http://europa.eu.int/comm/dg10/university/
http://europa.eu.int/comm/dg10/university/post_nice/index_en.html

La "Cité Idéal", par un artiste inconnu,
fin du XVème siècle, Galerie Nationale des Marche, Palais Ducale en Urbino, Marche

EUROPEAN COMMISSION

Education and Culture

Action JM

EUROPE 2004

LE GRAND DEBAT

Setting the Agenda and Outlining the Options

Brussels, 15 and 16 October 2001

EUROPEAN COMMISSION

Education and Culture

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Préface

Dans le cadre de sa collaboration avec le monde académique au sein de l'Action Jean Monnet, la Commission européenne a organisé à Bruxelles, le 15 et le 16 octobre 2001 un colloque « EUROPE 2004 – LE GRAND DEBAT ». Environ 150 professeurs Jean Monnet y ont participé ainsi qu'un grand nombre de membres du Parlement européen, de l'euro-sphère et de fonctionnaires des institutions.

Ce colloque s'insère dans le cadre de l'exercice de réflexion sur l'avenir de l'Europe après le Traité de Nice et se veut une importante contribution du monde scientifique « Jean Monnet » à cette réflexion d'ensemble ainsi qu'un apport au débat à deux mois du sommet de Laeken. Le colloque a permis de valoriser la collaboration scientifique dans la matière et a également constitué une première réflexion en commun.

Comme en 1996, lors de la négociation du Traité d'Amsterdam et en 2000 lors de la négociation du Traité de Nice, les professeurs Jean Monnet ont apporté leur contribution scientifique et critique au débat sur la réforme institutionnelle.

En avril dernier, Monsieur Romano Prodi, Président de la Commission européenne et Madame Viviane Reding, Membre responsable de l'éducation et de la culture, ont envoyé un message à l'ensemble des professeurs Jean Monnet[1] invitant la communauté académique à participer à ce « grand débat » et à engager une analyse approfondie sur le contenu des politiques de l'Union, la manière de les conduire et la poursuite des réformes fondamentales.

Ce colloque a permis d'aborder le « grand débat » sous différents angles. Trois thèmes ont ainsi été retenus, sur lesquels juristes, économistes et politologues pouvaient largement s'exprimer :

1. L'Europe 2004 – Le débat sur l'avenir de l'Europe : processus et acteurs

2. La constitution de l'Europe

3. La gouvernance de l'Europe

Les actes du colloque, qui reprennent l'ensemble des contributions, permettent d'apprécier la qualité de la réflexion qui a été entreprise et la diversité des apports.[2]

Je tiens à remercier tout spécialement les membres du comité scientifique pour leur soutien dans la préparation et l'organisation du colloque: M. Michel Petite et les Professeurs Joseph H. H. Weiler, Rainer Arnold, Roland Bieber, Rudolf Hrbek, Yves Mény et Mario Teló.

Nikolaus G. van der Pas
Directeur Général, DG Education et Culture

[1] http://europa.eu.int/comm/dg10/university/message_fr.html
[2] Adresse Website Conférence « Europe 2004 – Le grand débat »
English: http://europa.eu.int/comm/dg10/university/post_nice/index_en.html
Français: http://europa.eu.int/comm/dg10/university/post_nice/index_fr.html

Message d'accueil
Le débat sur l'avenir de l'Union européenne

Mme Viviane Reding
Commisaire Européenne chargé de l'éducation et de la culture

Le colloque

C'est un grand honneur pour moi de me trouver aujourd'hui devant cette prestigieuse assemblée d'universitaires, haut lieu de la connaissance européenne composé de spécialistes reconnus en intégration européenne.

Je suis particulièrement heureuse de l'occasion qui m'est donnée de vous rencontrer et de participer à vos travaux précisément au moment où l'Europe et le monde traversent une phase décisive de leur histoire et au moment où le plus grand débat sur l'avenir de l'Europe a été lancé.

Le colloque « Europe 2004 » est une initiative du Président Prodi et de moi-même. Nous attendons de cette conférence l'importante contribution scientifique et critique des professeurs Jean Monnet à cette réflexion d'ensemble ainsi qu'un apport au débat à deux mois du sommet de Laeken.

En effet, dans un message envoyé en avril dernier à l'ensemble des professeurs Jean Monnet via le site Internet de l'Action, le Président Prodi et moi-même, avons invité la communauté académique à participer au grand débat post-Nice et à engager une analyse approfondie sur le contenu des politiques de l'Union et la manière de les conduire, ainsi que sur la poursuite des réformes fondamentales.
Notre message annonçait également la tenue du colloque qui s'ouvre aujourd'hui.

C'est avec plaisir que Romano Prodi et moi-même avons constaté combien notre invitation a été bien accueillie au sein du monde académique. Elle a favorisé une série d'initiatives au niveau local et régional. Parallèlement, les plus grands spécialistes académiques dans les domaines scientifiques concernés ont répondu présent lorsqu'ils ont été invités à intervenir lors du colloque. Je les remercie chaleureusement et remercie tout particulièrement les co-Présidents du Comité scientifique qui a construit cette manifestation, le professeur Joseph Weiler, et Monsieur Michel Petite.

Je remercie également tous les participants d'être venus au Colloque et d'avoir assuré une réflexion préparatoire aussi riche. Je remercie enfin le Conseil universitaire européen, en la personne de son Président Monsieur Gil-Robles, pour le rôle de partenaire qu'il assume aux côtés de la Commission.

L'Action Jean Monnet

En ma qualité de Membre de la Commission responsable de l'éducation et de la culture, je suis frappée par la force de travail des réseaux Jean Monnet, qui sont devenus au fil du temps, un puissant vecteur pour la diffusion des connaissances sur l'intégration européenne et pour l'émergence d'un sentiment d'appartenance à l'Union.

L'Action Jean Monnet est implantée désormais de par le monde et vous êtes déjà présents sur tous les continents. Je m'en félicite. Cet intérêt croissant du monde académique non-européen marque bien à quel point la construction européenne est un phénomène unique qui constitue un sujet d'étude passionnant parce qu'il propose un modèle politique particulièrement original, dense et complexe.

Je me réjouis de l'occasion qui m'est offerte aujourd'hui de vous annoncer que, dès l'année prochaine, l'Action Jean Monnet poursuivra la création d'enseignements à l'intérieur de l'Union, en même temps qu'elle continuera à se développer en direction des pays candidats à l'adhésion et des universités du monde. L'intérêt que le Parlement européen porte à cette Action, ainsi que son soutien, ont été essentiels à cette évolution.

La Commission européenne et le Parlement européen n'oublient pas que votre rôle dans la diffusion des connaissances sur l'intégration européenne et la sensibilisation du public à ses enjeux a été déterminant dans les pays fondateurs. En outre, l'activité des universités a permis de rapprocher le monde académique des décideurs et des responsables politiques.

C'est un fait que la réflexion académique est indispensable aux politiques.

Les milieux académiques sont un segment influent de la société civile, et la Commission se réjouit des relations de confiance qui se sont développées entre nous. La synergie est porteuse car elle part de la réflexion indépendante propre à votre statut d'académiques. Pour ma part, j'ai suivi avec le plus grand intérêt vos derniers travaux sur l'élargissement et sur la gouvernance. Ces travaux ont abordé des problèmes sensibles de la construction communautaire et attiré l'attention par la pertinence de leurs conclusions

Aussi, je me réjouis du dialogue qui s'est développé entre nous et je souhaite donner à l'avenir un plus grand rayonnement aux conclusions de vos travaux.

Europe 2004 - Le débat

Il est très important, pour ceux qui ont la chance de faire partie de cette Europe unie, d'être à l'écoute de ce que les observateurs extérieurs ont à dire sur cette construction, ses caractéristiques, ses atouts, mais aussi ses lacunes. A l'heure actuelle, l'apport conceptuel que vous représentez, me semble de plus en plus essentiel.

Nous sommes tous d'accord : les réformes institutionnelles décidées par le Traité de Nice sont insuffisantes pour une Union élargie à 12 nouveaux membres ainsi qu'à la poursuite de certaines politiques. C'est pourquoi, il a été décidé de procéder avant 2004 à une nouvelle réforme des Traités à laquelle les Etats candidats devront être associés.

Pour ma part, je suis convaincue de la nécessité de repenser notre façon de construire l'Europe, pour servir de modèle d'innovation dans les rapports entre les citoyens et les institutions politiques, à une époque historique où la transparence et la responsabilité deviennent les nouvelles règles de gouvernement. Le sommet de Nice a défini le scénario politique dans lequel s'inscrit ce projet.

Après l'adoption de la déclaration de Nice sur l'avenir de l'Europe par la Conférence intergouvernementale, un grand débat s'est en effet ouvert sur l'avenir de l'Union européenne et ses finalités ultimes.
Dans cette perspective, l'analyse de deux points est préalable :

1- Le type de **processus** qui permettra d'aboutir à la reforme de 2004 et quels seront les acteurs du débat lui-même ?.

2- La définition des **grands thèmes** qui devront être pris en compte dans la réforme avant 2004 :

La Commission a présenté en juillet de cette année son Livre Blanc sur la Gouvernance européenne fidèle à son engagement de rendre l'Europe plus proche des citoyens. L'exercice a été mené à Traité constant mais la question d'une Constitution pour l'Europe reste posée par le Conseil européen de Nice.

Je constate avec satisfaction que ces sujets fondamentaux constituent les axes sur lesquels est bâti le programme de ce colloque.

Mais encore, quels sont les principes qui doivent gouverner la réforme de 2004 ? . Sans aucun doute, la **démocratie**, en rendant possible la participation active au débat de chaque secteur de la société. Mon ami José María Gil-Robles affirme que la méthode retenue doit être démocratique et non diplomatique. Je suis d'accord. Ensuite, la **transparence**, puisque l'opinion publique doit être associée au processus.

Vous avez décidé de traiter lors du colloque trois des quatre grands thèmes de la réforme identifiés à Nice :

-La **délimitation des compétences** entre l'UE et les Etats membres ; Quelle Europe veut-on faire compte tenu de la globalisation et de la modification du contexte européen et international ? Quelle répartition de compétences entre l'Union et les Etats membres ? Quelle solution au problème du financement des politiques ?

-La **simplification des Traités** : Faut-il s'orienter vers une Constitution ?

-Le **statut de la Charte des droits fondamentaux de l'UE**. Les Européens attendent beaucoup de l'Europe, ils demandent que leur appartenance à l'Union soit chargée de valeurs, que la personne humaine sera placée au centre du débat. C'est pourquoi je souhaite, tout comme Romano Prodi que cette Charte fasse partie intégrante des Traités.

Je suis persuadée que José María Gil-Robles nous éclairera avec sa longue expérience sur la nature de la construction européenne, modèle d'évolution et non de révolution, sur les limites à

l'architecture constitutionnelle et sur la nécessité de fonder la légitimité de l'Union sur celle des citoyens.

A mon avis, il est temps de revenir à la formule géniale consacrée par les pères fondateurs de l'Europe : la méthode communautaire. C'est ainsi que l'on est arrivé à contourner le dilemme entre un 'super Etat' et 'différents Etats autonomes'. C'est ainsi que l'Europe a écrit l'Histoire. Mais, sans institutions fortes et respectées, sans moyens financiers, il n'y aura pas non plus « d'Europe puissance ».

La tâche qui nous attend ne se limite pas à adapter les institutions et à réformer des procédures pour réussir l'élargissement. Les enjeux et les défis qui sont au cœur de cette prochaine Conférence Intergouvernementale touchent à l'essentiel et à l'avenir même du processus de l'intégration européenne. Ils sont déterminants pour l'avenir des citoyens de l'Union autant que pour celui d'un grand nombre d'européens en dehors de l'Union.

Et il est très important, pour ceux qui ont la chance de faire partie de cette Europe unie, d'être à l'écoute de ce que les observateurs extérieurs ont à dire sur cette construction dans le contexte du débat sur l'avenir de l'Europe à horizon 2004.

En mai 1996 et en juillet 2000, lors de vos précédents exercices de réflexion à la veille de la conférence d'Amsterdam et de Nice, les professeurs Jean Monnet avaient formulé des propositions pertinentes qui ont été accueillies avec intérêt par les politiques. Les travaux préparatoires des professeurs, accessibles sur le site Internet de l'Action Jean Monnet, laissent penser que ce colloque pourra, une fois encore, faire des propositions utiles.

En tout état de cause, le colloque que j'ai l'honneur d'ouvrir en ce moment vient parfaitement à son heure. La Commission, comme tous les acteurs qui se trouvent autour de la table des négociations, prendra connaissance avec grand intérêt des options qui en résulteront et des conclusions qui seront formulées.

L'Europe dans le monde

Le 12 septembre, au Parlement européen, suite aux horribles attentats terroristes perpétrés la veille contre les Etats unis, Romano Prodi a déclaré :

« Gli eventi drammatici a cui abbiamo assistito sottolineano ancora una volta la necessità di una Europa unita, forte, determinata, solidale, che protegga la libertà e salvaguardi la pace, in Europa e nel mondo. Un'Europa che agisce unita accanto ai paesi che condividono gli stessi obiettivi per la protezione e la promozione dei valori di libertà e di solidarietà che costituiscono il fondamento della democrazia europea.

Mi appello affinché la tragedia di ieri accompagni le nostre riflessioni su questi avvenimenti. I nostri cittadini potranno garantire la pace e la stabilità per se stessi e per i loro figli solo agendo solidalmente, solo se sentiranno di poter contare sull'Europa.

Questo è l'interesse di lungo termine dei nostri popoli, questa è la nostra via. Si tratta di perseguirla con coraggio e determinazione ».

Merci à tous d'être venus, pour certains de très loin, pour participer à cette conférence et nous apporter votre soutien.

La route sera longue jusqu'en 2004. La réflexion des professeurs nous accompagnera tout au long du parcours. Forte de cette conviction, je vous souhaite un colloque passionnant et je vous remercie pour la contribution tout à fait spécifique et active que vous apportez à la construction européenne.

Discours d'ouverture

M. José María Gil-Robles
Député au Parlement européen
Président du Conseil universitaire européen pour l'Action Jean Monnet

1. Introduction

En tant que Président du Conseil universitaire Jean Monnet je tiens à adresser mes remerciements à Mme Reding pour son chaleureux message d'accueil. Mme la Commissaire a su exprimer d'une façon aussi cordiale que précise ce que la Commission attend de ce colloque, qui s'inscrit dans le cadre de l'exercice de réflexion sur l'avenir de l'Europe après le Traité de Nice.

M. Prodi et Mme Reding ont adressé une invitation à l'ensemble des professeurs Jean Monnet à participer à ce débat. Cette heureuse initiative appelle de notre part non seulement les plus vifs remerciements, mais notre engagement à donner le meilleur de la communauté académique Jean Monnet à la construction d'un avenir qui se présente comme étant aussi difficile qu'exaltant, et qui intéresse chaque jour davantage les citoyens européens.

Le colloque qui démarre aujourd'hui sera, j'en suis sûr, un exemple de cet engagement. Et je tiens à remercier vivement tous ceux engagés dans la préparation et l'organisation: le comité scientifique c'est-à-dire: M. Michel Petite et les Professeurs Arnold, Bieber, Hrbek, Meny, Telo et Weiler, ainsi que l'équipe dirigée par Mme Belén Bernaldo de Quirós et le Secrétariat du Conseil universitaire européen pour l'Action Jean Monnet. Tous ont œuvré avec dévouement pour que tout soit prêt à temps.

Ces devoirs de gratitudes accomplis, je me propose de lancer quelques réflexions, non sur le fond du débat **-** cela serait déplacé avant le débat lui-même - mais sur les conditions politiques qui encadreront les décisions à prendre autour de 2004 sur l'avenir de l'Union européenne.

2. Les limites du "constitutional engeneering"

Le "génie constitutionnel" n'opère pas dans le vide. Rares sont les exemples dans l'histoire d'une mise à plat de l'ensemble des institutions politiques pour les reconstruire en partant de zéro. Moins encore si cet ensemble institutionnel date seulement d'un demi-siècle, qu'il est truffé d'adaptations concernant les institutions elles-mêmes et leur fonctionnement, et si en plus on peut caractériser l'histoire de ce demi-siècle comme un franc succès.

Ces affirmations sont sans doute des lapalissades, mais on oublie très souvent ces lapalissades quand la refonte de l'Union européenne est concernée. Je pourrais même dire sans exagérer que la littérature politique et scientifique sur les réformes à introduire dans les traités est, depuis l'origine des Communautés, le domaine par excellence du "wishful thinking", les résolutions du Parlement européen n'échappent d'ailleurs pas à cette règle.

L'originalité de la construction européenne favorise cette approche, poussant tout à chacun à lancer ses idées et ses solutions sans véritablement se soucier des possibilités de les insérer sans trop d'accrocs dans une structure existante, oubliant que la règle d'or de la politique est de résoudre un problème sans en créer un nouveau, plus grand encore.

Cette règle a mené les responsables politiques européens à faire évoluer les Communautés, puis la Communauté, puis l'Union d'une façon extrêmement prudente. Non seulement par petit pas, mais en tâtant soigneusement le terrain à chaque nouveau pas. Souvent j'ai remarqué que le symbole le plus approprié pour représenter notre Union n'est pas un de ces animaux puissants et orgueilleux auquel font appel les Nations - le lion, l'aigle,..etc - mais l'humble tortue! Celle qui fait "clopin, clopant" son petit bout de chemin et finit par devancer le lièvre. Elle n'est pas belle, elle ne suscite pas l'enthousiasme, mais elle est efficace et endurante. Ce n'est pas si mal!

3. Evolution et non révolution

On peut parier, que la CIG prévue pour 2004 ne s'écartera pas de cette tactique prudente. On agrandit une maison solide, on organise mieux son intérieur, mais on ne se lance pas dans la construction d'un nouvel édifice alors que celui qui existe peut encore prêter de bons et loyaux services. Cette approche n'est évidemment pas incompatible avec une perspective d'ensemble ni avec une ambition plus importante qui viserait à réaliser, non la refonte définitive de l'Union - ce ne serait pas faisable ni même souhaitable -, mais au moins les agencements nécessaires pour ne pas avoir à recommencer tous les quatre ans.

La stabilité institutionnelle est un atout, tant du point de vue de la sécurité juridique, que de la possibilité de tirer toutes les potentialités d'un système ou de son enracinement dans la société.

On peut ainsi prévoir, sans trop de risque, que cette évolution se fera sans s'écarter des grandes options faites au début de la construction européenne- Rappelons-les:

- union politique comme but, l'union économique étant un instrument pour arriver à ce but;

- union d'Etats qui mettent une partie de leur souveraineté en commun, tout en conservant leur propre organisation interne;

- union ouverte à d'autres états avec un statut d'égalité dans l'essentiel;

- union démocratique, sur un modèle parlementaire;

- union à moyens financiers suffisants pour avoir des politiques propres;

Comment ces options se sont-elles traduites au long de ces cinquante premières années? Comment peuvent-elles conditionner la CIG de 2004 ?

4. L'acceleration de l'union politique

Depuis la Déclaration du 9 mai 1950 l'union politique est à l'horizon du processus d'intégration européenne. Il est vrai que la priorité a été donnée à l'union économique durant ce premier demi-siècle, l'urgence étant d'assurer de solides liens d'intérêts communs entre les partenaires européens avant de bâtir sur cette base une superstructure politique. Ce n'était pas une mince tâche et les difficultés ont été plus grandes que prévu. Mais même si elle n'est pas

complètement achevée, les fondements sont désormais suffisamment solides pour appuyer sur eux l'union politique, dont le moment est venu.

La dimension désormais transnationale des grandes organisations criminelles, d'un côté, le phénomène migratoire et le brassage des populations de l'autre, exigeaient déjà cette union en ce qui concerne le volet de la justice et des affaires intérieures. Les attentats du 11 septembre semblent avoir donné un fort coup d'accélérateur, nos populations ayant brutalement pris conscience des carences dans ce secteur et de l'urgence de les combler.

Bien sûr, la tension du moment ne pourra pas durer trop longtemps, mais les défis qui sont à la base de cette tension ne seront pas surmonter de si tôt. La demande d'un espace européen de liberté et de sécurité sera donc forte, et elle ne sera pas satisfaite par des procédures de coopération intergouvernementale, dont l'inefficacité est avérée. La pression pour une communautarisation des politiques dans ce volet pèsera donc fortement sur la prochaine CIG.

Quant à la politique étrangère et défense, elle a toujours avancé à coup de crises, sans toutefois parvenir à répondre aux défis par des politiques communes. Les peuples sont par définition peu enclins à se lancer dans des politiques de puissance tant qu'ils ne voient pas leur sécurité menacée, l'alliance américaine agissant comme un élément dissuasif pour une défense et même une politique étrangère européenne. Les élites politiques nationales, de leur côté, tentent de s'accrocher désespérément aux symboles d'une puissance qui leur a désormais échappé. Nous assistons, à l'occasion de la crise actuelle, aux efforts des Etats les plus grands de l'Union pour trouver un certain rôle dans l'alliance contre le terrorisme, les moyens et les plus petits Etats se contentant pudiquement de jouer sous la houlette des USA avec plus ou moins d'enthousiasme.

Le déroulement des événements sera-t-il suffisant pour rompre cette inertie et pousser les Européens à enfin franchir le fossé existant entre la coopération et la communautarisation? Je n'ai pas d'éléments qui autorisent à parier sur cette hypothèse d'ici 2004. On peut s'attendre au moins à une coopération renforcée et plus visible. Le monde attend des européens qu'ils assument leur rôle en matière de promotion et de maintien de la paix.

5. Union des etats, non de regions

S'il y a un domaine ou le principe de subsidiarité a toujours été appliqué et doit continuer à l'être, c'est celui de l'organisation interne des Etats membres de l'Union.

Nous assistons bien sûr à une gigantesque redistribution du pouvoir politique à l'intérieur de l'Union. Cette redistribution tend à ajouter deux niveaux: la région et l'Union européenne, à ceux classiques de la commune et de l'état. Mais cette redistribution n'est partout uniforme, les traditions constitutionnelles étant heureusement - j'insiste sur ce mot - trop différentes pour pouvoir arriver à une harmonisation en la matière. L'erreur de nos aïeuls, qui ont morcelé les régions en départements comme moyen le plus sûr de la centralisation, ne doit pas être répétée.

Les décisions politiques au sein de l'Union exigent la concurrence entre deux légitimités: celle des Etats membres, dont les organes sont le Conseil européen et le Conseil, et celle des citoyens, qui s'exprime par la voix du Parlement européen. Ajouter à ce schéma, assez simple pour être efficace, des organes de représentation des régions ou des communes, ne ferait que compliquer ou retarder le processus décisionnel. Les expériences constitutionnelles de multiplication des chambres représentatives se sont, vous le savez bien, toujours soldées par des échecs. Les régions, les communes sont des éléments de l'Etat, et c'est à lui qu'il revient

d'organiser leur participation dans les décisions communautaires et dans leur exécution, selon le cadre constitutionnel de chaque Etat.

6. Union à la Bismarck ou union à l'Adenauer ?

L'intégration européenne est ouverte, depuis son début, a tout état européen qui respecte les principes de la liberté, de la démocratie, du respect des droits de l'homme et des libertés fondamentales, ainsi que de l'état de droit.

En fait, les six Etats fondateurs sont passés à neuf, puis à douze puis aux quinze actuels; le processus de réunification de l'Europe aux Etats de sa moitié orientale étant maintenant définitivement lancé. Et tout cela sur un pied d'égalité, sans que les six se soient octroyés des droits spéciaux. L'axe franco-allemand a certainement joué dans la construction de l'Europe unie un rôle qui ne peut être sous-estimé. Ce serait stupide de le nier. L'axe franco-allemand a fait avancer l'Europe quand il a marché bien et pèsera toujours, même après l'élargissement, d'un poids très important. Cependant, et par la force des choses ce poids tend à diminuer à mesure que l'Union grandit.

L'expérience de la première unification allemande nous a montré que le rassemblement autour d'un noyau dur - la Prusse dans le cas d'espèce - a provoqué plus de conflit qu'il en n'a résolu. Après la deuxième guerre mondiale, la République fédérale s'est organisée sur un modèle polycentrique. Les "pères fondateurs" de l'Union européenne sans doute avaient-ils à l'esprit ces expériences quand ils ont choisi pour la première Communauté le modèle polycentrique, en privilégiant le rôle des "petits Etats" et leur représentation dans les organes communautaires.

Il y a eu des tentatives d'abandonner ce modèle au profit d'un directoire des "grands", la dernière en date étant à Nice. Mais toutes ont échoué et le modèle polycentrique reste inchangé dans l'essentiel.

On peut certes rêver d'une Europe à géométrie variable, à un noyau dur, à un noyau lourd. Mais "les mots ne font pas la chose", et la réalité est que quelques Etats peuvent toujours traîner la patte sur l'un ou l'autre sujet, mais quand une très forte majorité se décide à aller de l'avant, elle finit par entraîner les retardataires.

Une avant garde minoritaire ou permanente entraînerait la division de l'Union ou sa déconstruction, les peuples n'acceptant pas d'être placés en permanence dans une deuxième catégorie. On peut - bien sûr- proposer des modèles monocentriques, mais ils auront peu de chance de se voir réaliser.

7. Une union a modèle parlementaire

L'histoire de la démocratie en Europe est l'histoire de la poussée des pouvoirs des parlements comme on a pu le constater dans les Etats membres tout au long du XIXème siècle et de la première moitié du XXème mais aussi l'Union européenne durant la seconde moitié du siècle qui vient de s'écouler. C'est la montée en puissance de l'organe de la représentation populaire face aux organes qui relèvent d'une autre légitimité: le roi ou l'empereur dans les états, le Conseil des Ministres dans l'Union.

Le modèle européen à l'origine était celui d'une assemblée consultative élue au second degré, mais avec le pouvoir de renvoyer l'exécutif (*la Haute autorité*) et avec à l'horizon une procédure d'élection directe. Ce modèle a évolué dans un premier temps en renforçant le rôle du Conseil,

l'organe des Etats, face à la *Haute autorité*, devenue simplement la *Commission*; puis par une augmentation lente mais constante des pouvoirs du Parlement européen face au Conseil et à la Commission, dont la responsabilité parlementaire est de plus en plus claire. *Nihil novum su sole*: on a assisté à cette même évolution dans l'ensemble de l'Europe au cours des deux derniers siècles. En fin de compte des facteurs semblables produisent de semblables effets.

L'Europe a besoin d'un vrai gouvernement. L'euro sera d'ici trois mois dans nos poches et une monnaie commune a besoin d'une politique économique commune, qui ne peut pas être gérée par douze Ministres des finances se réunissant une à deux fois par mois en décidant à l'unanimité. Ce gouvernement ne peut être autre que la Commission assurée de la double confiance des états, via le Conseil européen, et des citoyens représentés par le Parlement européen.

