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WHY EUROPE NEEDS A CONSTITUTION

THERE IS A remarkable contrast between the expectations and demands of those who pushed for European unification immediately after World War II, and those who contemplate the continuation of this project today—at the very least, a striking difference in rhetoric and ostensible aim. While the first-generation advocates of European integration did not hesitate to speak of the project they had in mind as a ‘United States of Europe’, evoking the example of the USA, current discussion has moved away from the model of a federal state, avoiding even the term ‘federation’.¹ Larry Siedentop’s recent book *Democracy in Europe* expresses a more cautious mood: as he puts it, ‘a great constitutional debate need not involve a prior commitment to federalism as the most desirable outcome in Europe. It may reveal that Europe is in the process of inventing a new political form, something more than a confederation but less than a federation—an association of sovereign states which pool their sovereignty only in very restricted areas to varying degrees, an association which does not seek to have the coercive power to act directly on individuals in the fashion of nation states.’² Does this shift in climate reflect a sound realism, born of a learning-process of over four decades, or is it rather the sign of a mood of hesitancy, if not outright defeatism?

Siedentop misses the mark when he complains of the lack of any profound or inspired *constitutional* debate on the fate of Europe, capable of seizing the imagination of its peoples. For our situation today is not comparable to that of either the Federalists or the delegates to the Assemblée Nationale. At the end of the eighteenth century, in Philadelphia and Paris, the Founding Fathers and the French Revolutionaries were

engaged in an extraordinary undertaking, without historical precedent. More than two hundred years later, we are not merely heirs to a long-established practice of constitution-making; in a sense, the constitutional question does not provide the key to the main problem we have to solve. For the challenge before us is not to *invent* anything but to *conserve* the great democratic achievements of the European nation-state, beyond its own limits. These achievements include not only formal guarantees of civil rights, but levels of social welfare, education and leisure that are the precondition of both an effective private autonomy and of democratic citizenship. The contemporary 'substantification' of law means that constitutional debates over the future of Europe are now increasingly the province of highly specialized discourses among economists, sociologists and political scientists, rather than the domain of constitutional lawyers and political philosophers. On the other hand, we should not underestimate the symbolic weight of the sheer fact that a constitutional debate is now publicly under way. As a political collectivity, Europe cannot take hold in the consciousness of its citizens simply in the shape of a common currency. The intergovernmental arrangement at Maastricht lacks that power of symbolic crystallization which only a political act of foundation can give.

An ever-closer union?

Let us then start from the question: why should we pursue the project of an 'ever-closer Union' any further at all? Recent calls from Rau, Schroeder and Fischer—the German President, Chancellor and Foreign Minister—to move ahead with a European Constitution have met sceptical reactions in Great Britain, France and most of the other member-states. But even if we were to accept this as an urgent and desirable project, a second and more troubling question arises. Would the European Union in its present state meet the most fundamental preconditions for acquiring the constitutional shape of any kind of federation—that is, a community of nation-states that itself assumes some qualities of a state?

Why should we pursue the project of a constitution for Europe? Let me address this question from two angles: (i) immediate political goals,

¹ Frank Niess, 'Das "F-Wort"', *Blätter für deutsche und internationale Politik*, September 2000, pp. 1105–15.

² Larry Siedentop, *Democracy in Europe*, London 2000, p. 1.

and (ii) dilemmas stemming from virtually irreversible decisions of the past. If we consider the first, it is clear that while the original political aims of European integration have lost much of their relevance, they have since been replaced by an even more ambitious political agenda. The first generation of dedicated Euro-federalists set the process in train after World War II with two immediate purposes in mind: to put an end to the bloody history of warfare between European nations, and to contain the potentially threatening power of a recovering post-fascist Germany. Though everybody believes that the first goal has already been achieved, the relevance of peace-keeping issues survives in a different context. In the course of the Kosovo war, its participants became aware of subtle yet important differences in the way that the US and UK, on the one hand, and the continental nations of Europe on the other, justified this humanitarian intervention—the former resorting to maxims of traditional power politics, the latter appealing to more principled reasons for transforming classical international law into some sort of cosmopolitan order. This is a difference that exemplifies the rationale for developing a European Union capable of speaking with one voice in matters of foreign and security policy, and bringing a stronger influence of its own to bear on NATO operations and UN decisions. Recent attempts by Persson, Solana and Patten to mediate between North and South Korea offer the first sign of a more serious intention by the EU to engage in global affairs.

The second goal, the containment of a potentially dangerous Germany, may have lost its salience with the growing stability of democratic institutions and spread of liberal outlooks in the Federal Republic, even if the unification of the country has revived fears of some return to the self-assertive traditions of the German Reich. I need not pursue this question here, since neither of the two original motives for integration could be regarded as a sufficient justification for pushing the European project any further. The ‘Carolingian’ background of the founding fathers—Schuman, De Gasperi, Adenauer—with its explicit appeal to the Christian West, has vanished.

