

The European Union came into existence through the Treaty of Rome, a treaty that exemplifies the federal principle without creating a federal state. The Treaty of Rome created a new legal order which is supreme even over subsequent contradictory national legislation, and which must be applied uniformly throughout the area covered by it. Nevertheless, the European Union was created through a treaty between sovereign states, not by a sovereign people. The United States' Constitution was created by 'We the people', the European Union by the states, in effect by 'We the states', or perhaps 'We the peoples'.

The European Union then is akin to a form of federal union between states, and it bears some resemblance, which should not be overstated, to a confederation. Such a form of union is to be distinguished both from complete fusion or incorporation such as occurred between England and Scotland in 1707, and between England and Ireland between 1801 and 1921; and also from a mere personal union such as the Commonwealth whose sole link is the requirement on all member states to recognise the Queen as Head of the Commonwealth. The distinction between a federation and a federal union of states is well expressed in the German distinction between a Bundesstaat and a Staatenbund. The latter, a form of federal union, seeks to create a quite different sort of relationship from that of a federal state. It is a relationship in which the

component parts seek, not to join together, but to delegate certain powers to a higher unit while retaining their own legal personalities.

The prime purpose of creating a confederation is to convert external relations between states into internal relations. The *raison d'être* is well expressed in the Final Act creating the constitution of the German Bund in 1820—the so-called Wiener Schlussakte.

‘As to its internal relations, this Union consists of a community of States independent of each other, with reciprocal and equal rights and obligations stipulated by Treaties. As to its external relations, it constitutes a collective Power, bound together in political unity’.

The main motivation has been the needs of defence. But commerce can also be a motive as it was with the German Zollverein, or customs union, created in 1834. The German Bund, like the American Confederation was a unit established primarily for the purposes of defence and foreign policy. The European Union, like the Zollverein, is a unit primarily for commercial and economic purposes. The Zollverein, like the European Union, had a common tariff and commercial policy, and it came close to becoming a monetary union since, from 1838, there was a common currency which each member state could use alongside its own currency, a solution to the problem of European currency union once proposed by John Major. The Zollverein, then, like the European Union, converted external trade into internal trade through the creation of an internal market.

A Union of this kind, like a confederation or a personal union, but unlike a federation, allows for the component parts to have different forms of government. In the Swiss Confederation of 1815, for example, Neuchatel, unlike the other cantons, was a monarchy, while in the German Bund of 1815, four of the members were republics, the remainder being monarchies. Similarly, in the European Union, seven of the member states are monarchies, and eight republics. More important, perhaps, four of the member states—Austria, Finland, France and Portugal—have semi-presidential systems of government in which a directly elected president co-exists with a Prime Minister and cabinet responsible to the legislature, while the other eleven retain the traditional cabinet system.

A further characteristic of this form of union is that membership in it is perfectly compatible with membership in other bodies. Neuchatel, for example, belonged both to the Swiss Confederation and the German Bund. Members of the German Bund also belonged to the Zollverein. Thus, the Zollverein was in a sense a confederation within a confederation.

tion. Similarly, in the European Union, three member states—Denmark, Finland and Sweden—belong to another union between states, the Nordic Union, while Belgium, Luxembourg and the Netherlands together form Benelux.

The first Swiss confederation was formed in 1291 and lasted until 1798. The second, however, lasted for just a short time, from 1815 to 1848, and proved to be a prelude to the establishment of a federal state—the Swiss Confederation of 1848, which, despite its title, was federal rather than confederal. So also, the Bund was a transitional stage in the development of a federal state—the North German Confederation of 1867, which became Bismarck's Reich in 1871. So also, another well-known confederation, that of the United States in 1781, prove to be but a short transitional stage to the development of a federation. Perhaps these three confederations helped to create a new national consciousness, which made closer union in the form of federation possible.

A federation, however, like a confederation, cannot come about through imperceptible and unnoticed stages or by accident. It can occur only through an act of will, exemplified by the adoption of a new constitution. The functionalist idea that, through a process of spillover, one can somehow slip into federalism without noticing it, is hardly plausible. The creation of a federal state must be the result of a specific decision. That decision need not, of course, be accepted by every member of the confederation, and not every member of the confederation need necessarily be included in the federation. A member of a confederation could be excluded from the ensuing federation either by its own decision or by the decision of others. Thus, in the North German Confederation of 1867—in fact a federation—Austria, the largest German state, was excluded following her defeat by the coalition led by Prussia in the war of 1866.

There is one very good reason why a confederation should, in the modern age, prove to be but a transitional form of government. It is that it is difficult for it to meet the norms of modern parliamentary democracy. It is difficult to make a confederation subject to parliamentary control, or for it to be held accountable to the legislatures of the member states. With the European Union as it is at present, just one of the member states—Denmark—allows its decisions to be made subject to strict parliamentary control, through the Market Relations Committee of the Folketing. Danish ministers negotiating with the European Union are required to seek the approval of this Committee before accepting common proposals. This, however, is a peculiar luxury reserved for

Denmark, and it results from the frequency of minority government in Denmark, which means that Danish ministers cannot be assured of the support of a majority in the Folketing. It would not, however, be possible for the European Union to operate with any degree of competence or efficiency if all fifteen member states were to be required consult with their legislatures before agreeing to new proposals.

In theory, the European Parliament would seem to be the body best placed to secure accountability in the Union. Those who criticise the control of 'Brussels' or of the 'Brussels bureaucracy' are frequently enjoined to remedy this condition by supporting stronger powers for the European Parliament. Yet, the European Parliament is not at present a government-choosing body, divided between a government and an opposition. Were it to become that, as, for example, German foreign minister, Joschka Fischer would wish, then Europe would have transcended confederation. It would be ready for federation. At present, however, the functions of the European Parliament are quite different from those of a domestic legislature. In particular, the European Parliament cannot initiate legislation. For, if it were free to initiate, and, in partnership with the Council of Ministers, to adopt legislation, then member states which were in the minority could be outvoted in both institutions. The European Parliament is thus at present far from being the parliament of a federation. Its functions have instead been well described by Murray Forsyth as a 'critical body set over as a distinct whole against, or alongside, the confederal government [...]'.⁴ The Parliament stands against the Council of Ministers and the Commission. Its relationship to these institutions is thus quite different from that of a parliament in a parliamentary or a semi-presidential state.

It might seem at first sight as if the role of European Parliament might resemble that of the legislature in a polity based on the separation of powers such as, for example, Congress in the United States. But in fact it differs from a legislature of the American type also, since neither the Commission nor the Council of Ministers is an executive government as the American presidency of course is. There is in fact no real analogy between the European Parliament and a domestic legislature, since the European Parliament does not represent one people. It represents instead many peoples. Thus, leadership in the European Union is bound to lie, as it did in the American, the Swiss and the German

⁴ M.G. Forsyth, *Unions of States: The theory and practice of confederation*, (Leicester University Press, 1981), p. 186

confederations, with the executive—with the Council of Ministers. The democratic deficit cannot, then, be cured by simply increasing the powers of the European Parliament. It is, rather, to some extent inherent in an institutional structure such as the European Union, which is bound to appear to the peoples of Europe as an alienated superstructure. For this reason, a confederation had more chance of survival during pre-democratic times when parliaments and electorates were not central to the political process, than in modern times.

The Convention, over which Giscard has presided, has produced proposals for a constitution for the European Union. Many of those who favour a constitution for the European Union, however, favour a constitution that reflects not just the European Union as it is now, but the European Union as they would like it to be. They would like the European Union to become a federal state. They would like the economic union to become a political union, as occurred, of course with the Zollverein. That is the wish, for example, of the German foreign minister, Joschka Fischer. His central proposal is that the President of the European Commission become responsible to the European Parliament. One corollary to this reform might be that the President would choose his or her own Commission, and the Commission, therefore, would be comprised of members of one political tendency—whether right or left—corresponding to the majority in the European Parliament, rather than, as at present, being a collegial or consociational body representing all of the main streams of political thought in the Union—rather like the Swiss executive. Such a reform could, it seems to me, be carried out without there being any need for constitutional amendment of the treaties, simply by activating Article 158 of the treaties. Other reforms, however, such as direct election of the President of the Commission, would clearly require treaty amendment, and this could only be carried out with the consent of all of the member states.

To make the President of the Commission responsible to the European Parliament would indeed begin the transformation of the European Union into something very like a federal state. It would, of course, give the European Parliament a greater voice over legislation, since elections to the European Parliament would become analogous to domestic elections. They would become elections to choose the leadership of the Union, and the broad direction of Union policy—whether to the left or to the right. Moreover, the President of the Commission would enjoy greater legitimacy. He would begin to have some of the attributes of a head of government, though naturally not all of them. Nevertheless, the

institutions of the Union would be in the process of being converted into the institutions of a state. The Commission would be in the process of becoming the executive of a state, the European Parliament the parliament of a state. The Council of Ministers, by contrast, would become an upper house of the new state and, rather like the Bundesrat in the Federal German constitution, a confederal relic. The people of the member states would then owe their prime allegiance to the European Union as the central authority and ultimate power. Europeans could then say, 'We the people of Europe' and not 'We the peoples of Europe'. It was to a proposition of this kind that Margaret Thatcher uttered her famous, 'No, No, No', in the House of Commons in November 1990, so precipitating the resignation of Sir Geoffrey Howe, and her own downfall. Yet, obviously, we are a long way from the kind of consummation so feared by Margaret Thatcher.

In the cases of those confederations which became federations—the United States, the Swiss, the German—a single nation or people developed, who came to feel that the confederal political structure was a constraint upon their joint activity as a people. A common consciousness gradually developed, and this common consciousness required a more tightly organised political structure, a federal state, for its expression. The sentiment for union had become stronger than the sentiment in favour of the components of the union. Thus, for Europe to become a federal state, the European peoples would have to come to feel more European than they do British, French, German, etc. The sentiment for union would have to be stronger than the sentiment for states' rights.

The development of such a common consciousness is the key to a willingness to accept majority decisions. It was probably never present on the part of Ireland after she became part of the United Kingdom following the Act of Union of 1801. The Irish were probably never willing to accept the majority decisions of Parliament at Westminster; and secession in 1921 was almost certainly the inevitable outcome. Such a common consciousness, however, probably was present between Scotland and England after 1707, although it may not be present on the part of the Scots today. It is almost certainly not present with regard to the domestic matters that have been devolved to the Scottish Parliament. Scots are almost certainly no longer willing to accept the decisions of Westminster on such matters as health or education. Thus, while Liberal Democrats in England are prepared to tolerate being a permanent minority at Westminster, the Irish were unwilling to do so, and the Scots may be unwilling to do so in their domestic affairs, owing

to their strong sense of nationality. The same is probably true of most, though perhaps not all, of the member states of the European Union. They would not be prepared to accept majority decisions of the Union in a number of areas, and in particular perhaps, foreign and defence policy, which they regard as against their interests.

The history of previous confederations shows that the transition to a federal system is unlikely to be smooth. In the case of Germany, despite the existence of a common language, the development of a common consciousness was slow. In Switzerland, whose people spoke four different languages, and were divided by religion, the development of a common consciousness was also slow. Moreover, in the case of the German and Swiss confederations, and even of the American federation, if it was in fact a federation before the Civil War, there was a struggle between the majority who sought unity, and a minority who sought to resist it. That struggle was resolved only by war. In 1847, the seven Catholic cantons in Switzerland, the so-called *Sonderbund* cantons, broke off from the Confederation and were subdued by force. A Swiss federal constitution was then established in 1848, and, by contrast, with the American constitution of 1787, it was ratified not by all states except one, but by a majority only, with six of the seven *Sonderbund* cantons being opposed to it. In 1866, Austria was defeated in a war over the powers of the Bund, and a North German Confederation, in reality a federal state, was established from which Austria and her supporters were excluded. So also, in 1865, the American constitution survived through the will of the majority, but not unanimously, with the Southern states being coerced back into the Union. Federalism may seem a system of government based essentially on choice, but, in the case of the American and Swiss federations, they were also the outcome of coercion. Under modern circumstances, however, the right of self-determination would no doubt be recognised, as it ultimately was in the former federations of Czechoslovakia, Yugoslavia and the Soviet Union.

In the United States, of course, the constitution of 1787 was agreed to peacefully, and accepted, after debate, nearly unanimously. The constitution of the United States is generally regarded as the first instance of a federal constitution. Yet, to imagine that the Founding Fathers sought to create a federal constitution in 1787 would be to commit the fallacy of the character in an old Hollywood film who declared that he was about to fight in the Hundred Years War. The Founding Fathers sought not to create a federal constitution—indeed the term ‘federal’ nowhere appears in the United States constitution—but to resolve a practical

problem by creating a stronger national government. Federalism thus did not spring fully armed from the head of Athena. It is a constantly evolving concept. Indeed, one valuable book on confederations, *Unions of States* by Murray Forsyth, refuses to grant the term 'federal' to the constitution of the United States before the year 1868.⁵ It was only with the passage of the 13th, 14th and 15th amendments after the Civil War, he believes, that the constitution became truly federal. On this view, the original constitution was not federal, and it was the so-called 14th Amendment Constitution of 1868 that inaugurated genuine federalism in the United States. Federalism is thus not a fixed point, unvarying through time. There are considerable variations in the application of the federal principle, both in space and in time. In the United States, conflicting views as to the nature of the 1787 Constitution, and where ultimate power lay, was decided only by a civil war. In 1923, Nicholas Murray Butler, in his book, *Building the American Nation*, wrote that it was only after that civil war that it was

'Established beyond peradventure that the United States is a nation and not a confederation of nation of states; That the Sovereignty rests wholly and exclusively in the people of the United States, and that sovereignty means, as Lincoln defined it in his message to Congress on July 4, 1861, "a political community without a political superior".'⁶

With the enactment of the 13th, 14th and 15th amendments, there could no longer be any doubt that the United States was now a nation, and not a mere confederacy or a collection of confederated states. Indeed, it was not in fact until the writings of political scientists such as Woodrow Wilson at the end of the 19th century that it became customary to refer to the United States as federal.

It is doubtful if European consciousness is at present strong enough to make possible the transition from a confederal union to a federal state. Indeed, the regular *Eurobarometer* surveys seem to show that this consciousness may well be weaker today than it was, for example, in the 1970s. Were European consciousness to become stronger, this would no doubt come to be reflected in an accretion of strength to the trans-European party federations, and a willingness on the part of electors to vote on specifically European issues, rather than treating elections to the European Parliament merely as plebiscites on the

⁵ Forsyth, op. cit. pp. 69-70

⁶ Quoted in Forsyth, op. cit. p. 70. One constitutional history of the mid-19th century, by Bernard Schwartz, is significantly entitled *From Confederation to Nation, 1835-77*, (Johns Hopkins University Press, 1973).

performance of their own national governments—as second-order elections, to use the terminology of the German political scientist, Karlheinz Reif. But perhaps the historical, linguistic, religious and cultural divisions between the member states are so deep that the creation of a federal state is unlikely for many years, if ever. Then the confederal-type system that the European Union is could prove to be, not a transitional stage, but rather a long-lived form of government, just as the first Swiss Confederation was. The European Union would then remain, for some time, in constitutional form roughly similar to what it is today, a form which has been described by Tony Blair as ‘a unique combination of the intergovernmental and the supranational’, but by an Australian authority on federalism, Rufus Davis, as ‘more akin to a Heath-Robinson design than any other known system of government.’⁷

Thus, while from the constitutionalist’s point of view, the constitution of the European Union is bound to appear as an essentially transitional constitution, a provisional one, it is worth bearing in mind the well-known French aphorism, ‘C’est seulement le provisoire qui dure’.

⁷ S. Rufus Davis, *Theory and Reality: Federal Ideas in Australia, England and Europe*, (University of Queensland Press, 1995), p. 177.

European Identity and Narratives of Projection

YASEMIN SOYSAL*

Is Europe a projection of national models?

I would like to discuss this issue in the specific case of the European identity project. What kinds of narratives are projected in the definition of European identity? Can we talk about an emerging Europe with its own identity and culture that is authentic and distinctive? And how does this identity differ from the existing national identities?

To open up these questions, I will briefly reflect on the nature and scope of the emerging European identity. And I will do that from the specific field of education by examining how Europe is portrayed in schoolbooks, particularly in history and civics subjects, as well as in debates and claims about school curricula. This draws upon comparative research I recently completed. In the research I investigated the content and style of history and civics textbooks and curricula used by secondary school students in the UK, Germany and France, in the 1950s, 1970s and 1990s.¹

So what does Europe stand for when you look at current educational material? As projected both in the textbooks and in the debates around them, 'Europe' is first and foremost a very diffuse idea, contained in an equally diffuse discourse, with contingent boundaries which do not by any means always overlap with the territorial confines of the European Union. Its identity is a loose confection of civic ideals — such as democracy, equality, progress and human rights.

As such, 'European identity' differs considerably from the national type of identity—the kind we are most used to. National identities locate their legitimacy in deeply rooted histories, cultures or territories. But Europe is not past-oriented: it is future-oriented. True, history schoolbooks may glorify Europe's Roman Catholic or even Greek origins as remarkable European achievements, citing them as elemental

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properties of ‘Europeanness’. But these origins are less and less offered us within a religious or ethnic narrative, and increasingly in the more abstract form of the universal principles they contain.

The fact that these same universal principles have also inspired most of the conflicts in Europe’s war-ridden past is conveniently forgotten. When you look at recent schoolbooks, especially those of the 1990s, Europe appears as a very peaceful continent. Yet we know that Europe emerged and was sustained more by conflict and division, than by consensus and peace. But now what holds Europe together, in schoolbooks, is a set of civic ideals and universalistic principles.

The trouble with such formulation of identity is that, however frequently they are claimed, these universalistic principles and ideals can no longer be confined specifically to Europe or its member states. At the end of the twentieth century, human rights, democracy, progress, equality are everyone’s, every nation’s modernity—even when they organize their modernity differently and even when they fail to exercise that modernity.

This is what makes impossible to define a territorially and culturally bounded European identity. But this is also what makes *a* European identity possible; one that transcends Europe and is legitimated by claims to universality rather than particularisms. This Europe does not exist against its ‘others’. Only in economic competition have America and Asia become Europe’s others. They do not necessarily constitute cultural others. Islam does not exactly make the grade, either. Europe, in collaboration with non-Europeans, defended and still defends Muslim Kosovo and Bosnia against a non-democratic Yugoslavian state. Also remember the extent of pains taken by the European leaders to differentiate their ‘war against terrorism’ (a highly ambiguous ‘other’ and not a very passionate one at that) from a ‘war against Islam’. Despite attempts to the contrary (and certainly there are attempts), Europe fails to create its cultural, and symbolic other; and rightly and fortunately so.

As such, Europe lacks originality, which is a condition of proper identity. Nor does its identity appear as a challenge to national identities. Schoolbooks and curricula testify to this. Although the ‘idea’ of Europe is incorporated into school curricula and textbooks in expansive ways, the teaching of the nation and national histories still takes up a significant part of the curriculum. A substantial proportion of history teaching in schools is still devoted to national or local history. But the nation and its history taught in schools are less recognizable

as such than before. The textbooks increasingly situate the nation and identity within a European context, and in the process, the nation is being reinterpreted and recast.

We might describe what is taking place as a ‘normalisation’ of national canons and unique national myths. By this I mean a standardising process that removes the unique, the extraordinary and the charismatic from national accounts. Take the increasing celebration in history textbooks of the Vikings as part of the European heritage. The warrior forefathers have been replaced with jovial long-distance traders. Similarly, ancestral tribes — Germanic and Gallic, Normans, Franks and Celts — are all increasingly depicted not in heroic, but in cultural terms, through such images as quaint village life, hospitality and artistic achievements. Rather than introducing these peoples, ancestral tribes, in terms of a national genealogy, their intercultural relations are emphasized. National transformations, such as the division of the Frankish Empire into three kingdoms in the ninth century, become part of a natural evolution towards the inevitable creation of a future Europe. The birth of the French Kingdom becomes the consequence of an ordinary historical evolution rather than the result of a unique French identity. Hence the French nation becomes like others, nondescript and ordinary.

The same normalisation has been applied to national heroes as well. They are talked about in a matter-of-fact way, far removed from mythical glorification. Jeanne D’Arc, Bismarck or Francis Drake are not simply personifications of glorious national moments, but also appear in the new textbooks as persons with ordinary weaknesses. Drake, for example, appears as a good sailor, but also a rather greedy man who stole from both the natives and the Spanish.

Like the nation, the local and regional are also re-articulated within the European. In French geography textbooks we read that ‘European integration has modified the organization of the French space.’ Within this new geography Alsace-Lorraine loses its contested existence in the national imaginary, and emerges as a region in the heart of Europe; rich, dynamic and with encouraging prospects. This is quite remarkable for France where regions are always undermined in favour of the centre, as opposed to Germany, for example, where regional diversity is inclined because of the more decentralised political structure.

Of course, we observe differences across countries as well. In German history books, Europe (and also local regions) figures heavily in the narration of history and identity, while the nation disappears. This certainly has to do with Germany’s specific historical trajectory, and

also the secure place that Germany feels within Europe. Having this secure outlook towards Europe, Germany does not feel threatened by, and is open to, the Europeanisation of its education.