Il faut éviter la multiplication des "Mister". La formule de diviser l'exécution de la PESC entre la Commission et Mr PESC rappelle la vieille formule des deux consuls à Rome, qui ne sert qu'à provoquer des conflits et des rivalités, sans améliorer ni la démocratie ni l'efficacité. Séparer la Commission et les "Mr." serait une grosse erreur.

Un renversement de la vapeur, menant à un système à nouveau dans les mains du Conseil européen ou du Conseil est peu probable, les moyens et petits états étant de plus en plus conscients que leurs intérêts sont mieux protégés dans les organes communautaires. N'oublions pas que la proportion des petits et moyens Etats augmente au fur et à mesure des élargissements.

Quant à l'élection directe d'un président - que ce soit du Conseil européen, de la Commission ou de l'Europe tout court, elle suscite un enthousiasme tout à fait mitigé, sauf dans certains cercles scientifiques et dans une partie de l'opinion publique française. La tradition constitutionnelle européenne est parlementaire, non présidentialiste, et les expériences de l'élection directe des Chefs d'état par le peuple se sont soldées par des échecs ou des demi-échecs.

C'est donc la poursuite de l'évolution menée jusqu'ici qui devient la plus probable, même si à l'intérieur de ce schéma beaucoup d'aménagements et d'améliorations peuvent être imaginés.

8. La revision des compétences et de l'acquis communautaire

L'acquis communautaire n'est pas le fruit du hasard. Il est le résultat d'un patient dosage, où tout le monde trouve des avantages qui justifient son appartenance à une union somme toute volontaire. L'Europe ne pouvant fonctionner au bâton, ce sont "les carottes" qui comptent!

Dans un système fédéral ou quasi-féderal complexe, une plus grande précision dans la détermination des compétences et des tâches de chacun des éléments de l'organisation est toujours souhaitable.

C'est un exercice parfois difficile - surtout quand les compétences sont de plus en plus partagées - mais techniquement possible. Mais quand on entend parler de mettre noir sur blanc les compétences de l'Union et celles des Etats membres il faut mettre en garde, car trop souvent la volonté de renationaliser une partie des politiques assurées par l'Union se cache dernière cette proposition, apparemment "neutre". La recherche de la clarté et de la transparence est un objectif louable, mais revenir en arrière sur le niveau d'intégration est une toute autre chose, un exercice dangereux de desserrement des liens tressés avec beaucoup d'efforts et de générosité de la part des uns et des autres.

Or, le problème se pose avec acuité car nous nous trouvons à un tournant. D'un côté nous demandons "plus d'Europe" - c'est d'ailleurs la devise de la prochaine présidence espagnole -: *plus d'Europe* en ce qui concerne la politique de sécurité et de défense, *plus d'Europe* pour lutter contre le crime organisé, *plus d'Europe* dans la politique économique et commerciale; plus d'Europe mais aussi... *une plus grande Europe*, une Europe en train de doubler sa population et le nombre des Etats membres.

Bien! Mais on ne peut avoir *plus d'Europe* avec les mêmes recettes ou avec des ressources en diminution. Maintenir les politiques déjà communautaires dans une Europe élargie et en ajouter d'autres, signifie augmenter les moyens budgétaires de l'Union. C'est l'effet inéluctable de tous les élargissements et de tous les approfondissements que nous avons connus, de l'application du principe de suffisance de ses moyens. En cette période de stabilité budgétaire que nous traversons actuellement, cette augmentation des recettes ne peut pas se faire sur le dos déjà trop chargé des citoyens. Il exige donc des transferts de ressources des Etats membres à l'Union, d'un côté, et des sacrifices pour accueillir les nouveaux Etats membres, de l'autre.

C'est là que le bât blesse. Les ressources budgétaires: c'est le pouvoir. Les Etats membres se résignent à confier à l'Union les tâches qu'ils ne peuvent plus exercer tout seul, tout en retenant pour eux les pouvoirs et les budgets correspondants! Cela tient du miracle. La foi et l'intelligence - et il y en a en abondance dans cette salle - peuvent faire des miracles; et d'ailleurs peut-être trouvez-vous cette solution miraculeuse.

Elargir l'Union à des pays qui seront presque tous les receveurs nets et sans que les contributeurs nets paient plus... voilà un autre miracle!

Seulement, confier l'avenir de notre Union à des miracles serait trop hasardeux. Revenir à l'esprit de solidarité qui a poussé à l'intégration, chercher des solutions où tout le monde a quelque chose à gagner, voilà une recette qui a fait ses preuves.

xxxxxx

Madame le Commissaire, Mesdames, Messieurs,

J'ai tenté d'esquisser un tableau des principales orientations qui ont présidé la démarche communautaire depuis son démarrage et qui vraisemblablement continueront à l'encadrer. Mon but était simplement de vous fournir un point de vue différent, un aperçu politique de la réalité visée par vos suggestions, vos idées, vos propositions, et sans vouloir d'aucune façon limiter ou orienter le débat dans un sens déterminé. Ce séminaire doit être un fructueux exercice de "brainstorming" qui offrira, j'en suis sûr, de nouvelles possibilités de faire avancer la "tortue européenne".

C'est cela l'important, et je serai heureux si les réflexions dont je viens de vous faire part n'ont pas un effet "lénifiant" mais plutôt un effet provocateur.

Merci de votre attention

Réveillons l'Europe[1]

Jacques Delors
Président de "Notre Europe"

L'attente d'Europe

[…]

Depuis plusieurs années, l'Union est en panne d'élan et en quête d'identité parce qu'elle n'a plus de projet politique commun en dehors du grand élargissement. Divisés sur l'Union économique et monétaire comme sur la défense, les Européens ne s'accordent ni sur les finalités de leur intégration, ni sur son mode de fonctionnement, ni sur les approfondissements à mettre en chantier pour réussir l'élargissement.

[…]

Seul un projet politique concret susceptible d'insuffler une nouvelle ambition et de fournir une direction à la phase actuelle de l'unification européenne pourrait renverser la tendance lourde à la perte de l'inspiration communautaire, à la crise d'identité européenne ainsi qu'à la désaffection grandissante des citoyens. Sans un tel projet, le mauvais fonctionnement des institutions est voué à se perpétuer et les Sommets européens sont condamnés à des résultats qui ne dépasseront plus le plus petit commun dénominateur. Le résultat de Nice n'a rien de circonstanciel et le "non" irlandais s'inscrit dans le désarroi que génère une telle situation.

L'Europe ne connaît qu'un seul vrai danger : s'arrêter.

[…]

Notre projet européen

Héritiers des pères de l'Europe et d'accomplissements déjà considérables, les dirigeants de l'Union ne pourraient mieux honorer leurs responsabilités qu'en s'attachant par priorité à définir les lignes de force d'une vision ambitieuse qui ne peut être qu'un projet d'approfondissement et de parachèvement de l'acquis communautaire.

Le grand débat citoyen, décidé à Nice en décembre dernier, peut y contribuer. D'ores et déjà, de nombreux chefs d'Etat et de gouvernement ont mis sur la table des propositions qui témoignent toutes d'une grande ambition pour l'avenir de l'Europe. Si l'écart est manifeste entre plusieurs de ces visions d'avenir, les conditions paraissent réunies pour une discussion fructueuse allant à l'essentiel et se déroulant dans des conditions satisfaisantes de transparence démocratique.

[…]

[1] Extrait d'un appel signé par un groupe de personnalités européennes, rendu public le 15 octobre 2001 à Bruxelles.

Les préambules des traités fondent la construction européenne sur les valeurs de paix, de prospérité partagée, de solidarité, de démocratie, de respect des identités et des droits fondamentaux. Ces valeurs sont aussi notre contribution à l'émergence d'un ordre mondial. Les déclarations récentes des dirigeants européens s'inscrivent dans cette perspective. Elles doivent conduire à un accord sur les finalités de l'entreprise commune.

L'Union doit renforcer sa cohésion interne pour parachever ce qui a été entrepris. La monnaie unique appelle une réelle coordination des politiques macro-économiques et un socle commun en matière de fiscalité et de politique sociale. La mise en commun de nos ressources humaines, scientifiques et technologiques doit nous conduire vers un développement durable, respectueux des ressources naturelles et de l'environnement. La réalisation d'un espace de liberté et de justice nécessite le rapprochement de nos systèmes de droit et des moyens de lutte contre la criminalité organisée et le terrorisme. Tout cela est la concrétisation politique du modèle européen de société qui nous est propre. Un élargissement qui ne s'accompagnerait pas d'un projet commun de société sonnerait le glas d'une intégration réussie et de notre rayonnement extérieur.

L'Union doit aussi devenir un acteur international global et influent. Elle doit contribuer à la maîtrise d'une économie mondialisée en y défendant les notions de solidarité, de développement durable et de prospérité partagée qui ont fondé sa propre évolution. Elle doit aussi aider la communauté des nations à faire face aux nouveaux défis qui s'accumulent et menacent la stabilité mondiale : équilibre écologique, prolifération des armes de destruction massive, crises financières systémiques, etc.

[…]

L'Union a vocation à devenir l'un des architectes majeurs de l'ordre international à inventer. Son modèle original, qui a apporté la paix, le respect du droit et la coopération dans un continent longtemps déchiré par la guerre et le nationalisme, peut inspirer d'autres régions du monde. L'Europe s'exprime dans le respect de tous et sans volonté hégémonique. Encore faut-il qu'elle le fasse à l'avenir d'une seule voix, à partir de positions communes.

Plus d'efficacité et de démocratie

Pour mettre en œuvre un tel projet, l'Union a besoin d'institutions fortes, démocratiques et efficaces, fondées sur la double légitimité qui est à son origine : celle des Etats membres, cadres irremplaçables d'identification citoyenne, et celle d'institutions de nature fédérale, démocratiques elles aussi, qui prennent en charge l'intérêt commun. La forme de la "Fédération d'Etats-Nations", qui s'inscrit dans le droit fil du projet des pères fondateurs, pourrait cristalliser un consensus porteur d'avenir.

Le Gouvernement de l'Union doit être assuré en synergie par le Conseil et la Commission sur la base des orientations données par le Conseil européen. Celui-ci doit se concentrer, plus qu'il ne le fait aujourd'hui, sur son rôle essentiel d'impulsion et de guidance. La Commission a la charge essentielle de dégager l'intérêt commun : elle gagnerait en légitimité démocratique si sa présidence et sa composition étaient liées aux élections européennes. Le Conseil, expression collective de l'intérêt des Etats membres, devrait statuer en règle générale à la majorité qualifiée.

Le danger de l'élargissement réside dans le risque accru du blocage par veto de l'un ou l'autre. Cela renforce la détestable pratique bruxelloise du " paquet ", c'est-à-dire le veto sur un point qui ne vous intéresse pas pour obtenir un avantage sur un point qui lui vous intéresse,

entraînant par contagion une paralysie générale où ne se retrouvent que les " spécialistes " qui ont la prétention de gouverner l'Europe. Le vote à la majorité est le " gendarme institutionnel " et dès lors le début de la sagesse.

Une formation centrale du Conseil, dite des " affaires générales " devrait réunir des ministres se consacrant essentiellement aux affaires européennes, notamment pour assurer, avec la Commission, la préparation et le suivi des Conseils européens.

Le Parlement européen doit exercer tout le pouvoir législatif et budgétaire en codécision avec le Conseil. Des " conventions parlementaires temporaires ", associant les Parlements nationaux, devraient pouvoir se prononcer sur certaines révisions du pacte constitutionnel, les traités d'adhésion et la fixation de ressources propres assurant un financement direct de l'Union.

[…]

La démocratie demande un ordonnancement, aussi clair que possible et conforme au principe de subsidiarité, des compétences des différents niveaux de pouvoir. Elle demande aussi que la Charte des Droits fondamentaux, approuvée à Nice, soit incorporée dans les traités et que le texte de ceux-ci soit rendu accessible aux citoyens. C'est une exigence normale, dans un ensemble démocratique, que les éléments fondamentaux du contrat de société soient clairement présentés pour être correctement perçus.

L'Europe n'a pas à être réinventée : elle a derrière elle plus d'un demi-siècle d'une histoire faite d'avancées considérables, d'hésitations, parfois de crises, qui lui donne une identité unique dans le monde. Si aujourd'hui elle doit franchir une nouvelle étape et se donner le visage d'une communauté politique identifiée et démocratique, c'est en puisant dans cette histoire ce qui lui a permis de transformer le rêve en réalité : un projet ambitieux, l'invention d'équilibres conciliant la nature originale de ses institutions et le respect des identités nationales, une méthode permettant d'avancer en ayant pris en compte tous les points de vue. A l'heure de la réunification du continent, c'est dans ce trésor qu'elle doit puiser l'inspiration qui lui permettra d'être au rendez-vous de l'Histoire.

Ce ne sont pas les doctrinaires qui ont construit l'Europe. Ce sont les entêtés audacieux.

L'Europe sommeille : réveillons-la !

Le débat sur l'avenir de l'Union: processus et acteurs

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Quo vadis Europa ?

1. La question, une fois de plus, se trouve posée. La conférence intergouvernementale qui s'est clôturée à Nice en décembre 2000 a laissé, comme les deux précédentes, un certain nombre de questions ouvertes. Les chefs d'Etat et de gouvernement ont décidé de laisser à leurs successeurs le soin de trancher, trois ou quatre ans plus tard, les points sur lesquels ils ne sont parvenus à dégager de consensus.

La nouveauté de l'exercice, qui peut faire toute la différence par rapport aux expériences précédentes, réside dans ce fameux "débat sur l'avenir de l'Union" que les chefs d'Etat et de gouvernement ont convenu de conduire dans l'intervalle. Ils n'en ont précisé ni la nature, ni la finalité, ni la méthode, mais en ont au moins posé le principe.

Le triomphe de l'empirisme

2. L'Union se trouve dès lors dans une situation ambivalente. D'un côté, en effet, il est acquis qu'un débat s'est enfin ouvert sur sa finalité; mais d'un autre côté personne ne semble vouloir prendre le risque de définir les résultats auxquels ce débat est censé aboutir. Situation qui est loin d'être neuve. Depuis les origines, les dirigeants européens s'accordent pour laisser ouverte la question cardinale des fins de la construction européenne. L'incertitude, délibérément entretenue, permet d'éviter les constats de désaccord irrémédiable. Les uns pourront penser que la discussion est susceptible de modifier les termes des oppositions, et d'aboutir par la magie de la délibération ou la force de l'entraînement à une véritable rupture constitutionnelle[1]. Les autres pourront continuer de considérer qu'un débat "n'engage à rien", et que le pouvoir du veto permettra toujours d'enrayer les dérives fédérales. L'accord sur le débat lui-même dissimule des différends plus profonds sur sa portée potentielle.

3. Comment, dans ces conditions, définir la méthode? Sur quels critères se fonder pour déterminer quels acteurs pourront y prendre part, et quel processus ils suivront? S'il s'agit simplement d'adopter un nouveau traité, les règles semblent s'imposer d'elles-mêmes: conformément aux règles énoncées par le traité, le pouvoir de négociation et de décision revient aux "Hautes parties contractantes", disposant toutes d'un droit de veto, tandis que la ratification des résultats répond aux modalités propres aux traditions constitutionnelles nationales.

[1] Telle est l'hypothèse ouvertement défendue par les mouvements fédéralistes et par la proposition de résolution du PE sur l'avenir de l'Union (en cours de discussion).

S'il s'agit, en revanche, de doter l'Union d'une constitution, ces pratiques peuvent paraître inadaptées. Le pouvoir constituant repose, par définition, sur une rupture par rapport aux procédures traditionnelles; acte de fondation ou de refondation, la constitution procède d'une logique qui lui est propre. Ce qui est loin de résoudre le problème. Si la constitution est l'acte du "pouvoir originaire", c'est-à-dire du peuple, où celui-ci peut-il être appréhendé; qui peut prétendre s'exprimer en son nom? Chacun sera tenté de répondre à la question en fonction de la finalité qu'il présume. Les uns diront que l'Union se prépare à s'ériger en fédération politique, et que sa source réside donc dans "un" peuple européen en devenir. D'autres affirmeront au contraire qu'elle ne peut être plus qu'une Fédération d'Etats, dont la source sont les peuples historiquement constitués – ceux qu'évoque le traité dans la fameuse expression "*une* Union sans cesse plus étroite entre *les* peuples européens"[2]. Le paralogisme n'est pas loin: pour définir la méthode il conviendrait de déterminer au préalable les résultats auxquels elle est censée conduire. A supposer même que ce dilemme puisse être résolu, il faudrait encore concilier les traditions nationales, qui ont chacune leur manière d'institutionnaliser le pouvoir constituant (Klein 1996).

On comprend, dès lors, que les questions n'aient pas été posées sur le plan des principes. S'il fut décidé d'engager un débat sans s'interroger *a priori* sur ses finalités, c'est précisément pour éluder ces interrogations existentielles et laisser au débat lui-même le soin de les trancher – ou pas. Quant à la méthode choisie pour mener ces discussions, elle fut plutôt induite des expériences récentes, en une logique toute pragmatique, que déduite de principes trop controversés. L' "esprit empirique" semble l'avoir résolument emporté sur le "style hypothético-déductif".

4. A peine, en effet, eut-elle clôturé ses travaux que la "convention" mise en place pour codifier la charte des droits fondamentaux de l'Union fut considérée – dans une unanimité relative mais dont la construction européenne n'est pas coutumière – comme une "divine surprise". Alors que, à la date de sa création, elle suscitait plus de scepticisme que d'enthousiasme, elle parvint finalement sans trop d'encombres et dans le respect du calendrier imposé à remplir le mandat que lui avait confié le Conseil européen un an plus tôt. L'expérience fut aussitôt présentée, dans les cercles politiques du moins, comme une réussite dont il convenait de s'inspirer pour poursuivre la réforme de l'Union. Ses défenseurs y voient une manière de concilier les avantages, tout en écartant les inconvénients, des méthodes antérieures.

La convention, ou "le meilleur des deux mondes" ?

5. Jusqu'il y a peu, il semblait n'y avoir, pour réformer l'Union, que deux voies théoriquement possibles. La première est l'avenue classique des conférences intergouvernementales. La seconde vise à la contourner en plaçant dans les mains des parlementaires le pouvoir ravi aux gouvernements. Reposant sur l'hypothèse de la rupture constitutionnelle, cette autre voie, chérie des mouvements fédéralistes, fut tentée par le premier Parlement européen élu au suffrage direct et aboutit au fameux projet de traité sur l'Union de 1984.

La conférence intergouvernementale a le mérite de reposer sur le "pouvoir réel", comme disait de Gaulle, c'est-à-dire pour l'essentiel sur les gouvernements. Mais on lui adresse trois reproches. Elle serait d'abord trop exclusive, et susciterait la frustration des nombreux acteurs qui, dans la grande vague de demande de participation qui s'est ouverte depuis le traité de

[2] Sur la portée fondamentale de cette expression, voir (Weiler 1999).

Maastricht (Telo 1995), exigent d'avoir voix au chapitre. Elle tendrait ensuite à figer les positions des partenaires, et à réduire le processus à un marchandage de concessions réciproques qui empêcherait d'atteindre l'intérêt commun. Elle souffrirait enfin d'être si close et si complexe que les citoyens n'y concevraient plus rien.

La voie d'une assemblée constituante n'échappe pas totalement à ces critiques. Elle est certes plus ouverte, mais l'expérience enseigne que, coupée des pouvoirs réels, elle a peu de chance de voir ses résultats adoptés. Elle montre aussi que le procédé de la délibération parlementaire ne garantit pas en lui-même la transparence et la clarté du processus.

Les partisans de la convention veulent voir dans cette nouvelle approche une "troisième voie", évitant les pièges des deux autres et combinant leurs avantages. La voie conventionnelle ne postule pas forcément une rupture[3]. Les chefs d'Etat et de gouvernement qui se préparent à réitérer l'expérience pour préparer les travaux de la CIG de 2004 ne semblent pas chercher à se dépouiller de leur "pouvoir constituant". Mais le seul fait qu'ils tentent à nouveau l'expérience montre qu'ils ont le sentiment de l'insuffisance de la voie traditionnelle.

6. Bien conçue, la convention permettrait, selon ses promoteurs, d'éviter les impasses tant du procédé intergouvernemental que de l' "assemblée constituante".

a) établie par les gouvernements, qui fixent son mandat, sa composition et ses règles, elle ne succomberait pas au syndrome de la tour d'ivoire;

b) de composition mixte, mêlant représentants des exécutifs et membres des assemblées, élus nationaux et européens, elle serait plus apte à conduire une véritable délibération qu'une simple CIG. L'expérience semble indiquer en effet qu'en mettant ensemble des acteurs issus de "milieux" différents, répondant à des logiques différentes, on évite les travers habituels du marchandage. Dans une partie où les "joueurs" sont nombreux, et où les clivages se recoupent, la délibération tend à être plus fluide (Elster 1998), moins figée sur les "intérêts nationaux" ou les "oppositions partisanes". La multiplication du nombre d'acteurs, et donc des coalitions possibles, éloigne le risque d'une opposition frontale entre majorité et opposition – comme déjà, d'ailleurs, l'escomptaient les Pères fondateurs de la république nord-américaine;

c) le risque d'une dilution de la délibération est censé être tempéré par la présence d'un organe plus restreint de coordination (le Présidium). Celui-ci assure aussi que les conventionnels resteront en contact permanent avec les principales composantes du système institutionnel européen;

[3] Historiquement, le terme " convention " renvoyait dans l'histoire constitutionnelle anglaise où il trouve son origine à l'idée de rupture par rapport à la tradition et désignait une assemblée originellement illégale imposant sa propre légitimité. C'est en référence à ce sens donné que les Américains baptisèrent " convention " l'organe de Philadelphie chargé de rédiger la constitution de la fédération des Etats-Unis.
Voir à ce sujet le classique de (Wood 1991). On ne sait si les membres de l' " enceinte " créée par le Conseil européen ont opéré ce choix sémantique avec les mêmes intentions subversives.

d) enfin, soumise à des obligations de consultation et de publicité, la convention assurerait une meilleure participation, directe ou subjective, des citoyens et de leurs intérêts organisés.

7. Ce sont ces arguments qui amènent à se demander si l'exercice de la convention peut être renouvelé. Pour partie, il s'agit d' "enseignements" tirés de la première expérience; mais dans une large mesure, il s'agit aussi d'idéaux, de vertus présumées. Réfléchir à la contribution d'une convention à la réforme de l'Union implique donc de tenir compte de ce double niveau d'évaluation : à la fois empirique et normatif.

Cela suppose aussi que l'on s'interroge sur la transposabilité d'une méthode qui ne fut pas conçue pour réformer l'Union. La convention sur laquelle on prend exemple fut établie dans le but de *codifier* les droits fondamentaux de l'Union, non de les énoncer. Les gouvernements avaient pris soin, d'ailleurs, de préciser les sources dont elle devrait s'inspirer pour ce faire, et ébauché les limites de l'exercice. La question qui se pose alors, au-delà des limites propres à l'expérience, est de savoir si une méthode inventée pour remplir une tâche de codification peut être adaptée à une œuvre de réforme ; et si ce qui vaut pour les droits, vaut aussi pour les dispositifs institutionnels et les politiques publiques.

Sans chercher à être exhaustif, on peut pointer trois aspects majeurs du processus susceptibles d'être affectés par ce "transfert de technologie décisionnelle". Ils concernent respectivement la composition, le mandat et les conditions procédurales de la nouvelle convention.

La composition de la convention

8. La composition de la première convention, telle que définie par le Conseil européen de Tampere, constitue une forme de compromis entre les arguments de principe et la prise en compte des "pouvoirs réels". S'inspirant de la fameuse doctrine fédérale de la "double légitimité", elle mêle élus nationaux et européens; tenant compte des spécificités du "modèle communautaire", elle inclut les représentants des gouvernements et de la Commission, et désigne des organes consultatifs. Au total, la convention apparaît comme un précipité de l'ensemble des éléments du système politique européen.

Cela a suscité deux types de réactions. Certains contestent **la frontière entre membres de plein droit et organes consultés**: les régions et entités fédérées, disposant parfois d'un pouvoir constitutionnel, n'auraient-elles pas dû être plus étroitement associées au processus? D'autres dénoncent **le poids prépondérant conféré aux représentants nationaux** au sein de l'enceinte, où les parlementaires européens ne disposaient pas du quart des sièges.

9. Ces arguments soulèvent deux objections. Sur le plan des principes, d'abord. Il est incontestable que la logique dont procède la composition de la convention n'est pas parfaitement claire; mais les réclamations de ceux qui voudraient voir modifiée la "pondération" des corps en son sein ou l'élargir à d'autres types d'acteurs ne sont pas moins arbitraires. Sur quelle base peut-on décider que le Parlement européen devrait avoir autant de sièges que les parlementaires nationaux? Pourquoi faudrait-il décréter d'emblée que les régions devraient en être partie prenante, alors qu'elles n'ont dans certains Etats qu'un statut subalterne?

Ces arguments apparaissent, d'autre part, remettre en cause les ambitions mêmes du processus conventionnel. Sa vertu affirmée, sa raison d'être, est de dépasser la logique de

concessions mutuelles propre aux CIG. Or, en portant le débat sur la pondération des corps en son sein, n'y réintroduit-on pas une logique d'intérêts et de marchandages; ne conduit-on pas à "intergouvernementaliser" la convention ?

10. La question de la composition de la convention se pose de manière plus aiguë en ce qui concerne la **participation des pays candidats**. La formule laconique adoptée par le Conseil européen de Tampere ("*Il convient d'organiser un échange de vue approprié entre l'enceinte ou son président et les pays candidats*") laissait le dilemme entier. D'un côté, il paraissait logique de ne pas donner à des pays qui ne sont pas membres de l'Union le même pouvoir qu'aux Etats membres; d'un autre côté il semblait inélégant et injuste de les exclure, dans la mesure où les résultats de l'exercice s'appliqueront à eux autant qu'aux membres actuels. Le Conseil européen a choisi de laisser la convention résoudre cette difficulté. La solution retenue ne fut pas satisfaisante: ni pour les candidats eux-mêmes qui n'ont pu, au cours d'une unique audition, s'exprimer pleinement; ni pour les membres de la convention qui n'ont pu comprendre leurs perceptions.