Of course, there was always a third strand in European integration—the straightforward economic argument that a unified Europe was the surest path to growth and welfare. Since the Coal and Steel Community of 1951, and the subsequent formation of Euratom and the European Economic Community of 1958, more and more countries have become

gradually integrated through the free exchange of people, goods, services and capital between them—a process now completed by the single market and single currency. The European Union frames an ever denser network of trade-relations, ‘foreign’ direct investment, financial transactions and so forth. Alongside the US and Japan, Europe has gained a rather strong position within the so-called Triad. Thus the rational expectation of mutual benefits within Europe and of differential competitive advantages on world markets could, to date, provide a legitimization ‘through outcomes’ for an ever-closer Union. But even making allowances for the consciousness-raising impact of the Euro, which will soon become a unifying symbol in everyday life across the continent, it seems clear that henceforward economic achievements can at best stabilize the status quo. Economic expectations alone can hardly mobilize political support for the much riskier and more far-reaching project of a *political union*—one that deserved the name.

Beyond a ‘mere market’

This further goal requires the legitimization of shared values.³ There is always a trade-off between the efficiency and legitimacy of an administration. But great political innovations, such as an unprecedented design for a state of nation-states, demand political mobilization for normative goals. Constitution-making has hitherto been a response to situations of crisis. Where is such a challenge, we might ask, in today’s rather wealthy and peaceful societies of Western Europe? In Central and Eastern Europe, by contrast, transitional societies striving for inclusion and recognition within the Union do face a peculiar crisis of rapid modernization—but their response to it has been a pronounced return to the nation-state, without much enthusiasm for a transfer of parts of their recently regained national sovereignty to Brussels. The current lack of motivation for political union, in either zone, makes the insufficiency of bare economic calculations all the more obvious. Economic justifications must at the very least be combined with ideas of a different kind—let us say, an interest in and affective attachment to a particular ethos: in other words, the attraction of a specific way of life. During the third quarter of the past century, Eric Hobsbawm’s ‘Golden Age’, the

³ John Fossum, ‘Constitution-making in the European Union’, in Erik Eriksen and John Fossum, eds, *Democracy in the European Union—Integration through Deliberation?*, London 2000, pp. 111–63.

citizens of Western Europe were fortunate enough to develop a distinctive form of life based on, but not exhausted by, a glistening material infrastructure. Today, against perceived threats from globalization, they are prepared to defend the core of a welfare state that is the backbone of a society still oriented towards social, political and cultural inclusion. This is the orientation that is capable of embedding economic arguments for an ever-closer union into a much broader vision. Of course, rapid economic growth was the basis for a welfare state that provided the framework for the regeneration of postwar European societies. But the most important outcome of this regeneration has been the production of ways of life that have allowed the wealth and national diversity of a multi-secular culture to become attractively renewed.

The economic advantages of European unification are valid as arguments for further construction of the EU only if they can appeal to a cultural power of attraction extending far beyond material gains alone. Threats to this form of life, and the desire to preserve it, are spurs to a vision of Europe capable of responding inventively to current challenges. In his magnificent speech of May 28, the French Prime Minister spoke of this 'European way of life' as the content of a political project: 'Till recently the efforts of the Union were concentrated on the creation of monetary and economic union . . . But today we need a broader perspective if Europe is not to decay into a mere market, sodden by globalization. For Europe is much more than a market. It stands for a model of society that has grown historically . . .'⁴

Globalization and social solidarity

Economic globalization, whether we interpret it as no more than an intensification of long-range trends or as an abrupt shift towards a new transnational configuration of capitalism, shares with all processes of accelerated modernization some disquieting features. Rapid structural change distributes social costs more unequally, and increases status gaps between winners and losers, generally inflicting heavier burdens in the short run, and greater benefits only in the long term.⁵ The last wave of economic globalization did not stem from any inherent evolution of

⁴ Speech to the Foreign Press Association, Paris, 28 May 2001.

⁵ Georg Vobruba, 'Actors in Processes of Inclusion and Exclusion', *Social Policy and Administration*, December 2000, pp. 603–13.

the system: it was the product in large measure of successive GATT rounds—that is, of conscious political action. Democratic governments should therefore also have the chance, at least in principle, to counter the undesired social consequences of globalization by complementary social and infrastructural policies. Such policies have to cope with the needs of two different groups.