In French textbooks, on the other hand, the French nation still has a much stronger presence. But, in this case, the French nation, which is historically conceptualized as an abstract and universalistic entity, is equalized with Europe. In other words, Europe becomes French. And since the French system is much more centralized, this universalistic conceptualization easily penetrates and dominates every aspect of education.

So 'Europe', as narrated in educational spheres, hosts multiple geographies, multiple boundaries and multiple cultural references. Europe affords national and regional identities and belongings, but not in an organic, interdependent way, as in national projects. If anything, within the European project the meanings of nation and region are being transformed, and are losing their charisma and uniqueness.

Europe, as a result, is fuzzy, not well-defined or precise enough to offer a coherent, collective identity. Unlike the national identities and histories, which were the passionate products of the nineteenth-century state and nation-building projects, Europe cannot afford to develop its discriminating particularisms; it cannot replicate national trajectories. This means Europe may never end up with a consistent and specific narrative.

What does this all mean for the Constitution of the European Union? And European polity-building? Very simply: If this is the identity that Europe has to work with, an identity based on a set of abstract, universalistic principles—democracy, progress, human rights, gender equality—without cultural particularity, its constitution is bound to be as non-descript and flexible as its identity. This assemblage of abstract principles and their enactment is what affords 'the ties that bind' in a possible European polity. In this sense, we should not expect the emergence of a European demos in the conventional sense (with a strong we-feeling and collective purpose).

That is to say, the existing national models and their historical trajectories are not the most fruitful source of inspiration for conceiving and implementing a European constitution. This may sound defiant, but if I take my own research seriously, I cannot come to any other conclusions.

Europe after the High Tide:

The Belgian Model for a Diverging Union

MARTIN CONWAY

The nature of the European question has changed. The Great Leap Forward, which carried the European Union from its regulatory and facilitating role in the 1970s to monetary union and putative statehood in the 1990s, has come to an end. From the Treaty of Nice in 2000, to the Constitutional Convention of 2002-3 and the impending integration of the states of Central and Eastern Europe, the agenda has been tacitly shifting from building an ever closer union of the member states to the much more complex task of stabilising and maintaining the emerging united Europe. Everything suggests that this will be a difficult task. Unification within the walled garden of Western Europe was, the British problem excepted, largely a question of matching like with like. But the three stages of expansion, first into the Mediterranean, then into Scandinavia, and now into the former Communist states of the east, have raised much more complex problems of convergence and even compatibility.¹ Consequently, unification, as it came to be understood in the final two decades of the twentieth century as the merging of economic, social and (more tentatively) political power, has been subordinated to the more limited, but no less challenging goal of European unity. The question is therefore no longer how much more can be achieved by way of closer unification, but how to hold on to (and make work) the unity that has been, or is about to be, achieved. We are, in sum, in a post-unified Europe.

New questions require new answers and, perhaps more importantly, new ways of thinking. To a historian, probably the most fascinating aspect of the work of the Convention has been the way in which it has revealed the plethora of ideological discourses that have survived the

¹ Theoretical literature necessarily tends to follow behind events. However, it is interesting to note that the notion of some form of ceiling to the process of European integration has begun to nuance the hitherto teleological tone of many studies of European integration. See, for example, the new sobriety evident in A. Kölliker 'Bringing Together or Driving Apart the Union? Towards a Theory of Differentiated Integration', *West European Politics* XXIV, (2001), no. 4, 125-51.

process of political homogenisation in Western Europe over the past half century. Never, in living memory, has a single European institution become the receptacle of so many official, quasi-official and simply self-important expressions of political ideas and ideals. The experience has been stimulating but also revealing of the absence of any recognisable centre of gravity in European political discourse. The nature of the question is clear: how to build a viable enlarged European Union? But the answers have largely served to demonstrate that there are an almost infinite number of ways of imagining and implementing the widely accepted principles of representation, accountability and good governance. In the absence of any shared way of thinking, national political systems continue to cast their shadows over the European debate. The problem is that none of these offers an obvious way forward for the nascent European polity. French principles of centralised republican universalism and the British *ancien régime* culture of parliamentary supremacy might be the most prominent of such national models; yet, they are also quite obviously the ones least suited to the needs of the multi-layered and multi-institutional Europe that has emerged from fifty years of episodic institution-building. Even the most durable example of constitution-making in Europe since 1945, that of the Federal Republic of Germany, seems now to be the product of a peculiar mid-century combination of social corporatism and political federalism, much less well adapted to the needs of a re-unified Germany or a newly-united Europe.

In this search for new ways of thinking, Europe's leaders could perhaps do worse than to look at the political model that lies just outside the door of the Brussels institutions. Belgium, Europe's first and indisputably most successful post-national state, has played an ambiguous role in the construction of the European Union. Despite the largely accidental presence of many of the major institutions of the European Union in the Belgian (now federal) capital, and the evident ease with which emollient and multilingual Belgian officials have moved in its corridors of power,² Belgium was, in the 1940s and 1950s, the original Eurosceptic state. Dragged by its Foreign Minister Paul-Henri Spaak into the first generation of European institutions against the instincts of most of its governing class, Belgium long regarded the EEC as little more than a necessary and convenient

² G. Dierickx and J. Beyers 'Belgian Civil Servants in the European Union: A Tale of Two Cultures', *West European Politics* XXII, (1999), no. 3, 198-222.

evil.³ That attitude changed substantially at the end of the 1970s and in the 1980s, partly as a consequence of the process of internal fragmentation that threatened to overwhelm the unitary Belgian state.⁴ But Belgian support for the further integration of the Union has never been as unconditional or as selfless as the Europhile declarations of its political elite might suggest. This has become increasingly evident in recent years as Belgian governments, and more especially their component political parties and electorates, have adopted a much more critical stance towards the eastern enlargement of the Union and changes in its internal structures of governance that might marginalise the influence of the smaller states.⁵

Yet, as Europe moves from building unity to managing divergence, the case of Belgium has, perhaps, acquired a new relevance. Reports of the death of Belgium tend to be exaggerated; but few would seek to claim that the Belgian federal system, with its obvious inefficiencies and duplications, is the obvious model for others to emulate.⁶ The relevance of Belgium in the current European constitutional debate lies, therefore, less in the particular content of its constitutional structure than in the instructive example it provides of a political system intended less to build unity than to manage disunity. This negative federalism is perhaps the first lesson that Belgium can provide to the potentially fissiparous European Union of the twenty-first century. Federalism, as it gradually took shape in Belgium over recent decades, was the product not of communities seeking to work together, but of political elites responding to the disparate popular grievances voiced against the centralised

³ On Belgian attitudes to the European institutions of the 1950s, see, for example, A. Milward *The European Rescue of the Nation-State*, (2nd edition London, 2000), pp. 46-118; M. Dumoulin 'La Belgique et les débuts de la construction européenne: zones d'ombre et de lumière' in M. Dumoulin (ed.) *La Belgique et les débuts de la construction européenne* (Louvain-la-Neuve, 1987), pp. 9-34; L. Van Molle 'Le monde agricole belge et la concurrence européenne', in M. Dumoulin (ed.), *op. cit.*, pp. 119-43; R. Coolsaet *La politique extérieure de la Belgique*, (Brussels, 2002), pp. 101-33. Andrew Moravcsik wisely omits Belgium from his discussion of the rational governmental decision-making that, he claims, lay at the origin of the Treaty of Rome: A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, 1998), pp. 86-158.

⁴ R. Coolsaet, *op. cit.*, pp. 212-7 and 263-72.

⁵ For example, the Flemish Socialist Party stated in 2003 its opposition to eastern enlargement if it threatened the construction of a 'social Europe'.

⁶ The Belgian federal constitution defies any brief summary. See, however, J. Brassinne, *La Belgique fédérale*, (Brussels, 1994); R. Falter, 'Belgium's Peculiar Way to Federalism', in K. Deprez and L. Vos (eds.), *Nationalism in Belgium*, (Basingstoke and London, 1998), pp. 177-97.

state by creating a new political system that also continued to serve their particular interests.⁷ 'L'union fait la force' was the *devise* of the Belgian state forged in 1830-1, but in the long and conflictual process of constitutional reform that has taken place since the 1960s, the force of this statement has seemed largely ironic. Rather than the point of convergence between complementary local and regional ambitions, the federal level of the Belgian state has come to resemble a meeting-place of feudal barons in which the representatives of its component regional, social and confessional institutions sink their differences in opaque and multilayered agreements.

The second lesson of the Belgian case for the European Union is therefore that complexity is not weakness. By most of the criteria of effective government, the political system of Belgium would be unlikely to score highly. The much-maligned federal Belgian system comprises a series of overlapping and poorly defined administrations at the federal, community and regional levels and a plethora of points of constitutional confusion. Its bureaucracies are undoubtedly inefficient and its finances rarely sound. Yet, it works; or, perhaps more exactly, its failure to work efficiently is one of the reasons why it has worked at all. The Belgian federal state, as it has emerged, is unsanctioned by either historical logic or grand principles, but this exercise in constitutional *bricolage* has the essential virtue in a highly segmented society that it provides manifold opportunities for sharing power and avoiding the stigma of exclusion or defeat. Whatever the vagaries of election results and the composition of particular coalitions, everybody can claim a share of the spoils. Be they Catholics, Socialists, Liberals or Greens, Flemish, Walloon, *bruxellois* or germanophones, all political families and regional groups have a role to play at the local, community (i.e. linguistic), regional or federal levels, as well as in the manifold para-state institutions that surround and buttress the political institutions. This inclusiveness has obvious and less obvious costs. The absence of clear winners and losers limits the capacity of the conscripted voters to have any influence over decision-making,⁸ and contributes to the appeal of those heretics, such as the Green parties (*Ecolo* in francophone Belgium and *Agalev* in Flanders) and the extreme-right *Vlaams Blok* in Flanders,

⁷ On the historical process of federalisation, see notably L. Hooghe, *A Leap in the Dark: Nationalist Conflict and Federal Reform in Belgium*, (Western Societies Program Cornell University Occasional Paper No, 27, Ithaca NY, 1991); X. Mabille, *Histoire politique de la Belgique: Facteurs et acteurs de changement*, (4th edition Brussels, 2000).

⁸ Voting is compulsory in Belgium.

who emphasise with lesser and greater degrees of success their outsider status.⁹ More profoundly, the inefficiency of a highly politicised public sector has been revealed by crises such as the kidnapping of a number of young girls during 1995 and 1996 when the police and judicial authorities were seen by much of the population to be unable or even unwilling to take decisive action.

The lack of transparency suggests a third lesson from the Belgian model; namely, that a common culture of governance can be more important than democratic accountability. Referenda are explicitly banned under the terms of the constitution. Although a consultative referendum was nevertheless held in 1950 to decide on the fate of the wartime King, Leopold III, it proved so traumatic and divisive that the Belgian political elite has carefully avoided consulting the people directly on any of the fundamental constitutional changes that have taken place over recent decades.¹⁰ In contrast, national parliaments, regional assemblies and local communal councils form a prominent and healthy element of Belgium's civic culture; they are not however the primary centres of power. Decisions are brokered outside of parliament in less public arena where accountability and legal oversight matter less than the ability of the representatives of different interests to speak each other's language, albeit metaphorically rather than literally. The survival of this Belgian way of doing business has been one of the most important reasons why the dismantling of the nation-state and the emergence of increasingly assertive regional governments has not led to the demise of Belgium. Future political problems, notably the vexed issue of the regionalisation of social security (and the end that this might bring to the subsidising of the francophone south by the currently more prosperous Dutch-speaking north), might indeed generate a political

⁹ See, for example, the quotations in M. Swyngedouw and G. Ivaldi 'The Extreme Right Utopia in Belgium and France: The Ideology of the Flemish Vlaams Blok and the French Front National', *West European Politics*, XXIV, (2001), no. 3, 13; and the contextual analysis in M. Swyngedouw, 'Belgium: explaining the relationship between *Vlaams Blok* and the city of Antwerp', in P. Hainsworth (ed.), *The Politics of the Extreme Right: From the margins to the mainstream*, (London and New York, 2000), pp. 121-43. The sharp electoral reverses suffered by the Green parties in the May 2003 general elections owed much to the way in which they were perceived by their former supporters as having been tainted by their membership of the governing federal coalition from 1999 to 2003. In contrast, support for the consistently excluded *Vlaams Blok* continued to rise.

¹⁰ P. Theunissen 1950, *Le dénouement de la question royale* (Brussels, 1986); J. Bauduin and H. Dumont 'Les bonnes raisons d'un référendum', in *Belgique, disparition d'une nation européenne?* (Brussels, 1997), pp. 217-20.

crisis sufficiently acute to defy even the considerable talent of Belgium's political elite to construct what is often referred to, with a mixture of self-deprecation and residual pride, as a *compromis à la belge*. But the obstinate durability of the Belgian political community during the final decades of the twentieth century now appears to have been more than a simple accident. Though it might superficially have owed something to the rediscovery of certain of the emotional elements of 'Belgianness', such as the national football team and the monarchy, it rested more profoundly on the survival of a particular political culture. This mixture of complex negotiation between consociational pillars (which have found many congenial niches within the multilayered federal structure), strongly rooted local loyalties and the avoidance of conflict often at the expense of decisive government has proved to be more resilient than the nation-state framework within which it developed from the mid-nineteenth century onwards. Such a system may not be a model of democratic accountability; but nor, emphatically, is it undemocratic. Indeed, in comparison with the presidentialism of France or the parliamentarism of Britain, it is the extent to which, albeit indirectly, the rulers of Belgium feel beholden to their social, ideological and regional constituencies that is the principal distinctive feature of the Belgian practice of politics.¹¹

To suggest the relevance for the European Union of Belgium's transition over the past half century from a centralised parliamentary monarchy to a confederal mini-regional union might seem a little perverse or even cynical. This is, however, to overlook the fact that the historical development of the present European Union over the last fifty years has been based predominantly on the avoidance of the principles of uniformity, democracy and accountability that are now frequently invoked as central to its future development. The European institutions of the post-war decades were the product of the muted and somewhat limited model of parliamentary democracy that prevailed in Western Europe after 1945. Rather than seeking to involve the people of Europe in the process, the 'founding fathers' of European integration sought to exclude them in favour of the construction of a limited but effective structure of inter-governmental co-operation, buttressed by the technocratic skills of the largely unaccountable European

¹¹ For introductions to contemporary Belgian politics, see J. Fitzmaurice *The Politics of Belgium: A unique federalism*, (Boulder, 1996); P. Delwit, *Composition, décomposition et recomposition du paysage politique en Belgique*, (Brussels, 2003)

Commission.¹² Moravcsik's now famous triptych of commercial advantage, bargaining between the major governments and credible interstate commitments, re-energised by the Kohl-Mitterrand-Delors axis of the 1980s, carried European integration an unexpectedly long way.¹³ But both the challenge of enlargement and the effective demise of the old forms of European solidarity provided by the transnational networks of Christian Democracy and Social Democracy now require that a new way of doing business be constructed. Europe is therefore not only about to become larger; it has also become inherently more difficult to govern. To adapt the phrase famously, if only allegedly, uttered by the prime minister of Belgium, Gaston Eyskens, when initiating the first constitutional reforms of the Belgian state in 1970: 'L'Europe de papa a vécu.'¹⁴

In this debate, the haphazard federalism of Belgium¹⁵ has perhaps more to offer than might at first sight appear. Belgium and the European Union are complex polities that lack the emphatic force provided by patriotic euphoria or historical solidity. They are also probably both ones that have already passed their moment of closest union. That does not mean, however, that they are doomed to disintegrate or disappear. Union can long outlive the process of unification, as the survival of Belgium and the obstinate resilience of the Habsburg Empire during the nineteenth century both suggest. What unites these post-national polities is that they tend to operate most effectively when they eschew the clarity of simple forms of political architecture. Common cultures of governance, complex even opaque structures of decision-making and shared pragmatic mentalities are more important to their viability than either institutional beauty or uniformity. This suggests that the current concern with the institutional form of the new Europe is perhaps rather

¹² M. Conway, 'Democracy in Postwar Western Europe: The Triumph of a Political Model', *European History Quarterly*, XXXII, (2002), 59-84. This is of course also the major if somewhat approximate argument of L. Siedentop, *Democracy in Europe*, (London, 2000). See also the excellent analysis of the problem of governance within the European Union provided in P. Magnette, 'European Governance and Civic Participation: Beyond Elitist Citizenship?', *Political Studies*, LI, (2003), pp. 144-60.

¹³ A. Moravcsik, *op. cit.*, especially pp. 473-89.

¹⁴ A. Méan, *La Belgique de papa. 1970: le commencement de la fin*, (Brussels, 1989), pp. 11-17.

¹⁵ K. Deschouwer and T. Jans rightly describe the federal system as 'een complex en volkomen idiosyncratisch federaal bestel': K. Deschouwer and T. Jans 'De Belgische politieke stabiliteit in vergelijkend perspectief', in M. Galle and S. Locufier (eds.), *Facetten van 100 jaar politieke, economische en sociale geschiedenis: Herdenking geboorte Achiël Van Acker 1898-1998*, (Brussels, 2000), p. 147.

mistaken. Whatever the exact nature of the structure that eventually emerges from the work of the Convention and the subsequent Inter-Governmental Conference, it will undoubtedly be a complex hybrid. Multiple presidencies, variable architecture and coalitions of the willing are all destined to be elements of the post-unified Europe that is now emerging. Rather than signs of weakness, they do perhaps more prosaically indicate the limits of the possible. The high tide of unification has passed, and the problems facing the European Union are both less grandiose and more resistant to easy institutional solutions than we are often encouraged to suppose.

The Regional Question, Subsidiarity and the Future of Europe

JOHN LOUGHLIN*

The diversity of the regional question.

The regional question is always with us, and has been on the political agenda since the formation of the nation-state. This is simply because the nation-state, as a system of political organisation, involved the imposition of centralised control over territory and, in the process, absorbed entities—provinces, regions, cities, and even nations—within its territorial boundaries. Thus, national centralisation entailed regional peripheralisation. Although patterns of centre-periphery relations are common to all European nation-states, there is also a great complexity in their origins and diversity in the forms of organisation that they eventually adopted. The ‘regional question’ is one element in this complex picture. The question has been asked whether, given this complexity, we can even speak of a single “regional question” and whether there is a common ‘regional interest’ capable of being represented at the European level. Let us look first at diversity.

With regard to state forms, the classic distinction is between federal and unitary states. Theoretically, federal states give greater protection to the position of regions than do unitary states. It is possible, however, to further break down these categories. Federal states may be centralised (Austria), decentralised (Belgium) or balanced (Germany) federal states. Unitary states may be centralised (Greece, Ireland, Portugal), decentralised (Scandinavian states and The Netherlands), and regionalised (Italy, Spain, France and, now, the UK) unitary states. This means that some federations (such as Austria) may diminish regional (Länder) autonomy more than others (such as Belgium) where the federal level has almost become a mere residual state, with many of its functions taken over by the communities and regions. On the other hand, some of the large unitary states (France, the UK, Italy and Spain) have strengthened the position of their regions, while the smaller unitary states have created levels of regional administration to some degree. The institutional picture is further complicated by the great diversity in the situation of local

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authorities and their relations to both regional and national levels of government. Patterns of local government organisation and intergovernmental relations vary between the north and south of Europe, but also even within countries such as across the German Länder.

Nevertheless, despite this great diversity, it is possible to discern trends towards convergence. With the exception of Belgium, federal states have tended towards centralisation, especially in financial matters, while regionalisation and decentralisation have been trends in unitary states. This has meant that it is becoming increasingly difficult to distinguish between the two main types of states. Furthermore, membership of the European Union has encouraged these trends towards convergence in the practical politics of policy-making even as state forms remain intact at the constitutional level.

Our understanding of the regional question has also varied in different historical periods. Since 1945 the question has been formulated in several distinct ways.

First, in the period of *les Trente Glorieuses* (1945-1975), which saw the growth of the Welfare State in Europe when, under the impact of post-war reconstruction and the Marshall Plan, economies and states steadily expanded. This period has been interpreted as the final stage in the process of nation-state building which began around the time of the French Revolution. The key features of this period were centralisation for redistribution, and growing bureaucratisation to administer burgeoning policy programmes. During this period, regions and sub-national authorities were viewed within the context of participation in the processes of national solidarity and reducing the disparities between stronger and weaker territories. At this time the policy instrument to bring about this convergence was regional policy whereby national governments would apply the same Keynesian and Beveridgian logic to territories as they did to weaker individuals and groups in social policy. We might call this *assisted regionalism*. Although Welfare State regimes differed across Europe, as the work of Gosta Esping-Andersen and Frank Castles has shown, these trends were features common to all states, whether these were federal or unitary.

During this period regional policy remained a competency of the national governments of the EC member states. Although a European regional policy was implicit in the preamble to the Treaty of Rome, which speaks of the 'harmonious and balanced development' of the Community, it was not until 1975 that the European Regional Development Fund (ERDF) was established. However, this was still little

more than an attempt at co-ordinating national regional policies with a view to preventing market distortion within the Community. A truly European policy did not emerge until the mid-1980s and early 1990s when successive reforms revamped the ERDF and created the Structural Funds. The reason for this tardiness is fairly clear: nation-states, during the period of their expansion during the *Trente Glorieuses*, did not need a European regional policy.