L'idée de reconnaître aux pays candidats un plus grand rôle dans la prochaine convention soulève parfois des inquiétudes. Certains, au sein du Parlement européen et dans les mouvements fédéralistes notamment, s'inquiètent des blocages qui pourraient résulter de l'implication de ces acteurs qu'ils croient hostiles à une intégration accrue. Mais on peut se demander si cela ne revient pas à confondre les causes et les effets. Les réticences exprimées par les représentants des pays candidats ne résultent-elles pas, au moins en partie, du fait qu'ils se soient sentis exclus du processus? Les dirigeants politiques de ces pays ne seraient-ils pas enclins, s'ils étaient invités à participer directement à ces débats, à adopter des attitudes qui démontreraient leur bonne volonté européenne? Et au-delà des milieux politiques, les citoyens des pays candidats ne percevraient-ils pas avec plus de clarté les enjeux des réformes si leurs représentants y étaient associés?

11. Au-delà de ces raisonnements hypothétiques, la seule solution mutuellement acceptable consiste sans doute à opérer une **distinction à l'intérieur du processus**. La première convention connut d'ailleurs deux phases distinctes. La première fut dominée par les débats ouverts entre l'ensemble des membres; à ce stade, les pays candidats pourraient se voir octroyer un statut de membre de plein droit. Il n'y a aucune raison, quand il n'est question ni de "décision" ni de vote, de les réduire à un statut d'observateur. Membres de plein droit, ils pourraient à la fois informer la convention du sentiment de leurs compatriotes et animer le débat dans leur pays. Dans un second temps, la convention cherchera à dégager un consensus sur la base des premiers débats, peut-être en concentrant, comme ce fut le cas dans la première expérience, les discussions à l'intérieur des différents "corps"; à ce stade, celui de la décision, les candidats pourraient participer à titre d'observateurs. On peut penser, d'ailleurs, qu'il est de l'intérêt des candidats eux-mêmes de ne pouvoir être accusés d'avoir bloqué le processus. Loin d'être parfaite, cette distinction vise seulement à honorer à la fois les exigences, potentiellement contradictoires, d'une association étroite des candidats et d'une délibération entre Etats membres.

Le mandat de la convention

12. La portée de ce “grand débat” dépend, dans une très large mesure, du mandat qui lui est assigné. Certes, l’expérience de la première convention a montré que le mandat fixé par le Conseil européen était plus indicatif qu’impératif. La convention a pu interpréter sa mission mais pas la transformer, et elle l’a fait en contact étroit avec les représentants des gouvernements et du Conseil. De plus, l’importance du mandat s’accroît s’il ne s’agit plus seulement de codifier un acquis mais de le réformer. Trois dimensions au moins méritent d’être examinées ici.

13. La première concerne **l’objet du débat**. Les conventionnels devront-ils limiter leurs délibérations aux questions de nature institutionnelle et procédurale, ou se pencheront-ils aussi sur le contenu des politiques de l’Union? Les mouvements les plus favorables à l’approfondissement de l’intégration plaident pour une approche globale, ne séparant pas les institutions des politiques. Une discussion cantonnée aux dimensions formelles de l’intégration, affirment-ils dans la lignée du discours de Lionel Jospin sur l’avenir de l’Union, ne pourra susciter l’intérêt des citoyens, et risque de produire “des institutions sans politiques”.

Mêler les deux ordres de problèmes pourrait toutefois s’avérer contraire à leurs objectifs. L’expérience enseigne que lorsque les questions de fond et de forme sont traitées simultanément, les chances sont plus grandes de voir s’additionner les résistances. Séparer les deux débats peut permettre, au contraire, de faciliter la délibération: il est plus aisé, par exemple, de discuter des modalités de définition des compétences dans l’abstrait qu’en cherchant à résoudre en même temps la répartition de telle ou telle compétence entre les Etats et l’Union.

Pour éviter que les débats fassent entièrement abstraction du contenu des politiques, on pourrait imaginer diverses formules: soit tenir **deux conventions successives,** ou, si les travaux devaient être clôturés mi-2003, deux phases dans la même convention; soit encore, comme le propose le rapport de Guy Braibant, subdiviser la convention en deux groupes, travaillant séparément mais en étroite collaboration. Le premier groupe tenterait de trancher les questions générales qui subsistent quant aux institutions et aux procédures, tandis que le second se pencherait sur la réforme des politiques de l’Union. (Dans cette hypothèse, le premier débat porterait par exemple sur l’amélioration de la procédure de codécision tandis que le second déterminerait son application à tel ou tel domaine.) Cela faciliterait la réorganisation des traités en deux volets, préconisé notamment par le groupe présidé en 1999 par Jean-Luc Dehaene. La CIG travaillerait, sur la base des travaux de ces deux groupes, à une refonte globale des traités.

14. Le mandat devrait-il être limité à **quelques questions clefs**, telles celles mentionnées dans l’annexe du traité de Nice, ou porter au contraire sur la réforme globale de l’Union? Ici aussi convient-il sans doute de ne pas figer trop rapidement le processus. Un débat trop ouvert risque peut-être de ne pas aboutir. Mais une discussion cantonnée à quatre ou cinq points pourrait être inefficace s'il devait apparaître, en cours de travaux, que la réponse à une question ne peut être pleinement résolue sans aborder une matière connexe que le mandat n’avait pas prévue. Une énonciation non limitative des questions à traiter (recourant au bien commode adverbe “notamment”) permettrait de baliser la délibération sans l’enfermer dans un carcan inutile.

15. La **forme que doit revêtir le résultat final** des travaux de la convention est sans doute **l'aspect le plus déterminant** du mandat. L'expérience précédente a montré que les travaux de la convention avaient été profondément marqués par le choix, opéré dès les premières réunions au sein de la convention elle-même, de rédiger la charte "comme si" elle devait être dotée de force juridique, et donc de rechercher un vaste consensus. Cette décision formelle conditionne toute la méthode de travail et le comportement des acteurs.

Deux options sont aujourd'hui discutées en ce qui concerne le débat sur l'avenir de l'Union. La première consisterait à confier à la convention le soin de dégager des "options" sur un certain nombre de questions, que la CIG trancherait ensuite elle-même. La seconde reviendrait à lui demander, au contraire, non seulement d'identifier mais aussi d'opérer les choix et de les couler dans un projet de traité.

Si la première voie devait être suivie, le travail de la convention n'aurait qu'une portée très relative par rapport à la CIG qui doit suivre. D'abord parce que l'identification des options est une tâche qui peut être aisément confiée à un organe préparatoire de profil moins politique. (Il s'apparente au rôle joué par le Secrétariat du Conseil dans la définition des "pistes" que la première convention a discutées.) Les vertus que l'on prête à la convention – ou que l'on en escompte – ne peuvent se déployer que s'il lui revient d'aller au-delà de cet exercice de préparation. Les conventionnels n'auront aucun incitant à dépasser la défense des intérêts nationaux, partisans et sectoriels, et donc du marchandage, s'ils ne doivent pas se convaincre mutuellement; ils ne seront pas contraints de chercher un langage commun ni de formuler leurs arguments dans les termes de l'intérêt général s'ils doivent simplement dégager une majorité.

Un tel choix conduirait en outre à déplacer les véritables moments de délibération au sein de la CIG elle-même. L'expérience du rapport Westendorp établi avant la CIG de 1996 l'a clairement montré: quand la trame soumise aux gouvernements dégage des pistes divergentes, la discussion et la négociation réelles se déroulent à huis clos, entre les gouvernements. On en reviendrait ainsi aux écueils que la convention est censée éviter: des discussions secrètes, fermées et prenant la forme de marchandages.

Il n'est pas pour autant indispensable que la convention aboutisse à un texte de traité juridiquement finalisé. Un objectif aussi précis risque de frustrer les gouvernements qui n'auront plus aucune marge d'appréciation – sauf à désavouer la convention – lors de la CIG. Il peut aussi entraîner les conventionnels sur la pente de débats techniques auxquels il serait difficile d'intéresser les citoyens. Le degré de précision des accords dégagés déterminera leur expression formelle: sur les points qui font l'objet d'un consensus clair, la formulation juridique s'imposera d'elle-même, alors qu'elle sera laissée à la CIG là où demeure une certaine ambivalence – ce qui se conçoit bien s'énonce clairement.

Les procédures de la convention

16. Le choix des procédures qui doivent guider les travaux de la convention découle, dans une large mesure, des décisions prises quant à sa composition et à son mandat. S'il s'agit de dégager des options, les conventionnels seront amenés à voter; si en revanche le rapport se veut consensuel, l'absence de vote peut être plus efficace – parce que le vote identifie des majorités potentielles et fige les relations au sein de l'assemblée. Deux questions d'ordre procédural subsistent toutefois, indépendamment des autres choix.

17. La première concerne les relations entre la convention et les différentes entités qu'elle sera amenée à consulter. L'expérience de **l'audition de la société civile** par la première convention fut jugée utile par la plupart de ses membres. Se pose toutefois le problème de la sélection des groupes consultés. Sur quelle base peut-on décider que tel groupe mérite d'être entendu ou pas? La question, mainte fois soulevée – et récemment encore par le livre blanc sur la gouvernance – n'a pas reçu à ce jour l'ébauche d'une réponse. Quels que soient les critères retenus, ils comporteront toujours une part d'arbitraire. Ce type de question peut difficilement être résolu *a priori*: en l'absence de précisions, la convention jugera elle-même, en fonction du déroulement de ses travaux, et en se fondant sur la légitimité qu'elle tire de son mandat, des groupes qu'elle souhaite entendre.

Il convient aussi de s'interroger sur l'intensité de cette consultation. L'expérience de la première convention fut jugée insuffisante par la plupart des associations conviées à donner leur avis. S'exprimant dans la dernière phase du processus, elles ont regretté de n'avoir pu intervenir dès les premiers jours. La création d'un forum permanent de la société civile qui accompagnerait la convention tout au long de ses travaux, tel que proposé par la Présidence belge, permettrait d'assurer une délibération plus continue de ses options. Les associations consultées ne génèrent pas seulement un flux d'information vers les conventionnels, elles peuvent aussi susciter des débats parmi leurs adhérents et, ainsi, ancrer la convention dans les "mondes vécus".

18. Le principe de la **publicité des débats** fut imposé à la première convention par le Conseil européen. Il devrait l'être aussi dans le cadre du débat sur l'avenir de l'Union. Il s'agit là d'un choix fondamental, car il fait toute la différence par rapport à la technique des conférences intergouvernementales. La publicité des débats est censée infléchir le processus dans deux directions.

A l'intérieur de la convention, elle doit contribuer à la qualité de la délibération. Les expériences historiques montrent que les participants à un processus de délibération sont enclins à dépasser une logique de marchandage entre intérêts sectoriels ou nationaux quand ils savent qu'ils s'expriment en public (Elster 1998)[4]. La contrainte formelle de la publicité force à formuler les arguments dans le langage de l'intérêt général. Ce qui à son tour doit faciliter l'échange des points de vue: même si les conventionnels ne cherchent en fait qu'à déguiser les intérêts particuliers qu'ils défendent en "biens communs", cela ouvre la possibilité d'un dialogue. Les participants peuvent en outre se permettre de changer d'opinion quand ils prétendent viser l'intérêt général, alors qu'ils tendent à rester figés sur leurs positions quand ils représentent un intérêt déterminé.

Les effets de la publicité sont toutefois aléatoires. Il faut avoir une très grande confiance dans la probité des représentants et la force du processus délibératif pour concevoir que les points de vue tendent naturellement à s'harmoniser par la seule puissance de "l'usage public de la raison". Dans les faits, de nombreux biais altèrent le processus (Habermas). Et les contraintes de publicité tendent aussi à déplacer les débats dans des instances formelles quand se posent des questions qui paraissent insolubles.

L'expérience de la première convention donne, là aussi, un enseignement utile: le comité de rédaction – qui s'est rebaptisé Présidium – offre un lieu de discussion plus resserré et discret,

[4] La publicité des débats peut aussi incliner les participants à refuser un accord qu'ils croient inacceptable pour leurs mandants. Mais ce risque est faible quand les conventionnels ne sont pas directement élus par, ni redevables devant, les citoyens.

où des compromis peuvent être préparés. L'équilibre entre la délibération large et ouverte et les compromis restreints et fermés permet de rechercher à la fois l'efficacité et la transparence du processus. Le Présidium joue, de plus, un rôle primordial de préparation des débats: les trames et propositions qu'il soumet à la séance plénière balisent fortement les discussions. Il est donc fondamental que cet organe préserve une composition mixte, assurant d'emblée une prise en compte des différents point de vue.

19. Les vertus de la délibération publique ne sont pas strictement internes. Depuis le siècle des Lumières, on considère la délibération publique non seulement comme le moyen le plus efficace d'atteindre l'intérêt général entre les participants directs, mais aussi comme la meilleure méthode d'éducation civique (Manin 1995). C'est en écoutant les arguments des uns et des autres, non dans le silence de leurs passions intérieures, que les citoyens se forgent leur propre opinion.

Sortir le "grand débat" des cénacles clos des diplomates et des spécialistes, c'est aussi viser à y **intéresser le grand public**. L'échec du référendum de ratification du traité de Nice en Irlande tombe à point nommé pour rappeler, si besoin en est, combien il est difficile de convaincre les citoyens d'adhérer à un texte élaboré à huis clos et qui n'a donné lieu à aucune discussion.

La première convention s'est, à cet égard, contentée d'une conception passive de la publicité: ses séances étaient ouvertes, et ses documents accessibles, mais ses travaux ont été peu relayés et n'ont pas généré de débat au-delà des cercles de spécialistes. L'histoire enseigne certes que les foules se passionnent peu pour les questions strictement institutionnelles, détachées des politiques substantielles. La convention offre néanmoins l'occasion, pour la première fois dans l'histoire de l'intégration européenne, de débattre clairement des finalités et des principes de l'Union. Et de conduire de telles discussions, non seulement après l'adoption du texte, dans la perspective de sa ratification, mais **dès le stade des travaux préparatoires**. La convention peut constituer, à cet égard, une première dans l'histoire politique occidentale: la plupart des processus constituants ont en effet – de la Convention de Philadelphie aux "comités d'experts" chargés de la rédaction de la constitution de la V^{e} République – travaillé à huis clos, le débat public ne se développant véritablement qu'*ex post facto*.

Le débat ne naîtra pas de lui-même, mais la convention pourrait se voir explicitement chargée de l'animer. Dans un premier temps, tout au long de ses travaux, ses membres auraient pour mission d'expliquer les réflexions en cours au sein des espaces politiques nationaux. Ils prolongeraient ainsi les débats d'ores et déjà amorcés et aideraient à faire comprendre les enjeux des réformes, les différends et les options, dans le langage propre à chaque culture politique. Ils pourraient aussi alimenter leur propre argumentation des réactions recueillies.

Au terme de ces travaux, le Présidium pourrait – à l'instar des auteurs des *Federalist Papers* – s'assigner la tâche de défendre publiquement le consensus obtenu et soumis à la CIG. Son argumentation, s'exprimant sous la forme d'un plaidoyer pour le consensus dégagé, contribuerait à alimenter une pédagogie de l'Union européenne: elle pourrait en effet susciter critiques et défenses, en sorte que se dessine un dialogue contradictoire, susceptible d'aider les citoyens à comprendre l'Union.

Cela éviterait aussi que la convention et la CIG constituent deux phases nettement distinctes du processus: **en poursuivant les débats avec les opinions publiques tout au long de la CIG**, le Présidium encouragerait les négociateurs des gouvernements à ne pas ignorer les travaux et discussions antérieurs.

Prendre la convention au sérieux

20. Ce qu'il adviendra de la convention chargée de préparer la CIG de 2004 et d'animer le "grand débat sur l'Europe" dépend, en large partie, de choix qui seront opérés avant qu'elle entame ses travaux. L'histoire est certes émaillée d'exemples d'organes échappant à leurs créateurs, mais l'expérience montre aussi que le choix de la méthode détermine profondément le déroulement du processus.

Si la convention qui a rédigé la charte fut plébiscitée, c'est qu'elle parvint à remplir sa mission au moment même où la conférence intergouvernementale démontrait, à Nice, ses limites. Comparaison n'est pas raison: l'exercice de codification qui incombait à la convention était sans doute politiquement moins sensible que la révision de la pondération des voix qui a absorbé l'énergie des membres de la CIG. Mais au-delà des tensions propres à l'objet de la discussion, son organisation en infléchit le déroulement. Tous ceux qui ont, de près ou de loin, participé aux travaux de la convention ont souligné la fluidité de l'exercice. Sa composition mixte, sa liberté d'organisation, le caractère ouvert de son mandat lui ont permis de mettre en place un véritable processus de délibération politique. Les acteurs ne sont pas restés campés strictement sur leurs positions; ils ne se sont pas rassemblés en coalitions stables se contentant d'échanger des concessions. La force de la discussion, ses formes et procédures, ont permis que se dégagent les fondements d'un langage commun, qui n'était ni le plus petit commun dénominateur, ni un maigre "consensus par recoupement".

Appliquée à la réforme de l'Union, la méthode peut peut-être éviter les impasses propres à la négociation intergouvernementale. Elle peut engendrer une discussion fondée sur des références communes, et **jeter les bases d'une "culture constitutionnelle"**; elle peut **produire un débat public et enraciner ses principes dans les cultures civiques**. Jusqu'ici, les gouvernements se sont avérés capables de produire des règles et des traités, mais ils n'y sont parvenus qu'à coups de compromis et concessions mutuelles, non en se fondant sur des références partagées; ils ont ainsi donné naissance à "une constitution sans culture constitutionnelle" (Weiler 1999). C'est là, précisément, que réside la contribution possible de la convention. Elle peut – mais ce n'est qu'une ambition, un idéal – aider à dégager ces références communes.

Autant qu'à la bonne volonté des membres de la convention, la réussite de ce processus tiendra aux paramètres qui lui seront assignés. S'il lui revient de dégager un accord politique large et clair qui balise le travail de la CIG, et d'animer un vaste exercice de pédagogie politique, elle peut y contribuer. Sinon la convention n'aura été qu'une froide opération de communication politique.

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Le débat sur l'avenir de l'Europe : processus et acteurs

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Groupe "Débat sur l'avenir de l'Europe"

L'élaboration de la Charte des droits fondamentaux de l'Union européenne a ouvert une nouvelle façon de faire l'Europe qui s'est appuyée sur la transparence et la concertation. Les membres de la Convention ont introduit une réforme de l'Europe par la pratique. L'expérience vécue par la Convention dans le cadre de la rédaction de la Charte, est sans précédent dans l'histoire communautaire, et pose la question de son renouvellement pour la CIG de 2004, voire pour la rédaction d'une future Constitution européenne.

Lancée au sommet de Nice en décembre dernier, la réflexion sur l'avenir de l'Europe doit aussi s'engager dans chaque État membre ; c'est pourquoi la France a pris la première l'initiative de lancer un débat public sur ce thème en vue des conclusions du sommet de Laeken.

I) L'expérience et les leçons de la Charte des droits fondamentaux de l'Union européenne:

L'élaboration de la Charte :

L'intérêt qui a accompagné l'élaboration de la Charte tout au long de l'année 2000 s'explique par l'originalité de la procédure adoptée, tout aussi innovante que la Charte elle-même. Cette originalité reposait sur trois facteurs qu'il convient de rappeler pour situer la portée de l'exercice:

- la qualité et la diversité des acteurs impliqués tout au long du processus ;

- la méthode de travail employée dans les débats de la Convention ;

- enfin, la concertation programmée.

L'ensemble de ces facteurs et le succès rencontré par la Charte - aujourd'hui considérée comme un acquis - permettent de penser que le même schéma, quelque peu modifié, pourrait se reproduire dans la future Convention, dont le principe a été retenu lors du Conseil informel des ministres des Affaires étrangères de Genval le 9 septembre 2001.

Avec le recul, il faut dire que la légitimité de la Convention, à l'origine, était faible. « L'enceinte », telle que dénommée par le Conseil européen de Tampere[1], n'était qu'un organe consultatif sans base juridique solide. Il a fallu un peu d'audace et de courage pour que ses membres se proclament « convention », contrairement à l'autorité légitime, le Conseil européen, qui l'avait expressément nommé « enceinte ». Le statut de la Convention n'était pas celui d'une assemblée constituante, mais il permettait de dépasser les contraintes rencontrées

[1] Se reporter à l'annexe des conclusions du Sommet de Tampere des 15 et 16 octobre 1999, « Composition, méthode de travail et modalités pratiques de l'enceinte pour l'élaboration du projet de charte des droits fondamentaux de l'Union européenne».

lors des Conférences intergouvernementales précédentes, sans toutefois que les compromis habituels ne soient tout à fait évincés du processus (cf. l'épisode de « l'héritage religieux » et l'ultime compromis linguistique).

Les acteurs :

La composition de la Convention est évidemment un élément essentiel : définie par le Conseil européen de Cologne et complétée par celui de Tampere, la Convention comprenait des parlementaires européens et nationaux, des représentants des chefs d'État et de gouvernement, ainsi qu'un représentant de la Commission européenne. Cette composition était originale de par sa double mixité, qui fut un redoutable facteur d'efficacité, mélangeant des représentants des institutions nationales et européennes, et sans que soit établie de hiérarchie entre tous ces acteurs. L'équilibre ainsi retenu est un gage de réussite et d'efficacité pour une future Convention.

La structure :

La structure de la Convention est généralement très mal connue dès que l'on sort du cercle des rares experts qui furent associés au processus de la Charte.

A côté de la Convention, on trouvait un organe beaucoup plus restreint : le « Présidium », composé du président, des vice-présidents et du représentant de la Commission, assisté par le secrétariat général du Conseil. Le Présidium était plus qu'un simple « comité de rédaction » ; c'était un réel organe d'orientation et de coordination. Il permit de dégager des formules de compromis et d'éviter les blocages des dernières semaines de la Convention ; bien entendu, il fut soutenu dans ce travail par la «task-force», composée de fonctionnaires des principales institutions européennes. Entre la Convention et le Présidium, se trouvaient enfin les trois « composantes » (représentants des exécutifs, du Parlement européen et des parlements nationaux).

Vers une nouvelle Convention ?

La nécessité pour les différentes composantes de coopérer dans ce travail imposait une méthode particulière et rigoureuse. Il fut décidé dès le début de ne jamais voter ; il revenait alors au Présidium de dégager les consensus en amont. Cette décision a été prise par la Convention elle-même qui a travaillé sans statut ni règlement. Elle peut surprendre car le vote est traditionnellement le meilleur moyen pour dégager une majorité dans un groupe ou une assemblée. Elle a pourtant été l'une des conditions du succès. Les votes auraient pu avoir pour effet de cristalliser les clivages, de crisper les positions et de créer des confusions. La Convention a, malgré ses engagements initiaux, tenté une fois de voter. Elle n'a pas recommencé car le vote avait été incertain dans ses résultats comme dans ses significations. Il a du être immédiatement annulé.

Tout comme la concertation avec la société civile, cette méthode de coopération, de dialogue et de consensus a pris beaucoup de temps et elle exige une grande patience ; il a fallu plusieurs fois revenir devant la Convention pour préciser le sens d'une première délibération. Chacun devait avoir la possibilité de s'exprimer et les présidents de séance n'ont jamais réussi à limiter le temps de parole des membres malgré des efforts répétés. Mais ce fut là encore une condition

du succès ; sinon, des veto seraient apparus et la Convention aurait dérivé vers une nouvelle forme de Conférence intergouvernementale.

L'indépendance des membres de la Convention a joué dans le même sens ; ils ne recevaient pas, en principe, d'instruction de leurs mandants, tout en ayant à leur égard des obligations d'information et de compte-rendu, afin d'éviter des surprises et des déconvenues au terme des travaux.

Comme le mentionne pertinemment Paul Magnette dans son exposé, la question de la transposabilité de cette méthode peut se poser. Dégager les forces et les faiblesses de la précédente Convention paraît essentiel avant de lancer le processus de la seconde.

Il n'est d'ailleurs pas prématuré ou imprudent de dire que la Déclaration et les travaux de Laeken porteront sur une future Convention, sur son mandat et sa composition. Ce serait même conforme à la juste logique des choses. Les ministres des Affaires étrangères réunis en Conseil informel à Genval le 9 septembre dernier ont d'ailleurs accueilli favorablement le principe d'une convention « composée de membres du Parlement européen, des Parlements nationaux, des gouvernements et de la Commission ». Ils ont aussi donné leur accord pour que « cette structure soit gouvernée par un présidium ayant à sa tête un président » ; tirant aussi les leçons de l'expérience de la Charte, ils ont confirmé la nécessité de mieux associer les États candidats, ainsi que « certains éléments de la société civile », terme pour le moins ambigu.

Trois cercles distincts pourraient être retenus pour organiser une future Convention :

- le premier composé du Présidium, autorité collégiale de fait dont il serait bon de renforcer les pouvoirs et les moyens par rapport à la précédente Convention ;

- un second composé des membres de la Convention, dont la composition pourrait obéir aux mêmes règles que celles qui ont été utilisées pour la Charte.

En revanche, il conviendrait de remédier à l'inégalité de fait entre les membres de la Convention et ceux du Présidium : les seconds ayant l'initiative des travaux et la maîtrise du calendrier, alors que les premiers ne pouvaient souvent en prendre connaissance qu'en arrivant en séance plénière. Si mandat était donné à la Convention pour rédiger une Constitution, la composition de fait de la structure devrait aussi être revue et rééquilibrée entre juristes et politiques.

En revanche, je ne verrais pas d'inconvénient à ce que la Convention, tout en conservant son unité fondamentale, soit divisée en deux sections - l'une chargée des institutions, l'autre des politiques européennes -, dont les travaux seraient étroitement coordonnés par un Présidium commun. Cette structure permettrait de garder l'architecture uniforme de la Convention et d'éviter ainsi d'avoir à constituer deux conventions, proposition qui aurait le double inconvénient d'affaiblir l'autorité de l'instance conventionnelle et de risquer d'aboutir à des incohérences, voire à des contradictions.

- enfin, un troisième cercle ou forum civil, regrouperait les associations, organisations non-gouvernementales, autres corps ou institutions du même genre. Embryonnaire lors de la première convention, un tel forum devrait voir son rôle augmenter selon des modalités qu'il serait préférable de définir clairement en amont du processus. En effet, les représentants de la société civile ont eu parfois l'impression de ne pas être assez entendus, et certains membres de la Convention, à l'inverse, voyaient dans leur audition, bien à tort, une perte de temps.

La vertu de ce schéma est certes de dépasser les clivages, comme l'a rappelé Paul Magnette, mais aussi de permettre à tous d'être entendus au cours de l'exercice. Une telle structure n'empêchera ni les conflits, ni la logique de concessions propre à toute instance internationale, mais elle a au moins le mérite de s'adapter au caractère spécifique de l'architecture institutionnelle de l'Union européenne, en prenant acte des expériences passées.