Their purpose must be to bridge the time-gap for short-run losers by investments in human capital and temporal transfers, and to offer permanent compensation to long-run losers in—for example—the form of a basic income scheme or negative income tax. Since neither group is any longer in a strong veto position, the implementation of such designs is a difficult task. For the decision on whether or not to maintain an appropriate level of *general* social welfare largely depends on the degree of support for notions of distributive justice. But normative orientations move majorities of voters only to the extent that they can make a straightforward appeal to ‘strong’ traditions inscribed in established political cultures. In Western Europe, or at any rate its continental nations, this assumption is not quite unfounded. Here the political tradition of the workers’ movement, the salience of Christian social doctrines and even a certain normative core of social liberalism still provide a formative background for social solidarity. In their public self-representations, Social and Christian Democratic parties in particular support inclusive systems of social security and a substantive conception of citizenship, which stresses what John Rawls calls ‘the fair value’ of equally distributed rights. In terms of a comparative cultural analysis, we might speak of the unique European combination of public collectivism and private individualism. As Göran Therborn remarks: ‘the European road to and through modernity has also left a certain legacy of social norms, reflecting European experiences of class and gender . . . Collective bargaining, trade unions, public social services, the rights of women and children are all held more legitimate in Europe than in the rest of the contemporary world. They are expressed in social documents of the EU and of the Council of Europe’.⁶

But if we grant this assumption, there remains the question of why national governments should not be in a better position to pursue

⁶ Göran Therborn, ‘Europe’s Break with Itself’, in Franco Cerutti and Enno Rudolph, eds, *A Soul for Europe*, vol. 2, ms. 2000, p. 51.

countervailing policies more effectively than a heavy-handed EU bureaucracy. At issue here is the extent to which intensified global competition affects the scope of action of national governments. In a recent book I argued that there has been a shift towards a 'post-national' constellation.⁷ Some counter-considerations have been adduced since then.⁸ No linear relation exists, it is observed, between economic globalization and the decreasing autonomy of the national state; nor is there always an inverse relation between levels of social welfare and employment. Independently of growing global pressures from without, the state has anyway had to learn to play a less dominant role *within national arenas*, in its interactions with powerful social agents.⁹ National governments may be compelled to lower taxes on capital under the pressure of international competition, but they still seem to enjoy a range of options in policy areas that have an immediate impact on interdependent rates of unemployment and levels of social welfare.¹⁰

Normative appeals

Such arguments do not undermine, however, the general thesis that national governments, whatever their internal profiles, are increasingly entangled in transnational networks, and thereby become ever more dependent on *asymmetrically negotiated* outcomes. Whatever social policies they choose, they must adapt to constraints imposed by deregulated markets—in particular global financial markets. That means lower taxes and fiscal limits which compel them to accept increasing inequalities in the distribution of the gross national product.¹¹ The question therefore is: can any of our small or medium, *entangled and accommodating* nation-states preserve a separate capacity to escape enforced assimilation to the social model now imposed by the predominant global economic regime? This model is informed by an anthropological image of 'man' as rational

⁷ *The Postnational Constellation*, Cambridge 2000.

⁸ Edgar Grande and Thomas Risse, 'Bridging the Gap', in *Zeitschrift für internationale Beziehungen*, October 2000, pp. 235–66.

⁹ Josef Esser, 'Der kooperative Nationalstaat im Zeitalter der "Globalisierung"', in Diether Döring, ed., *Sozialstaat in der Globalisierung*, Frankfurt 1999, pp. 117–44.

¹⁰ Fritz Scharpf, 'The Viability of Advanced Welfare States in the International Economy', *Journal of European Public Policy*, no. 7, 2000, pp. 190–228.

¹¹ For Germany, see Richard Hauser and I. Becker, 'Wird unsere Einkommensverteilung immer ungleicher? Einige Forschungsergebnisse', in Döring, *Sozialstaat in der Globalisierung*, pp. 40–87.

chooser and entrepreneur, exploiting his or her own labour-power; by a moral view of society that accepts growing cleavages and exclusions; and by a political doctrine that trades a shrinking scope of democracy for freedoms of the market. These are the building blocks of a neo-liberal vision that does not sit well with the kind of normative self-understanding so far prevalent across Europe as a whole.

This diagnosis suggests a normatively loaded, perhaps a 'social-democratic', reading of the economic justification for the European project. It might be objected that any such partisan view must divide the political spectrum along ideological lines. But in the absence of a stronger motivation, this may be necessary to mobilize public debate. As a strategy, it is innocent insofar as its success would at best be a procedural outcome—the creation of a more encompassing political framework. A European constitution would enhance the capacity of the member states of the Union to act jointly, without prejudicing the particular course and content of what policies it might adopt. It would constitute a necessary, not a sufficient condition for the kind of policies some of us are inclined to advocate. To the extent that European nations seek a certain re-regulation of the global economy, to counterbalance its undesired economic, social and cultural consequences, they have a reason for building a stronger Union with greater international influence. Mario Telò and Paul Magnette express the hope that

Europe will develop an open regionalism that strikes an innovative balance between protectionism and free trade, social regulation and openness. The European Union is now being challenged to develop a better balance between deregulation and re-regulation than national rules have been able to achieve . . . The Union may be seen as a laboratory in which Europeans are striving to implement the values of justice and solidarity in the context of an increasing global economy.¹²

With a view to the future of a highly stratified world society, we Europeans have a legitimate interest in getting our voice heard in an international concert that is at present dominated by a vision quite different from ours.