This is not to say that there was no regional mobilisation during this period. On the contrary, the 1970s and 1980s saw a significant increase in such mobilisation but this still occurred within a 'stato-national' framework. Regionalist demands were mainly made to national governments for increased assistance. A small, but vociferous minority of regionalists and nationalists in some regions made more radical demands to restructure their states along federalist or regionalist lines, or even for secession. But the nation-state remained the main frame of reference for these demands, as even extreme separatists wanted to create mini nation-states of their own. Such groups were divided on the question of European integration: moderate regionalists who were also federalists supported it; separatists who were nationalists or neo-Marxists opposed it, either because it undermined the nation-state, or because they saw it as a capitalist plot.

Due to challenges to the paradigm from the left and right, the regional question was reformulated in two successive ways in the *Post-Welfare State*. The 'New Left' (Adorno, Horkheimer, Marcuse, etc.) of the 1960s and early 1970s viewed the Welfare State as little more than a social democratic capitulation, and rescue of the capitalist system. However, the critiques from the 'New Right', (from philosophers such as Nozick, political scientists such as Niskanen, and economists such as Hayek and Milton Friedman), who attacked the state as such, carried the day. With the election of Margaret Thatcher and Ronald Reagan, the New Right had champions able to exploit the crisis of the Keynesian and Beveridgian model of the state in the 1970s.

Although Thatcher and Reagan did not dismantle the Welfare State they did attempt to undermine some of its main objectives such as redistribution, the drive towards equality, and economic intervention. At the very least, particularly in the UK, there was a slowing down of the increase in state expenditures on welfare policies, even if expenditures continued to rise. What does seem to have changed is the basic underlying philosophy of the state in which it came to be conceived as a hindrance to economic and individual freedoms. Jessop has described

this (in rather cumbersome language) as a transition from the Keynesian Welfare National State to Schumpeterian Workfare Postnational Regimes. Here we shall simply term it the Post-Welfare State.

The Post-Welfare State has taken two main forms, one associated with New Right, the second with reformed Social Democracy. The first used a neo-liberal approach to favour the market over both the state and civil society. The private sector was assumed to be better than the public in terms of management and entrepreneurship. 'No such thing as society' was acknowledged by those championing this view (or, at least, by Mrs Thatcher). This approach was especially important in the US and the UK, but it also influenced other European countries including Denmark, Sweden and France.

The second approach accepted the neo-liberal reforms of the 1980s and 1990s as irreversible, but attempts to modify them through the introduction of a societal element and by giving a more positive role to the state. This approach is associated with Bill Clinton's 'reinventing government' programme, and has influenced Tony Blair's Third Way as well as attempts by Gerhard Schröder and Lionel Jospin to revise their forms of social democracy. In this view the state is a 'facilitator' encouraging 'partnerships' between the public and private sectors, between different levels of government, and between business and civil society.

It is not accidental that, during this period of transition (the 1980s) from the Welfare to the Post-Welfare State, there was a renewed burst of European integration with the single market project and revisions of the Treaties. This was a response both to the challenge of globalisation and the renewal of capitalism, and to the failure of the Keynesian national state to meet this challenge. European integration was accompanied by a reform of regional policy in the 1980s and a modest but (for regions and local authorities) important increase in the funds available for regional development. It was also during this period that the Soviet Union collapsed and enlargement of the EU to the east became a real possibility. All of these developments fed into and reinforced each other.

The significance of the regional question also changed. First, under the impact of neo-liberal policy reforms, national regional policies were either seriously reduced or abolished outright (as in the UK). When this had happened some regions and local authorities found they had to reinvent themselves in a new situation of *competitive regionalism*, that is, they found their national governments were either unable or unwilling to help them with much needed funds. On the other hand, Brussels

was suddenly providing them funds, even if these were modest in overall terms. This, combined with the relative diminishing importance of national governments as policy actors, encouraged at least some regional authorities to adopt strategies that were wider than their own nation-states. New, bottom-up models of regional development, and notions such as subsidiarity and partnership were adopted by the EU itself in its reformed regional policies. Thus, the notion of *collaborative regionalism* developed alongside and co-existed with the competitive approach. During this period regions established a variety of associations to try to influence the direction of events, and in particular the reforms of the EU, in their favour. It might be noted that one of the principal outcomes of this mobilisation, the Committee of the Regions set up as an advisory body by the Treaty on European Union, was something of a disappointment to the regions, particularly the German Länder who had been at the forefront of the movement. Nevertheless, even this modest step is an indicator that the regional question was on the agenda of European politics in a novel way.

In each of the periods encompassing our three approaches the EC/EU can be characterised in particular ways (see Figure 1). During the early period, it was inter-governmental given the strength of the welfare state and the expanding economy. In the neo-liberal post-welfare period, it was marked by accelerated integration with a view to achieving the single market. In the new social democratic post-welfare period, it was neo-federalist and constitutionalist. However, we should inject a note of caution by pointing out that the division between one period and another is not always clear cut and that we are speaking of *dominant* tendencies in each period. These usually co-exist with the other approaches but these remain subordinate. For example, welfare and post-welfare approaches to policy co-exist, but the configuration in which they co-exist changes. In the EU, inter-governmentalism co-exists with supra-nationalism and neo-federalism. Competitive regionalism co-exists with collaborative regionalism. It is this complexity of sometimes complementary, sometimes competing, tendencies that we mean by the term *governance*.

Figure 1: Periodisation of Regionalism in Western Europe (1945-present)

<i>Period</i>	<i>Dominant Feature</i>	<i>Mode of Governance</i>	<i>Mode of Regionalism</i>	<i>Nature of EU</i>
Welfare State	State	Interventionist	Assisted	Residual/ Inter-governmentalist
Post-Welfare (neo-liberal)	Market	Diminished State	Competitive	Accelerated integration
Post-Welfare (Third Way)	Society	Partnership/ Network	Collaborative	Neo-federalist and constitutionalisation

The Convention on the future of Europe, regions and Subsidiarity: what to expect.

To this point I have described the mobilisation of regions against the background of the evolution of the nation-state and the European Union. All three processes are clearly closely inter-linked. The loosening of the rigidities of the traditional nation-state in the 1980s opened up opportunities for regions and local authorities to mobilise on a wider scale than hitherto. However, the setting up of the Committee of the Regions in 1994 seems to have somewhat deflated this mobilisation. This may explain why the regional question was largely absent during the Amsterdam and Nice IGC's. In Joschka Fischer's speech advocating a federal Europe given at Humboldt University in May 2000, reference was made only to relations between the Member States and the EU institutions, and not to the regions. The responses to this speech also largely ignored the regions. To some extent, this marginalisation of regions is a result of the renewed vigour of the nation-state, whereby national governments have attempted to reassert their central position in the EU in the face of advances made by the Commission and the European Parliament. This tussle has largely excluded representatives of the regions, even the powerful German Länder, who have probably, in any case, sorted out their relations with the German Federal Government in EU matters to their own satisfaction (and this had been the main motive for their external mobilisation).

This does not mean that the regional question has gone away. On the contrary, there is at present a new mobilisation, but of a rather different sort from the one that took place in the 1980s and 1990s. The divi-

sion between regions ‘strong’ or ‘weak’ in constitutional and political terms—a division always present in the regional movement—has come to the fore with the formation of new groups. Such groups include the Constitutional Regions, founded on the initiative of the Flemish Government and consisting of seven members (Bavaria, Catalonia, North Rhine-Westphalia, Salzburg, Scotland, Wallonia and Flanders), and RegLeg, a wider ‘Group of Regions with Legislative Powers’, set up under the auspices of the Congress of Local and Regional Authorities of the Council of Europe. The ‘weak’ regions are those, such as the French regions, without constitutional and legislative powers. These are still largely represented by bodies such as the Assembly of European Regions (ARE) and the Conference of Peripheral and Maritime Regions (CPMR).

The constitutional regions argue that they are responsible for implementing EU legislation in many policy areas, but complain that they are not involved in the preparation of this legislation. They have therefore mobilised anew to try to influence the Convention on the Future of Europe and the forthcoming Intergovernmental Conference, in order to strengthen their position in the EU’s legislative processes. Their weaker cousins have been left aside for the moment. The question is, how successful have the constitutional regions been in pressing their demands?

Background

First, it is clear that the Convention has been mainly an affair of EU institutions and Member States to the exclusion of the regions. Initially a suggestion was made to set up a Working Group on Regions, but this was dismissed in favour of a Working Group on Subsidiarity. Theoretically, subsidiarity should involve taking decision-making to the level closest to the citizen, while the complementary principle of proportionality states that the level should be appropriate to the task. This should mean that, at the very least, regions and local authorities are implicated in its exercise. However, although subsidiarity was understood in this sense in the reforms of the Structural Funds in the 1980s, its meaning was distorted in the Maastricht Treaty, mainly because of British attempts to reassert the dominance of member states over European institutions. Regional bodies such as the Committee of the Regions and the Constitutional Regions have challenged this interpretation and attempted to have the broader meaning accepted in their statements to the Convention alongside other demands aimed at increasing the power of regions at the European level.

Demands made by Regional Bodies at the Convention

At the Convention the Committee of the Regions made demands for:

- Recognition of the CoR's status as an institution;
- Power to bring actions before the European Court of Justice (ECJ), at least in defence of its prerogatives and the subsidiarity principle;
- Strengthening of the functions of the Committee by enabling them to go beyond their current purely consultative functions: this would include granting the right of a "suspensive veto" in some cases of mandatory consultation; the right to attend the dialogue between the Council, EP and Commission in the co-decision procedure; sanctions in case of failure to consult CoR where this is mandatory; a requirement that institutions justify failure to take the Committee's opinions into account in all areas where this is mandatory;
- An extension of the list of subjects for mandatory consultation to all areas related to powers of regional and local authorities, e.g. agriculture, research and technological development.
- The establishment of the right to address written and oral questions to the Commission;
- Setting co-decision making functions in specific areas.

The Constitutional Regions made the following demands, also broadly endorsed by RegLeg, to:

- Enable direct participation in the preparatory work for the 2004 IGC;
- Formalise the principle of subsidiarity to recognise the different competences of the EU, national governments and regions;
- Review the political responsibilities of the EU and the member states and regions, especially where laws impinge on their competencies;
- Strengthen the Committee of the Regions to become a full-blown EU institution rather than a mere consultative body.

The demands of the wider 'regional interest community' (that is, including regions without legislative powers) may be summed up in the contribution of the Assembly of European Regions to the Convention. That is:

- There should be a constitutional recognition of the positive aspect of diversity as embodied in the EU's regions;

- The principle of subsidiarity should be applied through trilateral contracts between the Commission, the Member States and the Regions;
- The division of competences should be clarified and verified by a mixed body working parallel to the ECJ;
- The Committee of the Regions should be strengthened;
- Regions should be able to appeal directly to the ECJ to preserve their rights and competences.

In an interesting turnabout from its traditional position on these questions the British government, represented by the Secretary of State for Wales Peter Hain, presented a policy paper at the February 2003 plenary session. The paper had been prepared at Hain's behest by the Scottish Parliament and National Assembly of Wales. The paper suggested:

- A Treaty reference acknowledging the role of regions in the EU;
- A specific endorsement of the role of regions in relation to subsidiarity;
- Mandatory consultation by the Commission;
- Early warning systems on proposals;
- Reform of the Committee of the regions.

Outcomes.

The Convention's Working Group on Subsidiarity, however, refused to accept most of these demands and instead strengthened the role of *national* parliaments. This is not surprising given that around 70 of the Convention's 105 members were drawn from national parliaments or the European Parliament, and also that the Committee of the Regions had only observer status.

In the end, the Working Group opted for an understanding of subsidiarity that primarily concerned relations between Member States and EU institutions, and tended to downgrade the relations of these two levels with subnational authorities, even those with legislative powers. On the other hand, it does somewhat strengthen the Committee of the Regions. The following were its principal recommendations:

- The obligation for the Commission to attach a "subsidiarity sheet" to its proposals;
- The setting up of an 'early warning system' to allow national parliaments (but explicitly ruling this out for regional parliaments) to give their opinions at the start of the procedure on whether or not

the Commission's proposals are in conformity with the principle of subsidiarity;

- The right of the Committee of the Regions to appeal to the Court of Justice in the case of texts concerning areas on which it is consulted in the normal context of its duties. However, it explicitly ruled out granting individual regions and local authorities this right;
- It also ruled out the creation of an ad hoc body responsible for monitoring the application of the principles of subsidiarity and proportionality.

The Draft Constitution

The Draft Constitution published by Giscard d'Estaing reflects these developments within the Convention:

- The Preamble mentions regional and local authorities in connection with respect for the internal political and administrative organisation of the member states;
- Within Title III, Articles 9 and 10 deal with subsidiarity and proportionality. These articles reaffirm the centrality of the Member States. Paragraphs 1 and 2 of Article 9 underline that it is the principle of conferral that governs the attribution of competences to the European level. This means that the Union shall act within the limits conferred on it by the member states to obtain the objectives laid down in the constitution. Paragraph 3 of Article 9, however, does make mention of the regional and local, as well as the central levels of government, as those levels where the principle of subsidiarity might be applied;
- Under Title IV, which gives the status of the institutions and bodies of the Union, paragraph 2 of Article 31 maintains the consultative status of the Committee of the Regions alongside the Economic and Social Committee. However, it also affirms that members of the Committee shall be elected regional or local politicians, or at the very least be accountable to a regional or local authority (originally members could be anyone chosen by a national government, whether they were elected or not);
- Attached to the Draft Constitution is a Protocol on the Application of the Principles of Subsidiarity and Proportionality. This largely reproduces the recommendations of the Working Group. National Parliaments are affirmed as the guardians of the principle of subsidiarity although the Commission must consult widely and

take into account the regional and local dimension when preparing legislation. However, a new role is given to the Committee of the Regions which may also bring breaches of the principle of subsidiarity to the attention of the European Court of Justice, but only in those areas where the Constitution states the Committee must be consulted.

Although the Constitution is only a draft, it seems unlikely that the final version will give a greater recognition to the regional dimension, to the Committee of the Regions or to subnational authorities.

The regional question and the future of Europe

Although Subnational Authorities and the Committee of the Regions fared rather poorly in the Convention, this does not mean that the regional question will go away or will become less important. On the contrary, the Convention has stimulated a new regional mobilisation and the question is once again on the political and policy agendas. The forthcoming IGC will be another opportunity to influence the evolution of the EU. The following points might be made by way of conclusion:

The Committee of the Regions

The Committee of the Regions will emerge strengthened from the Convention process, if only incrementally. Recent proposals from the Commission (formulated outside the Convention, but clearly in line with the draft Constitution's stipulation that it must consult widely) on the consultation of regional and local authority associations places the CoR in the position of intermediary between these associations and EU institutions. This will be formally acknowledged and given an institutional framework.

Regional Associations

The key development with regard to regional associations is the organisation of constitutional regions, or regions with legislative powers. It seems clear that the seven 'big hitters', supported by the larger grouping, will continue to protect their interests in the new Europe. This will force organisations representing the wider regional interest, including regions without legislative powers (e.g. AER and CPMR), to reformulate their strategies and activities.

Although it seems clear that the Convention on the Future of Europe

will not give regions what they are looking for, it will stimulate their further mobilisation. Europe seems to be turning into a sort of federalised system, albeit not a traditional federation. The question is whether the Member States will be the sub-federal units (the equivalent of US states, the German Länder or Canadian Provinces) and, if so, what the status of the present regions will be. Only the future can tell whether they are to become new forms of counties or provinces.

Subsidiarity

Is it too vague to be effective as a legal principle?

DERRICK WYATT

Subsidiarity requires that the Community act only if the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. (Article 5, formerly Article 3b of EC Treaty).

The aim of subsidiarity—a brake on the exercise of European lawmaking powers in the interests of decision-making at national and sub-national level

The aim of the principle of subsidiarity is set out in the Treaty on the European Union, and it is that decisions be taken as closely to the citizen as possible. The European Community Treaties had been in force for more than thirty years when the principle of subsidiarity was incorporated into the EC Treaty by the Maastricht amendments, which came into force in 1993. The reason for adopting a principle framed in terms designed to act as a brake on the exercise of Community law-making powers can be simply stated. Community law-making competence had expanded to the extent that the regulatory powers of the Community institutions were (defence and security issues aside) virtually co-extensive with those of the state, and most of those competences were exercisable through procedures in which qualified majority voting deprived individual member states of the power of veto over legislative initiatives which they considered contrary to national interests and/or unwelcome to their national electorates.

Some of the developments which culminated in adoption of the principle of subsidiarity:

- Wide interpretation of their lawmaking powers on the part of the Commission and the Council 1966-1986. In the 1970s and 1980s the Council, reassured by the practice of unanimous voting, even

in cases where the Treaty provided for voting by qualified majority, interpreted their powers to regulate the Common Market as being comprehensive powers to align any national laws which might have any impact at all on competitive conditions in the member states. In particular, law-making powers to improve the functioning of the common market were interpreted and applied in such a way as to cover protection of the environment, employment rights, and consumer protection.

- Progressive inclusion of new powers by successive Treaty amendments post 1987. A series of amendments to the original EEC Treaty added specific powers to legislate in the fields of employment law and environmental law, along with an assortment of powers in the fields of culture, public health, trans-European networks, and development co-operation.
- A shift from consensus to qualified (weighted) majority voting. The original EEC Treaty provided that most powers be exercised by unanimity, though some would be exercised by qualified majority. After the Luxembourg disagreement of 1966 the practice was that all powers were exercised by unanimity. It was agreed during the negotiations over the Single European Act (which came into force in 1987) that qualified majority would be used where the Treaty so provided. The number of subject areas where decision-making in Council was by qualified majority voting was also increased. Legislation to develop the internal market was one such area.
- The European Court of Justice gave a wide interpretation to the powers of the Community institutions and the duties of member states to achieve Community objectives. The Court of Justice has always given a wide interpretation to the powers bestowed on Community institutions, and has also adopted a wide view of the obligations of member states to achieve Community objectives, particularly as regards the free movement of goods, persons, and services. This had the knock-on effect of increasing Community competence to legislate to achieve the aims of the common market/internal market.

Adoption of the Principle of Subsidiarity

The principle of subsidiarity was introduced by the Maastricht Amendments to the EC Treaty (Article 3b, now Article 5). From the outset, the definition adopted was acknowledged to be likely to pose difficulties of application, which might prove insurmountable in practice.

Inherent difficulties in the definition of subsidiarity

A serious difficulty with the Treaty definition of subsidiarity is that it seems to pose for European legislation a test that such legislation is inherently likely to pass. One intrinsic objective of European legislation is to secure the European-wide adoption of the rules laid down in the legislation in question. This objective is difficult for member states to achieve at all, let alone sufficiently. The *scale* of European legislation is pan-European, as are the *effects* of European legislation. Thus the objectives of proposed pan-European legislation would appear by definition to be objectives which cannot be sufficiently achieved by member states, and would be more easily achieved by the Community. However, the principle of subsidiarity, as written into the EC Treaty, was not designed to operate in isolation. Supplementary criteria were to be adopted for its application even before the Maastricht amendments came into force.

Supplementary criteria for determining whether the objectives of the proposed action can be sufficiently achieved by member states

Source of the supplementary criteria

Initially adopted in the so-called Edinburgh guidelines, then in the Amsterdam Protocol on Subsidiarity and Proportionality, the following provisions flesh out the concept of subsidiarity as it appears in the text of the Treaty, and these provisions impose both procedural and substantive requirements:

‘(4) For any proposed Community legislation, **the reasons on which it is based shall be stated**¹ with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by **qualitative or, wherever possible, quantitative indicators.**

(5) For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States’ action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.

The following guidelines should be used in examining whether the abovementioned condition is fulfilled:

¹ Emphasis added.

- the issue under consideration has **transnational aspects** which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Community action would **conflict with the requirements of the Treaty** (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
- action at Community level would produce **clear benefits by reason of its scale or effects** compared with action at the level of the Member States.'

Some of the foregoing criteria provide an objective basis for limiting the exercise of community competence

These criteria support the notion that Community action should only be taken where it has distinctive *European* features which necessitate such action, viz., trans-national aspects which cannot be satisfactorily regulated by action by member states, or a Community requirement to adopt Community measures. These criteria also indicate that concrete evidence is intended to be provided of the need for Community action (the reference to qualitative and quantitative indicators), and that in principle it must be shown that action at Community level would produce *clear* benefits by reason of its scale or effects compared with action at the level of member states.

But the criteria combine objective and potentially justiciable factors with open-ended and essentially subjective criteria

While some of the guidelines have objective features, which could be described as broadly justiciable, this is less clearly so of all the guidelines. The guideline to the effect that 'action by Member States alone or lack of Community action would conflict with the requirements of the Treat [...] such as the need to [...] strengthen economic and social cohesion [...] or would otherwise significantly damage Member States' interests [...]' reserves a wide and essentially subjective discretion to the Community institutions.

The foregoing criteria, rigorously applied (with emphasis on the objective inhibiting factors, and a narrow reading of the open ended criteria), could have made a significant and beneficial difference to legislative process. Yet the principle of subsidiarity has not been rigorously applied. Remarkably, in view of the prominence it receives in the texts of the Treaty and Protocol, it has been treated as a procedural

mantra, rather than a constitutional tool to sift potential proposals for legislation.