Les points sensibles :

Des points sensibles peuvent néanmoins attirer l'attention et méritent d'être signalés :

1) l'association et plus encore la participation des pays candidats à la prochaine Convention ;

2) le rôle des associations, organisations non-gouvernementales et autres partenaires, c'est-à-dire de la société civile organisée, dans le débat ;

3) enfin, la recherche du consensus et la possibilité de présenter sur certaines questions plusieurs options.

La participation des États candidats :

Concernant la participation des États candidats, la formule retenue au Conseil européen de Tampere était pour le moins succincte[2] comme le rappelle Paul Magnette, celle de Cologne étant encore plus elliptique. Si un dialogue a pu être instauré avec les représentants des États candidats, il n'a duré qu'une demi-journée, vers la fin des travaux, en juillet 2000, et chacun n'a eu que cinq à dix minutes pour exprimer son point de vue. L'intervention des représentants des pays candidats s'est pourtant avérée utile, révélant toute la difficulté des négociations en vue de l'adhésion, une partie d'entre eux étant réservée sur les droits sociaux.

Un tel scénario ne pourra se reproduire pour la prochaine convention et trois options restent encore possibles :

- soit les représentants des États candidats seront membres à part entière dans la prochaine Convention ;

- soit ils seront uniquement consultés.

On peut également envisager une modification de leur statut en fonction de l'état d'avancement des négociations d'adhésion.

La solution est sans doute dans un juste milieu ; il serait en tout cas souhaitable qu'une consultation plus sérieuse, encadrée par le Présidium, sur des projets élaborés par écrit et menant à un réel dialogue entre le Présidium et les pays candidats, soit organisée.

Le rôle de la société civile :

Les faiblesses de la première Convention sur ce point doivent être corrigées pour l'avenir. Le *Livre Blanc sur la gouvernance européenne* publié par la Commission en juillet dernier, dont le contenu sera discuté demain, propose certains axes, mais ne suffit pas pour organiser un

[2] Point v) : « Il convient d'organiser un échange de vues approprié entre l'enceinte ou son président et les pays candidats ».

dialogue d'une telle ampleur dans le cadre d'une réforme des institutions, et a fortiori pour l'élaboration d'une future constitution.

Un premier point doit être amélioré, à savoir le temps d'audition jusque-là extrêmement réduit consacré à chaque association. Mais plus grave encore, le fait que la présence des membres de la Convention à cette audition a été tout particulièrement faible ; si l'exercice était renouvelé, l'absentéisme de certains membres de la Convention risquerait de le décrédibiliser sérieusement et serait à nouveau malvenu. Ces efforts supposent parallèlement une réelle prise de responsabilité des organisations non-gouvernementales et associations, qui devraient cette fois arriver avec des interventions mieux élaborées. Inhabituel pour les institutions européennes, l'exercice pourrait donc être renouvelé si ces deux conditions étaient bel et bien remplies. Ce système en deux phases – appel aux contributions écrites, puis, sur la base des résultats, convocation aux auditions orales – a été mis en place lors du débat public en France.

Une présélection des associations à auditionner serait par ailleurs souhaitable, même si tel n'a pas été le cas lors de la première Convention. Une sorte d'appel d'offre avait été lancé sur le site Internet du secrétariat général du Conseil de l'Union européenne : toutes les associations qui en avaient fait la demande ont pu être ainsi auditionnées. Le système de l'appel d'offre pourrait être répété dans la prochaine Convention s'il était assorti de l'obligation pour les associations d'y joindre une contribution écrite. Ceci permettrait d'encadrer le débat et de garantir toute sa qualité.

La question de savoir si la consultation s'étend à toutes les organisations ou à ce que l'on appelle maintenant la « société civile organisée » (syndicats, organisations du Groupe 3 au Conseil économique et social européen,… etc.) devra néanmoins être examinée avec soin.

La question des options :

Certains ont envisagé la possibilité que la Convention présente des options sur certaines questions.

Il y aura naturellement une différence importante entre les deux Conventions ; la première avait en effet un objet bien précis, essentiellement juridique : la rédaction d'une Charte des droits fondamentaux. La seconde aura sans doute un champ plus large, plus difficile, plus politique : l'élaboration d'une nouvelle architecture institutionnelle pour l'Europe ; elle ne constituera pas une codification juridique mais une réforme politique. On comprend dans ces conditions la recherche d'une formule plus souple, moins contraignante pour les Etats membres et les institutions européennes, d'où l'idée de confier à la Convention l'élaboration d'options ou de variantes entre lesquelles les décideurs feraient leur choix.

L'inconvénient d'une telle solution est double : les débats rebondiraient après la fin des travaux de la Convention, et l'on aurait perdu l'aiguillon de l'obligation de consensus qui a fait la force de la première Convention. A titre de compromis, on pourrait s'inspirer d'une pratique élaborée par la première Convention : celle-ci avait rendu compte de l'élaboration de ses travaux, à mi-parcours, au Conseil européen de Feira. Il n'y a pas eu de débats ou de décisions à cette occasion, mais les Chefs d'État et de gouvernement ont pour la plupart exprimé des opinions dont la Convention a pu ensuite tenir compte. Une telle procédure pourrait être renouvelée, sur la base de « rapports d'étape », selon un calendrier élaboré par la Convention et soumis au Conseil de façon informelle.

De même, comme ce fut le cas pour la Charte, le Parlement européen et la Commission seraient appelés à délibérer des projets en cours d'élaboration et pourraient ainsi intervenir utilement sur leur poursuite.

II) Le débat public en France : le processus et les acteurs

En France, une approche originale et innovante a été mise en place à la suite du Conseil européen de Nice, afin de lancer le débat sur l'avenir de l'Europe.

Un Groupe de dix personnalités indépendantes, que je préside, a été créé le 11 avril dernier par le Président de la République et le Premier ministre. Ce Groupe, dont l'appellation courante est Groupe « Débat sur l'avenir de l'Europe », est chargé de contribuer à la cohérence du débat national en vue de la rédaction d'un rapport de synthèse.

Pour que ce travail puisse réunir toutes les contributions et favoriser toutes les expressions (élus, partenaires sociaux, milieux économiques, universitaires et associatifs), un « questionnement » a été établi par le Groupe. Celui-ci s'articule autour de quatre grands thèmes qui sont au premier plan dans notre pays :

- A quoi sert ou doit servir l'Europe ?

- Quelles doivent être les compétences de l'Union européenne ?

- La démocratie et les institutions

- La poursuite du débat public sur l'avenir de l'Europe.

Ces questions servent aujourd'hui de support à la réflexion autour du « questionnement » qui a été diffusé par divers moyens à des milliers d'exemplaires, directement ou à travers les réseaux associatifs. Deux approches, nationale et régionale, ont été parallèlement retenues pour alimenter le débat autour du « questionnement » :

• Au niveau national, il appartient aux assemblées parlementaires et aux ministres de promouvoir le débat dans leur domaine respectif. L'Assemblée nationale prévoit d'organiser des « Assises sur l'avenir de l'Europe » au mois de novembre 2001, autour de parlementaires, de représentants d'association et d'établissements universitaires. A cela s'ajoutent des forums thématiques nationaux dont les thèmes ont été conjointement choisis par le Groupe en accord avec le Premier ministre et le Président de la République - Europe sociale, Services publics, Environnement, Justice :

1) Le **Forum « Europe sociale »** a été instauré à l'initiative d'Élisabeth Guigou, ministre de l'Emploi et de la Solidarité, et sera organisé le 30 octobre 2001 en coopération avec le Conseil Économique et Social.

2) Le second Forum concerne les **Services publics**. Il est organisé par le Ministère de l'Équipement, des Transports et du Logement en partenariat avec le Ministère des Affaires européennes et se tiendra en 6 novembre prochain.

3) Le Forum « **Environnement** » est prévu avant la fin du mois d'octobre.

4) Quant au forum « **Justice** », il aura lieu le 6 novembre prochain à l'initiative de Madame Lebranchu, ministre de la Justice.

• Au niveau régional, les préfets ont la responsabilité d'organiser des forums régionaux associant élus, représentants des milieux économiques et universitaires, partenaires sociaux et associatifs. Douze forums régionaux ont déjà eu lieu sur les 26 prévus au total. La participation à ces forums est importante (entre 200 et 1000 personnes) et les intervenants y sont très actifs. A la veille du sommet de Laeken, entre 15 000 et 30 000 personnes auront directement participé au débat public en France.

Parallèlement, plusieurs forums locaux ont été organisés ainsi que de nombreux colloques et séminaires d'initiative privée, sur des thèmes plus techniques comme les transferts de compétences. Le Groupe procède parallèlement à des auditions d'auteurs de contributions écrites.

Un site Internet consacré au « Débat sur l'avenir de l'Europe » a également été ouvert (www.info-europe.fr) : il permet de recueillir les contributions des citoyens, de favoriser la discussion en ligne et de couvrir un public qui n'aurait pu assister aux forums régionaux ou thématiques.

Les premiers enseignements de ces forums montrent que l'intérêt pour l'Europe est bien présent chez les Français, mais que les attentes en matière institutionnelle et politique ne sont pas toujours clairement exprimées : le débat sur la nature politique de l'Union européenne (fédération – confédération – fédération d'États nations) ou sur la future constitution européenne est encore mal perçu par de nombreux Français. Leurs préoccupations portent davantage, pour le moment, sur la dimension sociale de l'Europe, sur les questions d'éducation, d'environnement, et sur la communication en matière d'Europe. On constate un besoin important d'information sur l'Europe dans notre pays, et la revendication d'une plus grande transparence dans le fonctionnement des institutions européennes.

Ces résultats montrent que le débat engagé en France devra certainement se poursuivre au-delà du Sommet de Laeken, peut-être sous des formes différentes, dans le cadre de la réforme prévue pour 2004.

Un rapport de synthèse sur les attentes des Français en matière d'intégration européenne sera remis aux autorités françaises en novembre prochain. Il devrait faire le point sur les réponses au « questionnement », sans toutefois s'y réduire. L'objectif est de contribuer à alimenter le sommet et les débats qui auront lieu sur l'avenir de l'Europe à Laeken et au-delà.

Conclusion

S'il fallait retenir une seule chose de l'expérience de la Charte des droits fondamentaux, c'est sans doute l'esprit de concertation et d'ouverture qui fut présent tout au long du processus.

En dépit des imperfections dues à la nouveauté d'un tel exercice, la méthode s'est révélée satisfaisante dans son ensemble, anticipant certainement sur ce que pourrait être l'Europe de demain.

Le débat sur l'avenir de l'Europe : processus et acteurs

Giorgio Napolitano
Parlement européen

Le premier point que je vais aborder en partant du texte introductif de Paul Magnette est le rapport entre les questions de nature institutionnelle et les questions de fond, à traiter en vue d'une nouvelle Conférence intergouvernementale. J'aborderai en suite un deuxième point qui sera le mandat de la Convention qu'on envisage.

La déclaration avec laquelle les Chefs d'Etat et de gouvernement ont lancé à Nice le grand débat sur l'avenir de l'Union a reflété un certain degré de mauvaise conscience pour les conclusions si minces et douteuses de la CIG.

Pour certains chefs de gouvernement, elle n'a pas représenté, probablement, beaucoup plus qu'une concession aux mécontents; pour d' autres, elle a signifié l'admission qu'on devait aller plus loin, qu'un élargissement sans précédents de l'Union voire l'unification historique-politique de l'Europe, demander bien plus que des ajustements fonctionnels dans les institutions et dans le processus décisionnel, et que le stade auquel la longue marche de l'intégration est arrivée exige un dépassement de la philosophie des petits pas et des réticences calculées sur le futur de l'Union.

D'ailleurs cela avait déjà été dit au cours du 2000 par des personnalités politiques de premier plan, avant tout par Joska Fischer.

Mais c'est surtout après le tournant dramatique du 11 septembre, qu'une réflexion ouverte et courageuse sur l'Europe est devenue incontournable : une réflexion d'une épaisseur, d'une envergure correspondante à la dureté et à la complexité de ce contexte nouveau, vis-à-vis duquel ce serait vraiment dérisoire de voir des gouvernements et des chefs de gouvernement se bloquer encore sur le terrain des veilles querelles et des intérêts particuliers.

La farouche explosion du défi du terrorisme international, de la réalité impressionnante de son enracinement, de ses bases et de son influence, ne peut ne pas donner une portée bien majeure de celle imaginée par certains, au « grand débat », sollicite une remise en cause de ses priorités, fait avancer au premier plan pas seulement la question de la contribution de l'Union à la lutte contre le terrorisme et ses réseaux, même à l'intérieur de nos pays, mais plus en général le thème des responsabilités de l'Europe en tant qu'acteur global.

Aucun repli sur une approche dominée par des exigences et préoccupations internes à l'Union ne serait soutenable.

Si pour contribuer à une réponse commune à la menace terroriste, l'Union doit donner une impulsion nouvelle à ses politiques et ses institutions de défense, d'intelligence, de police et de justice – ce qui implique l'insertion dans le grand débat du développement du II et du III piliers, y compris leur évolution institutionnelle on doit comprendre que ce sont les problèmes de la gouvernance globale et de l'ordre mondial dans leur ensemble qui ont « précipité » (dans le

sens chimique du terme) avec le 11 septembre en exigeant des changements profonds, un engagement nouveau de la part de la communauté internationale et donc de l'Europe.

Est-ce que cela signifie qu'au sein du grand débat, et en particulier dans les travaux de la Convention qui va être créée, les questions de l'architecture institutionnelle de l'Union et de sa légitimité démocratique, vont devenir tout à fait secondaires, ou qu'on devrait séparer les questions de forme et les questions de fond comme Paul Magnette les a appelées en suggérant même deux Conventions successives ? Je ne le crois pas.

Je crois qu'on peut assumer les impératifs qui sortent du 11 septembre comme véritable clivage dans la situation mondiale pour relier les choix institutionnels qui sont devant nous à l'ambition obligée de faire de l'Europe un acteur global pleinement responsable, à la hauteur de ses potentialités. Pour jouer un tel rôle dans le monde d'aujourd'hui, l'Europe doit combiner – dans la perspective désormais très proche du grand élargissement – diversité unité et efficacité, capacité de décision et force d'attraction idéale, identité de principes et de valeurs et conscience de sa mission : c'est dans ce cadre que se posent les 4 thèmes indiqués à Nice et en particulier la réorganisation, (pas seulement la simplification) des Traités, et donc l'adoption d'un Traité fondamental voire d'une Constitution (je reviendrai sur ce point).

Le thème de la délimitation des compétences renvoie évidemment à une des « interrogations existentielles » que – comme Paul Magnette l'a écrit – on a voulu éluder à Nice en adoptant la déclaration 23 dans les termes que nous connaissons : c'est l'interrogation rappelée encore par Paul Magnette "Fédération politique" ou "Fédération d'Etats". Peut-être quelqu'un s'est souvenu à Nice de la discussion tourmentée qui eut lieu au cours de la préparation de Maastricht sur l'introduction dans le Traité d'une référence à la vocation fédérale de l'Union. Même si un certain nombre des chefs d'Etat et de gouvernements ont récemment épousé la formule de Jacques Delors, comme l'accent peut être placé librement sur la première ou sur la deuxième partie de la formule, la clarté et l'entente sur ce sujet n'ont pas encore été atteintes. Il y a ceux qui préfèrent pourtant considérer nominalistique une telle discussion et se concentrer sur « ce que nous voulons faire ensemble »; mais cela ne peut pas éviter de donner des réponses sur comment le faire, à travers quels développements sur le plan intergouvernemental et sur le plan supranational, avec quel choix pour l'exécutif européen et quel rôle pour le Parlement.

On devrait au moins débarrasser le terrain d'une polémique qui fausse les termes du vrai débat : c'est la polémique contre le principe d'une « ever closer integration », qui conduirait fatalement à un super Etat européen. Cette finalité - dit-on - devrait être éliminée dans les Traités, et la délimitation de compétences devrait être repensée en conséquence. Mais en effet dans les Traités vous trouvez depuis longtemps (l'Acte unique) autre chose, c'est-à-dire l'idée d'une union sans cesse plus étroite entre les peuples de l'Europe, « an ever closer union among the peoples » que c'est abusif d'identifier avec une intégration sans cesse plus étroite entre les Etats. Le super Etat est une cible facile mais imaginaire; le vrai débat concerne la distinction à faire entre ce qui doit être plus profondément intégré, ce qui doit rester sous la responsabilité des Etats, ce qui doit voir plus de coordination et de synergie entre les Etats dans le cadre de l'Union. Et cette tâche n'est pas simple, parce que dans l'opinion publique, il y a aussi une tendance à demander trop de l'Union; d'autre part le 11 septembre a fait brusquement découvrir comment la dimension nationale est devenue inadéquate pour faire face à beaucoup des défis de notre temps.

Ce qui reste essentiel, en tout cas, est l'effort pour rendre le processus d'intégration plus transparent et compréhensible aux yeux des citoyens, plus légitime et contrôlable selon les règles de la démocratie : autrement nous ne pourrons pas surmonter les frustrations et le

scepticisme croissant à l'égard de la construction européenne ni contrecarrer les campagnes europhobes, nous ne pourrons pas compter sur le soutien et sur la participation indispensable pour le succès de notre entreprise. La Convention peut être un instrument pour avancer dans cette direction, Paul Magnette l'a très bien dit : en impliquant la société civile, en intéressant le grand public, en donnant l'occasion de débattre clairement des finalités et des principes de l'Union, en jetant les bases d'une culture constitutionnelle.

Je viens ainsi à la Convention, au-delà des doutes que l'adoption de ce nom peut susciter, des équivoques ou des illusions qui peuvent surgir. Je partage les opinions du rapporteur pour ce qui concerne les avantages de cette méthode, de ce type d'organisme, sa chance d'éviter les impasses d'autres choix. En même temps, moi non plus, je ne veux pas tomber dans un excès de simplisme et d'optimisme, et donc je crois que Paul Magnette a raison à propos des interrogations et des risques qui se présentent soit pour le mandat soit pour les procédures. La Commission constitutionnelle du Parlement européen va adopter lundi prochain une résolution pour préciser ses positions sur tous ces aspects. J' insisterai ici surtout sur les risques concernant le mandat : si le Conseil, déjà à Gand, va s'orienter pour confier à la Convention le soin de dégager des alternatives, des options sur un certain nombre de questions, ce serait une façon de la vider, de la réduire à la même fonction à laquelle fut réduit le groupe de réflexion Westendorp. Le Parlement européen y réagirait dans toutes les formes possibles. Ce qui doit être dégagé par la Convention est un projet cohérent, comme la COSAC aussi l'a affirmé la semaine passée. On doit travailler à une reforme globale des traités, qui puisse inclure un projet de Traité constitutionnel, "a Basic Treaty" qui respecte encore et en même temps dépasse les canons du droit international public.

Le Parlement européen ne prétend pas, - voilà un point de discussion avec Paul Magnette - de placer dans les mains des parlementaires le pouvoir constituant ravi au gouvernement. Nous savons très bien que les chefs d'Etat et de gouvernement ne semblent pas disposés à se dépouiller de leur pouvoir constituant. Notre idée, plus réaliste, plus modérée, si vous voulez, mais tout de même innovatrice, c'est de mettre en cause le monopole du pouvoir constituant jusqu'à présent gardé par les gouvernements, pour en faire un pouvoir partagé entre les gouvernements et les Parlements. La Convention peut devenir l'instrument de cette innovation. Pas une Convention comme assemblée constituante, parce que l'art. 48 est là et impose que le dernier mot soit réservé à une Conférence intergouvernementale, donc aux Chefs d'Etat et de gouvernement. Pas le Parlement européen avec un mandat constituant, comme on avait demandé à l'époque d'Altiero Spinelli, parce que l'expérience a montré que le Parlement européen ne peut pas représenter tout seul les peuples de l'Union, à quel point les parlements nationaux doivent lui être associés dans le processus de parlementarisation et de constitutionnalisation de l'Union.

Oui, il y a une réflexion à faire aussi pour le Parlement européen, sur la façon dans laquelle il exerce son rôle, sur la façon dans laquelle il peut la renforcer (en l'affinant) sur le plan qualitatif, et sur la perspective d'une coopération de plus en plus étroite avec les Parlements nationaux en évitant en même temps le piège, la fausse solution d'une 2ème chambre. Les parlements nationaux doivent être parmi les acteurs fondamentaux du « grand débat » et de la Convention.

Plus en général nous devons nous engager – c'est le point de vue de la Commission que je préside et d'un rapport qui m'a été confié – sur la voie d'une coopération bien plus étroite, articulée et systématique entre le Parlement européen et les Parlements nationaux sans aucune confusion entre leurs mandats respectifs. Je vois ici un aspect, seulement un aspect, mais très important d'une vision plus ample : une vision de la démocratie en Europe, qui ne peut plus être garantie sur des bases uniquement nationales mais doit et peut se développer en

même temps au niveau supranational, à travers des formes d'intégration savante entre les deux niveaux. C'est difficile bien sur, mais, en reprenant ce que le Professeur Weiler a dit, « as a policy-maker I dare say : that can be done, that can be achieved ».

Le débat sur l'avenir de l'Europe : processus et acteurs

Christine Roger
Chef de cabinet du Commissaire européen Michel Barnier

Monsieur le Président,

Mesdames et messieurs,

Quelques mots, comme vous m'y invitez, pour commenter l'excellente présentation du professeur Paul Magnette sur la composition et les modalités de travail de la future convention.

Une convention, pour faire quoi ?

La déclaration de Nice identifie plus particulièrement quatre axes de réflexion :

- le rôle des parlements nationaux,
- la simplification des traités,
- l'insertion dans les traités de la charte des droits fondamentaux
- et la délimitation plus précise des compétences entre l'Union européenne et les Etats membres.

Il s'agit là de questions importantes, mais qui ne suffisent pas à décrire le champ de la réflexion. Comment poser la question des compétences sans s'interroger sur ce que les Etats membres de l'Union veulent faire ensemble ? Comment examiner le rôle des parlements nationaux sans une approche plus globale de la légitimité du système européen ?

La convention devra, plus largement, répondre aux attentes des citoyens qui, bien souvent et à juste titre, mettent l'accent sur l'efficacité de l'Union, sur sa capacité à mener des politiques dont ils ressentent fortement la nécessité. C'est pourquoi je crois que la question du mandat de la future convention mérite d'être abordée d'une manière nouvelle. Il s'agit moins de définir une liste de thèmes à traiter que de préciser dans quel esprit et avec quel cadrage politique les membres de la convention devront travailler.

Le grand bond en arrière ?

Ce que nous montrent les débats publics, pour la plupart, c'est une demande d'Europe. Sans faire de distinction entre les matières communautaires et le domaine intergouvernemental. C'est même dans ce dernier champ que les attentes s'expriment le plus. Politique étrangère et défense, lutte contre le terrorisme, coopération policière et judiciaire...

Or, certains des quatre thèmes retenus à Nice recèlent un réel potentiel régressif.

Lorsque certains, à propos de l'implication des parlements nationaux, recommandent la création d'une nouvelle chambre, de quoi parle-t-on ? Qu'il s'agisse d'ailleurs d'une chambre des représentants des parlements nationaux ou d'une construction nouvelle à partir du comité des régions, a-t-on oublié que ce système indirect prévalait avant l'élection des membres du Parlement européen au suffrage universel ? Et qu'il avait fallu s'en écarter, et pour de bonnes raisons ?

Lorsque certains, sous couvert de délimitation des compétences, contestent dans leur principe même des politiques aussi fondamentales que la politique de concurrence, la politique agricole ou la solidarité financière entre les régions et les Etats d'Europe, de quoi parle-t-on, sinon de démembrement de l'acquis commun ?

A ce jeu-là, chacun pourrait être tenté de refaire l'Europe à sa manière. Alors que l'Union se fonde sur des compromis entre les intentions parfois opposées des Etats membres. Il faut bien mesurer ce qu'implique la délimitation des compétences et ne pas perdre de vue la nécessité de maintenir des politiques communautaires fortes.

Voilà pourquoi je prends quelques distances à l'égard de l'affirmation du professeur Paul Magnette selon laquelle la convention doit nécessairement travailler par consensus.

Je ne pense pas qu'il soit souhaitable de voter – et, d'ailleurs, comment définir des règles de votes légitimes ? Combien vaudrait un député européen par rapport à un député national, un représentant de gouvernement par rapport à celui de la Commission ?

Mais je crois cependant que le consensus peut ne pas être toujours la meilleure formule. Comment faire pour que la nombreuse assemblée qui formera la convention choisisse pour l'Europe la voie la plus ambitieuse et non le plus petit commun dénominateur ? L'impulsion que donnera le président de cette convention sera déterminante – d'où l'importance du choix de cette personnalité.

Cela suffira-t-il pour que le consensus se fasse autour d'un projet nécessaire, plutôt que seulement réaliste ? Peut-être pas, car il faut bien voir que le poids du consensus, si lourd dans les discussions intergouvernementales, pourrait peser tout autant pour une convention multilatérale, où la méthode communautaire ne s'appliquera pas. De ce point de vue, des options, dont certaines seraient courageuses, valent peut-être mieux qu'un consensus au rabais. C'est pourquoi il me paraît difficile de prendre parti dans la querelle théorique qui oppose les partisans des options et ceux du consensus. Tout ce que l'on doit souhaiter, c'est que le résultat de la convention soit à la hauteur des enjeux. Et, en ce cas, la Commission sera la première à demander qu'il soit repris tel quel par la future conférence intergouvernementale qui révisera les traités.

Quelles orientations à Laeken ?

Un retour en arrière serait un réel paradoxe alors que l'Union européenne s'affirme comme le moyen le plus concret dont disposent nos sociétés pour répondre aux défis de la mondialisation des échanges et des cultures. Pour guider le travail de la convention, la déclaration de Laeken doit donner des orientations qui consolident l'intégration européenne. Et inciter les uns et aux autres à se déterminer sur certaines questions fondamentales.

Que voulons-nous faire ensemble ? Des travaux de Maastricht, d'Amsterdam et de Nice, on peut en effet tirer la conclusion qu'une nouvelle réforme des institutions ne sera réussie, et vécue comme telle, que si l'on parvient au préalable à définir un projet commun, à former une volonté politique. Et que l'on commence par analyser la réalité afin de préparer les réformes.

La réalité, c'est qu'il existe en Europe et pour l'Europe des volontés différentes, des ambitions différentes. Tous les Etats membres ne souhaitent pas, aujourd'hui, adopter l'euro. Ceux qui ont choisi la monnaie unique n'acceptent pas tous la perspective d'une zone d'intégration économique complète, étendue à certains domaines fiscaux et sociaux.