This would be a way of giving a normative appeal to the European project for those who take a critical view of the impact of economic

¹² Mario Telò and Paul Magnette, 'Justice and Solidarity', in Cerutti and Rudolph, *A Soul for Europe*, vol. 1, p. 51.

globalization on nation-states. But even neo-liberals opposed to political goals of this kind must heed other considerations. For further reasons to move European integration forward lie in the uneasy effects of previous decisions that are now irreversible. There is first the need for a reform of EU institutions imposed by the contradiction between the limited capacity of the European Council to reach agreements among diverging member-states, and the political decision to admit several new and even less homogeneous members. The enlargement of the EU will increase the complexity of interests in need of coordination, which cannot be achieved without further integration or 'deepening' of the Union. The EU has set schedules for enlargement that put it under a self-imposed pressure for reform, but reform remains in a deadlock that the Treaty of Nice has not resolved. To date the problem of enlargement has failed to act as a lever for the solution of the more severe *structural* problems that emerge (i) from an asymmetry between a rather dense horizontal integration through markets and the rather loose vertical integration of competing national governments, and (ii) from a corresponding deficit in the democratic legitimation of EU decisions.

Positive coordination

So far national governments have retained most of their competencies for cultural, economic and social policies, while they have transferred their monetary sovereignty to an independent and supposedly unpolitical institution, the European Central Bank. They have thereby renounced an important means of state intervention. As monetary union completes the process of economic integration, the need for harmonization of major public policies increases. National governments, resting as they do on different schemes of taxation, social-policy regimes, neo-corporatist arrangements, remain entrenched in distinct legal and political traditions. They therefore tend to respond differently to the same stimuli, and the interactive effects of their disparate policies can produce mutually counterproductive backlashes. (The uncoordinated reactions of neighbouring governments to protests against the sudden rise in oil prices last year provide a harmless case in point.) National governments still compete with one another in pursuit of the most promising adaptation of their welfare regimes to fiscal constraints imposed by the 'evaluation' of global financial markets. At the same time they face the challenge to agree on minimal social standards—steps in the direction of a 'social

union', as envisaged by Delors, to promote a European-wide convergence in levels of provision and benefit.

Yet these discrepancies between an advanced economic and a retarded political integration could be overcome by the construction of higher-order political agencies, capable of 'catching up' with the pressures of deregulated markets. From this perspective, the European project can be seen as a common attempt by the national governments to recover in Brussels something of the capacity for intervention that they have lost at home. This is at any rate the view of Lionel Jospin, who has called for common economic management of the Euro-zone, and in the long run harmonization of corporation taxes within it. Such a move would also meet another well-known problem. The so-called 'democratic deficit' of European authorities, in particular of the Commission, is a source of growing dissatisfaction within the broader population—not only of the smaller states like Ireland or Denmark, or countries that have temporarily rejected entry into the Union like Norway or Switzerland. So far, the Commission has mainly pushed market-enhancement policies that require only 'negative coordination', which means that national governments are expected to refrain from doing things. Beyond this threshold, the present kind of indirect legitimation through national governments is no longer sufficient.

Regulatory policies with a widely perceived *redistributive impact* would require 'positive coordination' on both the output-side—that is, implementation—and the input-side—that is, legitimation—of a quite different kind. At present, legitimacy flows more or less through the channels of democratic institutions and procedures within each nation-state. This level of legitimation is appropriate for inter-governmental negotiations and treaties. But it falls short of what is needed for the kind of supranational and transnational decision-making that has long since developed within the institutional framework of the Union and its huge network of committees. It is estimated that European directives already affect up to 70 per cent of the regulations of national agencies. But they lack any serious exposure to a timely and careful public opinion or will-formation in those national arenas that are today alone accessible to holders of a European passport.

The opacity of decision-making processes at the European level, and the lack of opportunity for any participation in them, cause mutual distrust

among citizens. Claus Offe has described the issues that stir fears within, and arouse rivalries between, different nations—concerns over fiscal redistribution, over immigration from and investment-flows to other states, over the social and economic consequences of intensified competition between countries with different levels of productivity, and so forth. Though himself a sceptical observer, Offe suggests ‘state-building’ as the solution—a European state-building which does not reproduce the template of the nation-state—and remarks that ‘the agency that will eventually realize a regime of “organized civility” governing the entire European space . . . will have to conform to two criteria that all European states have now come to take as the standards of acceptable political rule: legitimacy and efficacy.’¹³

Civic nations

So much for the reasons why we should support and promote the project of a European Constitution in the first place. But does Europe in its present shape meet the conditions necessary for the realization of such a design—that is: for the establishment, not simply of a confederation, but a federation of nation-states? We may address first the familiar objections of the Eurosceptics, and then deal more specifically with some of the prerequisites for a Union that would assume at least some qualities of a state.

Eurosceptics reject a shift in the basis of legitimation of the Union from international treaties to a European constitution with the argument, ‘there is as yet no European people’.¹⁴ According to this view, what is missing is the very subject of a constituent process, the collective singular of ‘a people’ capable of defining itself as a democratic nation. I have criticized this ‘no-demos’ thesis on both conceptual and empirical grounds.¹⁵ A nation of citizens must not be confused with a community of fate shaped by common descent, language and history. This confusion fails to capture the voluntaristic character of a civic nation, the collective identity of which exists neither independent of nor prior to the democratic process from which it springs. Such a civic, as opposed to ethnic,

¹³ Claus Offe, ‘Is there, or can there be, a European society?’, ms. 2000, p. 13.