Reactions to subsidiarity by member states and Community institutions

Member states have expressed support for subsidiarity and challenged Community legislation before the European Court of Justice

There is no doubt that at one level Member States have taken subsidiarity seriously and regarded it as a justiciable concept which could provide the basis for challenging the validity of Community acts adopted in breach of its requirements. Challenges to legislation on the basis of subsidiarity have been initiated by member states. But member states have not necessarily been either consistent or rigorous in their capacity as members of the Council, as regards voting on proposals for legislation.

The Commission and Parliament have been unenthusiastic about the application of subsidiarity in practice

The Commission has never been sympathetic to the principle of subsidiarity, and has tried to minimise its application in practice. Subsidiarity has no application to areas that fall within the exclusive competence of the Community. From the outset the Commission argued for an interpretation of exclusive competence which included measures designed to remove obstacles to the free movement of goods persons and services in the internal market. Since some of the most important and controversial of Community measures fall within this category, it is difficult to read this standpoint of the Commission as anything but a desire to minimise the practical effects of subsidiarity. This position was supported by the European Parliament. The European Court of Justice recently held this approach to be wrong.

Perfunctory attention to subsidiarity in the legislative process

The passages dealing with subsidiarity appearing in explanatory memoranda of the Commission are often perfunctory, in many cases simply stating that the requirements of subsidiarity are complied with. The qualitative and quantitative assessments referred to in points 4 and 5 of the 1997 Protocol (which were originally adopted as guidelines by the Council in 1992) were simply not undertaken, or not under-

taken in any adequate way. Compliance with subsidiarity is commonly demonstrated by the claim that the legislation will lay down common standards, and/or that individuals expect to find common standards in the various Member States.

An example of perfunctory reasoning concerns proposals for Directives prohibiting discrimination on racial and ethnic origin, disability, religion, sexual orientation, etc., in various contexts (which became Directives 2000/43 and 2000/78)

A Commission communication explains the subsidiarity justification as follows: ‘Most Member States have included in their constitutional and/or legal order provisions which assert the right not to be discriminated against. However, the scope and the enforceability of such provisions—and the ease of access to redress—vary greatly from one Member State to another. The draft directives would lay down a set of principles on equal treatment covering key issues, including protection against harassment, the possibility for positive action, appropriate remedies and enforcement measures. These principles would be applied in all Member States, thus providing certainty for individuals about the common level of protection from discrimination they can expect. Common standards at Community level can only be achieved through co-ordinated action.’

If the requirements of subsidiarity can be satisfied by measures which will ensure for individuals common standards wherever they go in Europe, then it is difficult to see how proposals for European legislation will ever ‘fail the test’. Commission justifications for subsidiarity are in effect a statement of the rationale of the legislation itself; they are not a genuine criterion for deciding whether or not to advance the proposal in question.

The Court of Justice has been unenthusiastic about the application of subsidiarity in practice

The Court of Justice could have breathed constitutional life into subsidiarity had it so chosen. It has certainly gone out of its way to enhance the legal significance of European citizenship, which amounts to something of a triumph of legal form over substance, given the essentially declaratory character of the Treaty provisions on citizenship. But the Court has set its face against doing the same for subsidiarity. It has minimised the duty of the institutions to incorporate subsidiarity reasoning into the preambles of Community acts. And in the case of internal market measures, while accepting that subsidiarity applies to the measures in

question, the Court has in effect held that if there is competence to adopt the measure, then that in itself resolves the question of compliance with subsidiarity. This is rather like the Commission's approach to subsidiarity and law-making generally—if there is competence to adopt common standards, the adoption of common standards justifies the exercise of the competence.

The explanation for institutional resistance to giving practical effect to the principle of subsidiarity

It is difficult to avoid the conclusion that the Commission, Parliament and Court have been reluctant to give full practical effect to subsidiarity because they consider that it runs against the grain of Community integration. Respect for subsidiarity may be outweighed by the universal institutional tendency to increase the scale of their activities rather than reduce them.

There is little evidence to be found that the principle of subsidiarity has modified the behaviour of the institutions in any significant way as regards the volume of legislation. It is possible that it has had some effect on the content of legislation (e.g., the reduction of the number of parameters in the water quality legislation referred to above).

The Council as a counterweight to the Commission and European Parliament?

The Council is made up of member states, and to some extent might be thought of as a counterweight to the centralising tendencies of the Commission and Parliament. In terms of taking decisions as closely as possible to the citizen, it is championing democracy in so doing. But it is only up to a point that the Council is effective in this respect. The Council is a political institution. When Member States vote on issues their first priority is whether they agree with the measure or not. If they do agree with a measure, there may be major advantages in supporting the measure, and in effect seeing government policy being pursued by the Community institutions. One advantage can be that a particular government policy may be unpopular, but if it is incorporated into the requirements of an EC Directive, then the national authorities can 'blame Brussels'. Another advantage is that implementation of EC Directives may expose governments to less parliamentary accountability than the implementation of purely national legislative measures (there is no doubt that in the UK implementation of Community obligations is much less costly in terms of Parliamentary time than primary legisla-

tion). Most of the argument about the legislative process is about the merits in terms of policy of the legislation in question. Furthermore, the Presidency system gives member states in turn the incentive to be seen to be constructive in securing progress on agreement on pending Commission proposals. Securing agreement on the passage of Community legislation may be presented as evidence of the success of a member state's presidency. The centralising tendencies of the Commission and Parliament exceed the ability and inclination of the Council to police the constitutional boundaries of Community action. Subsidiarity has never been unequivocally embraced by the Community institutions, and some member states have questioned its compatibility with the process of European integration.

Subsidiarity and the grain of European integration

In one sense it is true that subsidiarity runs against the grain of European integration. It *is* a 'states' rights' amendment. But it is a 'states' rights' amendment designed to enhance the Community project, not diminish it. The future of Europe depends on its peoples seeing the European project as empowering them rather than disempowering them. That future depends on inculcating a sense of ownership of the project on the part of the states and regions and parties and interest groups. The more that Europe legislates on matters that some states or regions or parties or interest groups consider should be legislated upon at a level they consider to be more accessible, the less these entities and groups, and the individuals who comprise them feel that Europe empowers them. The only effective remedy is for Europe genuinely to do less, and do it better. It is still not clear that Europe can rise to this challenge. If it does not, its legitimacy will increasingly be called in question. It was for this reason (as the matter is put by the Convention text accompanying the draft protocol on subsidiarity and proportionality), that the declaration adopted at the Laeken European Council referred to the expectations of European citizens who wanted 'a clear, open, effective, democratically controlled Community approach', and not 'European institutions inveigling their way into every nook and cranny of life.'

In any event, it is clear that the demand for subsidiarity to be made an effective feature of the European legislative process continues unabated, and it is equally clear that that message has been heard in the convention charged with drafting the EU Constitution.

Proposals for subsidiarity in the draft EU constitution

The proposed protocol on the application of the principles of subsidiarity and proportionality to be annexed to the EU Constitution has the following features, which are worthy of remark.

Most of the guidelines for application of the principle of subsidiarity are omitted on the ground that a protocol to a constitution should not contain too much detail, but reference to qualitative and quantitative assessment is retained.

The protocol provides that in the first instance it is national parliaments, which are to monitor the application of the principle by the Community institutions. Where at least one-third of national parliaments issue reasoned opinions on a Commission proposal's non-compliance with the principle of subsidiarity, the Commission shall review its proposal. After such review, the Commission may decide to maintain, amend or withdraw its proposal. The Commission shall give reasons for its decision.

Provision is made for application to the Court of Justice by Member States and in certain cases the Committee of the Regions on grounds of infringement of the principle of subsidiarity.

Could the new institutional arrangements make a reality of subsidiarity?

The role of national parliaments

The national parliaments will only play an effective role if they develop systematic objective criteria for the application of subsidiarity. If they fail to do this, and simply object to measures they disagree with, their objections will be easily dismissed by the Commission. This will particularly be the case if different national parliaments adopt different approaches to subsidiarity, and then adopt inconsistent approaches to proposals that come before them. The current criteria are too open-ended. But the current criteria are not reproduced in the draft protocol, apart from the reference to qualitative and quantitative criteria. There would be much to play for. Collaboration at an early stage between specialist parliamentary committees could lead to the national parliaments taking on a quasi-legislative role as regards those considerations, which would qualify as admissible objections on grounds of subsidiarity.

The role of the Court of Justice

An entirely fresh approach will be necessary if the Court of Justice is to justify the central role allotted to it in policing subsidiarity. What will be needed is a willingness to develop objective and justiciable criteria in dealing with challenges on grounds of subsidiarity. The Court will make or break subsidiarity as a workable mechanism for regulating the volume and content of European legislation.

The likely outcome

Any realistic assessment of the prospects for subsidiarity exercising an effective constraint on Community action in the new constitutional order is likely to be pessimistic. Community institutions are likely to be more attracted by a generous interpretation of their own powers than by the self-restraint ordained by subsidiarity. National parliaments are likely to take the same approach to Commission proposals for legislation as the national governments, which dominate those parliaments. Objections on subsidiarity grounds are likely to be reserved for Commission proposals to which national parliaments and national governments disapprove. If governments and parliaments approve of the policy of a Commission proposal, they are likely to endorse it, rather than raising the objection that the policy is being pursued at the wrong level. And the Court of Justice is unlikely to have the collective judicial will to devise and enforce objective and justiciable criteria capable of injecting constitutional coherence into the legislative process. The likely outcome is business-as-usual. But that outcome is not inevitable.

Flaws in the current proposals

One fundamental objection to applying subsidiarity at the level of the individual proposal is that by the time the Commission has reached the stage of working out the detail of a specific proposal, it is already too late for subsidiarity to have a restraining effect on Community action. At what level should subsidiarity operate? It should operate at the level of the legislative programme. For example, the Community action programmes on the environment should, in draft, be scrutinised and debated by the national parliaments. If that were the position, the national parliaments would be able to participate in a genuine European wide debate on where Europe intended to go in the years ahead. But the current proposals may simply pit national parliaments against the Commission. The latter will be as preoccupied with defending its

proposals as accommodating the objections of the national parliaments. That is a situation to be avoided.

The current proposals contemplate responses by national parliaments within a six week period. This is too short. A six week turn-around period for responding to legislative proposals might sound reasonable, but adapting agendas to incorporate proposals as they arrive, ensuring sufficient specialist input to enable elected members to offer a view, and the consolidating views into a reasoned opinion, all in six weeks, will not be easy and will, in some cases, deter national parliaments from responding.

An optimist's agenda

One compelling argument against writing-off subsidiarity as a failed constitutional experiment is that the rationale for introducing it was to compensate for the unworkability of the system of attributed powers established by successive treaties. The European lawmaker enjoys substantially all the regulatory powers of the modern state (defence and policing, etc. excepted). Most of those powers may be exercised by qualified majority voting in Council. The scene was, and is, set for a progressive transfer of powers from the national and sub-national level to the European level. The possibility of countering this tendency by reserving certain law-making powers to the exclusive competence of the member states has in effect been abandoned in favour of a constitutional principle of self-restraint, backed by procedures and mechanisms to secure application of that principle. Subsidiarity is not an optional extra. It is a substitute for alternative means of ensuring a balance between action at the European level, and action at the national and sub-national level. Yet the subsidiarity principle has not, in practice, pervaded the political culture of decision-making, and its procedures and requirements are in practice largely ignored. It will not really suffice if subsidiarity stands simply as a dignified constitutional statement of a common commitment to democracy.

Clearly those who have formulated the current proposals on subsidiarity have not excluded the possibility that it might in future play its intended role. For those optimists who share that hope, the present writer would commend the following agenda. In the first place, we might articulate subsidiarity for what it is—a safeguard for democracy. It is based on the principle that decisions should be taken as closely as possible to the citizen. Decisions taken at European level are taken as far from the citizen as it is possible to get, and for that reason there should

at the very least be a presumption against Community action in all those areas that fall outside the exclusive competence of the Community. In order to rebut the presumption against Community action, it should be possible to define advantages conferred by recourse to the European legal process which are clearly so substantial as to compensate for the loss of national and regional autonomy which results from their adoption. The advantages admissible for this purpose must be strictly limited by reference to the fundamental aims and values of the EU legal order, and must be based in all possible cases on empirical assessments of the scale and effects of proposed action.

As soon as possible after the new constitution is signed, specialist committees of national parliaments should exchange views on possible approaches to subsidiarity scrutiny of Commission proposals, with a view to establishing (as far as possible) objective justiciable criteria which will enable them to carry out a true subsidiarity assessment, rather than merely recording agreement or disagreement on the policy of Commission proposals.

In order to maximise the effectiveness of subsidiarity scrutiny by national parliaments, the Commission should announce that it will voluntarily submit to national parliaments all draft action plans and programmes likely to give rise to future proposals for legislation, so that national parliaments will be able to play a positive role in shaping future Community action in a way that complements rather than contradicts national and sub national action. Furthermore, national parliaments should be consulted in the process which gives rise to the drafting of Commission proposals, so that views can be expressed on the appropriate demarcation between Community action and national and sub national action in particular cases, when a proposal is still at a formative stage. Ensuring decision making takes place as closely as possible to the citizen implies a process that is wherever possible 'bottom up', rather than 'top down'.

Limited Union, Limited Member States

A New Model of Allocation of Power in Europe

JOSÉ M. DE AREILZA*

Introduction

The new European Union should have limited competences, but this should not be so as to differentiate it from member states. In effect, member states should also have their competences limited. The debate on competences ought to function as a new form of check and balances to limit the power of both the Union and the States.

The time for this argument has come. More than ten years after the negotiation of the Treaty of Maastricht, some national governments are still reacting against the growth of EU competences, while the Union is still undergoing a substantial expansion of them. One of the main goals of the European Convention has been to re-think the allocation of powers between EU and member states, while preserving flexibility. Some national governments have understood this reform as an occasion to place strict limits on EU competences.

The reaction against continuous expansion of EU competences is led nowadays by member states deeply conscious of their sovereign desire (UK, France) and by some political regions (especially German Länder) affected by the deep reach of European integration. Also, member states that are net contributors to the EU budget seem eager to re-nationalise competences in areas such as agriculture, state aid, or social and economic regulations before enlargement takes place.

In its final text the European Convention has adopted some proposals reforming EU allocation of power, including a classification of competences, a reserve clause in favour of member states and a new procedural development of their principle of subsidiarity that involves national parliaments in its application. The more radical reformers at the Convention have tried not only to limit European competences, but also to make them 'suspect'.

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I would like to analyse these proposals by stepping beyond the classic question of how much they preserve flexibility of EU action and how much they limit EU competences.¹ My critique will be directed first at the theoretical underpinnings of these Convention reforms on allocation of power, and afterwards at the techniques proposed.

Limited Union—Limited Member States

The EU's biggest problem of legitimacy is that sometimes it is seen as capable of regulating anything. But probably its second-biggest problem is the opposite perception, namely that it often fails to act. Recent Treaty reforms have given more competences to the Union, and have reformed institutions to make decision-making more efficient, in a majoritarian direction. At the same time, new transfers of powers have been drafted cautiously, and with many caveats, and institutional reforms have been influenced by the attempts made by national governments to somehow remain in control.

Among national governments there is consensus that the Union should not try to replicate a nation-state at the European level, or aspire to a formal general competence. The Union is a different social reality from a 19th century nation. It shares most competences with national levels of government due to the interdependence and complexity of public management. Above all, the ever-growing Union has a limited social legitimacy: most Europeans are uneasy about the fact that today almost any decision can be taken in Brussels. The diversity of European peoples and the existence of strong national democracies within Europe are premises for any further steps of European integration.

But, actually, the member states are no longer nation-states.² Today, member state powers are limited *de jure* and *de facto* by EU norms and policies—and, of course, by markets and third countries. They are seriously affected by the deep reach of European integration and the constitutionalisation of the Treaties, and by the fragmentation and divisibility of sovereignty.³

¹ The constitutional debate on allocation of power should encompass also a discussion about the EU budget. It seems almost ridiculous to debate allocation of power without taking into account both EU financing and the specific financial impact of EU policies on different Member States.

² See Joseph H.H. Weiler, *The Transformation of Europe*, *The Constitution of Europe*, (Cambridge: CUP, 1999).

³ Neil MacCormick has explained how Member States can lose sovereignty without the EC necessarily gaining it, avoiding the classic zero-sum situation of a classic international relations mentality: 'there has been a pooling or a fusion within the

In fifty years of integration, the European polity has achieved a virtual general competence,⁴ moving beyond the notion of delegation, a concept that no longer has explanatory power. My core argument is that we should accept this transformation as a normative one. Member States have limited competences, even if they can claim residual powers and a formal general competence under their national constitutions. Instead of applying the Van Gend en Loos model that states ‘the Community is a new legal order of international law for the benefit of which the States have limited their sovereign rights’,⁵ we should accept the permanence of EU limits on the scope of national competences as an explicit part of the European social contract. With this model in mind, we should reform the Treaties and the political process to make sure that the limitation of member state and Union competences, through their mutual interaction, has a positive effect on entrenching checks-and-balances.

The proposition, that the Union is a permanent and beneficial limit on member states, and vice-versa, that member states are permanent and beneficial limits on the Union, has already been made over the past few years.⁶ As Joseph Weiler argues ‘European integration has been, historically, one of the principal means with which to consolidate democracy within and among several of the Member States, both old and new, with less than perfect historical democratic credentials.’⁷ Moreover, we have reached the point at which arguably there is no complete democratic legitimacy for either of these two levels that does not include the beneficial and limiting impact of the other level. Miguel Poiaras Maduro has explained the several ways in which European integration improves the national political process, protecting citizens who form national

communitarian normative order of some of the states’ powers of legislation, adjudication and implementation of law in relation to a wide but restricted range of subjects. Some matters fall to be handled within one normative system or normative order, while other parts remain rooted or based in other normative systems or normative orders, with arrangements designed (so far, rather successfully) to prevent incompatibility in areas of overlap. We must not envisage sovereignty as the object of some kind of zero sum game, such that the moment X loses it Y necessarily gains it’, Neil Mac Cormick, ‘Beyond the Sovereign State’, 56 *The Modern Law Review*, 1/1993, 1-18.

⁴ See Joseph H.H. Weiler, ‘The Transformation of Europe’.

⁵ Case 26/62, Van Gend en Loos, 1963 ECR 1.

⁶ See Joseph H. H. Weiler, ‘Federalism and Constitutionalism: Europe’s Sonderweg’, in *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU*, ed. by Kalypso Nicolaidis and Robert Howse, Oxford: OUP, 2001); and Francisco Rubio Llorente, ‘El futuro político de Europa. Espacio, fines y métodos’, *Claves de Razón Práctica*, issues 89-90, 1999.

⁷ Joseph H. H. Weiler, ‘Federalism and Constitutionalism’.

minorities or majorities with a second reading at the European level, and enhancing competition between member states.⁸

Hence, in the current EU constitutional reforms on allocation of power, it is better to put aside the question of where final authority lies, or which legitimacy is higher, by applying the principle of constitutional tolerance formulated by Joseph Weiler.⁹ As he has put it, a hierarchy of norms does not have to reflect hierarchy of real power. Debates on whether European legitimacy or national legitimacy is higher should have no impact on allocation of powers.

The model of 'limited Union, limited Member States' leads to a functional analysis of the reach of European competences. This functional test should be coupled with legal and political limits, both at European and national levels, to preserve the flexibility of interaction of these two substantial spheres of power. Whether this limited Union added to its limited member states equals a 'full sovereign entity', or represents a new model of democratic and limited governance, then becomes an important question, especially for the external, or international, dimensions of both levels of government.¹⁰

In any case, the claim that the equation should be 'limited Union, limited Member States' can be made stronger by finding similar arrangements with a beneficial impact in comparative experiences of power-sharing between two levels of governance. Let me mention the Spanish experience of extreme decentralisation over the last 20 years.¹¹ This process has led to the diffusion of most territorial tensions. Thanks to a model of instability in the allocation of powers, difficult questions of final authority are eluded and boundaries are kept, but not as rigid norms.

In effect, Spain has moved swiftly from being a very centralised country, to a model of allocation of power, which can be described as 'Limited State, limited Comunidades Autónomas (Spanish Regions)'. Today 40% of public spending is either regional or local. With a certain amount of creative ambiguity, the country is a mixed regime, a Federation-and-Confederation at the same time. The imagination of a Spanish demos co-exists with the opposite one of several regional demoi.

⁸ See Miguel Poiaras Maduro, 'Europe and the Constitution: What If this Is As Good as It Gets?', in *Rethinking Constitutionalism in the European Union*, ed. by Wind and Weiler, (Cambridge: CUP, 2000).

⁹ Joseph H. H. Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg'.

¹⁰ I would like to thank Professor Francisco Rubio Llorente for this idea.

¹¹ See Francisco Rubio Llorente, *La forma del poder*, (Centro de Estudios Constitucionales, 1993)

There is a catalogue, a classification of powers, and a residual clause in the Spanish Constitution, but the evolution of the political process and Constitutional Court decisions have changed this allocation radically, adding a great deal of flexibility. There are no rigid boundaries in almost all policy areas.