Et ce n'est qu'un exemple. Sur la défense commune, sur les questions d'asile et d'immigration, sur une quantité de questions qui font l'objet d'exceptions et de dérogations dans les traités, les divergences sont objectives. Or, avec l'élargissement, ces forces centrifuges vont s'accroître mécaniquement. Et peut-être même s'étendre à des domaines aujourd'hui mieux protégés de cet éclatement des politiques – le marché intérieur, peut-être, le financement de l'Union, la politique de solidarité entre les régions et les Etats, la politique agricole commune, la politique de concurrence...

Il faut peut-être sortir de certaines équivoques et s'interroger sur ce qui unit les Etats européens, mais aussi sur ce qui peut à certains moments les séparer. Et se demander si le projet européen peut résister à cette diversité accrue.

L'Union ne peut esquiver le débat sur les écarts de capacité et de volonté qui existent et existeront entre les Etats membres. Et les réformes institutionnelles doivent tenir compte de cette réalité.

Si ce débat sur les objectifs de l'Union a effectivement lieu, il faut espérer que le champ d'action de l'Union apparaîtra plus nettement et sera mieux accepté par les peuples de l'Europe. Alors se posera la question institutionnelle. De quelles institutions faut-il disposer pour porter le projet européen ? Comment renforcer la légitimité démocratique et l'efficacité de nos institutions ?

En conclusion, je soulignerai donc l'importance que la déclaration de Laeken pose les bonnes questions et se garde d'apporter maintenant les réponses. Car l'Union européenne, pour la première fois peut-être, a le temps de réfléchir à ce qu'elle veut devenir, à ce que représente le doublement programmé du nombre de ses Etats et à la manière dont elle peut conserver son élan fondateur et l'unité dont la nouvelle donne internationale prouve chaque jour l'absolue nécessité. Il faut en profiter.

The Constitutional Architecture

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I. Introductory Remarks

Talking about the Future Constitutional Architecture of the European Union against the background of the preparations for the next intergovernmental conference is no "green field operation". To start with the obvious, we have to face the fact that conceptual blockage is a threat from the very beginning. On the one hand, we see *Joschka Fischer*[1] propose a "European Federation" including a "fully fledged" European Parliament and a division of competences, on the basis of a concept of shared sovereignty. On the other hand, we also note that the responses e.g. by the British and the French prime minister are more or less open objections. *Tony Blair* criticises "the view of Europe as a superstate, subsuming nations into a politics dominated by supranational institutions" which allegedly "fails the test of the people", and denounces the "so-called democratic deficit."[2] *Lionel Jospin*, more cautious, stresses the vision of Europe as a "federation of nation states", but avoids any suggestion to enhance parliamentarism at European level.[3] Under these circumstances, what can be the contribution of (legal) science to such a *political* decision like that on the Future Constitution? The answer can, in my opinion, and if we agree that it is not for scientists to make politics, only lie in an effort to analyse the starting point and the possible impact of envisaged alternatives. My contention is modest and challenging at the same time: It is possible to address the most important deficiencies of the present Constitution of the EU, and at the same time avoid the "Ultimate Goal Trap". This contribution is a search for safe ground for such a pragmatic way forward which could avoid premature blockage. It is at the same time a plea that at this stage it is neither necessary nor desirable to call for a completely "New Constitutional Architecture".

II. A Preliminary Agenda: Why Terminology Does Matter!

The topic of a Constitutional Architecture involves the disputed question whether the Union does already have a constitution, or should have one in the future. Indeed, in legal and political

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[1] *Fischer* (2000).

[2] *Blair* (2000). "There are issues of democratic accountability in Europe - the so-called democratic deficit. But we can spend hours on end, trying to devise a perfect form of European democracy and get nowhere. The truth is, the primary sources of democratic accountability in Europe are the directly elected and representative institutions of the nations of Europe - national parliaments and governments." Compare also the speech by Foreign Secretary *Straw* (2001): "I do not buy the Europhobic argument that the only acceptable form of European unity is intergovernmental co-operation, and that the only acceptable basis for agreement is unanimity … But nor do I buy the argument of the so-called federalists that the EU can only connect with its citizens by by-passing the institutions of the nation states and creating strong centralised bodies which have the attributes of statehood at European level."

[3] *Jospin* (2001).

science, it has become common to speak of the "constitution" of the EU or the Communities.[4] The European Court of Justice has referred to the TEC as the basic "constitutional charter".[5]

First, the employment of such terminology does not necessarily imply that the EU is a state. On the contrary, the term "constitution" is equally taken to mean the basic legal fundaments of an international organisation.[6] In general, what is covered by this notion is the founding treaty leading to the establishment of an organisation, including its legal personality, as well as amendment and termination procedures. Furthermore, legal theorists often refer to the "constitutions" of confederations.[7] Moreover, several founding instruments of traditional international organisations are expressly titled as a "constitution". This is so in the case of UNESCO, the WHO, the ILO and the FAO.

It is clear that, *in this sense*, the EU already has a constitution.[8] Thus, the controversial contention, namely that a constitution is not conceivable without a state,[9, 10] is unfounded. Consequently, the debate on the "constitutional deficits" of the EU can, and should, be distinguished from that on the statehood of the Union.[11] That the Union is no state consequently is no obstacle to further elaborate on "The Constitution of Europe".[12]

Thus terminology does matter in the sense that there is no reason to avoid the term "European Constitution". So far, this is no cure for eventual deficiencies, but merely the removal of an conceptual obstacle to a fruitful debate.

Second, and of course even more important, is that we might consider the current Treaties to already fulfil the functions traditionally ascribed to constitutions *of states*.[13] This means, and omitting controversies on the subject, to define and authorise certain organs to enact (and to enforce) law which is directly binding on the citizens, to define the law making procedures, and to establish limits to the powers of the authorized organs. All this would be enshrined in a legal text[14] which is more stable in terms of alteration procedures than the (subordinate) rest of the legal order. However, things should not be mixed up: This debate is on the eventual transformation of the Union into a state. By accepting that the Treaties do fulfil these functions we acknowledge the state-like appearance of the Union.[15] It does not imply that the Union actually is a state, nor that it should become a state.

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[4] On this and the following, see also *Bieber* (1995), *van Gerven* (1995), *Griller et al* (2000) 86 ff , *Müller-Graff* (1999), *Petersmann* (1995), *Schneider* (1997b), *Schwarze* (2000) 16 f, *Weiler* (1999), with extensive further references.

[5] Case 294/83, *Les Verts*, 1986 ECR, 1339, para. 23. The Court emphasized that the EC "is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty." See also Opinion 1/91, *EEA I*, 1991 ECR, I-6079, para. 21.

[6] See *Schermers/Blokker* (1995) § 1146.

[7] Compare *Kelsen* (1949) 319: "[t]he constitution of the central community which is at the same time the constitution of the total community, the confederacy ....".

[8] This is also the view taken by e.g. *Bieber* (1995) 292 ff, *Griller et al* (2000) 86, *Huber* (2001), *Pernice* (2001), *Petersmann* (1995).

[9] E.g. *Isensee* (1987) para. 1, claiming that the constitution is not to be understood without the state, the state being its subject and its prerequisite.
This debate has emerged mainly in Germany within recent years. Compare e.g. *Grimm* (1995) and *Zuleeg* (1997).

[10] But also, that a state is not conceivable without a people of at least relative homogeneity: see e.g. *Böckenförde* (1987) para. 63 ff; this view seems to have been accepted by the German Constitutional Court in its Maastricht judgement, BVerfGE 89, 155, at 186.

[11] For this debate, compare e.g. *Griller et al* (2000), *Grimm* (1995), *Kumm* (1999), *U. Schmid* (1999), *Weiler* (1998), *Mancini* (1998).

[12] *Weiler* (1999).

[13] Compare only *Craig* (2001) 126 ff, and *Pernice* (2001) 158, with further references.

[14] This being the rule, not excluding the exception of unwritten constitutions like in the United Kingdom.

[15] Compare below III. B.

Thus, the discussion on the actual functions and the desired qualities of the constitution of the Union is of the utmost importance. To understand its origins and implications, it is necessary to analyse the motives and the intentions of the various contributions to the debate.[16] Intentions may range from the promotion of the idea of European integration among European citizens, without aiming at substantial reforms of the system as such, over concerns that the "state-like" features of the Union make constitutionalization an urgent necessity, to the political impetus to found a European state as the desired final stage of European integration.

A third, and most important, aspect of the debate is the following: If we agree that the constitution of the Union already today fulfils functions which are typical for statal constitutions, it is essential to ask what the remaining difference is. Sometimes, this debate is avoided. Academics concentrate more and more on the unique features of the Union. It is widely accepted to look at the Union in general and the Communities in particular as *sui generis* in nature, organisations which cannot be captured in the traditional categories of the state and of international organisations. Instead, the Union is seen as an organisation which transcends these traditional categories. The implicit or sometimes explicit suggestion is that it does not make sense or that it would be misleading to discuss these new developments in the terms of the past.

This view is – and without neglecting the merits of the debate on the *sui generis* features of the Union – rejected here mainly for two reasons. The first is that the thoroughly and over centuries developed categories of theory, this is the General Theory of Law and State[17] including that of Communities of States (*Theorie der Staatenverbindungen*) is flexible enough to capture a wide variety of organised co-operation between states, ranging from more or less decentralised unions of states or confederations (*Staatenbund*) where the relations between the member states are based on international law, to federal states (*Bundesstaat*) where the relations between the members are governed by state law. History offers all sorts of variations of such Communities of States, inspiring also for a closer analysis of the Union. The Union is, on the grounds of this tradition, a confederation (*Staatenbund*). Such qualification, it has to be stressed, in no way diminishes the Union's specific achievements, especially its supranational legal order – which might be seen as an unprecedented range of competences being transferred to an international organisation empowered to adopt legislation which is directly binding on the citizens, supreme over member state's law, partly open to adoption by majority decisions, partly even by organs (the Commission) acting independently from the member states, and including a centralised legal scrutiny by the ECJ. In traditional theory, this means that the Union has, in terms of centralisation, come near a federal state. It might be called a highly integrated confederation but – for reasons to be discussed – has not turned into a state. There is nothing sensational in this result, given that the dividing lines between confederations and federal states are, according to traditional theory, far from being clear cut.

This might exactly be one of the reasons to leave these traditional categories behind. The effort is to find new categories for such unprecedented development. It is perfectly understandable that, in order to capture the remarkable specificities of the Union, the terms "confederation" and "state" are avoided. Instead we speak, to name only a few of the well argued proposals, of "Multilevel Constitutionalism"[18], "Supranational Federalism"[19] or "European Commonwealth"[20]. To call the Union – as it stands today or as it should emerge in the future – a "European

[16] *Craig* (2001) 135 f.
[17] Compare only *Bindschedler* (1954), *Jellinek* (1882), *Kelsen* (1949), *Kunz* (1929).
[18] *Pernice* (1999).
[19] *Von Bogdandy* (1999).
[20] *MacCormick* (1999).

Federation" or a "Federation of nation States"[21], arguably in the same vein reflects the *sui generis* character of the Union as an untypical confederation (or an untypical federal state). Again, there is nothing to object as long as this does not imply to denounce the traditional categories of General Theory as irrelevant. Such a stance would have to be argued for the sake of scholarly prudence.

However, if it were only for "academic theory", things might be easier to handle. We might, still important enough, argue about the conditions of scientific concept building. We would have to identify elements of a (third) alternative to confederations and states, and good reasons to overthrow as insufficient the flexible concept of "Confederations" (*Staatenbünde*). But the second reason why the debate on statehood cannot be avoided – and discerns it from that on scientific concept building alone – is that we are talking about a decisive category of international law.[22] Its relevance will not disappear for the only reason that fifteen (or even twenty seven) European states participate in an unprecedented process of integration. If we agree that one of the most important consequences for a state to form part of a confederation or of a federal state is the existence or the non-existence of legal personality *under international law* with all its repercussions (e.g. for liability under international law, for membership rights in international organisations), it becomes abundantly clear that the point is of vital importance for the Member States of the Union.[23] International law, however, and in this point in conformity with general theory, does not offer a third alternative to confederations and (federal) states.[24] This does not exclude "mixed arrangements" where component states may to a certain extent still be authorized by virtue of the federal constitution to engage in international affairs. But in general, the difference between a confederation and a federal state – the foundation in international law and the foundation in national law respectively – involves the issue of "international presence" and international responsibility. A debate ignoring these implications would not only be highly theoretical, it would simply miss a decisive element of constitution building. This, it is submitted, is the most important reason why the debate on statehood cannot and should not be avoided in the constitutional debate, and why is has to be conducted, at least to a certain extent, in the categories of international law.

III. The Starting Point: The Union is No State – But Why?

A. The Decisive Reason for the Absence of Statehood

We all agree that the European Union and the European Communities respectively are no state. But there is no harmony on the question why this is so. The prevailing view seems to be that the reasons lie in the absence of several attributes which are considered to be essential for a state. For some, it is state power – the argument being that Community powers were not sufficiently comprehensive, even if others say that in several points they surpass the powers of the federal level in many federal states –, while others draw on the lack of a state people. But since we cannot, against the background of the state-like appearance of the Union, agree on the point where quantity might eventually change the quality of the system, many proposals for a reform immediately face suspicion. The introduction of a charter of fundamental rights into the Treaties, or the elimination of decision making under the constraint of unanimity (eventually including

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[21] See above near fn 1 and 3.
[22] See for the following only *Kelsen/Tucker* (1966) 259 ff.
[23] Very clearly addressed in the speech by *Chaques Chirac* to the German Bundestag, 27 June 2000 (Le Monde, 28 June 2000, p. 16) stressing that neither the French nor the Germans envisage the creation of a European Super State "qui se substituerait à nos Etats-nation et marquerait la fin de leur existence comme *acteurs de la vie internationale*".
[24] Recently in the same vein *Leben* (2000) esp 110 f.

Treaty amendments), or a president of the Commission elected directly by the people, or a catalogue of competences, or enhanced parliamentarism: Might not each point or at least their combination result in the emergence of a European State?[25]

The way chosen here is to first reflect on an answer to the question what makes the difference between the Union and a state in order to find a way to avoid the transgression of the controversial border. For, consensus is needed for every reform, and we can take it for granted that no consensus will be available for the forming of a European state. Obviously the consensus which is lacking concerns the finality and legitimacy of European integration.[26]

Should we discover that desired reforms inevitably necessitate the foundation of the "United States of Europe" as a new state under international law, we could still conduct an academic debate and hope to convince politicians. By contrast, the suggestion I would like to put forward is that this is not necessary, that substantial reforms can be undertaken without such a fundamental change in the legal nature of the Union.

The reason for this position is simple: Given the state-like properties of the Union *as it exists today*, the decisive element missing for the emergence of a state is the lack of the founding will of the member states.[27] Thus the Union and the Communities respectively have to be qualified as confederations of states under international law. It is not the substance of the current state of affairs, including indisputable conservatory elements, designed to preserve the statal character of the Member States,[28] which is the obstacle for statehood. To put it more bluntly: Even today the powers of the Union and the Communities encompass what is necessary for a federal state; in terms of competences maybe still a rather weak federal state, yes, but nevertheless a federal state in the sense that the central and the component entities enact laws directly binding for the citizens within defined fields of activity, that there is participation of the component entities in the law making of the central entity, and that there is a mechanism of judicial settlement of disputes in cases of conflicts between them.[29]

Eventual amendments of the current constitution would not more or less automatically turn the Union into a state. As long as the Member States do not want to found a state, those reforms which are under discussion would not inadvertently produce that effect. Things might be different if the proposals would include a complete centralisation of competences and the elimination of the Member States' legal personality under international law. But this is not the case. In this sense: There is no case for a completely new European constitution. Substantive reforms can be achieved without changing the status of the Union as a highly integrated confederation of states.

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[25] E.g. *Müller-Graff* (2000c) 160 f, *Leben* (2000) 107, 108.
[26] See e.g. *H. Schneider* (1998) 331 ff, 338 ff.
[27] For a more detailed elaboration see *Griller* et al (2000) 65 – 88. The core aspects are coined in the following subchapters.
[28] *Dashwood* (1998b) 202 f. The author mentions inter alia the principles of the attribution of powers, subsidiarity and proportionality, as expressly introduced into the ECT by the Maastricht Treaty.
[29] See e.g. *Lenaerts* (1990); recently *Weiler* (2000) 239.

B. The Details of the Argument

1. The Powers of the EU and the Communities

a) General Attributes of a State

Neither the EU nor the Communities can be classified as a state under international law or in the light of the general theory of law and state[30]. However, the reasons given for this widely accepted diagnosis differ remarkably. I would like to discuss three of the alleged "deficiences" regarding statehood – the absence of sufficient powers, in particular to determine the scope of existing powers, the lack of a state people and of a state territory –, before offering my own interpretation.

Regarding state power, it is useful to begin with *Kelsen*'*s* position[31] that the only difference between a federal state and a (con)federation of states is the degree of centralisation involved. The degree of centralisation, in this view, distinguishes not only the unitary state divided into provinces from the federal state, but also the federal state from an international confederation of states.[32] It is stressed in this context that in a federal state, certain important subject matters - such as foreign affairs (specifically the conclusion of international treaties), the declaration of war and the conclusion of peace, as well as control of the armed forces - usually fall within the competence of the federation. Therefore, organs of armed forces are organs of the federation, not of the component states. By contrast, the competence of an international confederacy is, according to this view, usually limited to the settlement of disputes between the member states and defence against external aggression. In a confederacy of states, the competence of the member states in the field of external policy and military affairs remains virtually unrestricted. There is no centralisation of executive power. As a result, the Member States retain unrestricted possession of their primary instruments of power.

On this ground, it could – at least in terms of the first decades – be concluded that the Communities should be qualified as confederations, since they lacked the necessary centralisation in foreign and military affairs,[33] despite far-reaching centralisation in economic matters.

This analysis, given in the context of the general theory of law and state, is partly overlapping with views expressed on a widely respected triad of international law, i.e. the constituent elements of statehood: territory, people[34] and power. It is claimed that the Union[35] lacks the third element, since the power to use force is still monopolized by the Member States. It is

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[30] On statehood of the Union and the EC, compare e.g. *von Bogdandy* (1999), *Dashwood* (1998b), *Mancini* (1998) and *Weiler* (1998).

[31] For the following, see *Kelsen* (1949) 321.

[32] *Kelsen* (1949) 316 ff.

[33] *Kelsen*/*Tucker* (1966) 264, fn. 89. In addition, *Kelsen*/*Tucker* point out that the Commission (then, the High Authority) possesses no powers of enforcement, the EC organs lack the competence to execute sanctions against violators of the Treaties and the Communities have no police and military forces of their own.
For these reasons, the authors also reject as misleading the idea that the EC is a partial federation.

[34] On the first two elements, see below after fn. 64.

[35] For the sake of brevity, I am referring to the EU as an international organisation comprising the three European Communities, founded according to Article 1 TEU. The discussion in the text is, however, dependent neither on the legal personality of the EU nor on a specific characterization of the relationship between the EU and the Communities. It would be equally possible to disregard the special status of the EU and discuss the matter in terms of the three Communities alone.

argued in particular that military and police affairs, as well as the enforcement of European law in general, remain within the national sphere.[36]

An argument on the grounds of the *Kelsenian* approach is that the power of a State may be seen as "nothing but the validity and efficacy of the legal order, from the unity of which is derived that of the territory and of the people"[37] and that it is a hopeless effort to try to produce an exhaustive enumeration of state competences. This also holds true when trying to define an exact borderline between sovereign states and entities lacking this quality in terms of minimum competence requirements.[38] In contrast, it can hardly be denied that as far as competences are concerned "there is a smooth transition from loose cooperation between states to structured cooperation within an international organization, just as there is a smooth transition between some international organizations and sovereign states".[39]

In this context, the most forceful objection against the view that foreign affairs and military matters have to be centralized in order to transform a community of states into a fedaral state is that the essential element of the notion of state power, at least in international law, is *not* to secure a certain element of centralisation *within* a polity but to secure – in addition to validity and efficacy – independence from outside powers. State power under international law is a decisive criterion when ascertaining self-governance,[40] but not when ascertaining the specific degree of centralisation within a state.

Thus, it is arguable that even the complete decentralization of foreign and military affairs, as a prerogative of the EU Member States, would not inevitably exclude the quality of the Union's statehood *per se*, if common action in these fields was nevertheless possible.[41] Furthermore, regarding military affairs, if the absence of an army does not prevent an entity from being classified as a state,[42] why should decentralisation?[43] Overall, therefore, its relatively weak position in the field of foreign and military matters is not a decisive argument against the Union's statehood.

This is not to say that the issue of centralisation is completely irrelevant in this context. But it is submitted that there are no good reasons to define, in terms of specific fields of activity, sort of *à priori* competences the centralisation of which would be indispensable. As far as the necessary degree of centralisation, in general terms of "regulatory output", is concerned, I hold that neither international law nor theory provide a precise dividing line and that, in reality, the transition from confederation to federal state is a smooth one.

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[36] Compare *Oppermann* (1994) 91; but also *Everling* (1993) 941 f and *Stein* (1990) 98 ff.
[37] *Kelsen* (1949) 255.
[38] *Kelsen* (1925) 110 f. *Kelsen* stresses that each effort to draw exact borderlines in terms of competences, in order to define minimum rights for a sovereign state, would be arbitrary.
[39] *Schermers/Blokker* (1995) § 31.
[40] Meaning the ability to form a will of its own, not the absence of obligations. Compare *Doehring* (1987) 426.
[41] Compare the thorough study by *Kunz* (1929) 660, who stresses that the division of competences in the field of foreign affairs is a mere question of positive law for the federal state and that under international law, the centralisation of competences does not constitute a decisive difference between a confederation and a federal state.
[42] This can at least be concluded from the historic examples of unarmed (neutral) states such as Costa Rica, but also from the debate on the elements of statehood, where it is widely accepted that factual dependence from another state or even occupation by another state does not, per se, inhibit statehood; compare e.g. *Isensee* (1989) 135, *Kimminich* (1992) 30.
[43] Lack of competence in military affairs would be very unusual for a federal state – compare *Kunz* (1929) 655 ff. However, there are historic examples of federal states that have to rely on military contingents from the component states, as is the case in Switzerland. In addition, the transition from exclusive competence of the federation to concurrent federation/state competences is rather fluent.

b) Statal Features of the Union and the Communities

The situation in practice seems to be that the regulatory powers of the Union and the Communities do not lag far behind those of the central authorities in a loosely integrated federal state. Despite acknowledged limits in the field of foreign affairs, the EU clearly has a "state-like" appearance in terms of permanent population, defined territory and scope of powers. As a general impression, this view is acknowledged even by writers fiercely opposed to the concept of European statehood *per se*.[44]

It is relatively undisputed that Community competences nowadays impinge on nearly every field of national law-making.[45] It is only of secondary concern that the exact degree of this intrusion into the core of national sovereignty (in the sense of political independence) is difficult to estimate. Moreover, this calculation varies from state to state, depending on the division of powers between legislative and executive institutions at the national level. The legislative organs, *i.e.* parliaments, in Member States like Great Britain and France with a traditionally strong executive may be less affected than those in states like Germany or Austria, where thorough determination of each act of the executive by the legislature is mandatory under constitutional provisions.

The dictum ascribed to the then president of the European Commission, *Jacques Delors* – and presumably accepted by the German Constitutional Court in its Maastricht-judgment – that by 1993, at the time of the judgement, nearly 80% of all legislation in the field of business law would be determined, and that nearly 50% of *all* German laws passed would be brought about by Community law[46] seems spurious. What can be stated is that *Delors* was, in 1988, of the opinion that by 1998, 80% of European economic legislation, and perhaps fiscal and social leglislation, probably *would* be of Community origin.[47] Other estimates, referring to different points of time, range from 50–80%[48] [49], leaving it partly unclear as to which specific legal effect is meant to be captured by these figures. In any event, whatever the exact proportion is, a comfortable majority of all legislative acts valid within the Member States - clearly more than 50% - are now of EU origin, because the act itself was passed at European level (especially in the form of regulations and international agreements), or because the national act is incorporating EC or EU law (especially with regard to transposing EC directives) or, lastly, because the national legislator has to abide by substantial limits imposed under EC or EU law (especially primary Community law as interpreted by the ECJ). This estimation is reinforced as from 1999, by the communitarization of most important monetary and fiscal issues within the

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[44] E.g. *Isensee* (1995) 572 f. Compare also the more neutral remarks by *Doehring* (1995) 265 ff.

[45] E.g. *Schmitter* (1996) 124: "[t]here is no issue area that was the exclusive domain of national policy in 1950 and that has not somehow and in some degree been incorporated within the authoritative purview of the EC/EU." As a consequence, it is acceptable - at least in the domain of political science - to address the EU and the EC as "a state-like politico-administrative system" [*Wessels* (1996) 20] which may be described using seemingly competing models of intergovernmental as well as (cooperative) federal structures.

[46] BVerfGE 89, 155, at 172. The Court reported, but did not comment on, the relevant statement of the plaintiff.

[47] Proceedings of the European Parliament, 6 July 1988, No 2-367/140 (German version at 157): "Ten years hence, 80% of our economic legislation, and perhaps even our fiscal and social legislation as well, will be of Community origin." Compare also BullEC 7/8-1988, 124.
The passage still is astonishing insofar as it seems to suggest that fiscal and social law could be excluded from the corpus of economic legislation.

[48] Compare the studies cited by *Mancini* (1998) 15 and *Ress* (1995b) 122.

[49] At least in absolute numbers, the legislative output of the Council of Ministers has surpassed by far (twice as much) that of the German Parliament, and the tendency is still growing; see *Rometsch/Wessels* (1997) 212. This indicates the growing influence of EC legislation on national systems.

framework of European Economic and Monetary Union,[50] and also by the new Community competences introduced via the Amsterdam Treaty.

Detailed comparisons in this context with traditional federal states, like Germany, the USA, Switzerland or Austria, are lacking. However, there does not appear to be a categorical difference in the degree of centralisation within traditional federal states on the one hand and the EU on the other.[51] Thus, generally speaking it is, even in terms of minimum levels of centralisation, difficult to bluntly exclude the EU's statehood.