¹⁴ See Ernst-Wolfgang Böckenförde, *Welchen Weg geht Europa?*, Munich 1997.

¹⁵ ‘On the Relation between the Nation, Rule of Law, and Democracy’, in *The Inclusion of the Other*, Cambridge, MA 1998, pp. 129–54.

conception of 'the nation' reflects both the actual historical trajectory of the European nation-states and the fact that democratic citizenship establishes an abstract, legally mediated solidarity between strangers.

Historically, national consciousness as the first modern form of social integration was fostered by new forms of communication, the development of which was indeed *facilitated* by the stabilizing contexts of traditional communities. The fact that modern democracy and the nation-state have developed in tandem, however, does not indicate a priority of the latter over the former. It rather reveals a *circular process* in the course of which democracy and the nation-state stabilized each other. Both have jointly produced the striking innovation of a civic solidarity that provides the cement of national societies. National consciousness emerged as much from the mass communication of formally educated readers as from the mobilization of enfranchised voters and drafted soldiers. It has been shaped as much by the intellectual construction of national histories as by the discourse of competing parties, struggling for political power.

There are two lessons to be learnt from the history of the European nation-states. If the emergence of national consciousness involved a painful process of abstraction, leading from local and dynastic identities to national and democratic ones, why, firstly, should this generation of a highly artificial kind of civic solidarity—a 'solidarity among strangers'—be doomed to come to a final halt just at the borders of our classical nation-states? And secondly: the artificial conditions in which national consciousness came into existence recall the empirical circumstances necessary for an extension of that process of identity-formation beyond national boundaries. These are: the emergence of a European civil society; the construction of a European-wide public sphere; and the shaping of a political culture that can be shared by all European citizens.

A catalytic constitution

These functional prerequisites of a democratically constituted European Union project points of convergence between rather complex processes. We should not forget, however, that this convergence in turn depends on the catalytic effect of a constitution. This would have to begin with a referendum, arousing a Europe-wide debate—the making of such a

constitution representing in itself a unique opportunity of transnational communication, with the potential for a self-fulfilling prophecy. Europe has to apply to itself, as a whole, 'the logic of the circular creation of state and society that shaped the modern history of European countries.'¹⁶

A European constitution would not only make manifest the shift in powers that has already taken place. It would also release and foster further shifts. Once the European Union gained financial autonomy, the Commission assumed the functions of a government and the Council became something like a second chamber, the European Parliament would attract more attention for the better-staged and more visible exercise of competencies which are already remarkable. Full budgetary powers would not be necessary in the beginning. The focus of politics would move to some extent from national capitals to the European centres—not just through the activities of lobbyists and business organizations which have quite a strong presence in Brussels already, but through those of political parties, labour unions, civic or cultural associations, public interest groups, social movements and 'pressure from the street'—protests no longer merely by farmers or truck-drivers, but arising from the initiatives of citizens at large. Relevant interests formed along lines of political ideology, economic sector, occupational position, social class, religion, ethnicity and gender would moreover fuse *across national* boundaries.¹⁷ The perceived transnational overlap of parallel interests would give rise to cross-boundary networks and a properly European party system, displacing territorial by functional principles of organization.

Creating a public sphere

There will be no remedy for the legitimation deficit, however, without a European-wide public sphere—a network that gives citizens of all member states an equal opportunity to take part in an encompassing process of focused political communication. Democratic legitimation requires mutual contact between, on the one hand, institutionalized deliberation and decision-making within parliaments, courts and administrative bodies and, on the other, an inclusive process of informal mass communication. The function of the communicational infrastructure of

¹⁶ Offe, 'Is there, or can there be, a European society?', p. 13.

¹⁷ Philippe Schmitter, 'Imagining the Future of the Euro-Polity', in Gary Marks and Fritz Scharpf, eds, *Governance in the European Union*, London 1996, pp. 121–50.

a democratic public sphere is to turn relevant societal problems into topics of concern, and to allow the general public to relate, at the same time, to the same topics, by taking an affirmative or negative stand on news and opinions. Over time, these implicit attitudes coagulate to constitute public opinion, even though most citizens do not send public messages beyond voting or non-voting. So far, however, the necessary infrastructure for a wide-ranging generation of diverse public opinions exists only within the confines of nation-states.

A European-wide public sphere must not be imagined as the projection of a familiar design from the national onto the European level. It will rather emerge from the mutual opening of existing national universes to one another, yielding to an interpenetration of mutually translated national communications. There is no need for a stratified public communication, each layer of which would correspond, one by one, to a different 'floor' of the multilevel political system. The agenda of European institutions will be included in each of a plurality of national publics, if these are inter-related in the right way.