The state's residual powers are not considered powers as such from the point of view of *Comunidades Autonomas*, which often demand (and obtain) more powers of self-government based only on political negotiations. Their regional Constitutions, or *Estatutos*, cannot be reformed without agreement between the state and that region. There is a strong competition between the principle of respect for identity of regions versus the principle of Spanish unity. At the same time a multi-speed Spain is already under way, since not all *Comunidades Autonomas* have or want to exercise the same powers (for example, in areas like taxation, home affairs, public health, or education).

Flexibility in a limited Union with limited Member States

Preserving flexibility

During the course of European integration there has been no essentialist reading of allocation of power. Instead, a functionalist mentality has prevailed: the reach of EU powers has been decided by the political process, inspired by very general treaty objectives. The texts of the Treaties have included no lists of EC and Member States competences. In spite of the principle of attributed competences, a clear jurisdictional boundary was never set by the European Court of Justice at the beginning or in the course of integration. In fact, often the attribution of new legislative powers to the EC has not required explicit new Treaty delegations by all of its Member States.

Even before the program of harmonisation of the Single European Act in 1986, the EC had gone beyond even an explicit or implicit delegation model. The question of what powers the EC had or should have was no longer answerable *a priori*, given the tension between Member States and EC institutions that empirically decided it, and the lack of clear vertical or horizontal separation of powers in the EC.

The institutional discretion regarding where and whether to act, and how to do so, has become part of the functioning of the European Union. The case-by-case discussion of jurisdiction is subordinated to the solution of substantial problems, something that has given rise to great flexibility. Without the Union having the capacity of progressively

determining the scope and reach of its own powers there would be no integration process.

Most EU reformers have valued, and still value, this European tradition of flexibility. This is probably why, in its early stages, the European Convention rejected the German initiative of introducing a detailed catalogue of EU competences to the new Constitutional Treaty. The catalogue was seen as too rigid and cumbersome. The Convention, nevertheless, has proposed a new classification of competences, but this taxonomy will not be a strict legal limit. Most competences are shared in any federal system, not just in the relationship between the EU and member states. Any essentialist reading of the classification will, in the end, be one more competing vision in the midst of a plethora of political interpretation and judicial adaptation.

The future debate should not be focused on who is to be the final interpreter of the classification, who has *Kompetenz-Kompetenz*. The classification of competences should be interpreted and adapted to new circumstances by European institutions and national governments, by the ECJ and national courts, all of required to enhance the interaction of two flexible systems. The ECJ should have *Kompetenz-Kompetenz*, but this power should be construed as a shared competence, not as an exclusive right. That is to say, the ECJ should 'gain' this right and exercise it while keeping in mind the possibility of national adjudication of allocation of powers from a member state standpoint.

The main tool to preserve flexibility between two limited spheres is to make a functional analysis of the reach of EU competences, both in future constitutional reforms and in the day-to-day negotiation of the reach of EU power by European and national actors.

After all, if there are functional relationships between different types of competences, can not an argument for competences on taxation be derived from the freedom of establishment and capital (internal market competences), and therefore should these competences not be subject to similar rules (i.e., qualified majority)? The same can be argued about free movement of persons and competences on social security systems.

Note that I am not saying that these competences can be justified under internal market rules. It is broader than that: the reality is that the spillover effect goes much further, affecting those competences more than at the margins. Functional spillover between competences should be a tool to orient both the debate on competences, and the goal of flexibility.

Restoration and creation of new limits

A lesson from past integration is that European and national political actors do not normally respect the boundaries of competences. In the context of two flexible and limited systems, we need to prevent public and private actors from using any of them to pursue their policy goals without regard for national or Union concerns.

The search for flexible boundaries demands re-thinking of four types of limits, some of which already exist: EU limits on EU action; EU limits on national action; national limits on EU action; and national limits on national action.

In the following pages I will only focus on EU limits on EU action, the topic most debated by the European Convention. But it should be kept in mind that this type of limits only performs the function of a first violin in a quartet.

Figure 1: Restoration and creation of limits in a Limited Union with limited Member States

<p>-EU limits on EU action:</p> <p><i>legal:</i></p> <ul style="list-style-type: none">+new article 230 ECT+judicial review of choice of legal basis <p><i>political:</i></p> <ul style="list-style-type: none">+procedural subsidiarity+new controls over infra-national actors+minority protection in the Council+safeguards in enhanced co-operation <p>-EU limits on national action:</p> <ul style="list-style-type: none">+principle of supremacy+EU institutions <p>-National limits on EU action:</p> <ul style="list-style-type: none">+national constitutions and national judges+national representation in EU institutions <p>-National limits on national action:</p> <ul style="list-style-type: none">+EU supremacy enforced by national judges
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EU limits on EU action

The European Court of Justice should play a greater role in creating legal limits to EU action, even if drawing the line is criticised as judicial activism or rejection of the ECJ pro-integrationist past. In fact today, for legitimacy reasons, it is important to find some EU legal limits to EU action. A possible way to limit EU powers would be through the more severe adjudication of the Art 230 ECT declaration of lack of competence (*ultra vires*). It would be useful if a new wording of the Article expressly backed this monitoring. Another possibility is to foster the judicial review of choice of legal basis on EU attempts to harmonise when allocation of power is not based in functional spill-over of competences.

The principle of subsidiarity does not work well as a legal limit. It is a political principle with a highly subjective content that can go from national devolution to centralisation. There are only a few theoretical cases in which the Court can use the principle as a clear rule and draw the line; in most cases there is no objective criteria to guide adjudication. So far, the ECJ has not annulled any EU norm based on this principle. Unsurprisingly, the Court does not want to correct the EU political institutions' application of a political principle. The heart of subsidiarity, 'the necessity to act at a given level of government' is the central political issue of any federal debate.

Yet the principle of subsidiarity can be used to develop a procedure inside political institutions in order to achieve two objectives. First, the principle might separate debates on the substance of Commission proposals from the debate on EU versus Member State jurisdiction. Secondly, it should enlarge the debate on jurisdiction to include national parliaments, regions or any other legitimate actor normally excluded from the process. The early warning system proposed by the Convention points in this twofold direction.

Another important form of political control over the scope of EU action is to develop new rules and new practices for administrative control over 'infra-national actors', something that does not require constitutional reforms.

In many policy areas, European integration is no longer run either by a few national executives, by a majority of them or by European institutions acting as such. In areas such as internal market standardisation, external trade rules of origin, or telecoms, experts with no national or European loyalties control decision-making. These actors are shielded

from debate and accountability about the political choices they make when deciding ‘technical matters’. Historically, these policy-makers have been responsible for the growth of EC competences. They were moved by similar incentives to those motivating national governments to expand EC jurisdiction: a lack of democratic controls, increased effectiveness (direct effect, supremacy, national judges as EC judges), fewer budgetary constraints, and weaker political checks. These policy networks have been able to use EC-implied doctrines to their advantage. This bureaucratic and entrepreneurial phenomenon is called ‘infra-nationalism’, since it is typical of domestic decision making.¹² It requires different democratic controls from Constitutional reforms discussed at IGCs or at the Convention.

Finally, political controls have to be developed in the reform of decision-making rules in the Council. Unanimity or qualified majority voting have been key elements for the expansion of competences. In this regard, even in an enlarged Union, some decisions should not be subject to qualified majority, a rule that has normally facilitated an accelerated expansion of EU competences. Qualified majority as the general norm assumes a political community with general powers. New forms of minority protection in the Council have to be found, from exceptional and reasoned vetoes in the hands of individual Member States, to rules on blocking minorities. These forms of minority protection, in the long run, will create trust and the habit of consensus among Council members.

Last, but not least, I have argued elsewhere that future enhanced co-operation in EC matters might be a way to control the expansion of EU competences (opting out by non participants, and by closer control by participants).¹³ But enhanced co-operation, made easier by each constitutional reform since its creation in 1997, can also lead to an unchecked expansion of competences from the centre. This possible use of enhanced co-operation goes against the objective of flexibility, would increase tensions among first class and second class Member States, and would tend to reduce the overall transparency of EU decision-making.

¹² See Weiler, ‘European Democracy and its critics: polity and system’, in *The Constitution of Europe*, and José M. de Areilza, ‘Sovereignty of Management? The Dual Character of the EC’s Supranationalism –Revisited’, *Harvard Jean Monnet Working Paper*, 2/95.

¹³ José M. de Areilza ‘Enhanced Cooperation in the Treaty of Amsterdam: some critical remarks’, *Harvard Jean Monnet Working Paper*, 13/98.

Some conclusions

A new constitutional model of 'limited Union, limited Member States' should be adopted to understand and to criticise the Union at this stage of integration. The Union should have limited powers, but so should its member states, as a way to enhance European and national democracy. The debate on competences can then function as a new form of checks-and-balances to limit the power of both the Union and its Member States, while a functional, non-essentialist understanding of competences remains in place.

In fact, functional spillover between competences should be the criteria used to negotiate EU jurisdiction. At the same time, political and legal limits on scope of competences need to be found or made more explicit, between these two substantial spheres of power that interact with flexibility: that means EU limits on EU and national action, alongside national limits on EU and national action.

Competence and Complexity, Simplification and Clarification . . . and Legitimacy too

STEPHEN WEATHERILL*

Introduction

In the Great European Debate since Laeken, there has been a tendency to treat the pursuit of *clarification* and of *simplification* as a single issue and, moreover, as obviously desirable. My principal argument in this short paper is that clarification and simplification may, in some circumstances, be helpfully treated as distinct issues and, moreover, that they are not necessarily always desirable. In particular, I am more in favour of clarification than I am in favour of simplification. Of course, some matters are susceptible to beneficial simplification – eliminating the ‘three pillars’ and reducing the number of different legislative acts and procedures, for example. But more general assumptions of the virtue of simplification may be perilous, for it is to State models that the simplification process too readily turns. In this sense the *complexity* of the EU may be one of its strengths – indeed, it may be indispensable to the successful prosecution of its mission, and to securing its legitimacy. *Why* the European Union is a complex organism can be usefully clarified. But complexity as a defining characteristic should be fed more actively and constructively into the debate about clarification and simplification.

The stresses of Qualified Majority Voting

The entry into force of the Single European Act in 1987 injected qualified majority voting (‘QMV’ hereafter) into Council practice as the norm in some areas of Community legislative activity, most prominently those associated with the construction of the internal market. QMV has been extended into new areas of legislative activity of the EC by the subsequent Treaties of Maastricht, Amsterdam and Nice and even into the non-EC EU. The functional competence of the Community itself has been steadily enhanced on periodic Treaty revision,

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while enlargement has added new participants. Moreover, the adopted rules are supreme and they are capable of direct effect. Community law plays a vital role in holding states to agreements made at the European level. The law's contribution to making commitments credible serves as a persuasive explanation for the acquiescence of national political elites in the Court's groundbreaking decision-making in the early years of the EC. But the rise of the possibility, if not necessarily the regular occurrence, of outvoted minorities under the system of QMV in the legislative procedure ruptures the direct link between Community law as a system susceptible to vigorous enforcement, and the ability of the Member States to use their veto power as a means of guarding the gate through which rules must pass before becoming invested with legal force. A regime of QMV, in place of unanimity, generates a distinct and sharper appreciation of the importance of defining the limits of Community competence, from that which prevailed in times when an anxious state knew the Council acted only if every state was in agreement, and that therefore ultimately that the state could refuse to budge. In addition, it increases the attention that must be devoted to ensuring the legitimacy of decisions taken within the field of Community competence.

This would lead one to suppose that the Single European Act ought to have been political dynamite, but in fact there was a delayed reaction before sceptical national politicians, academics and national courts came to understand what had happened in the apparently technical name of making an internal market. An incremental drift has occurred in the ensuing understanding, and subsequent reaction. I will briefly sketch the responses to the tensions injected by QMV – even though they were not all necessarily presented as reaction. I will argue that some features are usefully compared with aspects of statehood – but that explicit allowance for the distinct nature of the EU must be made. Whereas others are not characteristic of states at all, but rather reveal what is distinctive about the EU. This is a picture of complexity, but my perception is that complexity has more value than has been allowed it in the Laeken and Convention debates. In this sense the tendency for critical reaction to EU choices to be delayed is still prominent. Just as the SEA's 'perils' were under-estimated, so a significant element of the argument for a final constitutional settlement of the relationship between Union and state competences is driven by an under-appreciation of how much has already been achieved in delicately balancing the powers of the Community and the Member States. This should be *clarified*. But I am more sceptical about how much it can be and should be *simplified*.

The responses to this alleged ‘post-QMV’ legitimacy crisis are varied, but they can be grouped around two distinct types. One insists on the depth and breadth of the political and moral responsibility to which the EU is, and should be, subject. The other seeks to limit the powers that the EU exercises, and thereby to preserve national control.

Legitimacy at the European level

What follows is a brief overview of features that demonstrate the enhancement of the political and moral responsibility assumed by the EU through the widening of its activities beyond the economic. This is coupled with the (correct) assumption that legitimation/supervision through national-level control is inadequate and, in fact, is defeated by the very fact that the trans-national level has become the key site for policymaking and action.

The Parliament has been the winner in successive Treaty revision (albeit admittedly much less strikingly so at Nice). One might take this fact to be a tacit admission by the Member States that the ‘democratic credentials’ of the organisation are thereby enhanced and, under the influence of broadening of competence and extending majority voting in Council, that they should be enhanced. This represents an assumption that European-level democracy needs to be improved, and that the system cannot rely for its legitimacy on its foundations in the (democratic) Member States, coupled with its functionally limited capacity.

European Citizenship, the Maastricht innovation, took the rhetoric, if not necessarily the substance, to a new plane. Citizenship does not have to be associated with states. European Citizenship does not imply a transfer of status from State to European level. Indeed Article 17(1) EC provides that ‘Citizenship of the Union shall complement and not replace national citizenship.’ But the very language of ‘citizenship’ suggests an attempt to convey something of the shifting sands of allegiance and legitimacy that flow from the deepening role of the European Union, and to add a (supplementary) European level of democratic legitimacy. It has not done very well on this score. But it could. If legitimacy involves the construction of a sense of European identity which is, first, in supplement to and not a replacement for national loyalties, and, second, built around social values, not ethnicity or nationhood, then European Citizenship has some potential for developing an appealingly inclusive notion of political belonging. It may be true that the loyalty of the peoples of Europe to European-level governance is, as a general

proposition, weaker than the bond linking them to State-level decision-making, not least because of the absence of true European political parties and a European media. But this does not mean that a deep cleavage between the two levels is necessarily desirable, or that it is doomed to endure indefinitely. One may therefore argue for a distinct form of European identity-formation built around shared constitutional values, and capable of underpinning multiple sites of political authority with a degree of social legitimacy. This could serve to challenge approaches based on membership in a single political community as descriptively and normatively orthodox.

Fundamental rights protection in the EU is central to the elaboration of a richer political discourse. Article 6 EU, a Maastricht innovation, commits the Union to observe fundamental rights, although the Court's jurisdiction to apply that provision is confined to the circumstances envisaged by Article 46 EU. The Amsterdam Treaty introduced new provisions in this area, although, perhaps surprisingly, they were directed at exercising control over recalcitrant Member States rather than the institutions of the Union. This is Article 7 EU. The Charter on Fundamental Rights supplies the latest boost to the protection of fundamental rights. This was accepted as a non-binding legal document by the Parliament, Council and Commission at Nice in December 2000, and subsequently adopted as a proposed Part 2 of the text released from the Convention in June 2003. Human rights represent a powerful rallying call in any polity, and the Charter is capable of serving the EU well as a basis for generating or, in some States, re-generating popular support. Moreover, I would argue that the very debate itself is constructive and capable of replenishing interest in, and enthusiasm for, the sense of a European dimension to political culture. So in both content and process the Charter could assist in the generation of something one could point to as a concretisation of shared supra-state values uncontaminated by a nationalistic edge.

These are trends that I would treat as indicative of an impetus towards recognising the enormous political and legal clout of the Community. It has been felt accordingly that European democratic credentials should be attached to the process, and that European notions of citizenship and fundamental rights protection should be available. This stands for the growth of rule-making power and accompanying legal political responsibility at the European level. But, in contradiction, there also exist signals of anxiety even scepticism about the accretion of power at European level.

Legitimacy at the State level

‘Subsidiarity’ is the slogan most prominently associated with the perception that the Community has become too ambitious and that the intensity of its policy-making should be curtailed in favour of greater respect for the autonomy of the Member States’ regulatory preferences. This, in fact, is not what the version of subsidiarity found in the Treaty states. It provides a more balanced formulation of the need to assess without preconception where the most efficient level of governance in Europe lies. According to Article 5(2) EC there is only a built-in preference for state action if all things are equal (which they never are).

Subsidiarity is properly taken as part of a propensity to devote closer attention to the merit of Community intervention. The evolution of EC law has been characterised by its outward spread. The EC Treaty confers defined competences on the Community, but it does not make explicit the residual areas of exclusive national competence. ‘Protecting’ such areas of exclusive national competence is accordingly awkward, at least once the naked political fact of veto power in Council as a means of halting unwelcome legislative ambition has been surrendered. Under the influence of both the political and the judicial institutions of the European Community, national systems have become gradually subject to EC incursion in ever-wider fields.

Here subsidiarity may be treated as a sign calling on us to consider whether the Community should act. Subsidiarity has the potential to serve as a basis for the general notion of a complementary relationship between state and European levels and, in addition, may capture the essential point that both actors are involved in the governance of Europe, even if their contributions will vary from sector to sector. But there is no sector-specific suppression of Community competence under the subsidiarity principle.

There are other, more specific, more operationally useful devices for fixing the limits of Community competence. It has been frequently and correctly observed that periodic Treaty revision has expanded Community competence, but one should also be aware of how carefully defined the new competences have tended to be. For example, the Community has lately been granted competence to act in the fields of public health, consumer protection and culture. But this competence is defined as supplementary to that of the Member States. The Community may, for example, adopt incentive measures, but harmonisation of public health laws is explicitly excluded by Article 152(4). This proviso was a major

reason for the legislature's unsuccessful attempt to fit harmonisation of tobacco advertising rules under Article 95 (ex 100a). In its 'Tobacco Advertising' judgement the Court itself insisted on the seriousness with which the limits of the Community's attributed competence must be taken when it annulled Directive 98/34 on application by Germany, which had been outvoted in Council (Case C-376/98). The Court pointed out that the Treaty confers the EC no 'general power to regulate the internal market'. The Court found that the Directive, which had imposed a wide-ranging ban on the advertising of tobacco products in Member States, did not contribute to market-building to the extent required for activation of provisions governing the harmonisation of laws in (what is now) Article 95 of the Treaty. The Court strengthened the constitutional bounds of valid Community action, and refused to accept that a political majority can, in effect, assume responsibility for fixing the reach of the Treaty.

It is also significant that the transfer of power under the Treaty is not all one-way – that the competences that the Community has gradually added to its list beyond the arena of market building typically involve the establishment of minimum standards only. Articles 176, 137 and 153 EC, governing competence to legislate in the fields of environmental protection, social policy and consumer protection respectively, stipulate that national measures stricter than the agreed Community standard are permitted, provided they are compatible with the Treaty. Such a measure establishes a common EC-wide rule, but as a minimum only, as a floor above which Member States may introduce stricter rules up to the ceiling set by the Treaty itself, in particular by the rules of free movement. This may be taken to represent confirmation that integration and uniformity are inapt as paramount guiding values in such realms, and that space should be preserved for diverse local preference and for regulatory experimentation.

Other general manifestations of an anxious desire to control the expansion of the Community's influence can be grouped under the general heading of flexibility. This is a many-headed beast, but loosely what is at stake is the development of a collaborative inter-State endeavour that does not necessarily involve orthodox communautaire methods, nor the participation of all the Member States. Room is left for the expression of local preference. The Community can not simply swallow up a sector. Scope for opting out, the provisions on enhanced co-operation invented at Amsterdam and refined at Nice (and as yet unused), and the open method of co-ordination all fit this schema. Closer co-

operation has a particularly positive constructive potential, for (unlike subsidiarity) it breaks the simplistic State *or* Community confrontation, and suggests layered alternatives in between.

In this paper, the key argument is that the perception that the Community may be over-reaching itself is *already* being addressed; and that a drive to use the 2004 IGC to harden the division of competence between States and Union risks overlooking or undervaluing existing methods of re-balancing. Clarification of why the process is complex is virtuous. Simplification may rob us of dynamism and adaptability.

The appeal of multi-level constitutionalism

The juxtaposition of devices and symbols that insist on the depth and breadth of the political and moral responsibility to which the EU is subject, alongside other instruments that pay more sceptical attention to the setting of limits on the powers that the EU exercises, may seem to carry a whiff of paradox. In the former instance, the EU appears to be treated as if it were a State or at least something closely akin to one. In the latter the EU's credentials as a functionally limited international organisation are on display. But it is not a paradox precisely because the State/non-State dichotomy is misleading as to the true nature of the EU, which deserves to be intellectually liberated from such binary thinking in favour of a recognition of the virtues of multi-level constitutionalism as a model for governance.