On the other hand, for those who adhere to the position that competences in foreign affairs and military matters *are* indispensable to the construction of statehood, it is certainly relevant that those fields are more and more the subject of Union or Community activities.[52]

2. The Determination of Owned Competences (Kompetenz-Kompetenz)

Another reason put forward for lack of statehood of the Union, and closely related to the issues discussed above, is the so-called principle of limited individual competences of the Union and the Communities.[53] In this context among others,[54] the German Constitutional Court (*Bundesverfassungsgericht*), when stressing that the TEU establishes a federation of States[55] and not a state, expressly emphasizes that the Union and the Communities are only equipped with specific competences and powers, in accordance with the principle of limited individual competences.[56] This, the Court concludes, does not give the Union or the Communities a power to determine their *own* competences (Kompetenz-Kompetenz), which would, according to the Court, violate the German Constitution. Therefore, the Union, according to the Court, is a federation of states, the common authority of which is derived from the Member States themselves. These Member States could, as "Masters of the Treaty", even revoke adherence to the Union by an *actus contrarius*. Thus, Germany, in the perception of the *Bundesverfassungsgericht*, preserves the quality of a sovereign state in its own right.[57]

This argument amounts to the position that statehood is dependent on the competence of an entity to determine its own competences or powers. But again, as an argument against the

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[50] At the same time, this is the first case of differentiated integration in accordance with the first pillar of the EC, which is of substantial importance not only in terms of the matter concerned, but also in terms of quantity of legislation, thereby leading to a differentiated acquis communautaire for different Member States considerably.

[51] It is not without irony that severe opposition in Germany to the "communitarization" of cultural affairs in particular, but also regarding the restrictions on structural policy through the Community's law on state aid, was based on the argument that the Community would interfere with core elements of the statal quality of the *Länder*, thereby surpassing the powers of the German federal organs. Sometimes, however, this discussion seems to lack consistency. On the one hand, critics claim, in the context of the autonomy of the *Länder*, that the Community's competences are at the edge of transcending those of the federal level in a federal state, thereby threatening the federal principle as enshrined in the German Constitution. On the other hand, it is argued that the Community's competences are not comprehensive enough to threaten Germany's statehood.
For discussion on the threats to federalism, compare e.g. *Herdegen* (1995), especially 1370 ff; *Hilf* (1994), *Stein* (1994), *Schweitzer* (1994) and *Schindler* (1994).

[52] More details in *Griller* et al (2000) 73 ff.

[53] Article 5 TEU and Article 5 subpara. 1 TEC.

[54] Compare *Steinberger* (1991) 16 f fn. 21, 22, *Streinz* (1990) 955.

[55] The Court uses the term *Staatenverbund* instead of the more common term *Staatenverbindung*. *Staatenverbund* might be better translated as "compound of states" and not federation of states. The significance of this denomination shall not be discussed in depth here as, it is submitted, the question is not of vital importance for this discussion. Arguably, the Court wanted to express its reservations on the notion of a possible legal personality for the Union, but wanted to avoid further emanations on the possibility of federations of states without legal personality.

[56] BVerfGE 89, 155, at 192 f; CMLRev 1994, 251, at 258.

[57] BVerfGE 89, 155, at 190; CMLRev 1994, 251, at 258 f.

statehood of the Union, this is not convincing. The eventual[58] loss of independence of the component states of a Union, which would be caused by the transfer to this Union of the power to determine its own competences (Kompetenz-Kompetenz), does not necessarily imply that such a transfer would be *essential* for the creation of a state. International law requires independence of a polity in the sense of self-governance as a prerequisite for statehood. Whether or not the competence to determine the competences of the federation rests with the organs at the federal level alone or with those of the component states, or has to be effected jointly, or by unanimous decision of the members, or even whether there is no procedure foreseen for changing the division of competences, is only of secondary concern.[59] Anything else would amount to nothing less than mixing up the quality of statehood with the internal relations between federal and regional authorities.[60]

History reveals that the power of component states to block amendments to the federal constitution, and thereby deny the enlargement of competences of the federation, is a common characteristic of federal states.[61] Article V of the US Constitution, which requires the ratification of amendments to the Constitution by three-quarters of the US states after they have been adopted in Congress, provides just one example. Given that the competences of the federation in the USA context are limited from the outset, this amounts to a lack of competence to determine competence at federal level alone. But who would deny that the USA are a federal state?

Thus, the lack of power to determine its own powers[62] does not inherently prevent the Union from being a state, especially not under current circumstances in light of its "state-like" range of existing competences.[63]

3. State Territory and State People

Regarding the triad of traditional state elements, it is often argued[64] that the Union does not have a state territory, but only the definition of the territorial scope of the Treaties by reference to the territories of the Member States,[65] and that there is no state people, but only "the peoples of the States brought together in the Community."[66]

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[58] But what if a federation had such a competence, but never uses it, or has only used it to obtain marginal competences? Why should this lead to statehood? Is it not the actual amount or degree of competences used that matters more?

[59] Therefore, it is unnecessary to scrutinize, in this context, the position of the ECJ that the Member States are no longer free to amend the Community Treaties in every respect, not even by the amendment procedure under Article 48 TEU – compare Opinion 1/91, *EEA I*, 1991 ECR, I-6079, para. 69 ff, esp. para. 72. If this were true, the Member States would no longer be the "Masters of the Treaties" and, thus, the competence of the Member States to determine the competences of the Communities would be restricted.

[60] See *Lerche* (1995) 420, who is very clear in this respect. Compare also *Craig* (2001) 134 f, 138, *Hartley* (1999) 152 ff, *MacCormick* (1999) 101 ff, *Schilling* (1996), *Weiler* (1999) 286 ff.

[61] Compare *Kunz* (1929) 667 ff.

[62] To provide the Union with such a *Kompetenz-Kompetenz*, it is submitted, was the aim of Article 31 of the Second Report of the Institutional Committee of the European Parliament on the Constitution of the EU, 9 February 1994 (rapporteur: Fernand Herman), PE 203.601/final, 2, 13.

[63] Compare above after fn. 46.

[64] Compare the references above in fn. 36.

[65] Article 299 TEC.

[66] Article 190 TEC.

It is interesting to note in this context that (also) the German Constitutional Court stresses that the TEU establishes a federation of States for the purpose of realizing an ever closer union of the peoples of Europe (organized as states) and not a state based on the people of one European nation; compare BVerfGE 89, 155, at 188 = CMLRev 1994, 251, at 258.

As for the territorial scope of Union and Community law, it has to be said that international law requires a definition of state territory for the sake of delimiting governmental powers.[67] There is no reason why such a delimitation cannot be accomplished by referring to the territories of the Member States. History shows an abundant number of examples of federal states composed of the territories of their members.[68] At least in some cases, the federal constitution simply refers to the territories of the component states in order to define its boundaries.[69]

As for the definition of a 'state people', the situation is similar at least under international law, where the notion of state people is somewhat synonymous with that of population. In other words, the people of a state need not form a nation and it is easily possible that several nations can be gathered in one state or that one nation can be spread over or divided into several states[70] – to mention only the well known examples of Switzerland, Belgium, Canada, South Africa or India.[71]

But also, seen from the perspective of the general theory on law and state, it is to a certain extent at the discretion of the State to define the personal boundaries of its powers, that is to say to define who is subject to its powers and who is entitled to a certain set of participatory rights usually identified as citizens' rights.[72] This is exactly what the TEC has done by establishing a "Citizenship of the Union" and by stating that "[c]itizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby."[73] According to this concept, every person holding the nationality of a Member State shall be a citizen of the Union. By insertion of the Amsterdam Treaty, it is now expressly stated that citizenship of the Union "shall complement and not replace national citizenship". However, this appears to have been clear beforehand in any case.[74] Taken as a whole, the concept of European citizenship, as created by the Maastricht Treaty and developed by the Amsterdam Treaty, may well be relatively weak or even flawed.[75] Nevertheless, it meets the criteria of international law for the definition of a people being subject to special rights and duties.

Moreover, since it can be, and in fact is, argued from a theoretical point of view that citizenship is not even an essential feature of a state,[76] there is no reason why - in one or the other respect,

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[67] Compare *Doehring* (1987) 425. *Verdross/Simma* (1984) § 380.
[68] See *Rudolf* (1987) 364 f.
[69] The Austrian Constitutional Act (*Bundes-Verfassungsgesetz*), calling Austria a federal state, not only provides that the federal state is composed of the autonomous provinces (*Länder*, Article 2), but also, that the state territory consists of the territories of the *Länder* (Article 3).
[70] See *Geiger* (1994) 21; or *Doehring* (1987) 425: "For the definition of State population, homogeneity regarding ethnic, cultural, religious, racial or other criteria is not decisive. A multinational State can be a State under international law, and the criteria mentioned above are only relevant when defining the nation as a bearer ot the right of self-determination."
[71] For a discussion of these examples, see *Mancini* (1998).
[72] Leaving aside the question of special duties of citizenship.
[73] Article 17 para. 2 TEC.
[74] Thus, the amendment does not change anything regarding the legal significance of European citizenship. See also *Hilf* (1997a) 356.
[75] *Weiler* (1996) 65 ff. It is certainly true that citizenship of the "Union", which is in fact limited to the First Pillar of the Union (in order not to create a prejudice in the discussion on the legal personality of the Union), is misconceived from the beginning. It is equally true that most of the citizens rights mentioned by the Treaty (freedom of residence, right to vote, diplomatic protection, petition right) did exist beforehand and remain dependent on secondary legislation which could be passed notwithstanding the specific notion of European citizenship.
However, *Weiler* himself (73 ff) seems to mitigate his criticism by the observation that Article 17 TEC might well be seen as a first step in decoupling citizenship from nationality. Compare in this respect also, *Hilf* (1997a) 350 ff.
[76] *Kelsen* (1949) 241 argues that the existence of a state is dependent upon the existence of individuals that are subject to its legal order, but not upon the existence of "citizens" *per se*.

be it ethnical or political – a homogeneous people should be essential in this context.[77] What is relevant here is that as far as state territory and state people are concerned, the EU would, in principle, meet the usual standards for statehood.

4. The Lack of Will to Found a European State

In light of the discussion so far, it is submitted that it would be unfounded to refer, as is sometimes done, to the specific organizational and structural characteristics of the Union and the Communities, created by the Amsterdam Treaty in conjunction with the Maastricht Treaty, as supporting the absence of statehood in the EU context. In other words, it does not seem justifiable to qualify these characteristics as reinforcing the "conservatory elements of the Union's constitutional order",[78] guaranteeing the Member States' independence as sovereign states.

It is certainly true that the Treaties foster certain Member State rights: the Union has to respect the national identities of its Member States,[79] its citizenship is derived from that of its Member States,[80] an "ever closer union" is to be created not for a European people but "among the peoples of Europe"[81] and Treaty amendments require the consent of all Member States.[82] It is also true that Community powers are subject to restrictions, such as the principle of limited individual competences,[83] most of which are concurrent and not exclusive in character, leaving substantive powers with the Member States. Furthermore, the principles of subsidiarity[84] and proportionality[85] have to be observed.

But all of this is, as argued above, conceivable not only in a more or less integrated supranational community of states but also, in a more or less integrated federal state consisting of "autonomous" component states. And, in fact, this is true not only within the sphere of legal theory but in reality as illustrated within federal states, such as Switzerland, the USA, Germany or Austria, which would at least to a very considerable extent meet the standards described above.

Therefore, the conclusion is that the existing relationship between the Union (and the Communities) and its Member States does not decide the statehood of the Union conclusively. Why, then, is the Union not perceived as a state, if the existing powers might actually be sufficiently comprehensive, if a European territory and a European population can be identified, meeting the requirements of international law as well as those of the general theory of law and state, that is to say, if the structural state of affairs is sufficient?

The contention is that the reason is simply the absence of will, on the part of the Member States and the institutions of the Union, to found a European State, and the absence of corresponding acts recognizing the Union's statehood on the part of the international community. This lack of

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[77] For all of these reasons, it does not seem necessary to enter the arena for the battle of the *prepositive* requirements of statehood, which is mainly fought using arguments of constitutional law.
[78] *Dashwood* (1998b) 202. With due respect, what I am referring to is not the precise wording (apart from the quoted passage), but the overall tendency of the cited article.
[79] Article 6 para. 3 TEU.
[80] Article 17 TEC.
[81] Preamble to the TEU.
[82] Article 48 TEU.
[83] Article 5 subpara. 1 TEC.
[84] Article 5 subpara. 2 TEC.
[85] Article 5 subpara. 3 TEC.

will is reinforced by the Treaties of Amsterdam and Nice, given the very absence of provisions aimed at an alteration of the current situation.

The Member States of the Union are not yet prepared to change the legal quality of their traditional reliance on state law, which would be the primary implication of the foundation of a European state.[86] Within the framework of an international organisation, the relations of its members are governed by international law. In contrast, the relations of the component states of a federal state are governed by state law. The EU, at least as far as its first pillar is concerned, is a highly integrated, supranational legal order, albeit still established under international law.[87]

If it is true that "there is a smooth transition between some international organizations and sovereign states,"[88], this implies that the triad of state power, state people and state territory under international law allows for some discretion. In general, decisions on classification for entities within the zone of uncertainty rest with the international community. The Union, having transcended the traditional limits of confederations (including international organisations), but still not equipped with the full range of the *usual* and *traditional* insignia of a state, seems to have a choice. To date, it has avoided choosing statehood, with the international community accepting this *status quo*.

In fact, according to the prevailing view, international law itself provides the basis for such a situation. While the general principle is that a polity clearly fulfilling all three criteria of statehood should be classified as a state, even if it would deny being one,[89] there are different criteria for non-typical "borderline cases" like the EU. Moreover, uncertainties in the application of the traditional 'three elements' theory are inevitable and well known in practice.[90] Thus, it is possible that an entity can be recognised as a new state without or before fulfilling all of the criteria. And it is equally possible that a polity that *has* fulfilled all of the criteria might not be recognised in international terms. The suggestion is that this is the situation in which the Union finds itself. Where a clear cut decision is not possible, it seems only natural that the international community would respect the will of the entity in question.[91] As long as there is no expression of will to form a new state, there is no reason to treat this special community as if it had reached such a decision. The situation would be more difficult if there was international pressure on the

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[86] It should be noted that this would not imply the loss of the capacity of the Member States to act in the international sphere, especially the right to conclude treaties. Compare in this respect – the disputed issue being (again) whether, in a case where members of a federation are empowered to conclude treaties with third parties, these members are to be classified as partial subjects of international law or only as components of a decentralized state – *Griller* (1996) 20 ff, *Kunz* (1929) 130, 660 ff, 678 ff, *Rudolf* (1987) 366 ff, *Verdross* (1926) 125 (but see also at 123).

[87] I share, therefore, the view of the ECJ in Case 26/62, v*an Gend en Loos*, 1963 ECR, 1 at 12, where it stated that "...the Community constitutes a new legal order *of international law*" (emphasis added). Later, as is well known, the Court changed its rhetoric by calling the TEC an independent source of law (Case 6/64, *Costa v ENEL*, 1964 ECR, 585 at 593 f; Case 11/70, *Internationale Handelsgesellschaft*, 1970 ECR, 1125, para. 3). However, it never explained in which respect the treaty could be "independent" from international law apart from forming a *special* international community. Therefore, the so-called *Gesamtaktslehre* that supports this jurisprudence – mainly developed by *Ipsen* (1972) 63 – is rejected: see *Griller* (1989) 573 ff. From recent literature, compare *MacCormick* (1997) 333 ff, who seems to take a similar stance; see also *de Witte* (1999) 210: "The principles of direct effect and supremacy, as presently formulated and accepted, continue to confirm the nature of EC law as that of a branch of international law, albeit a branch with some unusual, quasi-federal, blossoms."

[88] *Schermers/Blokker* (1995) § 31.

[89] Compare *Doehring* (1987) 423.

[90] Compare *Verdross/Simma* (1984) §§ 384 ff with further references. Recent examples are offered by the recognition of Croatia, Slovenia and Bosnia-Herzegovina by the international community.

[91] It is interesting to note in this context that some scholars argue that a state population under international law only exists if the overwhelming part of the population is willing to form a particular state. *Doehring* (1987) 424 writes: "[a] population whose majority refuses to be assembled as a State population does not correspond to the requirements for identifying a State in international law."

entity to act as a state in the international sphere.[92] But as long as this is not the case, ultimately, even a highly integrated international organisation such as the European Union has the final say.

Needless to say, the fact that the Union and its Member States have so far chosen to refrain from the expression of such will or intention is not merely a casual decision. In truth, most of the EU Member States simply prefer to uphold the idea that the Union is a community based on international law, leaving untouched their own legal quality as states under international law. Furthermore, most of the Member States would be prevented by their national constitutional systems from assenting to such a step. Constitutional amendments, in some cases including a referendum, would be the constitutional prerequisite to the foundation of a European state.[93] Nothing indicates that this is about to change in the near or even in the far future, although there is considerable discussion on whether it would be desirable.[94]

IV. The Consequences: Fighting Constitutional Taboos

Given the "state-like" appearance of the Union, it is not surprising that some of those issues which are hotly debated under the heading of "European constitutionalization" coincide with issues of constitutional law-making within states, including the Member States of the EU. These concern especially law-making and law-making procedures, the principles of the relationship between the executive and legislative powers, fundamental rights of citizens, issues like transparency, simplification and codification of the founding treaties.[95] Neither the Amsterdam nor the Nice Treaty brought major steps forward in these fields. The Treaty of Nice, however, in No 23 of the Declarations adopted by the Conference, makes most of it the core issue for the next IGC. And the list of topics is not exhaustive.

It has already be stressed that reforms, and even substantial reforms in these fields would not more or less automatically turn the Union into a state. Consequently, it is not timidity or "political realism" to abstain from a scholarly debate on the range of options for more or less centralized states or the "many faces of federalism"[96]. Instead it is considered essential to identify the potential to decouple substantial reforms from the dissent in the finality debate: the "room for manoeuvre" to achieve such reforms without triggering fierce opposition against the creation of a European "super state", or against depriving the Member States of their "constitutional autonomy", or of their "sovereignty".[97]

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[92] Such a pressure might at least partly develop in the framework of the participatory rights of the EU, the Communities and the Member States respectively, in international organisations such as the WTO, the IMF, etc. It might be looked at as an advantage for the EU to dispose of the voting rights of all of its members, given that federally structured states are quite naturally treated as one state.

[93] Compare only recently the contributions in *Kellermann,/de Zwaan/Czuczai*(eds) (2001). In some Member States, especially in Germany, it is even (but not yet convincingly) argued that the constitution would completely impede such an amendment – see e.g. *Isensee* (1995) 575 f.

[94] See, in this respect, the controversy between *Mancini* (1998) and *Weiler* (1998).

[95] Compare the references in fn 4.
It goes without saying that the above list is not exhaustive and that there are many challenges; compare only *Club de Florence* (1996), or *de Búrca* (1999).

[96] *Lenaerts* (1990).

[97] Such reasoning has, by the way, to take into account the rapid evolution in international relations which has almost swept away the traditional concept of the sovereign state as the stable and core subject of international law. For a discussion of sovereignty in the context of European integration, leading to the result that this is not a fruitful category to assess the achievements and prospects of European integration, see only *Bindschedler* (1954) 68 ff, *de Witte* (1998a), esp 301 ff, *Griller* (1989) 13 ff, *Saladin* (1995) 28 ff., all with further references.

As has been shown above, a closer look at the categories of the General Theory of Law and State including the Theory of Communities of States (*Lehre von den Staatenverbindungen*),[98] is fruitful. Traditional categories of general theory, but also those of international law, appear to allow for a much more intensified cooperation between "sovereign" states than is insinuated in the recent debate on constitutionalism and statehood in Europe.[99] It is also, to look at the other side of the coin, not very difficult to give historic examples and to imagine variations of federal states where the component states (the "Länder") have the decisive say, even where the component states could be considered as "Herren der Verträge". Moreover, it turns out that the frequently mentioned competence of a "constitutionalized" polity to determine its own competences (Kompetenz-Kompetenz) does not provide for a sharp distinction between states and international institutions.[100] Rather than being decisive for the important notion of self-governance, Kompetenz-Kompetenz might be crucial for the separation of powers between the central and regional or local authorities of a polity.

Expressed in traditional terminology, the flexibility of the concept of confederations allow for more variations, and thus for more fantasy than is usually assumed. To make the point clear once more: Against this background there is no case for a new "Constitutional Architecture" which would necessitate to abandon the Union's status as a confederation as a prerequisite for substantial reforms. In contrast, if the hypothesis of greater flexibility is correct, that could mean to "set free" the debate on some of the taboo issues. It might turn out that it is nothing but self-evident, seen against the background of history and theory, to reject every extension of majority voting, or the growing influence of the European Parliament, or simplified procedures for the revision of the Treaties, as a threat to the "sovereignty" of the Member States.

Under these circumstances it could be acceptable that the challenges especially of EU enlargement and the establishment of the European Monetary Union, which have been agreed upon *despite* all controversies on finality, could trigger substantial reforms not so much for the sake of conceptual consensus, *but simply in order to meet the pressing necessities implied in these steps*.[101] Such reasoning seems to be in line with the 1999 *Weizsäcker-Dehaene-Simon* report which has warned against a half-hearted structural reform which might impede the upcoming EU enlargement(s) and that, therefore, the EU deficits in clarity, transparency, flexibility and accountability of institutions need to be addressed.[102] This is not to say that the absence of a thorough discussion of the fundamental decision to enlarge the Union is not to be deplored.[103] But this is certainly no reason to neglect the challenges, and even more so, since most of the issues mentioned would be equally relevant in the absence of the perspective of enlargement.

The purpose of the following chapter is to illustrate the stance that substantial reforms could be realised without the invention of a "New Constitutional Architecture". It goes without saying that the purpose is not to elaborate in detail on the raised issues.

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[98] Including the path breaking studies of *Jellinek* (1882) and *Kunz* (1929) which appear to be neglected in the actual debate.
[99] Compare above near fn 31 and after fn 85, and esp. *H. Schneider* (2000) 172 ff. This meets with suggestions in literature that the TEC and the TEU do not close but instead rather open the debate on the "differentness" of the EU; see *Shaw* (2000) esp at 15.
[100] See above near fn 60.
[101] See *Maurer* (2000), *Schneider* (1998) 337 ff.
[102] On this and the following see e.g. *Piris* (1999) 576 ff, *H. Schneider* (2000).
[103] *Weiler* (2000) 236 f.

V. Salient Issues for the Future Constitution of Europe

A. Formal Aspects[104] of Constitution Building: Reorganising the Treaties

1. Merging the Treaties and the Legal Personalities

Prominent voices identify the non-transparent status quo of the European Treaties as the most important defect resulting from the pragmatic evolution of the European constitutional development during the last decades.[105] Thus, simplification and consolidation of the existing constitutional instruments is considered to be of crucial importance.[106] This had already been one of the starting points of the IGC 1996. However, the Amsterdam Treaty only arrived at rather modest results, a long way from making Union and Community law "more readable and more accessible to citizens".[107]

Thus, a first and indispensable objective is to *make one Treaty out of the TEC, the TEuratom, and the TEU*[108]. Most valuable work has already been done in this respect in the framework of a feasibility study carried out by the European University Institute (EUI) in Florence for the European Commission.[109] This study includes a Draft Basic Treaty, which aims at a merger of the TEU and the TEC. Equally useful in this respect is the effort which was undertaken by the General Secretariat of the Council in the aftermath of the Treaty of Amsterdam.[110] The Secretariat drafted two versions: one upholding the division between the Union and the three Communities as well as between the Communities, and another one aiming at a merger of the three Communities into a single Community, but distinct from the EU. Without going into the details, it shall be stated that the debate could very well be continued on the basis of these proposals. This would not exclude further ambitions, but it is a sound starting point for the preparation of an IGC.[111]

A second, and even more ambitious, aim might be to merge not only the texts of the Treaties, but to *merge the Union and the Communities into one legal personality*. Obviously this touches upon the controversial issue of the legal nature of the Union. However, today we cannot only rely on more or less compelling arguments pointing into the direction of a legal personality of the

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[104] When I make a distinction between formal and substantial issues of constitution building, it is clear that this is not to argue for a sharp dividing line. But if we keep in mind that all aspects are interconnected, the distinction might yet be useful for reasons of clarity.

[105] *Oppermann* (1999) para. 918.

[106] E.g. *Schwarze* (2000) 17.

[107] Compare *Griller* et al (2000) 39 ff.

[108] The assumption is that the TECSC is going to lapse in 2002. It should be mentioned that there are additional challenges, which should not be underestimated, on how to rearrange all the Protocols and Declarations, but also how to include, to the largest extent possible, the Single European Act, the Amsterdam and the Nice Treaty, the Protocol on the Privileges and Immunities of the European Communities, and eventually parts of the accession Treaties in the merger.

[109] A Basic Treaty for the European Union. A study of the reorganization of the Treaties (2000).

[110] Consolidated Version of the Treaties, SN 1845/00, 14 July 2000.

[111] There are a number of other efforts which might broaden the debate – see the references in *Craig* (2001) 148 fn 108. However, the option to prepare for a new IGC on the basis of a simplified version of the existing law can be achieved on the grounds of the proposals mentioned in the above text.
It shall also be said – contrasting to *Craig* (2001) 147 ff – that there is no compelling argument to sharply distinguish between the elaboration of a constitution and the effort to simplify the existing Treaties. *Craig's* major concern is that a constitution should include explicit rules on the relationship between Union law and the law of the Member States. However, this is not even the case in all federal states, as the Austrian example proves. It is not unusual that constitutions, also written ones, are to a considerable extent in central points developed further by the jurisprudence of the highest courts.

Union.[112] We also have to note that in the meantime the Union has in fact started to make use of Article 24 TEU by concluding an agreement with Yugoslavia.[113] As a consequence the alleged absence of legal personality of the Union should be no obstacle to unity any more, since a merger with the Communities would not include any "upgrading" in this respect. That the consequences need not have to be revolutionary might be indicated by the fact that renowned scholars have argued already in the past that the Union and the Communities form a single organisation.[114] Given that this certainly is not the prevailing view renders the respective passage in Declaration No 23 attached to the Nice Treaty too narrow; it only calls for a "a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning". But it should be stressed that unifying the Union could very well go together with the continuation of different powers for the organs of the Union in the various fields of activity. This would include the option to uphold intergouvernemental structures for the CFSP and the PJC. Nevertheless, the positive effects on the readability of the texts for the citizens and the consequences for the apperception of the Union system in the public should not be underestimated.

However, the mistake should be avoided to look at the effort of unification as a purely technical issue. The forming of one text includes the difficulty of reshuffling texts including a multitude of more or less carefully drafted compromises. Fears might arise that what at first sight is a small change in words turns out to be a reform in substance. Thus it has to be warned against leaving the issue for the very end of an intergovernmental conference, as has happened before. By contrast, it would be wise to *start the next IGC on the basis of consolidated versions of the Treaties*. But it must be clear form the outset that *every* consolidation of the Treaties would trigger the need for a ratification of the entire result. If this alone is deemed to risky an exercise, as has been the case towards the end of the pre-Amsterdam IGC for the reason that it might lead to a re-opening of controversies which were meant to have been settled long ago,[115] would that not imply a disastrous condition of the overall reforming impetus of the Union?