The pressing question 'Can the European Union become a sphere of publics?'¹⁸ is often answered from a supranational rather than a transnational perspective. If we look for monolingual (usually English-speaking) media with multinational audiences penetrating national borders we find a business elite reading the *Financial Times* and the *Economist*, or a political elite reading the *International Herald Tribune* with a digest of the *Frankfurter Allgemeine Zeitung*—which means: nothing specifically European. This is not a promising model for the audio-visual communications of a general public, even for cross-boundary communication via print media. In the audio-visual sector, the bilingual, French–German television channel *Arte* is already more plausible, though still aimed at a notionally supranational public. A real advance would be for national media to cover the substance of relevant controversies in the other countries, so that all the national public opinions converged on the same range of contributions to the same set of issues, regardless of their origin. This is what happens temporarily—if only for a few days—before and after the summits of the European Council, when the heads of the member states come together and deal with issues

¹⁸ This is the title of an informative empirical analysis by Philip Schlesinger and Deirdre Kevin in *Democracy in the European Union*, pp. 206–29.

of equal perceived relevance for citizens across Europe. The fact that these multiple, horizontal flows of communication have to pass through the filters of translation does not reduce their essential significance.

Within the present Union of fifteen members there are thirteen different, officially recognized languages. This constitutes at first glance an embarrassing obstacle to the formation of a shared polity for all. The official multilingualism of EU institutions is necessary for the mutual recognition of the equal worth and integrity of all national cultures. However, under the veil of this legal guarantee it becomes all the easier to use English as a working language at face-to-face level, wherever the parties lack another common idiom.¹⁹ This is in fact what now happens anyway, in ever wider circles. Small countries like the Netherlands, Denmark, Norway or Sweden provide good examples of the capacity of formal education in schools to spread English as a second 'first' language, across their whole populations.²⁰

Sharing a political culture

The generation of a European public opinion depends on the vital inputs of actors within a European civil society. At the same time, a European-wide public sphere needs to be embedded in a political culture shared by all. This widely perceived requirement has stimulated a troubled discourse among intellectuals, since it has been difficult to separate the question 'What is Europe?' from the fact that the achievements of European culture—which did not, in fact, seriously reflect upon its own nature and origin until the eighteenth or nineteenth centuries—have been diffused across the globe.²¹ The main religion in Europe, Christianity, obeyed its missionary imperative and expanded all over the world. The global spread of modern science and technology, of Roman law and the Napoleonic Code, of human rights, democracy and the nation-state started from Europe as well. Let me therefore mention

¹⁹ Peter Kraus, 'Von Westfalen nach Kosmopolis. Die Problematik kultureller Identität in der Europäischen Politik', *Berliner Journal für Soziologie*, no. 2, 2000, pp. 203–18; and 'Political Unity and Linguistic Diversity in Europe', *Archives Européennes de Sociologie*, 41, 2000, pp. 138–63.

²⁰ Kraus cites a poll finding that even a majority of the German-speaking Swiss prefer English to the two other national languages for communication across linguistic borders.

²¹ Pim den Boer, 'Europe as an Idea', *European Review*, October 1998, pp. 395–402.

two more specific experiences of our countries that resonate still in the rather remarkable responses they have evoked. For Europe has, more than any other culture, faced and overcome structural conflicts, sharp confrontations and lasting tensions, in the social as well as in the temporal dimension.

In the social dimension, modern Europe has developed institutional arrangements for the productive resolution of intellectual, social and political conflicts. In the course of painful, if not fatal struggles, it has learnt how to cope with deep cleavages, schisms and rivalries between secular and ecclesiastical powers, city and countryside, faith and knowledge, and how to get along with endemic conflicts between militant religious confessions and belligerent states. In the temporal dimension, modern Europe has institutionalized a comprehensive spectrum of competing conservative, liberal and socialist interpretations of capitalist modernization, in an ideological system of political parties. In the course of a heroic intellectual appropriation of a rich Jewish and Greek, Roman and Christian heritage, Europe has thus learnt a sensitive attitude and a balanced response, both to the deplorable losses incurred by the disintegration of a traditional past and to the promise of future benefits from the 'creative destruction' of present productivity.

These are dispositions that act as a spur to critical reflection on our own blind spots, and to a de-centering of selective perspectives. They are not in contradiction with the well-taken—and only too deserved—critique of our aggressive colonial and Eurocratic past; the critique of Eurocentrism itself emerges from a continuing self-criticism. The secularization of the egalitarian and individualist universalism that informs our normative self-understanding is not the least among the achievements of modern Europe.

The fact that the death penalty is still practised elsewhere—even in the United States—reminds us of some specific features of our heritage:

The Council of Europe with the European Convention of Human Rights, and its European Social Charter, have transformed Europe into an area of human rights, more specific and more binding than in any other area of the world . . . The clear and general European support for International Crimes Tribunal, again in contrast to US fears, is also in the same line.²²

²² Therborn, 'Europe's Break with Itself', p. 49 ff.