What is actually at stake is an acceptance that the increasingly dense involvement of the EU, and in particular the EC, in regulatory activity increases anxieties about the accountability to which it is subject. The two trends identified above involve two different choices as to the proper site of that accountability: first, the European level, achieved by, for example, a deeper role for the European Parliament and a firmer stance on fundamental rights protection at the European level; and, second, the national level, which is indirectly secured by placing tighter limits on what the Community is permitted to achieve. But in fact there is no need to make a choice. Both elements combine to generate a credible level of legitimisation for the activities pursued in the Union.

This is the 'either/or' problem. There is a risk that an over-emphasis on whether the Community/Union, on the one hand, or its Member States on the other, can or should act may tend to obscure the point that fundamentally both should be seen as complementing each other in the delivery of effective and legitimate governance for Europe. It

is vital to escape imprisonment in thinking that assumes the rise of trans-frontier markets generates a need for geographically bigger States. Economic structures migrate in ways that do not have to be followed, and frequently cannot be followed by political institutions. It is a trap to treat the increase in private economic power in supra-State domains as a basis for shifting extra public power to that same level. This would in turn lead to demands for greater institutional accountability to be transplanted to that level, a process that would then be seen to impoverish the domestic political sphere. This is a self-defeating prognosis. Instead the EU is part of the necessary leap of imagination which projects us towards an understanding of governance that transcends the State, either acting alone or in constructing inter-state bargains. And that is not *simple*.

Beyond the descriptive claims I have made, I would make the normative claim that Europe must not be built on an ‘either/ or’ model. The Union is not a state, is not on the road to becoming one, and it should not take that road. ‘Multi-level governance’ acts as a rather neat shorthand for describing the way in which Europe (and not only Europe) is the subject of many layers of intersecting legal and political authority, some territorially defined, others sectorally defined. These differing layers of authority are not necessarily capable of subjection to a single, internally consistent rule of authority, yet work more or less successfully. Multi-level governance stands for multi-level constitutionalism, within which national and European level systems of governance interconnect in the quest for a workable system of governance for a transnational society. This challenges readings that assume the ‘states’ is necessary an organisational starting-point in dealing with the growth of transnational economic activity. It builds a case that, in fact, the very combination of European institutional and constitutional architecture alongside those of the Member States secures a broader sense of democracy – a democracy which ensures the reflection and representation of interests outside a context which is dependent on, and limited by State systems. In this sense I argue that European integration is itself democratic, and can be legitimated by its capacity to inject into national political processes a legally enforceable duty to respect interests that are affected by decisions taken, yet which are not, or are inadequately capable of shaping those decisions through voting power. European integration can *also* be legitimised by its capacity to improve the effective problem-solving ability of States, by providing a reliable framework for the taking of collective action. In short, national-level decision-making is flawed in its

assumption of what does not exist – a stable set of consumers of those decisions, whose preferences will be fully satisfied by the national polity and who are not joined by other ‘external’ affected parties. European law needs to correct these malfunctions, but without eliminating the state itself which plainly retains an indispensable, but not unique, role in sustaining the loyalty of citizens to adopted political decisions. This suggests a wider context, which insists that the function of the European Union is to ‘tame’ the nationalistic urges of its states by using legal rules to strip them of their capacity for harmful excesses. That is, European market-building is reflected not in European state-building, but in making national systems more European. ‘QMV’ has brought home the need for devices that achieve this without imposing a crude undiluted (statist) majoritarianism at the European level.

Conclusion

On the one hand one observes attempts to impose limits on what the Community can do, arising in part from anxiety that the Community lacks sufficient legitimacy. On the other the Community drives towards increasing legitimacy at the European level by adding to aspects of the Community and/or to the wider Union features that reflect the State-like reach of its activities. My claim is that these are complementary approaches that emphasise the proper roles of both states and European institutions. But they are complex. They can be clarified – or at least it can be clarified *why* they are complex. But it is dangerous to seek to simplify them, for it is to state models that the simplification process too readily turns. And that is not what Europe needs.

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The Problems of Representing Diversity

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European integration has historically been a project of the European nation states' elites. The historically unparalleled integration between nation states that has taken place in Europe over the past 50 years was not invented 'from below', it came about as the result of elite leadership. Only the positive effects of this integration – above all economic, but also enhanced exchange and eased mobility – evoked popular support for the project. If European integration is to be durable and legitimate in the future, however, it will have to become a project of the people(s).

The EU, as it stands at the beginning of the 21st century, clearly is not that. Awareness of this has risen over the last decade. With the Maastricht Treaty making the European Union a more influential force in citizens' everyday lives by increasing the number of policy areas in which it plays an important role, there was a growing tendency to see the EU as afflicted by a 'democratic deficit'. Without wanting to discuss the merits of this allegation here, it is clear that the debate over this 'democratic deficit' has prompted reactions in discussions over the future of European integration in the past years, and a willingness to fix shortcomings.

It is not least the process of the European Convention, which is an outcome of this willingness. For the Declaration of Laeken (which started the Convention process) centrally called for 'More democracy, transparency and efficiency in the European Union', and went on to state:

'The European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses. However, the European project also derives its legitimacy from democratic, transparent and efficient institutions.'

The remainder of this essay will argue that there is indeed a problem with democracy in the European Union, but that it can only very imperfectly be fixed by institutional means. As a consequence, the second argument goes, a different focus is required as a solution, namely more differentiation in integration. Unfortunately, the European Convention

has not taken up the opportunity to encourage a shift of European integration into that direction.

Two conflicting goals

If we go back to the quotation from the Laeken Declaration and the task it sets for the Convention, we can see that it distinguishes between two sources of legitimacy for the European Union: one that focuses on ‘democratic values’, the other on ‘efficient institutions’. As the following text in the Declaration makes clear, we can understand the first to focus on questions of democratic participation (or, in political science terminology, ‘input legitimisation’), and the second on the efficiency of decision-making (or ‘output legitimisation’).

The Convention was thus charged to discuss questions relating to voting and appointment rights (e.g. who appoints the President of the Commission) and of the role and relative power of the Council and the Parliament, as well as the streamlining of competences, for example through an extension of qualified majority voting in the Council, or an end of the rotation of the Presidency of the Union.

Regarding the ultimate goal of enhancing the EU’s legitimacy, it would clearly be good to make progress in both dimensions. However, as students of politics know (and the Convention soon discovered), there is a tension between these goals, which ultimately results in a trade-off: for the greater the number of actors and the extent of their participation in a decision becomes, the more complicated the decision-making process becomes, at least if we assume considerable disagreement between the participants (which seems reasonable). Conversely, the more the increased efficiency and speed of decision-making and implementation of EU policies becomes the focus of reform, the more that will have to be sacrificed in terms of the breadth of participation of many different points of view.

No institutional solution for a structural problem

This is not to argue that the allocation of rights and powers in the institutional structure of the European Union does not matter. Obviously, it does matter where authority lies and which institution has which rights. But what I want to argue is that we should not lose sight of the fact that certain limitations exist that cannot be overcome, even if all participants express their willingness to overcome them – and the dilemma between

participation and efficiency is one example. As a consequence, there is no 'optimal' solution to the allocation of power, because each combination represents a compromise between the two competing goals just mentioned.

But ultimately, the problem of democracy in the European Union lies deeper – it is a structural problem for which there is no institutional solution. The reason is that democracy cannot be achieved through the right institutions and rules alone. Democracy needs a foundation on which it is built, and that foundation cannot be provided by institutions, it must be present in the community for which democracy is to be achieved. The preconditions for this, however, are hardly existent in today's European Union of 15 member states, and they will be even further diluted by the extension to a European Union of 25 or more member states in the coming years. By not acknowledging this fact in its Draft Treaty for a Constitution of Europe, the European Convention misses an important opportunity to provide the European Union with tools for tackling the problems of the future.

The problem of collective identity

The position from which this argument is being made is by no means one that is hostile towards the intentions of European integration. But it is a position that takes certain problems as insurmountable by enthusiasm alone – such as claiming that all future member states are part of a 'European family'. As many people know, belonging to the same family is not in itself a sufficient recipe for harmony and agreement. Furthermore, it is questionable whether the citizens of the present and future EU really conceive of themselves as a collective in the way that citizens of nation states do. To illustrate this with an example: since 1990 West German citizens have accepted substantial transfers, amounting to 2 to 3 per cent of GDP per year, to East Germany, on the grounds that they perceive themselves as a community (and even so, this has created substantial tensions in the German political system). Is it more than a rhetorical question to ask whether citizens of (for example) Ireland or the United Kingdom would feel sufficiently 'common' with the citizens of Romania, Lithuania, or Slovakia to willingly accept sacrifices on a similar scale?

Again, this is not at all an argument against EU enlargement – not least because enlargement only exacerbates a problem that already exists in the present European Union. It is, however, an argument that

points to the structural problems of achieving democracy in a European Union. To put it pointedly: a European Constitution cannot start with a ‘We, the people...’, and not even with a ‘We, the peoples...’, for the simple fact that there is no ‘We’ worthy of that name.

Must that be a problem? No, because we can find other ways of decision making than those which mimic the processes of the nation states that we invariably take as reference points. But if we fool ourselves into thinking that we can disregard the fundamental differences between the preconditions of democratic decision-making on the European Union and the nation-state level, then this may endanger the future viability and functioning of the European Union. At the very least, it will be a big burden to its legitimacy.

The missing foundation of democracy in the EU

Let me come back to the question of why, on the European Union level, the conditions for democracy are not present in the way that they are in the nation state. If we take democracy to mean decision by majority rule, then we must ask: if you are a member of the minority in a given question, why should you accept the majority’s decision as legitimate? You will only do so if you trust that the majority is, in principle, benevolent towards you (even if decides against you in this particular question) and cares about the collectivity as a whole. To put it in different terminology, the welfare of all is an argument in the utility function of each member of the collectivity. In other words, it requires a ‘thick’ collective identity. Such an identity rests on the existence of a civil society, on shared experiences and expectations, and on an ongoing process of public communication that creates a link between society and the political institutions.

It is only when these conditions are present that a true democracy can exist, that majority rule is legitimate and solidarity between majorities and minorities in specific questions can be expected and demanded. But while a critical public system of communication does exist on the level of European nation states, it does not on the level of the European Union as a whole. The intermediary structures of party systems and interest group systems are still firmly anchored in the environment of the respective nation states, and co-operation on the European level is but loose. This is most obvious in the election campaigns for the European Parliament, which even after twenty years of direct elections are still fought predominantly over national issues rather than compet-

ing EU-wide visions and manifestos. Both printed and electronic mass media are even more strongly oriented to national audiences, and not to a European public. This is, of course, above all caused by the absence of a common language – the most obvious hindrance to an ongoing critical and truly public discourse on the European level.

Facing the challenges

If a functioning democracy does not rest on the ingenuity of its institutional construction alone, but just as much on the circumstances it exists in, and these circumstances are not given by the European Union at the moment (and will probably be even less available after enlargement), what conclusion should be drawn from this? Certainly not that we should ignore the problem – for to adapt the European Union to the challenges posed by enlargement was the key task with which the European Convention was charged. At the same time, ignoring the problem would endanger the legitimacy of the European Union, while increasing legitimacy was another task set for the Convention.

One way forward would be to actively embrace the concept of more differentiated integration for a more heterogeneous future European Union. Of course, this might seem to contradict the celebrated fact that Eastern enlargement will finally overcome five decades of European disunity, and it might run counter to attempts to build a ‘foundation myth’ on this fact. But giving in to such temptations may have adverse effects on the stability of the ‘European house’ in the future. Another reason why such a solution may not have been pursued more actively is that many may perceive it to be synonymous with strategies of ‘opting out’ that have above all been used by political forces opposed to all further European integration in the past.

But in fact, the concept of more differentiated integration has a long and venerable tradition in the history of European integration, ranging from the Tindemans report in the mid-1970s, through concepts of ‘géometrie variable’ to ‘multi-speed Europe’, and to Joschka Fischer’s Humboldt University speech in 2000. All these concepts accepted that the process of European integration did not provide the legitimacy to force unwilling member states towards goals they did not share (least of all through majority voting), but also recognised that, by the same token, those who were willing to go further should not be held back.

The Treaty of Amsterdam even introduced the concept of ‘Enhanced Co-operation’ into European Union rules, and they were amended in

the Nice Treaty. Still, it has not proved very popular or relevant since, and never been used – probably for the reasons given above. But differentiated integration must lose its bad name, and conditions for it should be eased. After all, a number of successful such projects (from the Schengen Group to membership in the Euro) have shown that it can work and avoid deadlock in European decision-making. Unfortunately the European Convention has failed to provide leadership on this, choosing instead to mention it only in passing in Article I-46 of the Draft Treaty.

The upcoming Intergovernmental Conference should not make the same mistake, but pursue the concept more stringently and campaign for it more actively. In an enlarged European Union of 25 and more states, interests will diverge more clearly than they have so far – not least because the differences between countries will increase drastically: measured in GDP per capita, the ratio between the richest and the poorest country in the current EU is between 1:2 and 1:3; after enlargement, it will increase to between 1:4 and 1:6.

If the European Union is to cope successfully with the challenges ahead, it will have to change. Of the two avenues for increasing legitimacy, it has been argued here, the one via increasing input from the peoples of the Union will not work, because the preconditions for a functioning democracy are not met on the European level and will not be in the foreseeable future. If the European Union wants to gain more legitimacy (or just avoid the loss thereof), it can thus only use the method of improving its output: by increasing the efficiency of its decisions and policies. Actively advocating more differentiated integration through methods like ‘enhanced co-operation’ could make a substantial contribution towards this goal and help avoid deadlock in the future.

Conceptualizing Europe

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Representation

As I write this text (on June 20th, 2003), it is still not entirely clear what form and structure the institutional architecture of the European Union will take. We now have a draft that the President of the Convention for the future of Europe presented to the Council of Ministers in Thessaloniki, and that will be the document, which the Intergovernmental Conference will discuss and possibly approve during the Autumn. But despite all this, some important decisions are still open – essentially those concerning the process of ratification of the new constitutional Treatise and the very composition of the Commission. I believe, nonetheless, that no radical change will be introduced, as to the EU's major institutions: the Council, the Commission, the Parliament and the ECJ. For certain, some transformations have been included in the new Treaty (that will have the symbolic name of 'constitution') in order to accommodate ten new member states within the decision-making mechanisms, notably those of the Commission and the Council. The most important is probably the creation of a president of the European Council appointed for two and half years, the consequences of which are quite difficult to predict. (It is regrettable, in my opinion, that the President of the Commission will be appointed by the European Parliament by simple majority making him the expression of a political majority, rather than an organ *super partes*).

In this text, I shall proceed from the hypothesis of the basic maintenance of the institutional *status quo*, and begin by briefly answering some of the questions posed by those who edited this volume, keeping in mind the different models of democracy and constitutionalism present in different European countries. But I will also try to introduce a different perspective, since I believe that by slightly changing the questions, important elements will emerge that should help us in our understanding of the EU.

I will also begin with a few words concerning the concept of *representation*, as it emerged at the end of the 18th century, when it started to qualify what we call *democracy*, and what our founding fathers called

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representative government. Representative government was understood as the *government of an elite* selected by the active citizens and a *government accountable* to them, who trust the elite to make decisions but participate, so to speak, in the government of the political community essentially by choosing the elite (which is selected through elections) and making it periodically accountable. This choice looks less strange if we consider the following points. On the one hand, the idea is the same as we find in Aristotle when he likens some political regimes to restaurants (using rather different words, of course): the public judges the quality of the food even though its members may not know how to cook. To speak with Sieyes, citizens have to obey the laws but they are unable to write them because of lack of time or interest (which creates a lack of competence). In a representative government, such citizens at least have the right to choose who will write, enact and enforce the laws.

This remark brings me to my second point: representation or representative government is a legal mechanism (e.g. repeated competitive elections) introduced in order to establish the *political obligation of citizens to their government*. This mechanism was introduced by the ruling elites in order to establish their own legitimacy, notably against the ‘monarchical principle’ that had dominated most European political communities since the Middle Ages. With a little simplification and exaggeration, we may say that this type of representation is essentially connected to the political form of the centralized national state (that the British government now wants to export to the Islamic world), which became the dominant form in Europe over a long period of time from, roughly, the French Revolution to the Second World War and the collapse of the Soviet empire. Parallel to this type of representation, the European continent also manifested a different and older form of representation, the one the Germans call *ständische Vertretung*. Here the representative is not, like in Burke or Sieyes, the representative of the national unit, but of a specific segment of it: a group, a class, a corporation, or any sort of political subunit: *Land*, member state, region and so on. It is this second type of representation which is at the origin of a certain type of bicameral constitutional systems: those we find in countries like Germany or more recently Spain, and that is absent in more centralized political system like France and, at least traditionally, the UK.

The first form of representation, which I call *national representation*, is characterized by free mandate, and may be defined as the principle legitimizing an elective and accountable aristocratic government. Here,

naturally, I use ‘aristocratic’, in the classic, Aristotelian sense. The other sense looks like the older type of representation based on a sort of imperative mandate and it may be considered as a representation of interests or some other specific cultural, economic, religious (and so on) element. In any event, it plays an important role inside federal states; where there is a strong will to bring together the principle of political unit *while respecting internal differences*. Were Europe something like a federal state, it would make sense to imagine a constitutional architecture in which a second parliament, made up by members representing the member-states as such, played an important role alongside a European parliament (representing the European ‘demos’, whatever that may mean). In a sense, and if we want to stick to this traditional political language, it is the European Council which is this sort of second chamber representing the member states, alongside the European Parliament representing the European citizens, and the Commission representing the general interests of the EU, which means here its ‘ever closer union’.

Misleading categories

Still the transposition of this intellectual approach from the European member-states to the EU is not sufficiently convincing. This is because it presupposes that the EU is a sort of big state that might be organized along the same lines as the smaller nation states that are currently its members. This assumption is however belied by a closer look at both the origins of the Union and its possible and desirable development in the foreseeable future.

At the origin of what we now call EU, we must not forget, there was an offer made by France (by its foreign minister Robert Schuman) to Germany, an offer that the loser of the war was very happy to accept, to engage in a common economic development in order to avoid the wars that had plagued the two countries for centuries – wars that France was able to win in the last century, after Sedan, but only because of its allies, and only by paying quite an exorbitant price for victory. In order to be less dependent on England and the US, and to avoid the economic and political cost of its recent quasi-victories *vis-à-vis* its big German neighbour, France invented what is now the EU. The political and legal entity called EU is not, and will not be for a long time, either a state writ-large or even a federal state. It is a complex, composite organism that uses economic and administrative tools to produce peace, rather

than war; an organism that looks from a legal point of view more like the Holy Roman Empire, than like a modern territorial political unit or nation-state.

Because of the dominant democratic rhetoric, we have some difficulties in making the intellectual leap necessary to understand the political and legal reality of the EU and also needed (for those interested in doing it) to promote the integration of its member states. Consider just one important, and in my opinion misleading, debate: the one on the European ‘*Volk*’ and the European constitution. Euro-skeptics – by this term I mean those who have been claiming that it is not possible, and is in any event undesirable, to establish a strongly integrated European Union – have put forward the argument that the existence of a people or a common public opinion is a precondition for the existence of a constitution (at least in the French and German sense of the word, or if you prefer, in the sense that constitutional theorists, like Sieyes or Schmitt, give to the term ‘*constitution*’, or ‘*Verfassung*’). This argument reasons that since a European *Volk*, or demos, is non-existent, a democratic European constitution would be impossible.

I would suggest that this question is somehow irrelevant if we look at the very process of the European integration. For one, what is missing is not a European *public opinion* (I assume that this is the content of the word *Volk*, since I cannot believe that it has a different meaning – there is no shared language in either in Switzerland or in India – and at least 80% of Italians were unable to write or read that tongue when the country was established as a political unit in 1861 by a man, Camillo Benso di Cavour, whose own language was French). Recent events clearly demonstrate that what is lacking is not a common European public opinion, but a unified and strong enough European political class, able to act in concert and able to treat disagreement like the political classes of civilised nation states do every day. My point is that the real precondition of a stronger European integration is not a European demos (European society is quite homogeneous from a social and cultural point of view), but a homogeneous political class able to speak for the citizens of the EU member states. Mr Blair, who was probably the most popular European politician until recently, has shown how unwilling he was to play such a role by speaking for Europe. Things may change in an unforeseeable future. But I believe that it will take a long time and, moreover, a political decision in the United Kingdom, such as Charles de Gaulle spelled out back in 1961, when he said:

‘Dans la coopération politique des Six [founding members of the

EU], je vois avant tout la pratique d'une coopération politique France-Allemagne, qui peut et doit devenir une réalité ne fût-ce qu'en liant l'Allemagne à l'Occident. Quant au Marché commun, mon avis est qu'il demeurera au niveau d'un traité de commerce facilitant les échanges et obligeant notre industrie à se moderniser. Cela étant, rien n'empêche d'imaginer que la coopération politique franco-allemande s'étende un jour à l'Angleterre. Pour cela il faut que ces trois grandes nations européennes prennent un jour la résolution de s'organiser en dehors des Etats-Unis'¹

Let me now return to the question of the European Constitution, the other side of the demos-constitution debate. Europe already has a constitution (see the excellent synthetic account of it by S. Cassese, 'La costituzione europea', in *Quaderni Costituzionali*, XI, no. 3, December 1991, pp. 487-508) in the British (Aristotelian) sense of the word. The EU has its organs, rules, competences, and civil servants, and they can be described and are taught – mostly with British textbooks – in all the Political Science Departments and Schools of Law of the Continent. And I have no doubt that Europe will proceed in an inevitable process of economic and administrative integration. I have read that it is already impossible to take economic sanctions against a single member-state of the EU without spreading the effects of the sanctions among the other members.