2. A Basic Treaty and the Reform of the Revision Procedures

The impetus for simplification and consolidation might include the idea of reorganising the amendment procedure for the Treaties. In its opinion presented in the 1996 Intergovernmental Conference, the Commission underlined the importance of making a distinction between the fundamental articles of the Treaties and the others. The idea was, among others, taken up by Mr *Dehaene*, Mr *von Weizsäcker* and *Lord Simon* in their report on the institutional implications of enlargement.[116]

As a follow up to this report, the Commission organized for a feasibility study carried out by the European University Institute (EUI) in Florence in the framework of the mentioned project.[117] This study includes the mentioned Draft Basic Treaty, which aims at a merger of the TEU and

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[112] See *Griller* et al (2000) 52 ff.

[113] Council Decision of 9 April 2001 concerning the conclusion of the Agreement between the European Union and the Federal Republic of Yugoslavia (FRY) on the activities of the European Union Monitoring Mission (EUMM) in the FRY, OJ No 2001/L 125/1.

[114] Compare *von Bogdandy* (1999a) and *Curtin/Dekker* (1999).

[115] See the critique in *Griller* et al (2000) 40 ff.

[116] The Institutional Implications of Enlargement (http://europa.eu.int/igc2000/repoct99_en.pdf).
Obviously much more proposals have been presented and more variations are contemplated than those referred to in the above text; see e.g. the systematisation (which is in itself problematic) in *Müller-Graff* (2001) 213 ff.

[117] A Basic Treaty for the European Union. A study of the reorganization of the Treaties. Report (http://europa.eu.int/comm/igc2000/offdoc/repoflo_en.pdf).

the TEC.[118] But it also includes the more ambitious task to make a distinction between basic and less important provisions and to assemble the former in one document. A second and complementary study by the EUI focussed on the reform of the amendment procedures.[119] A fundamental assumption of the exercise is that it might also be possible to differentiate between the revision procedures, according to the relative importance of the provisions to be amended. The full-dress revision procedure, with ratification by the national parliaments of each Member State, including eventual referenda is, according to the authors of the study, fully justified for the fundamental provisions affecting the division of powers between the Union and the Member States, or defining their role in the decision-making process. After enlargement, however, applying this procedure to other provisions would be an undue constraint. The authors propose a decision to be taken in Council by a superqualified majority of 4/5 of the Member States representing 4/5 of the population; this would enter into force upon ratification by 4/5 of the Member States, as well as the European Parliament. It is not necessary to discuss the details of this thorough study.

The effort of dividing the Treaties does not only imply the (disputed) distinction between fundamental and less fundamental provisions. The proposal of simplified revision procedures also immediately provoked the fundamental “constitutional” objection that the authorization to amend the more “operative” parts of the treaties by eventual majority decisions to be taken by the Council and the European Parliament would not meet the requirements of the present constitutional status of the Union. It would endanger, it was argued, the constitutional autonomy of the Member States and at least in parts result in the transfer of the competence to determine its own competences (“Kompetenz-Kompetenz”) to EC organs, and thus into statehood of the Union.[120]

However, it is not easy to defend the position that all Treaty provisions have a “constitutional” character.[121] In several cases it might well be argued that provisions included in secondary legislation adopted by qualified majority are much more “constitutional” in character compared to certain parts of the founding treaties.[122] Moreover, it is a common feature of international organizations to provide for simplified revision procedures.[123] Nobody would argue that this is per se a threat to the "constitutional autonomy" of the Member States. It might also be said that the notion of "constitutional autonomy" is in itself highly problematic under the conditions of the changes in international co-operation during the last decades.

One option could be to accept, to a certain extent, revision decisions of the organs of the Union, presumably the Council and the European Parliament in a co-decision procedure including a superqualified majority. Another option would be revision procedures allowing for the entering into force of treaty amendments upon a qualified majority of ratifications by Member States. And obviously combinations and variations are imaginable, as proposed in the cited study. Again, it should be stressed that implications on the division of powers between the member states and the Union might be limited, depending on the provisions which would be the subject of such an alteration procedure.

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[118] http://europa.eu.int/comm/igc2000/offdoc/draftreaty_en.pdf.

[119] Reforming the Treaties’ Amendment Procedures. Second report on the reorganisation of the European Union Treaties submitted to the European Commission on 31 July 2000.

[120] *Huber* (2001) 235.

[121] Compare for this and the following *Griller* (1998) 317 ff.

[122] As a consequence one might even go one step further and contemplate to “convert” certain parts of primary law into secondary law. Is it really convincing that the location of Europol (in Den Haag) has to be fixed by primary law (Protocol No 8 attached to the TEU and the TEC), while that of many other organs not mentioned in Art 7 TEC is not? As a result of a certain “package deal” in the past, it is understandable; but is a prolongation necessary?

[123] See *Schermers/Blokker* (1995) §§ 1173, 1178, 1187.

However, it has to be added that such a change would have to carefully shape the legal rank of those norms which were produced on the grounds of the "simplified" procedure, including the settlement of disputes on eventual violations of the limits of the alteration competence. This competence would be vested in the EJC. In this respect the splitting of the revisions procedures would impact considerably on the legal system of the Union. It is possible to equate the derogatory power of the provisions subject to the simplified procedure and those subject to the "full-dress" procedure, or to subordinate the former to the latter. This would inevitably be the consequence insofar as the respect for the limits of the simplified alteration procedure would be subject to judicial control.

B. Aspects Regarding the Substance of Constitution Building

1. Democracy

a) Some Remarks on the Concept of Democracy

With regard to democracy, we first have to assess whether there is a democracy deficit in the law making of the Union. In my eyes, this is one of the most fundamental amongst all of the constitutional topics in the sense that the answer to this question most likely decides on the direction of every future constitutional reform. And the answer still is most disputed. While some argue that the democracy deficit is nothing but a phantom, others identify transparency and openness as the gravamina.

My conviction is that democracy is on the equal participation of citizens in the law making process of the polity they live in, or, as *Montesquieu* put it, the basic ideas are on the "identity of rulers and ruled", and the equality of citizens.[124] This includes the power to eventually influence the outcome of this process. The more remote from the citizens and their influence decisions are taken, the less democratic the system is. The exercise of powers – if the people does not decide directly but through representatives – requires a continuous chain of democratic legitimisation which originates in the people. Once established, this power must not become autonomous. It needs consistent feedback from the people and accountability to the people.[125] Exercise of authority must be limited in time and permanently accounted for.

In this sense, "democracy" is a comparative term, and the Union for sure is not anti-democratic or autocratic, but is has a democracy deficit. The cure, as I shall argue, should be to enhance parliamentary law making at EU level. The cure is not to copy the parliamentary systems of the member states.

However, there are objections to the position just mentioned. The Maastricht judgement of the German Federal Constitutional Court could be interpreted to the end that there is not much to criticise regarding the democratic legitimacy of EU decision-making, as long as the national parliaments have the power to control further integration steps, be it through the ratification of Treaty amendments, be it through the accountability of the representatives of the Member States in the Council.[126] Based on such reasoning, the Court held that EU-membership of the Federal Republic of Germany was in conformity with its constitution, including the requirement to respect democratic principles in the sense of Article 23 of the German Basic Law. We should also note that just recently, in its White Paper on European Governance, the Commission

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[124] *Montesquieu* (1748). See also *Kelsen* (1929) 3 ff, and *Grabitz* (1979).
[125] *Böckenförde* (1987) para. 10 ff.
[126] In this sense recently *Huber* (2001) No 18 and 19. Another line of justification of the status quo can be found in *Dehousse* (1998); see also the scepticism in *Weiler* (1999) 264 ff, and the remarks of *Tony Blair*, above fn 2.

expressed its view that the Union "has a double democratic mandate through a Parliament representing EU citizens and a Council representing the elected governments of the Member States".[127]

By contrast, the prevailing view appears to be that there is a democracy problem.[128] The Council replaces the democratically elected national parliaments at Community level as (still) the most important decision-making institution. Its members legislate for the whole of the Union but are legitimised by a part of the population only. This legitimisation is furthermore indirect and mediated through the national parliaments. Accountability of representatives in the Council does not work appropriately in the decision-making procedure. This is rather undisputed in cases of majority voting, since the representative may be outvoted. But is has to be stressed that this is also true in cases of a unanimity requirement. This is so since law making is not static but dynamic in character: Amendments of unanimously adopted decisions require unanimity which makes it impossible for a single national parliament to enforce desired reforms, even if the representative in the (European) Council is fully accountable to this parliament.[129] Thus, democratic accountability under the unanimity requirement is only assured as long as no decision is taken,[130] or if all the ministers unanimously agree on the uniform amendment desires of their parliaments.

The right of the European Parliament to participate in the legislative procedure is not covering all important fields. But even where the European Parliament is, like in the co-decision procedure, on equal footing with the Council, the critique is that the Parliament is not representative in so far as it does not meet the fundamental requirement of equal weight of votes, and that the election procedures differ remarkably between the Member States.

As a consequence, I have to say that the desire, as expressed in Declaration No 23 as attached to the Nice Treaty, that the next ICG should address "the role of national parliaments in the European architecture", is too narrow to address the whole issue of the democracy problem.[131] This it not to say that the participation of national parliaments in the decision making process at EU level could not or should not be improved, especially in order to promote better co-operation between the national and the European level.[132] However, the remedy for the democracy deficit has primarily to be found at the European level.

Another aspect is the proposal to "resolve" the democracy issue on the grounds of a more utilitarian, "output oriented" approach. Democracy is addressed as only one important facet of the more fundamental issue of legitimacy. Legitimacy, it is said, besides being based on democratic concepts, can also derive from "technocratic-utilitarian" performance, like the effective implementation of policy goals and fulfilment of individual needs; it could also derive from effective promotion of the rule of law.[133] In the terms of the White Paper of the Commission, essential for more democratic governance are "*openness, participation, accountability, effectiveness and coherence*".[134] However, I have to say that it is not really

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[127] COM(2001) 428, 25 July 2001, at p. 8.

[128] E.g. *Häberle* (1992) 432, *Hrbek* (1995) 175, *Ress* (1989) 628 ff; recently *H. Schneider* (1999a), *H. Schneider* (1999b), *Lübbe-Wolf* (2001).

[129] See *Griller* (1995a) 164 ff, and recently *Lübbe-Wolf* (2001) 249 ff, esp. at 257 f.

[130] And only if in this case the Member States remain free to legislate in the respective field.

[131] It should thus be borne in mind that the four points mentioned in the Declaration are accompanied by the expression "inter alia", and that it would be another missed opportunity to restrict, with regard to democracy, the agenda to the role of the national parliaments.

[132] Compare recently the balanced arguments in *Pernice* (2001a).

[133] Cf. *von Bogdandy* (1997) 16 ff. On the concept of input and output oriented democracy compare also *Scharpf* (1999).

[134] COM(2001) 428, 25 July 2001, at p. 11. But see also below near fn 139.

convincing to "compensate" for the democracy deficit – in terms of democratic decision taking – by improving flanking elements of democracy, such as fundamental rights protection or transparency, or the rule of law. If participation is mediated through several levels of decision taking, if accountability does not include an effective motion of distrust and the direct election of those who take the decisions, we cannot expect European citizens to feel comfortable with their amount of influence. Thus, openness, participation, accountability, effectiveness and coherence *in the sense as acknowledged by the Commission* are extremely important in order to enhance the practice of decision taking, and the Commission deserves full support for it. But achievements as envisaged by the Commission in its White paper cannot sufficiently compensate for the remoteness of decision taking from the citizen. To put it very provocatively: There is a deficit in the degree of participation of the people and in the accountability of the representatives. Yes, democratic decision taking should also be open, effective and coherent, but these are only necessary, not sufficient conditions for democracy.

b) Consequences for the Institutional Reform

But would the creation of a "fully fledged parliament" be the right solution, as it is often offered?[135] Again we are immediately confronted with a fundamental "constitutional" argument: such a parliament would create or at least prepare a federal state, it would marginalize the Member States' parliaments.[136] And apart from that, it is often argued that the European Parliament would not be able to play the role of a fully fledged parliament, not the least for the already mentioned reason of a lack in European identity.[137]

To make things short: It is submitted that that strengthening the European Parliament would not lead to a federal state. It would not necessarily include the transfer of additional competences to the Communities and the Union respectively, but would only mean that those competences already transferred would be used in a more democratic manner.

But it is by no means implied that there is only one, meticulously determined model of democratic legislative process, and neither that it is the example of nation-state democracies which should be transposed one by one to the EU. Conceivable are rather several possibilities of democratic legitimisation, which may include elements of direct democracy as well as the requirement of qualified majorities for decisions on important topics, different degrees of independence of the executive and ways for the creation of executive bodies.[138]

Consequently, and on the basis of the general observations above, the diagnosis and the proposal for future reforms as presented in the Commission's White Paper on Governance are justified: "In the context of a gradual extension of the areas where decisions are taken jointly by the Council and the European Parliament (the so called co-decision procedure), those two Institutions should enjoy equal roles. That is not the case under the current Treaty."[139] Taking into account the concerns on such development, reforms could be introduced step by step, but the ultimate goals should be the following:

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[135] Compare only *Lübbe-Wolf* (2001), and the suggestion of *Fischer*, above fn 1.
[136] Already *Badura* (1966) 73 f, but see also *Leben* (2000) 107, *Streinz* (1990) 959, and the discussion in *Schneider* (2000) 175 f.
[137] E.g. *Hrbek* (1995), *Hartley* (1999) 18 ff.
[138] *Kelsen* (1929) 26 ff, 38 ff, 53 ff, 69 ff, 78 ff.
[139] COM(2001) 428, 25 July 2001, at p. 35. The Commission is also right stressing that a better dividing of the powers between the legislature and the executive would make it easier to apply the principles of subsidiarity and proportionality. However, it is a slight exaggeration to conclude that it could only be the Commission "to assume full executive responsibility".

- The realization of "appropriate representation of the peoples of the States brought together in the Community"[140] in the European Parliament. This should at least gradually ensure equal representation of the citizens as an element of the desired equal weight of their votes. This could include the introduction of a minimum of seats to ensure the representation of the smallest Member States.[141] It has to be said in this context that doubts may arise whether the condition of "appropriate representation" is fully met by the amendments included in the Nice Treaty.[142] Obviously the allocation of seats to the Member States is far from being proportionate to the size of the population.

  The establishment of a uniform procedure of universal suffrage to the EP should in this context also be accomplished.[143]

- A rebalancing effect preventing to marginalize smaller Member States could be a gradual decoupling of Member States' size in population and voting rights in the Council. The pursuit of Member State's interests would thus depend less on the size of the country represented. That would not include the introduction of a two-chamber system; the Council could still be composed of the ministers of the Member States. It would also not be necessary to change the role of the Commission into that of a "European Government".[144]

- Very important would be, as has often be said, the further extension of the co-decision procedure – say: majority decision taking involving the European Parliament – to most fields of law making by the Union. According to the position taken here, this is not only a matter of efficiency against the background of EU-enlargement. It is at the same time implied in the goal to enhance democracy in the Union. Obviously there might be good reasons to avoid majority decisions in cases like the establishment of a common defence, or law making under Article 308 TEC. Nevertheless, co-decision should be the rule. We should also keep in mind that Treaty amendments would still be a special case – and we might add that the above exceptions come near Treaty amendments.

  Majority decision making should also be seen as a precaution against the dangers of en hanced cooperation. Obviously this mechanism includes the threat of splitting the Union up into various groups of Member States at the expense of "economic and social cohesion"[145]. Enhanced cooperation as a "last resort, when … the objectives of such cooperation cannot be attained within a reasonable period"[146] will be much less likely if it is possible to come to a solution by qualified majority voting.

- There are a number of additional options which should be evaluated carefully, like the introduction of elements of direct democracy; an interesting proposal is to combine the elections to the EP with a limited number of referenda, to be decided e.g. by the EP or on

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[140] Article 190 para 2 subpara 2 TEC.
[141] See *Griller* et al (2000) 285 ff.
[142] However, it is clear that as a rule of the same rank, Article 190 para 2 subpara 2 TEC is necessarily a lex imperfecta vis-à-vis amendments of subpara 1.
[143] This task can be achieved by secondary legislation. The conditions were made easier by the Amsterdam Treaty, which allows for provisions "in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States" (Article 190 para 4 TEC).
[144] Of course this is a much more "conservative" approach than other proposals, e.g. that of *Schmitter* (2000) esp. at 81 ff. However, this is deliberately so. It is contended that *Schmitter's* proposals (on purpose) include a far-reaching departure from the principle of equal representation of the citizens. This is rather high a price for the protection of smaller countries, which arguably can also be achieved by a re-weighting of the votes in the Council.
[145] Article 2 TEU.
[146] Article 43a TEU as amended by the Treaty of Nice (open for ratification).

the request of several Member States, or of a qualified number of citizens.[147] It should also be said that there are a number of non-specific, meaning: not EU-specific concerns of democracy[148] which should be contemplated.

c) A Referendum on the "New Constitution"?

It has been argued that a "true" constitution could not come to life without the creation by "the people".[149] Let us assume that what would be required is the consent of the people expressed in a sort of referendum under the constraint of a qualified majority, and let us, for the sake of argument, assume for a moment that there actually is a European people.[150]

First, is has to be said that a positive referendum on the introduction of a "new constitution", the formation of a "new European polity" could without doubt increase the "democratic legitimacy" of such a system in terms of the consent of the citizens. However, we must not ignore that the issue begs, even if we have accepted the notion of a European people, the inevitable question: which people? The topic includes the tricky aspect of defining the correct boundaries of a *demos*, and the eventual existence of multiple *demoi*.[151] If a "true" constitution requires the consent of the people, would not also the integration of the Member States' constitutions (which by definition still are "true" constitutions) into the "new" system require the consent of the Member States' people, since this would imply a fundamental change of their constitution? Thus, if the underlying rationale should be consistent, and in my eyes even independently from the requirements of the national constitutions, a referendum meant to legitimise the constitution of the European Union would have to call not only for a qualified majority of all European citizens, but in addition also for the consent of all of the Member States' citizens. Apart from this, there is no principal objection against the idea of a referendum on a new constitution. Only that I cannot see such a new constitution.

Second, the adoption of a constitution by referendum certainly is no absolute condition, not even for constitutions of states.[152] Many constitutions of nation states entered into force without a preceding referendum and without being looked at as illegitimate.[153] Furthermore, if we accept that the will of the people can also be expressed through representatives, it cannot be said that a referendum is indispensable. However, we have noted that the current system of representation includes a democracy deficit. Taking this result seriously leads to the concurring option that the European Parliament should have a decisive say in constitutional amendments.

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[147] *Weiler* (1999) 350 f, *Schmitter* (2000) 36 f.

[148] Compare only *Lübbe-Wolf* (2001) 265 ff.

[149] *Grimm* (1995) 291: "The Treaties are not however a constitution in the full sense of the term. The difference lies in the reference back to the will of the Member States rather than to the people of the Union." It is well known that for *Grimm* that cannot be changed within the near future because of the absence of a European people.

[150] It can be asked whether the consent of the people could *instead or in addition* be obtained in the course of the elaboration of constitutional amendments, say in a Convention similar to that which preceded the proclamation of the Charter of Fundamental Rights. However, and apart from other difficulties, it has to be said that such procedure could at best be seen as an improvement of the *representation* of the citizens in the course of the deliberations. The composition and the role of the members of the Convention in the case of the Charter as well as the envisaged version for the next IGC do not aim at the participation of representatives of the people, but rather at the participation of "civil society". That would not meet the requirements for *direct* legitimisation of the results.

[151] *Weiler* (1999) 344 ff.

[152] This has rightly been stressed by *Craig* (2001) 137 ff.

[153] It is well known that several constitutions, not the least the Bonner Grundgesetz, are more or less openly opposed to elements of direct democracy; compare only *Krause* (1998).

Third, and on the grounds that the Union already has a constitution and that we are not talking about the founding of a new state[154], a referendum would only make sense if substantial changes are at stake. Thus the issue should *not* be decided *in abstracto,* but only with regard to the quality of the achieved results. It is not that a referendum without major changes would nevertheless produce a European state.[155] That would depend on the contents, not primarily on the procedure. However, arguably a referendum only makes sense if it opens a real choice for the citizens. Let us assume that the outcome of a referendum on the existing system, or on rather marginal changes, would be negative. What would be the consequence? The immediate consequence would be that the Treaties, that is the actual constitution, would remain unchanged (only without having obtained the approval of the citizens in the referendum). But such a negative referendum could only be interpreted to the end that there is discontent regarding the existing system. Should the consequence be to introduce more fundamental reforms, or to terminate the Union?

Against this background I feel that also in this respect a more pragmatic attitude is appropriate: That constitutional changes do not necessarily trigger the need for referenda. That referenda only make sense in the context of major changes of the system. That a referendum is advisable only with regard to issues which have a slight chance to be understood also by citizens which are no experts, which makes the elaboration of a Basic Treaty an indispensable precondition for a ballot on the whole system. And that it should also be contemplated to submit only parts of eventual changes to a referendum, e.g. the incorporation of the Charter of Fundamental Rights into the Treaties.[156]

2. Fundamental Rights

In December 2000, the Charter of Fundamental Rights was the subject of a joint solemn proclamation by the European Parliament, the Council and the Commission in Nice.[157] The European Council welcomed this proclamation and highlighted that the Charter combines "in a single text the civil, political, economic, social and societal rights hitherto laid down in a variety of international, European or national sources". The European Council then continued: "The European Council would like to see the Charter disseminated as widely as possible amongst the Union's citizens. In accordance with the Cologne conclusions, the question of the Charter's force will be considered later."[158] Declaration 23, the "Declaration on the Future of the Union", which is part of the final act of the Intergovernmental Conference, calls for the continuation of the debate about the future development of the Union. This includes the Charter of Fundamental Rights. What is to be addressed is "the status of the Charter of Fundamental Rights of the European Union proclaimed in Nice, in accordance with the conclusion of the European Council in Cologne".

For the sake of brevity is should only be said here that the charter is a primary candidate for a "constitutional change", that is for its incorporation into the treaties. However, attention should

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[154] Which are of course not the grounds of *Grimm's* arguments.
[155] *Craig* (2001) 138 f. For a different view compare *Weiler* (2000) 238.
[156] This could eventually even be done in the mentioned combination with elections to the EP – see in the above text before fn 147.
[157] OJ 2000/C 364/1: "The European Parliament, the Council and the Commission solemnly proclaim the text below as the Charter of fundamental rights of the European Union."
[158] Presidency Conclusions, Nice European Council Meeting, 7, 8 and 9 December 2000, SN 400/00.

be devoted to the eventual removal of more or less obvious deficiencies of the Charter at such an occasion.[159]

3. Competence Aspects

Several proposals have been made to introduce a catalogue of Community competences, or at least a "negative list" which would exclude Community legislation in certain areas.[160] In the same context it was also argued that strengthening the principle of subsidiarity[161] would be a sort of redress against the erosion of Member States competences. Especially the Germany *Länder* call – it should however be added: in a markedly more cautious manner than a year ago – for a catalogue of competences.

However, a catalogue of competences, and even a negative one, faces severe difficulties. Most important is that such a catalogue would entail a complete restructuring of the actual "functional" competence order of the Communities.[162] Apart from that, it is no realistic perspective that such a complete restructuring could be agreed upon in the foreseeable future.

In this situation, it appears to be more promising to clarify and to develop further the existing system.[163] This should especially include to sharpen the limits within specific areas. To develop further and to build on examples like Article 151 para. 5 TEC (culture) and 152 para. 5 TEC (health) could produce operational results. It should be noted that it is against the background of the latter provision that the ECJ only recently has annulled the EC directive on advertising and sponsorship of tobacco products for competence reasons.[164]

Also other aspects involving institutional reforms are worth further investigation. It has been proposed to establish a "European Constitutional Council" modelled on the French *Conseil Constitutionnel,* that would have the exclusive jurisdiction regarding the boundaries of Community and Union competences.[165] The core aspect of the idea is that the president of this Council would be the President of the ECJ – this court in turn would lose the competence to decide on competence matters –, and its members would be sitting members of the constitutional courts or their equivalents in the Member States. There would be no veto right, decisions would be taken by majority. Another proposal calls for a "committee on subsidiarity" which would issue an opinion in the course of the legislative procedure[166]. This opinion would have to be taken into consideration, and it would be difficult to ignore a votum of the committee stating that a certain goal could be better or at least equally well reached at the Member State level than at EC level.

4. Shifting of Loyalties – Demos – European Identity?

It is controversial whether the prerequisites which are sometimes suggested for a *state* constitution – such as a relatively homogeneous people, a common culture, a common

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[159] Compare *Griller* (2001a). See also the contribution of *Dutheil de la Rochère* in this volume.
[160] See only *Weidenfeld* (1994a) 19 ff. For a discussion of the subject also *Everling* (1991 and 1995), *Griller/Müller* (1995).
[161] Compare in this context the reforms made by the Amsterdam Treaty – see *Griller* et al (2000) 96 ff.
[162] Compare from the recent literature only *Schwarze* (2000) 22 f.
[163] See esp. *Pernice* (2000 f), and the contribution of *Pernice* to this conference.
[164] C-376/98, 5 Oct 2000, not yet reported.
[165] *Weiler* (1999) 353 f.
[166] *Pernice* (2000 f).

language, a Europe wide political debate – could also be prerequisites for further constitutional developments at EU level. Originally, these aspects were primarily invoked against the idea of a European state. But the same arguments can be developed against substantial reforms as such.

This shall be illustrated again for the important aspect of majority decision taking. Following EU enlargement, there will be more small EU Member States. It has therefore been argued that this, for the sake of efficiency, will necessitate increased supranationalism and enhanced centralized enforcement mechanisms. While it is evident that majority voting is, as has also been argued above, the key characteristic of democratic constitutionalism, majority voting in "international" relations will lead to illegitimate majority dictate *unless* there is a common identity of a polity, a consensus on the unifying principles of the polity which even allows for the acceptance of being outvoted by majorities formed not only of members of the own ethnicity. In a sense, this might, in the European context, presuppose the possibility of "multiple demoi", the identification of citizens not only with the common values of their own ethnicity, but also with that of the supranational Community.[167] However, there is still strong opposition against the contention that this state of affair has already been reached, or even that this would be desirable. It is argued that it is still the nation state legitimacy is primarily vested with. On the basis of such reasoning, unanimity should play an important role in European decision making, and sufficient influence has to remain with national parliaments representing the (national) people.[168] It is this view which apparently has influenced the German Constitutional Court in its Maastricht judgement. In other words: In the absence of a consensus that the nation state should and could be abandoned as the focus of the "social contract" between the citizens[169], majority voting – and thereby the integration process as such – will not only increasingly endanger legitimacy but even cause far-reaching systemical crisis.[170]

A similar thrust might be imputed into the debate on the "shifting of loyalties". European citizens should be able to accept the EU as "their polity" they can identify with. This might be, it is said, a condition for the success of every substantial step in European constitution making. Even if, to give an example, majority voting and the influence of the European Parliament, on the basis of constitutional and international law, could be strengthened without transgression of the border to statehood, such reforms might be a failure, if they do not meet the desires of the European citizens. However, it is not so easy to determine what these desires are? Is it enhanced legitimacy in terms of "input-oriented" or "output-oriented" democracy, or a combination of the two, or even different fundaments of legitimacy? Would it be a serious alternative way to achieve more acceptance among the citizens by accommodating utilitarian desires?