What forms the common core of a European identity is the character of the painful learning process it has gone through, as much as its results. It is the lasting memory of nationalist excess and moral abyss that lends to our present commitments the quality of a peculiar achievement. This historical background should ease the transition to a post-national democracy based on the mutual recognition of the differences between strong and proud national cultures. Neither 'assimilation' nor 'coexistence'—in the sense of a pale *modus vivendi*—are appropriate terms for our history of learning how to construct new and ever more sophisticated forms of a 'solidarity among strangers'. Today, moreover, the European nation-states are being brought together by the challenges which they all face equally. All are in the process of becoming countries of immigration and multicultural societies. All are exposed to an economic and cultural globalization that awakes memories of a shared history of conflict and reconciliation—and of a comparatively low threshold of tolerance towards exclusion.

This new awareness of what Europeans have in common has found an admirable expression in the EU Charter of Basic Rights. The members of the 'Convention', as it is called, reached agreement on this document within a remarkably short space of time. Even though the European Council in Nice only 'proclaimed' and did not adopt in binding fashion its catalogue of basic rights, the Charter will exert a decisive influence on the European Court of Justice. Thus far the Court has been primarily concerned with the implications of the 'four freedoms' of market participation—free movement of persons, goods, services and capital. The Charter goes beyond this limited view, articulating a social vision of the European project.²³ It also shows what Europeans link together normatively. Reponding to recent developments in biotechnology, Article 3 specifies each person's right to his or her physical and mental integrity, and prohibits any practice of positive eugenics or the reproductive cloning of human organisms.

Designing a framework

Taking it as a premise that a European Constitution is both feasible and desirable, let me finish with a few remarks on some problems to do with

²³ Wolfgang Däubler, 'In bester Verfassung', *Blätter für deutsche und internationale Politik*, November 2000, pp. 1315–21.

its design. Joschka Fischer has outlined the challenge we face—how to find the right combination of a ‘Europe of nation-states’ with a ‘Europe of citizens’.²⁴ He has also mentioned some more or less conventional alternatives for strengthening the European Parliament, establishing an effective and legitimate executive, and creating a democratically accountable Court of Justice.²⁵ These proposals do not exhaust the range of imaginative options, but Fischer rightly focuses on the core problem of a federation of nation-states that need to preserve their integrity by occupying a much more influential position than the constituent elements of a federal state normally do.²⁶ The intergovernmental element of negotiation between former nation-states will remain strong. Compared with the presidential regime of the USA, a European Union of nation-states would have to display the following general features:

- ▶ a Parliament that would resemble the Congress in *some* respects (a similar division of powers and, compared with the European parliamentary systems, relatively weak political parties);
- ▶ a legislative ‘chamber of nations’ that would have more competencies than the American Senate, and a Commission that would be much less powerful than the White House (thus splitting the classical functions of a strong Presidency between the two);
- ▶ a European Court that would be as influential as the Supreme Court for similar reasons (the regulatory complexity of an enlarged and socially diversified Union would require detailed interpretation of a principled constitution, cutting short the jungle of existing treaties).²⁷

²⁴ Joschka Fischer, *Vom Staatenverbund zur Föderation* (speech at Humboldt University on 12 May 2000), Frankfurt 2000.

²⁵ Fischer offers an option between the models of the US Senate and the German Bundesrat for the second chamber, and a choice between two constructions, one developed from the European Council of Ministers, and the other resembling the present Council, but with a directly elected president, for the executive.

²⁶ In this respect Article 3 of the new Swiss Constitution is interesting, in that it applies the principle of subsidiarity to yield a rather strong position to the constitutive units: ‘The cantons are sovereign, so long as their sovereignty suffers no restriction from the federal constitution; they exercise all rights that are not transferred to the confederation’.

²⁷ See the study for a reorganization of the treaties: European University Institute, *Ein Basisvertrag für die Europäische Union*, May 2000.

In this context a few remarks may be in place.

1. The political substance of a European Constitution would consist of a definite answer to the issue of the territorial boundaries of the Union, and a not-too-definite answer to the question of how competences are to be distributed between federal and national institutions. It is important to settle soon the thorny problem of which countries will finally belong to, and which are to be excluded from, the Union; the determination of frontiers is compatible with a 'variable geometry' that would facilitate the process. For the time being, we might differentiate between a centre and a periphery, depending on the pace and degree of integration. The issue of a 'Europe of different speeds' touches on the problem of a provisional regulation of competences which leaves some room for experiments.