So what is this new constitution that the Convention has been writing? And who has to represent whom in the 25 member states of the EU? I'll try to answer the first question, but I want to add another one to the list. What can the EU bring into being for the citizens, in order to make them more interested in it. Can it offer more participation or more rights and public goods? Democracy matters for a liberal only in so far as it helps in avoiding despotism and monocracy (after all, election, accountability and majority rule are a means to realize good government and are not goals in themselves). The polyarchic and pluralistic character of the EU is so strong that there will be no danger of despotism. The current danger is a lack of interest from the citizens. Voting and political participation in the traditional sense are not able to evoke interest. European citizens possibly vote too often. Voting matters notably to those who are excluded – as it did to the working class in the 19th century and to women, for even a longer time – perhaps it matters nowadays to the new immigrants in the EU. If we include

¹ unpublished manuscript, 26 February 1961; now in Eric Roussel, *Charles de Gaulles*, (Paris : Gallimard, 2002), p. 717

citizens in too many circles, they get bored and alienated. Citizens, with few exceptions (notably politicians and academics), just want security, prosperity and respect and protection of their individual rights. They are happy to vote every 'x' years, but they want the other goods and rights every day. And the EU has been able to improve the citizens' lives – up to a point. The challenge in the future years will be still on that side of the public life.

As a general conclusion I would like to suggest that the new constitution – actually a new Treaty, or a rationalised Treaty – will not be more than a perhaps significant 'step farther' (to echo Robert Schuman), on the slow way toward integration that Euro-enthusiasts have no means to accelerate, and Euro-skeptics cannot stop, whatever they do. To be sure, if we speak not of economic and administrative aspects, but of political integration, it is a fact – perhaps a disturbing fact – that the UK holds a 'veto power' over common European politics. One can hope, and I hope in any event, that the British government will realize that it alone it cannot resist the dictates of the United States.

As to the question of 'who represents whom?' The Commission and whatever permanent group of European civil servants represent the Union as such; the Council represents the national political classes; the ECJ represents the rights of the citizens it must protect; and the European Parliament represents a hope that will be thick reality when we (I mean people of my generation) will not be around any more.

It is a curious circumstance that the European constitutional reality has a British, more exactly an English form – it grows slowly, it has never been decided (in the German sense of *Entscheidung*), it looks complex and chaotic, to the *Economist*, like the old English constitution did to the eyes of French political theorists and to those of Thomas Hobbes. But the English form is filled with a German content: Europe will never be based on something like parliamentary sovereignty, but will look, as it looks now, and as it looked from the very beginning, like the post-World War II German constitutional system, with a sort of double representation (roughly speaking: Europe is the Commission and the Parliament; member states and the Council), and a powerful Constitutional Court. It will be based on both political accountability and the legal protection of rights by non-accountable organs: the European judiciary and the ECJ.

Citizenship in the European Union

Between nationalism and cosmopolitanism

PAUL MAGNETTE*

The European Convention will not be remembered as Europe's Philadelphia. The project of constitution written by this assembly does not amount to a legal revolution; it codifies and rationalises the *acquis*. This is particularly obvious in the chapter defining the status of European citizenship, which reproduces the content of the former treaty. One could even argue that the *conventionnels* have frozen this status, as they suggest suppression of the clause that could be used to introduce new rights in this title.

There are those who regret this: the Convention could have been a political opportunity to empower the citizen. Actually, the *conventionnels* have indirectly fostered this ambition by introducing the Charter of Fundamental Rights in the 'constitution', and by granting the citizens a right to ask the Commission to submit propositions of European legal acts. But the basic features of this status remain unchanged. In this paper I argue that this should not be seen as a missed opportunity: European citizenship, in its original definition, symbolises the peculiar nature of the European Federation of states, and what makes it different from other federal experiences.

Citizenship in a Federation of states

What does it mean to be a European citizen? Although more than ten years have passed since the creation of this legal-political concept by the Maastricht treaty, we still do not have a satisfying answer to this question. We know, and we already knew long before the concept was formally coined, what European citizenship is not (Aron, 1974). Even the most nostalgic Federalists agree that European citizenship is different from national citizenship. The EU is not a state; there is no European demos; a European 'national' identity and a supranational regime of inter-personal solidarity are very unlikely to emerge. Although Title VIII

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of the Maastricht treaty was conceived by analogy with national status and rights, EU citizenship must be ‘something else’.

Most of those who have written on this subject have underlined the ‘complex’ nature of this status. EU citizenship must be understood as a multi-level, multi-functional, multi-identity concept (Meehan, 1994; Lippolis, 1994; Wiener, 1997; Shaw, 1998; Faist, 2001). Yet what remains to be clarified is *which* levels, which functions and which identities must be considered as components of this concept. And even if this could be decided, the major question would remain open: *how* are these different elements articulated; how can the relations between the civil, social and political, as well as the national, sub-national and European dimensions of citizenship, be conceptualised? How can we define the alchemy of an ‘*E pluribus unum*’ polity? Arguing that a non-nationalist principle must be discovered to provide the ‘ties that bind’ in post-national polities, the most sophisticated analysis of multicultural citizenship admits that ‘Liberal theory has not yet succeeded in clarifying the nature of this “peculiar sentiment”.’ (Kymlicka, 1995: 192).

This is not, however, entirely true. Since the end of the eighteenth century the liberal tradition inspired by Kantian principles has tried to define the conditions of citizenship in multi-national polities. According to Kant, once a State enters a ‘federation of free states’ it must accept a new kind of law. Beside the *ius civitatis*, which defines the internal organisation of the state and the relations between the state and its citizens, and beside the *ius gentium*, which codifies the relations between the states, a third legal corpus must be forged, the *ius cosmopolitanum*. This third dimension of the public law regulates the relations between the citizens of a state and the other member states – a horizontal legal relation which had long been ignored in a legal tradition dominated by the concept of sovereignty.

The concept of citizenship set up by the Maastricht treaty is an illustration of this *ius cosmopolitanum* (Magnette, 1999). The ‘vertical dimension’ of EU citizenship, which connects citizens directly to EU institutions, is very limited; but the ‘horizontal dimension’ of EU citizenship is largely developed (O’Leary, 1996; Shaw, 1998). The principle of free movement of persons, limited as it is, has generated increased relations between citizens and public authorities of other member states. The principle of non-discrimination (or equal treatment) has granted these moving citizens a legal instrument to challenge discriminatory national laws and administrative practices. Most of the rights enumerated under the Title VIII of the treaty simply redefine the

scope of this basic principle. The fact that the authors of the treaty have developed this horizontal dimension of citizenship, rather than the vertical bonds between the citizens and the Union, confirms that they intended to build a ‘federation of states’ rather than a ‘European state’. In the EU, as in the ancient leagues of Greek cities, the *isopoliteia* is more developed than the *sympoliteia*.

Tame the nation, eroticise the Union.

This is vital to an understanding of the nature of the ‘ties that bind’ in the EU. The creation of a European citizenship does not replace national citizenship – as is redundantly stated by the treaty itself; but it nevertheless challenges national status and rights. In Weiler’s powerful and elegant metaphor, paraphrasing Marcuse, European citizenship confronts Eros and civilisation (Weiler, 1997). The aspiration of ‘supranationalism’ is not to replace national identity and rights, but to ‘keep the values of the nation-state pure and uncorrupted by the abuses’ (Weiler, 1997: 341) amply demonstrated by recent history. This was earlier the ambition of Kant’s right of hospitality: when citizens of a state visit another state and come into contact with its citizens and its public authorities, these foreign individuals and institutions force them to think about themselves. The EC principle of ‘equal treatment’, enforced by the Court at the request of migrant workers, has progressively deprived national laws and administrative practices of their most obvious discriminatory features. And though the treaty protects some national restrictions, they are under pressure: lawyers will probably argue that, now that European citizenship has explicitly been given a constitutional status, the Court should state that these exceptions are unconstitutional.

Moreover, this is not a purely legal dynamic. Confronted with other civic cultures and with different habits and social links, citizens tend to see their own culture differently. The process of permanent comparison between national experiences – through benchmarking, or simply tourism – gradually transforms national identities. Once they enter the European Union, and accept its principles of reconciliation and co-operation, nations are encouraged to rethink their own history (Ferry, 2000). Because they are part of a broader community, and because of the peaceful confrontations this community generates – through intergovernmental meetings, in parliaments or before courts – citizens and nations become more reflexive. Citizens remain very proud of their

national identity, as is constantly shown by *Eurobarometer* polls. But this civic pride becomes more tolerant, less aggressive and less exclusive.¹ By analogy with psychological theories of moral development, one could say that national identities in Europe are slowly moving from a conventional to a post-conventional (reflexive) status, due to the effect of de-centralisation produced by trans-national contacts. European citizenship is not merely a ‘federal’ set of rights to which national citizenship must conform; it is rather a principle that generates horizontal confrontation between diverse national visions of common basic norms.

This is not a unilateral movement. European citizenship is not the formal definition of the most liberal philosophy, imposed upon traditionalist national legacies by an enlightened federal élite. The confrontation between different versions of the citizen’s rights also challenges the EU itself. Euro-scepticism cannot be reduced to a reactionary answer to the modernism of the EU. The EU has no monopoly of ‘civilisation’, and national feelings are not purely erotic. Hostile attitudes towards the EU are more than passionate or utilitarian reactions against a destabilising open market. The most subtle analyses of euro-scepticism have shown that it is best explained as the disarray of those citizens who see the EU as a process, and feel unable to see their own position in the ‘future of Europe’ (Percheron, 1991; Belot, 2002). What they fear is not the EU as such, or the disappearance of their conventional identity, but a process of social innovation perceived as ambivalent. True, these fears can sometimes feed xenophobic reactions. But they also offer cognitive and motivational resources to criticise the EU, and thereby counter-balance the abstractness and remoteness of the European project. When, for example, their attachment to their national model of solidarity leads them to reject the EU, this is not necessarily a reactionary attitude. The national consciousness, forged and strengthened by mechanisms of inter-personal solidarity, helps us understand the asymmetric ‘political economy’ of European citizenship (Streeck, 1997; Poiars Maduro, 1998) and provides arguments to criticise it. In the same vein, critiques of the EU’s democratic deficit, which is always based on implicit analogy with national civic processes, can be seen as a useful contribution to a critical understanding of the EU, which forces its actors to improve it. These ‘national’ oppositions to the EU are the root of reforms which

¹ If 38% of persons asked still “see themselves as (nationality) only”, 48% see themselves as (nationality) and European’, *Eurobarometer*, 52, fall 2002.

tend to make it more respectful of ‘legitimate diversity’ (Scharpf) and more modest. While a dynamic EU citizenship forces national identities to think about their prejudice, it also constrains the actors of the EU to contemplate the limits of their own ideology.

Between nationalism and cosmopolitanism

This dynamic offers an original ‘third way’ between the two most radical conceptions of citizenship. The nationalist version, notably defended by Hegel, saw the war as a necessity to preserve the vitality of national consciousness. The radical cosmopolitan view, illustrated by Anarchisis Cloots and leading figures of the French Revolution, contrarily argued that national identities had to be banned in order to build a purely universalistic citizenship. Paradoxically, this abstract cosmopolitanism led to aggressive nationalism and imperialism. If it had not done so, it would probably have produced anomie and despair in an abstract community.³

European citizenship tries to avoid these two forms of corruption of collective identity. The Ancients, and those who like Machiavelli followed them, argued that to avoid corruption a polity must organise a permanent confrontation between the sources of corruption. Since it was impossible to change human nature to make citizens virtuous, the system had to be built on the people’s vices; it had to be conceived as an engine turning individual vices into collective virtues. The polity would be stable if the abuses of one of its elements were counterbalanced by its other elements. This is, after all, the *raison d’être* of constitutionalism.

In a sense, European citizenship applies this dynamic political reasoning to the question of identity. By creating a permanent confrontation between national identities and common principles, it erodes the parochialism of national polities, while strengthening their capacity of resistance against the most dangerous trends of modernity.³ This might help break the vicious cycle, which leads from local prejudice to abstract universalism, and from abstract universalism to a rebirth of xenophobic reactions. Since these two types of identity are permanent

² Recent research (Duchesne and Frogner, 2002) have confirmed Rousseau’s conviction that a European identity cannot be built in the absence of national consciousness; national identity offers a ‘concrete universalism’ which can be a step towards a broader community.

³ Paul Ricoeur (1986), interpreting Karl Mannheim, suggests a virtuous democratic confrontation of ideologies and utopias, to strengthen the integrative virtue of ideology while attenuating its paralysing effect.

features of social groups, and since a perfect synthesis of the virtues of liberalism and communitarianism does not seem to be possible, their peaceful confrontation at least offers a 'negative substitute' of an ideal form of membership.

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Our European Demoi-cracy

Is this Constitution a third way for Europe?

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The tabloids have branded it as the biggest decision facing modern Britain, and the mark of its final downfall. Ever since the draft Constitutional Treaty for the European Union started to take shape in bits and pieces last year it has provoked passion in Britain and a yawn in the rest of Europe. Public opinion may yet pick up elsewhere as the intergovernmental conference puts its own mark on the document and as a number of EU members put it to a referendum in the Spring. In the meanwhile, one can understand both the inflated expectations and the indifference. For the first time in the history of the EU, delegates other than diplomats have engaged for more than a year in a public debate about its foundations, its goals and its methods. The reach of their so-called dialogue with civil society may have been wanting, but they have conducted this debate in a highly open and transparent fashion, with the full paraphernalia of web cast and e-forum.

But while the plot and the set may look impressive, the play itself is not revolutionary. For the most part, the draft European Constitution codifies under one umbrella the plethora of treaties and amendments adopted by European Union members over the last 45 years. The idea that, with it, Britain would lose its unique identity is a strange one.

Nevertheless, the draft Constitutional Treaty has a major flaw which cannot help but antagonize Eurosceptics: its drafters seriously saw their task as writing a... Constitution! As the most recent of this breed, it tries hard to resemble traditional national constitutions, in a prose that seems to borrow from the worse in each EU language. As a result, its content is easy to misrepresent by those who now accuse Blair of surrendering Britain to Europe, once and for all. This, while on the continent, citizens are already mobilizing against its timid “non federal” character. “This

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is a British achievement through and through” recently wrote Robert Badinter, a prominent French Conventioneer.

Whatever the well rehearsed slogans on both sides, the new blueprint is on the right track. To see this, Eurosceptics should stop equating more European democracy with their dreaded “more Europe,” and self-styled Euro-enthusiasts on the continent should stop equating concessions made to Britain with “less Europe”. In fact, both Eurosceptics and Euro-enthusiasts have much they can be pleased about. And after all, if the EU is to reinvent itself as a democratically legitimate polity it must bring both of these constituencies on board. Nevertheless, while the final verdict must await the end of the IGC, the French school teacher has an apt expression for this stage of the game: *peut mieux faire*. I believe this is how.

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Indeed, it is the original, if necessary, sin of the EU not to have been built on a democratic foundation at a moment when the citizens of Europe, or at least those who cared, would have said “Yes!”. There was a chance to do just that the last time delegates from around Europe met at The Hague in 1948 in the hope of founding a United States of Europe. Nothing came out of their debates but the echo of arguments that are still with us today.

This failure was probably the EU’s saving grace, making room for a more pragmatic, workable approach to integration on the war-torn continent. The European Community replaced grand visions of democracy at the European level with the so-called *community method*, which puts the member states in the driving seat through the intense day-to-day diplomacy of the Council of Ministers, while giving the European Commission the task of balancing the power of big states with a vision of the common good. Later, an elected European parliament was added for minimal democratic flavour. And as Jean Monnet predicted, states started to engage in endless creative bargains (‘give me money for my farmers and I will give you a market for your products’), thus creating *ad hoc* solidarities between national constituencies. In the ensuing decades, this logic served us well for the most part. From the European Communities of 1958 to the European Union of today, European administrations, industries, political parties, trade unions and non-governmental organizations, as well as our political leaders, have learned to work together on everything from food or banking safety regulations to the granting of visas and global trade negotiations.

They may still often disagree, as our national interests do not always converge, but they have learned to manage their differences more effectively and constructively. The European crisis over Iraq, however serious, was an exception to the rule.

The *community method* is the open secret behind the EU's continuous balancing act between old and new members, left and right ideologies, big and small states, general and sectorial interests, business and consumers.

Grand rhetoric has it that we have now exhausted the merits of this functionalist approach and so a new phase in the life of the EU is required. The widening of EU powers to include what everyone perceives as the traditional prerogatives of the 19th century regal state (money, police, migration, management of external boundaries and foreign policy) has not been matched, the story goes, with a parallel increase of its accountability to European citizens. And the doubling of the EU's size over a decade through the enlargements of 1995 and 2004 will spell its demise if not matched by a rethink of its institutions. Hence the Convention, hence the draft Constitution.

Sceptics like Andrew Moravcsik and others have claimed that this whole exercise is much ado about nothing, a misguided attempt to fiddle with a European Union that ain't broke, a Union as democratic as it should and can be. Surely, the EU does not exhibit half the flaws its critics attribute to it. Not only is it *not* a super-state but it lacks the attributes of a state *tout court*. What manner of state would it be with its tiny budget and its tiny administration, rules agreed to in Brussels by national representatives, and interpreted, policed or enforced on the ground by agents of the member states? Moreover, the EU is still primarily excluded from the areas of state action most citizens care most about – from the welfare functions of health, social security and education to defense and home security. And when it does act, it usually does so more transparently than domestic counterparts, through all-out consultations with policy networks, forums and civil society groups of all shapes and colors. The numerous forms of democratic safeguards embedded in its decision making procedures and institutional structures (super-majorities and vetoes, involvement of four different institutions, role of the national capitals in drafting laws) guarantee that no interest will be trampled on. It may be imperfect, but the EU level of democracy compares favorably with the level of democracy in its member states.

But those who dismiss calls for a more democratic EU do so from the point of view of social science rather than political philosophy, and thus

miss an important point. The success of the European adventure in the last five decades was simply not predicated on exploring a new form of democracy beyond the nation-state. In today's EU, the (democratic) whole is less than the sum of the (democratic) parts. All of the EU's laudable features somehow do not amount to a form of democracy that most European citizens recognize, and that would be appropriate for the kind of issues it is now dealing with. This is because, to the extent that the EU is indeed a new kind of democracy-in-the-making, its democratic character cannot be recognized and developed if we hang on to the conventional paradigm of statehood. If there is no need to deny past achievements, to trash Monnet in order to rediscover Pericles, we must ask anew how the two shall meet.

We need to start with the recognition that the debate has been perverted by the Cartesian tyranny of dichotomies, all variants of "more" vs "less" Europe. European Superstate vs Union of States. Super-power Europe vs civilian power Europe. European democracy vs national democracies. For or Against. Inside the Convention itself, the two main camps were identified from the start as the intergovernmentalists and supranationalists (also referred to as federalists). The former, which include most big countries' government representatives, want to address the new challenges by strengthening the Council of state representatives, prefer to retain the unanimity rule for policy areas close to the core of traditional state sovereignty and, especially for the British and Germans, see the answer to the democratic deficit in a stricter delimitation of powers between the Union and the States. The latter, which include most of the small member states as well as representatives of the European parliament, want to protect the Commission as a advocate of weaker parties, strengthen the European Parliament as the locus of democratic control, extend majority voting in the name of effectiveness and continue to expand EU powers if necessary. At least some in this camp like to call themselves "friends of the community method."

At the outset of the Convention, its president, Mr Giscard D'Estaing called on the Conventioneers to seek to keep the best of both approaches. And at the end of the day, as the final draft was approved by consensus, everyone seemed to converge on a vision of the EU grounded in a double legitimacy of states and citizens, a Community of Nations.

But has the Convention then succeeded in designing a third way for Europe? Has it achieved grand synthesis rather than a messy compromise? Many would say 'No', feeling that no settlement can

accommodate Europe's wide spectrum of political families, national sensitivities, and historical trajectories; no such settlement can deal with the legitimate fears and aspirations of all sides; and bargains and give-and-take is what the exercise is all about, not the design of a new polity embraced by all.

The irony, however, is that the EU as we have it today provides all the ingredients for such a third way. The draft Constitution falters when ignoring this. It is at its best when it recognizes and builds on what we have: our European *demos*-cracy.

A European Demos?

The argument defended here requires a detour in democratic theory since at the root of the conflict between intergovernmentalists and supranationalists lies a more fundamental fault-line on the actual and desirable relationship between the EU and democracy. As general wisdom has it, democracy requires a *demos*, a group of individuals who have enough in common to want to and to be able to decide collectively about their own affairs. In the representative mode of democracy, this translates into the ability to consent or dissent with the way they are governed. A European democracy would mean being able to “kick the rascals out” (of Brussels). In other words, if Europeans in their majority expressed themselves in a certain way, the minority would consider their decision final and legitimate. So we have to ask: Is there a European *demos* to express such consent? Can there be a European *demos*? Should we want a European *demos*?