The embattled delimitation of what is to be reserved for executive authorities, what is up for co-legislation and what remains in the competence of national legislatures must certainly be settled in broad outline from the beginning. But this part of the organizational nucleus of the Constitution should be kept open for revisions at fixed dates, so that we can learn from unanticipated consequences within a stable framework. Such a temporalization of essential clauses squares with the idea of a democratic constitution as an ever more exhaustive realization of a system of basic rights under changing historical circumstances.²⁸

2. 'Subsidiarity' is the functional principle that meets the needs of the diverse and territorially distinct units of a federation. But the wider the differences—in size of territory and population, economic weight and level of development, political power and cultural form of life or collective identity—between these constituent units, the greater the danger that majority decisions at the higher instances will violate the principles of equal protection and mutual recognition of diversity. Structural minorities limit the range of valid majority decisions. In such situations, legitimacy can only be secured on the condition that some areas are reserved for consensual negotiations. As we know from countries like Switzerland or the Netherlands, however, consensual procedures suffer from a lack of transparency. Here

²⁸ See my argument in *Between Facts and Norms*, Cambridge, MA 1996, chapter 9.

European-wide referenda would give citizens broader opportunities and more effective means to participate in the shaping of policies.²⁹

3. Some minor suggestions are worth consideration. It would help to overcome the legitimization deficit, and to strengthen the connexions between the federal legislature and national arenas, either if certain members of the European Parliament at the same time held seats in their respective national parliaments, or if the largely neglected Conference of European Affairs Committee (which has met twice a year since 1989) could reanimate horizontal debate between national parliaments and so help to prompt a re-parliamentarization of European politics.³⁰ Are there alternative modes of legitimization too? The approach labelled 'comitology' attributes legitimating merits to the deliberative politics of the great number of committees working in support of the Commission.³¹ But here there is a deficit on the output as well as input side, since federal legislation is implemented only through national, regional and local authorities. To meet this problem, Ingo Pernice has suggested transforming the present Committee of Regions into a chamber that would give sub-national state actors a stronger influence on EU policies, and thereby facilitate the enforcement of European law on the ground.³²

The politics of unification

For European unification to move forward, however, there still remains a vacant space which would have to be filled by the political will of competent actors. The overwhelming majority of the population that is currently resistant or hesitant can only be won for Europe if the project is extricated from the pallid abstraction of administrative measures and

²⁹ Edgar Grande, 'Post-National Democracy in Europe', in Michael Greven and Louis Pauly, eds, *Democracy beyond the State?*, Oxford 2000, pp. 115–38; and 'Demokratische Legitimation und europäische Integration', *Leviathan*, no. 24, 1996, pp. 339–60.

³⁰ Lars Blichner, 'Interparliamentary discourse and the quest for legitimacy', in Eriksen and Fossum, *Democracy in the European Union*, pp. 140–63.

³¹ Christian Joerges and Michelle Everson, 'Challenging the bureaucratic challenge', in Eriksen and Fossum, *Democracy in the European Union*, pp. 164–88.

³² 'Which institutions for what kind of Europe?', ms. 1999. For another conception, see Dominique Rousseau, 'Pour une constitution européenne', *Le Débat*, January–February 2000, pp. 54–73.

technical discourse: in other words, is politicized. Intellectuals have not picked up this ball. Still less have politicians wanted to burn their fingers with such an unpopular topic. The fillip given to a constitutional debate by Fischer's speech at the Humboldt University, prompting Chirac and Prodi, Rau and Schroeder to react with their own suggestions, is all the more noteworthy. But it is Jospin who has pointed out that no reform of procedures and institutions can succeed before the content of the political project behind it becomes clearer.

The markedly national orientation of the Bush Administration can be regarded as an opportunity for the EU to define a more distinctive foreign and security policy towards the conflicts in the Middle East and the Balkans, and relations with Russia and China. Differences that are coming more into the open in environmental, military and juridical fields contribute to a soundless strengthening of European identity. Still more important is the question of what role Europe wishes to play in the Security Council and, above all, in world economic institutions. Contrasting justifications of humanitarian intervention, not to speak of basic economic outlooks, divide the founder states of the EU from Great Britain and Scandinavia. But it is better to bring these smouldering conflicts out into the open than to let the EU splinter over dilemmas that remain unresolved. In any case, a Europe of two or three speeds is preferable to one that breaks up or crumbles away.

Jospin's hint at what the 'mechanism for strengthened cooperation' agreed at Nice might mean was unmistakable: 'Naturally it could be applied to the coordination of economic policy in the Euro-zone, but also in fields like health and military procurements. With this kind of cooperation, a group of states that has always been indispensable could once again give new impetus to the construction of Europe.' A sober calculation of interests could well induce the French and German governments to seize the initiative again, once next year's elections to the Elysée and the Bundestag are over. The *International Herald Tribune* has dryly commented: 'In the last resort, the French will be prepared to pay a certain price for Berlin not becoming the capital of Europe'.³³ In line with the policies of Genscher and Fischer, Germans would be well advised to agree. Since diplomacy is at an impasse, open political controversy over the direction in which the EU should develop

³³ 12 June 2001.

can only be of benefit. The constitutional–legal dispute between ‘federalists’ and ‘sovereignists’ masks a substantive dispute between those like Jospin, who regard harmonization of important national policies as urgent, and those like Schroeder, who would like a façade of tailor-made central institutions deprived of all significant fiscal powers. All sides, however, can agree that delimitation of the competences of federal, national and regional levels is the core political issue to be settled by any European constitution.