Ever since a famous ruling by the German Supreme Court in 1994 one response has been given legal pedigree: the so-called *no-demos* thesis. Accordingly, democracy requires a *demos*; there is no European *demos* but only national *demoi*. Ergo, democracy at the European level is a fruitless pursuit. Those functions of the state that require democratic control (from policing to immigration) should never belong to the EU.

To be sure, for those who call themselves ‘civic nationalists’ in Britain or national sovereignists in France, the nation does not need to be ethnic in nature, but it must provide the basis for a sense of common belonging – be it in a common language, culture, history or political habits.¹ This is

¹ For a fascinating discussion, see Justine Lacroix, *Communautarisme versus libéralisme : quel modèle d'intégration politique ? Les présupposés normatifs d'une union politique européenne à la lumière des débats intellectuels contemporains*, PhD Thesis, Brussels, 2002.

a precondition for what representative democracy is all about, accepting to be in a minority one day, expecting to be part of a majority another. National sovereignty must be defended not as a reactionary reflex but as the ultimate guarantee of democracy itself. Europe, therefore, is the realm of agreements between states and, to the extent that our leaders need to be accountable to their voters for what they do in Brussels, the realm of indirect democracy. It is only reluctantly that sovereignists accept that some modicum of direct democracy needs to be injected at the European level through the European parliament and that European affairs need to be more transparent, understandable and accountable to the citizens of the member states. But they oppose the creation of a direct link between these citizens and European institutions (such as a universally elected president of the Commission). This approach underpins the defense of intergovernmentalism as the most legitimate way of running European affairs.

On the other side of the fence, as the mainstream story would have it, there are of course those who believe in a *European demos*. Supra-nationalists see the European Union as entailing a progressive transfer of loyalty from the states to the Union. Common policies and programmes create *de facto* solidarities between citizens of different states, and encourage the mobility of students, workers, professionals or firms. Such progressive “Europeanization” in turn is both the source and the consequence of the development of a European public space where domestic politics converge to create a common European political culture and “language,” and in the end, a European civic nation. This school of thought believes in the emergence of a European identity coexisting with national or other local identities. If, as Anderson argued, collective identities are constructed as much as passed on across the ages, why not an imagined European identity? Newly constructed identities can be layered on top of older, equally constructed, national ones, through the crafting of new common symbols and histories in school curricula and the media, and the projection back into the past of a ‘common destiny’. In this volume, Yasmin Soysal tells the story of how European schools play this game today.

There are of course shades of grey. While some believe in an existing European demos, most of its proponents reconcile themselves to the fact that we have “a demos in the making”, premised on an incipient European identity. But, at least, all supra-nationalists think that the emergence of a European demos is both possible and desirable in the foreseeable future. This in turn implies that democracy in the EU can

and must be perfected above all along traditional lines of majoritarian representative democracy: two legislative chambers and a commission “prime minister” emanating from them.

Should we agree that the constitutional challenge is to arrive at a compromise between these two visions of democracy? Not if we recognize that this version of the great compromise misses the crucial point: These two visions of democracy in Europe are but two sides of the same coin. This is because sovereignist and supranationalist thinking are both state-centric. Symbols dear to supranationalists such as a common flag, passport, celebration day or hymn for Europe, as well as a textbooks telling a “European” history, all constitute attempts to recreate the mystique and power of the nation-state at the European level. In both visions, the political community is predicated on the existence of a single *demos*, which in turn depends on a common identity between its members. Both camps believe that politics must be communities of identity, both echo Gellner’s definition of nationalism as requiring that the political and national units be congruent.

There is however, a third way for Europe. Sovereignists need to accept that the EU is indeed a community of peoples and not only of states, peoples who ought to take an unmediated part in European politics. And supranationalists need to accept that democracy in Europe does not require that this community become a single *demos*, whose will is expressed through traditional state-like institutions.

European Demoi-cracy – the third way

After half a century of existence, the European Union has established itself as a new kind of political community, one that rests on the persistent plurality of its component peoples, its *demos*. It is more than a particularly strong version of a confederation of sovereign states, in that its peoples are politically connected directly and not only through the bargains of their leaders. And yet, to the extent that these peoples are organized into states, these states should continue to be at the core of the European construct. In short, the EU is and should continue to be a *demosi-cracy* in the making, subject to the rule of its peoples, for its peoples, with its peoples.

Our European *demosi-cracy* is neither simply a *Union of democracies* nor a *Union as democracy*. Our European *demosi-cracy* is instead one of the most innovative political machines ever invented to create and manage not only economic but also democratic interdependence.

Such a third way is based on the premise that the nation-state is too important a category in Europe to be hijacked by the EU itself. It is precisely in defense of traditional notions of democracy within the confines of the nation-state that we need to “do something else” and “be something else” at the EU level. If the EU is not a state today we should not want it to become one. Instead it must be understood as a Union of States and Peoples.

This is why such a third way comes under the broad aegis of so-called post-national thinking, but a brand of it that Habermas himself does not always embrace. Post-national principles of community create an alternative to, not a replica of, the nation-state where citizenship needs to be conceptually severed from nationality. Yet I believe that the dominant brand of post-national thinking often becomes simply a version of traditional supranationalism. The idea of European democracy is thus a radical version thereof, which takes to their ultimate logic the implications of pluralism and the rejection of identity politics. In this sense, a democracy partakes normatively to both of liberal and cosmopolitan visions. Not liberal as is often understood on the continent as free trade plus human rights. But liberal as the emphasis on the necessary constraints imposed by the presence of others in our midst. Not cosmopolitan as the claim of the irrelevance of national boundaries. But cosmopolitan as the emphasis on the responsibilities and opportunities created by the existence of others beyond these boundaries.

This is the all too implicit message contained in the draft Constitution or at least in an indulgent reading of it. If today’s EU is an incipient “European democracy”, it is a very imperfect one. The current draft is meant to improve at the margins the EU’s blueprint for day to day action and to sketch an EU-topia for EU citizens. But it fails on the latter because it is generally presented and perceived negatively, simply as a compromise avoiding sovereignists and supranationalist extremes. A genuine EU-topia cannot simply be something “in between.” Instead it must boldly follow and expand the spirit of democracy.

More specifically, a Constitution celebrating the EU as democracy requires three consecutive moves away from mainstream Constitutional thinking. First *from common identity to the sharing of identities*; secondly *from a community of identity to a community of projects*; and finally *from multi-level governance to multi-centred governance*.

The first move in some ways was already contained in the founding fathers’ intuition that has now found its way into the (French version

of the) preamble: the call for an ever closer union between the peoples of Europe. Sovereignists need to recognize that what matters here is the ‘s’ in the peoples of Europe. Supranationalists need to accept that nowhere does the Constitution call for the emergence of a homogeneous community where the solemnity of law is grounded on the will of a single demos. Instead it makes respect for the national identities of its member states, as reflected in their fundamental political and constitutional structures, one of its foremost principles. Our European democracy is predicated on the mutual recognition, confrontation and ever more demanding sharing of our respective and separate identities – not on their merger. The EU is a community of others. In political terms, a democracy is not predicated on a common identity, European public space and political life. Instead, it requires informed curiosity about the political lives of our neighbours and mechanisms for our voices to be heard in each other’s forums. In time, a multinational politics should emerge from the confrontation, mutual accommodation and mutual inclusion of our respective political cultures. As the Constitution recognizes, trans-European political parties have a key role to play in this regard. So do the media.

Mutual identification makes it possible to reconcile diversity with integration. We do not need to develop a ‘common’ identity if we become utterly comfortable borrowing each others’. We do not need to invent a common European history if we learn to borrow each other’s past and identify, for instance, with the victims of the crimes our nation may have committed. The constitutional clause borrowed from the Maastricht treaty stating that we can benefit from each other’s consulate services outside the EU provides an apt metaphor: Abroad, I can be a bit British and a bit Italian—more than European *per se*. I have nothing to gain by spinning the rainbow white.

But where then is the glue that binds us together? This brings us to our second move away from mainstream constitutional thinking. The reading of the draft Constitution makes it amply clear that this political community does not rest on a shared identity, as is usually assumed with nation-states, but on shared projects and objectives. As stated in its very first article, member states confer competences on the EU “to attain objectives they have in common”, not as the expression of some state-like collective essence. These objectives are then defined extensively – from the promotion of peace, social justice or children’s rights, to working for sustainable development, full employment or solidarity with future generations. The Union is also defined by its values: respect

for human dignity, liberty, democracy, the rule of law and human rights. But here what matters crucially is not the proclamation of these values (they are after all universal, if not universally applied), but the *praxis* associated with common values. The list of values is restrictive and short (is that all we believe in?) because it is actually “judiciable”. A member state can ultimately be kicked out for acting against them.

The sense of belonging and commitment to the European Union ought to be based on the *doing* more than the *being*, on shared projects and ambitions, both internal and external. A community of project is not necessarily less demanding than a community of identity. But it is voluntary and differentiated rather than essentialist and holistic. It is worth reminding ourselves that the goal of the single market is still the most popular shared project in Europe. In short, the *Europeanization* of national citizens through the instrumental benefits and opportunities that the Union creates does not necessarily require or lead to their *Europeanness*. Shared material or idealistic goals provide the ties that bind.

The third move away from mainstream constitutional thinking consists in translating the ethos of mutual recognition of identities and shared projects into legal and institutional terms. A demoi-cracy should not be based on a vertical understanding of governance, with supranational constitutional norms trumping national ones and supranational institutions standing *above* national ones. Instead, our demoi-cracy ought to be premised on the horizontal sharing and transfer of sovereignty. It involves a dialogue rather than a hierarchy between different legal or political authorities such as constitutional courts (captured by Miguel Maduro’s contrapunctual metaphor), national and European parliaments, national and European executives. It is about multi-centered not only multi-level governance, with decision made not *by* Brussels but *in* Brussels as well as elsewhere around Europe. When it comes to rules, procedures and institutions, a European demoi-cracy is neither national nor supranational but transnational.

Some may argue that the very idea of drawing up a Constitution is anathema to this spirit of non-hierarchical governance. Until now, and in the spirit of demoi-cracy, the EU has been founded on what Joseph Weiler has described as Constitutional tolerance, whereby national constitutions and the courts protecting them have coexisted without the need for an overarching umbrella. For lack of a formal supranational Constitution trumping national ones, Europeans have chosen to constantly and willingly renew their commitment to their common rules

while conducting an on-going dialogue on the implications of such a commitment. But it is too late in the day to argue this point. Indeed, it is precisely in order to dispel such misgivings that this Constitution – albeit brought about by a Constitutional treaty- must be different from any other of its state-bound predecessors. Does it succeed?

Ironically, many in the UK believe that the British government's success in having the F word deleted from the final draft constitutes a symbolic victory against a “superstate” drift. As in the past, federalism, as understood in the UK, seemed to pit supranationalists against sovereignists. Yet, federalism does not mean more Europe and less nation-states. Nor does it simply mean decentralized government (as the German like to point out), a view still tainted with hierarchical thinking. Instead, it is a mode of organisation as old as human society that is more compatible with the existence of many *demos* than that of a single *demos*. Federalism should not mean bringing different polities together as one, however decentralized. It means instead retaining what is separate, the *demos*, *in spite of* all that is common. We forget this today, because, while the notion was developed in the 17th century by Althusius *against* Bodin's vision of the state, the history of federalism is that of its progressive subversion by the state paradigm of centralisation. This Constitution should have been bold enough to present the EU as a federal union, not as a federal state, and thus rescue the federal baby from the statehood bathwater. Instead, and this is an acceptable second best, it speaks of the “community way” of doing business.

Throughout the draft Constitution the reassertion of this community way serves a vision of European *demos*-cracy well. For example, the principle of mutual recognition of laws and regulations is embedded in the unchanged articles on the single market – that is the highly managed form of recognition adopted in the 1980s with only minimal common standards to regulate the EU single market alongside fine-tuned bargains on the balance between “home” and “host” state rule. In the same spirit, the revised articles serving as a basis for cooperation in the so-called areas of justice, security and freedom have put mutual recognition of judgments and penal practices at the centre of cooperation among policemen and judges. Only minimum common standards are called for and only to the extent that they are necessary to ensure mutual trust. When it comes to creating safeguards against the potential risks from free movement of people as well as goods across European borders, the Union does not resort to a European FBI. A *demos*-cracy requires overarching rules or institutions only when the

“crimes” cannot be tackled effectively at the national level. It is still unclear whether the proposed European prosecutor much maligned in the UK would overstep this minimalist rule.

Indeed, joint governance predicated on demoi-cracy calls for more rather than less horizontal interaction between centers of governance in Europe, be they states, regions or cities. But unimaginatively, the draft only refers to loyal cooperation vertically, between the Union and the member states, not among the latter.

The draft contains little new about EU citizenship, which has always mostly been about the horizontal rights connected with freedom of movement and non-discrimination on grounds of nationality – rights we exercise when we cross borders in the EU. But at least these rights figure most prominently in the Constitution. Unfortunately, the Conventioneers shied away from explicitly expanding the mutual granting of political rights in each other’s polity beyond the Maastricht right to vote in local elections. As Paul Magnette discusses in his work, Ancient Greeks called this the principle of *isopolity*, according to which the cities would, on a reciprocal basis, grant equal rights to their respective citizens residing within their walls. At the same time, the Constitution strengthens the vertical aspect of rights – *sympolity* for the Greeks – by incorporating the Charter of Fundamental Rights. In empowering citizens against their state, the Charter is part of a universal trend to decouple the notion of rights from that of belonging to a polity. As a matter of fact, non-EU citizens living in the EU are also beneficiaries of these rights. The reach of the Charter should not be exaggerated as it often is in Britain. It is meant to guard against abuses of power in the design and implementation of EU law, not to supersede national practices.

The Convention was meant to tackle the division of powers between the states and the Union and respond to the widespread fears of “creeping competences” by the European publics. Here again, the Constitution does not change the basic facts: the EU is still largely excluded from the areas of state action most citizens care most about and which are the object of intense democratic debates at the national level. From the welfare functions of health, social security and education, to defense and home security, no “European majority” can tell the majority of citizens in a given state what to do. On the welfare state functions, such as social security, the EU only steps in when the free movement of people is at stake. The veto is rightly retained on taxation and defense which involve the kind of reciprocal sacrifice still

connected with a single demos. Unfortunately, the draft fails to convey that competences can and should come back down, as they do in federal cycles. Nor is the thorny matter of “preemption” addressed with the sensitivity that it deserves – making clear that if the Union acts on one small front say in transport, it does not override state competence in its overall transport policy.

There is nevertheless innovative thinking on competences in the new draft. For the first time in EU history and in one of the Convention’s boldest moves, the expansion of community powers is made subject to an ‘early warning system’, a veto over EU laws to be exercised by national parliaments on grounds of subsidiarity – the presumption that governance should take place at the lowest possible level. Contrary to the fears of many supranationalists, such national level democratic control over the expansion of EU powers does not mean “less” Europe. It is exactly the spirit of demoi-cracy to have directly elected representatives police the boundary of competences in the name of individual national majorities.

Indeed, an EU demoi-cracy cannot rely for its legitimacy on representative democracy in the manner of its member states. Beyond the classical Westminster-type democracy, it may be possible for the EU to promote new forms of *participatory* and *deliberative* democracy – including through the Web – that are more ambitious and inclusive than those found in the member states themselves, but which do not aggregate the expressions of popular will. In this spirit, the draft Constitution devotes separate articles to participatory democracy, and has acquired at the last minute a clause allowing for citizens’ initiative: one million is the magic number to force the Union to revisit one of its laws.

But the current draft fails to convey as one should for a demoi-cracy, that the democratic question in Europe is not just about the role of citizens and civil society in EU governance but also about the role of EU governance in supporting vibrant civil societies and local democracy in Member States. Democracy, in its book, seems to be about what happens at the centre.

The ultimate implication of seeing the EU as demoi-cracy has to do with the nature and permanence of the bond that unites the peoples of Europe. Perhaps the most significant criterion distinguishing a state from a union is the right of secession for its constituent parts, the ‘right of withdrawal’ as the draft puts it. The inclusion of such a right testifies to the widely shared intuition in the Convention that the separate peoples involved in the EU adventure are together by choice and

would continue to make sense as separate *demoi*. This clause has been contested intensely by some supranationalists who point out that it was not included in the previous treaties and would represent a step back on the road of integration. Yet the right of withdrawal must be defended passionately, not as a concession to national sovereignty, but in the name of *demoi*-cracy in the EU. Quite simply, if a majority in a country one day wishes to separate from the whole it must be able to do so.

Most of these characteristics should be music to Eurosceptics ears while not being viewed by euro-enthusiasts as undesirable hurdles on the road to integration. In fact, the spirit of *demoi*-cracy may have lost out on issues where Britain did not get its way, such as in questioning the way the principle of primacy or supremacy of EU law has finally been included. Nobody can deny the binding character of formal international obligations including and especially EU law. But the draft Constitution conveys the wrong impression by not stating clearly that primacy does not allow the European Court of Justice to interfere with the constitutional arrangements of the Member States, nor does it render a particular national measure “null and void”, but simply its application in a particular case. And the text does not make it clear that even with such primacy, EU law is usually meant to empower member states or individual citizens, not to take away their capacity to act. In many cases, the Constitution simply lacks the language of *demoi*-cracy.

Last but not least, the British government has expended a lot of political capital over the perennial institutional question: Who should govern the EU? And paradoxically, it has done so by promoting an innovation that does not seem to chime with the spirit of *demoi*-cracy, namely the creation of a post of permanent president of the European Council. Combined with an indirectly elected president of the Commission, the EU system will conspicuously move closer to a national model combining a head of state and a prime minister. The small and medium size countries have opposed this but to no avail. Yet rotation in the leadership of the Union should be defended, not only in the name of equality between member states but as a key institutional symbol of the ideal of *demoi*-cracy. The rotating presidency today conveys to European citizens a sense that EU policy is not “made in Brussels” but is a shared and decentralized enterprise conducted everywhere in Europe from Helsinki to Lisbon. What better symbol of our *demoi* than the family of European cities? The Convention has failed to find a way of combining the need for permanence and sharing of leadership in the Union.

Giscard's version of the preamble provides the riddle at the heart of all these debates when he quotes Thucydides (notwithstanding problems of mistranslation): "Our Constitution is called a democracy because power is in the hands not of a minority but of the greatest number." But how and on which scale should this greatest number be counted in a Union which is closer to the federation of city-states of Thucydides' times than to ancient Athens? Many convention members, starting with its president, reason that the Union should slowly move towards a "population principle", be it through more proportional representation or more proportional voting. They should not push this reasoning too far: An EU-wide majority in the European parliament does not easily compete with a plurality of majorities at the national level. The so-called opposition between big and small member states is between two versions of democracy: European-level democracy and national-level democracy. It is only in the continued balance between both, in the decades to come, that our European demoi-cracy can flourish.

Beyond Philadelphia

Some have likened this constitutional moment to Philadelphia, 1787. Others reply that such a comparison is overly ambitious. Yet, the mission of *this* Constitutional Convention was no doubt the more demanding. Jefferson and Madison did not have to cope with the Internet, nor did their dialogue include their women, the penniless or the natives. Most importantly, the 13 American states were skeletons of states not full-blown patented welfare states as in today's Europe, with their long histories, strong national identities, different languages and obsession with national sovereignty.

Indeed, the kind of Constitution the EU needs has never been seen before. It is a Constitution which should negate the very assumptions that usually underpins constitutions, namely the pre-existence of a single constituted demos or even a demos to be constituted by the constitutional moment itself. It is a Constitution which should set the foundations for a genuine European demoi-cracy and help us move beyond the traditional dichotomies – variants of *more* or *less* EU – towards a *different* EU, accepted by the greatest number, the mainstream of European citizenry. An intriguing idea aired at the Convention, and unfortunately forgotten for now, was for each EU country to come up with its own line in the Preamble: "We the people of Britain", "We the people of France ...". Such a dialogue of *demosi*

to be learned and recited by school children around Europe would have constituted a fitting start.

Obsessed as we are by the mirage of singleness and unity, we tend to overlook the radical nature of the mutual opening and mutual recognition of identities and citizenship which has, at least partially, characterized the Union for the last decades. In an enlarged EU, in an EU whose ambitions could be that of a global mediator, this spirit of European democracy is more necessary than ever.

Let us be inspired by Frank Thompson's enthusiastic acclaim of the prospect of a union of western Europe just before his death in the resistance in 1944: "How wonderful it would be to call Europe one's fatherland and think of Krakow, Munich, Rome, Arles, Madrid *as one's own cities* . . . Differences between European peoples, though great, are not fundamental. What differences there are serve only to make the peoples mutually attractive". A half-century of peace later, let us celebrate with him the pleasure that can be drawn from the multiplicity of Europe, its nations, folklores, languages, politics and cities, and from the mutual attraction between its utterly separate peoples.

Whether or not this new Constitutional Treaty ultimately succeeds in giving it a proper manifesto, it is still ours to shape and to dream, our European democracy.

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