However, we have to note in the first place that these objections are more or less theoretical insofar as the support for the consensus principle is too late. It has largely been replaced by majority decisions. It comes near fiction to pretend that majority decision taking could be looked at as the exception. Moreover, we have seen that in a system like that of the Union unanimity cannot be regarded as the cure.[171]

But if we can, as described above, decouple at least to a certain extent the debate on the needs for reforms from that on the ultimate goal of European integration, the above suggestions are

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[167] Compare *Weiler* (1999) 344.
[168] Compare recently *Huber* (2001), but see also the critique above under III. B. 1.
[169] See *Pernice* (2001) 167, arguing that the founding treaties are, already today, a European *contrat social* even more than national constitutions.
[170] Cf. also *H. Schneider* (2000) citing e.g. *Otto Kirchheimer* (1965).
[171] See above near fn 129.

much less forceful. It is not that the shifting of loyalties, the emergence of a European demos, or of a specific European identity, would be without importance. But they are no longer prerequisites for reforms, and it might well be that the "causal chain" could be inverted: that a Union which is well functioning could enhance the shifting of loyalties or the emergence of new identities; that a system of enhanced democracy together with the adoption of the Charter of Fundamental Rights could provoke the rise of a "European identity". It is simply not convincing that such an identity has to exist prior to the introduction of a more democratic system at EU level.[172]

VI. Concluding Remarks

The European Union is no state. It is not necessary to change that as a precondition to address the most pressing needs to reform the constitutional system. The constitutional architecture of nation states need not be the blueprint for the Union. But it is equally important to see that the resemblance between specific features of the Union and statal structures should no longer form an obstacle to a fruitful debate. The fear that each step further could produce a "European Superstate" is unfounded. Obviously, this is in itself not the cure for the acute problems, but it might ease up a more pragmatic debate on Europe's future. It might even be that it could promote genuine solutions for the Union.

[172] *Habermas* (1995) 305 f. The mechanisms of a change of basic assumptions is much more complex, as has been demonstrated e.g. by *H. Schneider* (1991) and (1998a).

Res publica europaea:
How to improve constitutionalism without increasing statism

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Introduction

This paper deals with the problem of the future EU Constitutional Architecture, along the lines of Prof. S. GRILLER's introductory report "The Constitutional Architecture".

I. On the European people

I will not devote much time to this problem. Enough to say that there never was a proper *"pueblo español"* ("Spanish people") before 1812 (Napoleonic Wars). Actually some claim that under the Spanish present Constitution coexist several peoples - Galicians, Basques, Catalans, Valencians, Canarians... - but no one in his senses claims that our Constitution is less of a Constitution for this reasons. Similarly, there never was a "people of the British Commonwealth"; not even of the British Isles.

Think of a hypothetical polity consisting of a single, culturally homogeneous people. Would it need a constitution? Yes, although perhaps not necessarily written, in this case. Now think of another polity made out of several peoples with nothing in common but the desire of coexisting together under the rule of law and avoiding despotism. Would it need a constitution? Of course; although probably written, in this case.

II. European State: or *res publica europaea?*

"Constitution" and "State" are different notions. Whether or not the European Community meets the requirements of a state adds little to our understanding of the European predicament of these days. The same can be said of integration theories based in the concept of the state[1]. Now that states like the Spanish one are passing away I feel unable to see the point of a true European state. I rather suggest using notions such as *comunidad política,* "polity" or the Latin *res publica europaea* (Rome was pluralistic and stateless), which are simpler and more universal than "state".

[1] GRILLER seems to depart from a classical concept of the state and, after studying its three traditional elements, suggests that the European Community is not far from meeting the requisites of states. Another writer, Dominik HANF, pays little attention to the fact that whether or not an European people and an European state are really needed before we can speak of a Constitution. *Cfr.* HANF, "State and Future of the European Constitution", *German Law Journal* 2, núm. 15, 15-IX-2001. Robert BIDELEUX ("Civil Association: The EU as a Supranational Liberal Legal Order", in EVANS (ed.), *The Edinburgh Companion to Contemporary Liberalism,* Edinburgh, 2000), writes that "[...] Integration theories [...] have failed to shed much light on the nature of the nascent supranational polity [...] Such theorising has lately been going round in circles and repeating itself [...]".

Any association that evolves from the international to cross the line into the political terrain, will need a constitution, state or no state. What makes a constitution being constitutional is the rule of law, the separation of powers, territorial arrangements, and civic liberties.

III. Is there a European Constitution?

There seems to be little doubt that there already exists an European Community Constitution - although no document has such a name. This informal Constitution is different from those of the states, and rightly so[2]. Where can we find it? In the Treaties, the European Court of Justice (ECJ) rulings, the ECHR, the member state constitutions, some leading rulings of the highest courts of some member states, and in the general principles and traditions common to all member states. PERNICE writes that national constitutions and the European Constitution merge all together to make up a coherent system[3] - on this point I cannot agree: I am unable to find any real coherence, not even a proper "system". Consistency and coherence are not the greatest virtues of a body of law. Just think that to this day, the law enforceable in the territory of the US lacks full coherence.

IV. Do we need a written constitution?

The discussion between written or unwritten constitutions bears little fruit because no constitution is really unwritten - including the British - and no written constitution - including the Spanish - consists of a single, formal, codified document. Over time every successful constitution grows a full set of rulings, laws and conventions surrounding the main document. The discussion that makes sense is whether or not we need a statist code-like, *norma normarum,* monist, sovereign Constitution. The US Constitution is written, but not code-like, monist, *norma normarum,* like the Spanish one. To be precise, the Spanish Constitution for all practical purposes has stopped to be code-like, monist and *norma normarum,* just because it has been a very much alive and successful Constitution and because we joined the EU when our Constitution was only eight years old. The US Constitution is a written one and *reflects* values but it *is not* a shared, objective set of values to be imposed from above by an unfettered constitutional court. What if we do not share more values than those of the general, common western culture, and yet we want live together in this loose and compound *res publica europaea?*

My contention is that Europe needs a written constitution - not a code-like, statist constitution. We live in a postmodern landscape multi-constitutional, multi-governmental and post-sovereign: the European constitution, whichever its name, must meet these requirements, not the requirements of a 19th c. Constitution intended for Spain, France or Prussia at that time.

What needs Europe a Constitution for? Europe needs a Constitution to protect our liberties, avoid undue expansions of Brussels competences, control governmental actions, prevent any concentration of power, protect our cultures, guarantee the rule of law, and so on. In sum, the reasons why the European Community is in want of a constitution are more or less the same as in any polity. We need also a compact-like Constitution, which implies that if the central power breaks the compact, citizens member states and regions would become free to disobey the laws.

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[2] Griller also says that statist constitutions must not necessarily be the model of the European.

[3] "The European Constitution", paper given to the 16th Sinclair-House Talks, Bad Homburg, May 2001.

V. Eight suggestions for constitutional architects

After the Spanish constitutional experience, successful but not along rationalistic designs, I am inclined not to trust too much in constitutional rationalist architectures. So I would suggest but a handful of points.

A) Put a bit of order in the present EU constitutional stuff

First, we should take the European Constitutional materials as they stand today - dispersed and disordered - and make them ordered and intelligible. This would be far from a typical academic entertainment: many an observer would be surprised to realise how many features of a (material) Constitution we already have.

Consolidating and clarifying these constitutional materials would be no exercise of linguistic stylism - on the contrary it would imply to take sides in several controversial problems, except in the case of those parts of the Treaties more easily translatable into reasonable size and terms.

B) On the relations between national Constitutions and the European one

Things being as they are, the Treaties make already part of member states constitutions. It became evident when Spain joined Europe in 1986: although never acknowledged formally, several parts of the Constitution were *ipso facto* altered: economic provisions, state aids, competences of the regions, powers of the Spanish Parliament, and supremacy of the Spanish Constitution; to name but a few. On their turn, national constitutions make part of the European one, making up a body of European Constitutional Law that does not form a fully integrated, coherent system.

This is not said just to please both sides. It is simply that the relationship between the European and the national constitutions is one of interdependence[4], not of independence, nor of hierarchy and subordination.

It should be noted that national constitutions have not been enacted under the European one but on the contrary. So the European Constitution does not "constitute" the national ones, which must never be considered neither as hierarchical subordinates nor as rivals of the European. They rather are its "bases", with which it can obviously conflict in some circumstances. So, some articles of some national constitutions should be regarded as real parts of the European Constitution —and must keep on playing that role, I dare say. This is most clearly visible in the German *Grundgesetz* (arts. 23.1, 88, 79) but also, to a lesser degree, in the Portuguese (arts. 7.6; 102) or the French constitutions (arts. 88-1, 88-2, 88-3 and 88-4).

The Canadian Constitution gives us a hint of the kind of relations that we could establish between the two constitutional levels:

"The Constitution of Canada includes

(a) the *Canada Act 1982,* including this Act;

(b) the Acts and orders referred to in the schedule; and

[4] R. ARNOLD, *OP. CIT.*

(c) any amendment to any Act or order referred to in paragraph (*a*) or (*b*)".

Now, this Schedule[5] lists 30 items, including the British North America Acts[6], the Statute of Westminster, 1931; four provincial constitutions or acts[7], the British Columbia Terms of Union and the Prince Edward Island Terms of Union.

Why not to add a similar article to the EU Treaty? It should simply state that "European Union Constitutional Law includes the constitutions of all member states as interpreted by their highest Courts". It would guarantee constitutional integration as well as constitutional and legal pluralism and open-endedness. (I do not think we need a "fundamental legal order", fashionable as it is, lest it generate monism and hierarchy).

This is not to say that incoherence and unintelligibility are treasures to be preserved. It is dispersion of power and of constitutional interpretation what must be preserved. It is the constituent role of national constitutions what must be preserved. They are no longer supreme but they must keep being the "constituent assembly" of the European Constitution. They have to keep on being true constitutions and not laws or statute acts under disguise. The possibility of altering them without the consent of their peoples should be banned in theory and in practice.

C) On the role of national parliaments

I am sorry I am not very optimistic on this point[8]. National parliaments are not in their golden age - some of them have never had a golden age. Several member states are partitocracies, and their main parties have plenty of channels to participate in EU governance.

Were I to make a choice, I would prefer to give a role in the European jurisdiction to the highest national courts.

D) On subsidiarity

PERNICE proposes to create a "warden of subsidiarity"[9]. All right, but whom could we trust such a mission? Not the European Parliament because it has been an engine of integration and it does not represent territories but people. The new defender of subsidiarity could be composed out of the Committee of the Regions, the national highest courts, and the upper houses of national parliaments. It should have a real say in the law-making process when bills had any relevant territorial dimension - something similar to the German *Zustimmungsgesetze.*

E) On democracy

The usual view - the European Community as a dark den of technocracy and the member states as marvellous models of democracy - is not realistic. Yet the European Community suffers from an evident democratic deficit. But having a democratic deficit is one thing, and

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[5] Schedule to the Constitution Act, 1982. Modernization of the Constitution.
[6] 1867, 1871, 1886, 1907, 1915, 1930, 1940, 1943, 1946, 1949, 1951, 1952, 1960, 1964, 1965, 1974, 1975, and 1975 (No. 2)
[7] Manitoba Act, 1870, Alberta Act, 1905, Saskatchewan Act, 1905, and Newfoundland Act, 1949.
[8] HANF
[9] PERNICE, *op. cit.*

being liberal rather than democratic[10] is another thing. For the Union is too big and complex to be literally "democratic". It is very difficult to increase the European democratic dimension beyond a certain degree that could be reached relatively soon, should we put the shoulder to that wheel.

Democratic culture and traditions are not really strong in several member states and it would be naïve to expect that the building of the Community is to be more democratic than its bricks. European experience shows that when a member state has a strong Court, or solid regions, or independent MPs, such a fact never fails to have repercussions on the constitutional life of the European Community. The sum of weak or poor democracies at the state level will never result in a robust constitutional system at the continental level.

My contention can be summarised as follows: democracy in the level of states and regions; liberalism and checks on power in the European level.

F) On the role of the ECJ

No one denies the role it has played in the process of integration. But now we have perhaps come to the moment of *Taking the Constitution Away from the Hands of Courts*[11]. I am heartly in favour of law-making by the judges; but if we come to constitution-making, it cannot be the same.

The function of reviewing the constitutionality of laws should be trusted to a new, non-judicial body appointed by the Commission, the European Parliament and the Council of Ministers. The function of solving conflicts of competences should be trusted to another non-judicial body appointed by the Commission, the European Parliament, the Council of Ministers, the upper houses of national parliaments and the Committee of the Regions. None of these bodies should be permanent but *ad hoc,* as WEILER suggested[12].

G) On competences

We should clarify what the European Union is for and how its model for the future is. But reaching such a high level of agreement is unlikely in the near future. Shall we put our confidence in making one or several good lists? The experience of Spain and other countries is a bit disappointing: first, because lists are often in need of interpretation, and second, because they not always prevent the never ending story of increasing central powers. For our present purpose I will rely on some general principles.

Firstly, European central powers should avoid to "micromanage", even when exclusive European competences are at stake. In a multi-governmental landscape, micromanagement should be reserved to the government closest to people, usually regional, except in very small and homogeneous states.

Second, the European Community should refrain from acting when the states are able to do things by themselves, even if a bit imperfectly; and when things do not affect any other member (for example: regions, except frontier ones).

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[10] BIDELEUX

[11] I borrow the title of a book by M. TUSHNET (Princeton, 1999). See also STITH, "The Rule of Law vs. The Rule of Judges: A Plea for Legal Pluralism", *Political Thought,* 3 (1997), 31-55.

[12] Cf. Stith-Weiler, *Dos visiones norteamericanas de la jurisdicción europea,* Santiago de Compostela, 2000.

Third, it should act only when it is really necessary to reach the general goals of the Union. For example, how office furniture must be, or how pigs must be killed in traditional Galician rural areas, are not crucial issues for a powerful and prosperous Union. For the same reason, all competences actually in the hands of Brussels that are not indispensable for building a prosperous and powerful European Union, should be given back to the states or regions.

Fourth, Subsidiarity must be separated from efficiency (thus, we will have to reform art. 5 of the EC Treaty). Subsidiarity should apply to all European competences, including exclusive ones (except those like art. 106 of the EC Treaty), and to this end, paragraphs 2 and 3 of the Protocol on Subsidiarity and Proportionality should be reformed.

Fifth, all member states should keep some substantial competences beyond mere implementing of European decisions, as stated in the German *Maastricht* ruling. The same should apply to regions when, according to their state constitution, enjoy substantial powers.

Sixth, the principle of universal competence or *Kompetez-Kompetenz* should be abolished. European integration is incompatible with member states enjoying such a competence, that in fact they have long lost. But European integration, if we have a compound European polity or *res publica europaea* in mind, does not demand that Brussels have *Kompetenz-Kompetenz* any more than the states —just what has happened to sovereignty—. Articles 6.4 of the EU Treaty and 308 of the EC Treaty should be reformed to prevent the Community assuming new decision competences without the consent of the actual competence-holder (states or regions, according to the states constitutions).

H) On the Charter of Rights

My approach departs a bit from the nearly universal celebration of the Charter - not that I deplore it, needless to say. But it is doubtful if we need *this* Charter to be integrated in the Treaties and given legal enforceability. Its rights are not new; some of them are not enforceable (art. 15) some others are not legal or constitutional in nature (art. 25). Having a Charter of Rights making part of the Constitutional law and enforceable by judges is all right, but I doubt if it should be just this one, at least in its present form. If we want a Charter of Rights directly enforceable, why not to write down just a handful of realistic rights and a clause like the Amendment IX of the US Constitution? Our Charter is so detailed and full of values that any activist judge could rule on nearly every aspect of our personal lives - and the goal of European integration never was to impinge upon people's lives. It has been a real triumph of the defenders of the constitutional notions of "shared set of values" and "fundamental legal order"[13]. Values are a very powerful uniforming tool apt to homogenise not only governments and laws but people and civil societies as well. As BIDELEUX[14] points out, the task of judges is not to ascertain, reflect or defend the wishes of a *demos* - not even, one should add, to interpret or impose values.

[13] On both points I depart from my colleague Prof. Arnold (U. of Regensburg). We keep on friendly discussing these subjects several years ago.
[14] Bideleux, *op. cit.*

Process, Responsibility and Inclusion in EU Constitutionalism: A Contribution to the Debate on a Constitutional Architecture

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1. Introduction: raising questions

Is the current 'constitutional' debate in the European Union a new stage in the development of the 'ever closer union', or a continuation of longstanding debates in many academic and some media, opinion-former and political circles about the finality of European integration? Can any sort of debate about constitutions, constitutionalism and constitutionalisation assist in resolving the very real political problems faced by the EU at the present time, especially since these include not only the ongoing economic challenges of globalisation and the development of a global trading order through the WTO, the threats and opportunities of impending enlargement and the problems of a cumbersome institutional framework which does not assist the goal of transparent and efficient policy-making, but also of much more recent vintage the very specific challenges of a changing world order raised by the events of September 11 2001. Do such debates not risk dangerously privileging law over politics, diverting constructive polity-building energies into blind alleys of discussion amongst technicians and experts about constitutional authority, sovereignty and legal rights which fail to illuminate the fundamental questions of political acceptance and legitimacy which undermine the EU's capacity for action and its claim to be a responsible post-state polity?[2] Can the debate on the *Future of the Union* in the run up to the putative IGC of 2004 presaged in the Declaration attached to the Treaty of Nice effect an opening of options, rather than a closure of possibilities? What is at stake in the context of 'constitutional contemplation' for the EU? Above all, is the so-called Great Debate a risk-free activity, comprising myriad opportunities to educate all participants in the debate in the civilising forces of constitutional democracy, which are just waiting to be harnessed? Or can, in fact, such a debate provide a platform not only for those opposed to deepening and widening EU-based integration, but even for forces antithetical to the taken-for-granted premises of constitutional democracy. These are some of the pressing questions which are raised when we consider the possible constitutional futures of the European Union.[3]

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[2] N. Walker, 'The White Paper in Constitutional Context', in C. Joerges, Y. Meny and J.H.H. Weiler (eds.), *Symposium: Responses to the European Commission's White Paper*, EUI RSC/Jean Monnet Program, 2001.

[3] Although this brief paper draws heavily upon previous work by myself alone and with others in the field of EU constitutionalism, it is in fact more in the nature of a preliminary think-piece intended to stimulate further reflection. For more detailed exposition of my views on EU constitutionalism, see the following papers: 'Postnational Constitutionalism in the European Union', (1999) 6 *Journal of European Public Policy* 579; 'Process and Constitutional Discourse in the

None of this is intended to decry the necessity for setting out clearly the groundwork of possible legal frames for the future of European integration. It is merely to highlight the limited solutions to political problems grounded solely within legal argument and doctrine. The important question engaged by Stefan Griller, for example, in his paper on *The Constitutional Architecture* is the following: what is the most helpful methodological framework for developing conceptions of the European Union's constitutional architecture? Specifically what is the role of the concept of 'state' especially for legal science's contribution to the Future of Europe debate? What is the structuring force of a legal scientist's insight that notwithstanding its formal similarity in many respects to a state, the EU is not a state and will not become one – essentially for political rather than formal legal reasons? For Griller, it follows that there is more scope for institutional imagination to be applied to the task of future legal construction. Such construction should not be thought, automatically, to fall foul of the 'holy cows' of state sovereignty or to threaten the continued existence or viability of the Member States as sovereign states.

The 'touch of stateness' argument provides a different but complementary angle on this point. In earlier work together with Antje Wiener,[4] she and I have sought to isolate the various institutional and theoretical dimensions involved in the perverseverance of thinking about the state in studies of the law and politics of the EU. This helps to shed light on the paradox that the EU is simultaneously both 'near-state' and antithetical to stateness. 'Stateness' persists to a remarkable degree in both normative discussions of alleged deficits within the EU and many approaches to theorising the EU as an instance of governance beyond the state. Each of these dimensions continues to push the mainstream of scholarship on the EU overwhelmingly towards a positivist analytical and indeed normative perspective on issues about future development and reform. Following these dissections of the paradox of the EU polity both as it exists at present and in its ongoing process of becoming, we derived a set of methodological premises about studying the role and construction of norms, identities, practices and discourses in order to assist us in the task of analysing and presenting constitutional pasts, presents and futures.

This comment focuses primarily on the normative questions which frame debates about the EU constitutional architecture, although the following section comprises a re-presentation of the standard template of EU constitutionalist thinking with a view to identifying some of the key analytical questions which remain open. The main section of the paper, Section III, identifies the core facets of what is termed a 'responsible and inclusive EU constitutionalism', and draws on some contemporary theories of recognition and dialogic or relational constitutionalism in order to argue for a focus on process, freedom, fairness and democracy as well as formal constitution-building within the 2004 Debate. In the conclusion, I deploy some of the insights thereby developed in the light of current debates about the processes of constitution-building and Treaty-making in the EU.

2. The standard template of EU constitutionalist thinking

Four principal propositions can be advanced about the standard template of EU constitutionalist thinking. This paper does not seek the outright discarding of this template (and indeed it does

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European Union', (2000) 27 *Journal of Law and Society* 4; 'Relating Constitutionalism and Flexibility in the European Union', in G. de Búrca and J. Scott (eds.), *Constitutional Change in the European Union: From Uniformity to Flexibility?*, Oxford: Hart Publishing, 1999.

[4] J. Shaw and A. Wiener, 'The Paradox of the 'European Polity'', in M. Green Cowles and M. Smith (eds.), *The State of the European Union. Risks, Reform, Resistance, Revival*, Oxford: Oxford University Press.

not truly exist in the rather caricatured form in which it appears to be in the brief sketch which follows); it has served the EU relatively well in its piecemeal construction of a range of limited constitutional principles structuring the *status quo* of governance beyond the state. However, these propositions do need to be the subject of continuous critical reflection in the process of taking forward the challenges of constitutionalised governance in a site of political and legal authority situated beyond or outside the state.

1. In much analysis of the EU's constitutional pasts, presents and futures, empirical and normative questions are conflated. For example, the literature on constitutionalism frequently slips between three distinct levels of analysis influenced by different strands of constitutional thinking: the discussion of aspects of the 'EU constitution' as empirical fact; the articulation, within a normative project, of the *desirderata* of a constitution for the EU as legal, political and economic integration project; and the use of political theories of constitutionalism, especially in their liberal and communitarian guises, and less often in the guise of neo-republicanism, to analyse the politics, practices and institutions of the EU especially in comparison to nation states. Certain assumptions often then slide into the discussion:

- That the model of the EU legal order as a constitution for the EU evinces a higher degree of clarity, coherence, consistency and completeness than is the case. This often leads to an overstatement of the *status quo* of the *de facto* EU constitution.
- That the *normative* project of EU constitutionalism must, by definition, be 'integration-friendly', fostering greater centralisation at the expense of decentralised or dispersed centers of powers, focusing on a monistic system of EU/federal legal and constitutional authority, at the expense of the potential of constitutional pluralism.
- That the EU has a settled and now unambiguous relationship with states and 'stateness'.
- When deployed these assumptions limit the vocabulary of EU constitutionalism, and also its capacity to contribute constructively to problems of polity formation in a governance setting beyond the state.

2. There have been many attempts to capture the 'essence' of EU constitutionalism, and to outline in as complete a way as possible what a constitutionalised European Union actually is and may become in the future. Much of the debate has of course concentrated on the question of whether the EU is or might become a state, even if not the conventional type of state with which we are most familiar. Alternatively, it might develop into some as yet incompletely specified halfway house between a state and an international organisation. The urge to categorise, to name and indeed to predict the future finality of the EU is hardly surprising, but arguably it results in ultimately circular arguments, based on an unrealisable attempt to confine the constitution as a document and as a discrete event. The naming process then becomes a self-fulfilling prophesy of establishing either affinity with or distance from the familiar domestic and international institutions. Several critical reflections need to be entered. First, although a constitutional framework for a polity such as the EU is unavoidable, it cannot provide answers to everything. Second, any constitution needs to be the subject of continuous critical reflection and should be seen more as a set of interlocking

processes rather than as a single one off event or document. Following James Tully, it is illuminating to define a constitution in the following terms:[5]

'A constitution should be seen as a form of activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with three conventions of mutual recognition, consent and cultural continuity.'

To put it another way – which leads us onto the third proposition – we could adopt the mathematical perspective of seeing the European constitution as a vector rather than as a point.

3. There is – as will already be clear – a powerful tradition of metaphor, simile and imagery in literatures on the EU in general, which has been carried over into constitutional studies in particular. Notable images include that of the 'bicycle', suggesting that the edifice of European integration – if ever it ceased moving forwards – would somehow topple over and crumble, and more recently the pillar imagery widely used to help bring some sense of order and understanding to the immensely complex legal and institutional framework of the EU. It is from the pillar imagery, via precisions such as the Greek Temple or the Gothic Cathedral developed in legal academic literatures, that we come to the suggestion that what is in the process of being built is a 'constitutional architecture'. Yet it is doubtful whether the conception of a constitutional architecture is a useful one, given that it fails effectively to capture the liminality and procedural, dialogic and relational aspects of EU constitutionalism, which will be presented in more detail in the following section.[6] The metaphor also suggests a single director of operations, the architect, who is in overall control of the creation of the edifice. This extension of the metaphor most emphatically does not work for the EU either descriptively or normatively. Descriptively it fails, because even if one were to view the Intergovernmental Conference as a single arbitrating body for constitutional development, the IGC itself is melded from multiple voices and inputs. Moreover, Treaties, once agreed, are subject to wider interpretative communities, including the Member States, the institutions and – especially – the Court of Justice. Normatively, the metaphor projects a top-down model of constitution-building which may have been dominant hitherto in the EU, but which is reaching the end of its use shelf-life, especially in view of the widely perceived legitimacy gap between the citizens and the EU. Finding new and effective mechanisms to secure wider participation in constitution-building is an important practical challenge for the EU at present. However, a procedurally-based analysis of EU constitutionalism requires more than simply the recitation of anecdotal expressions of the self-evident adequacies of current EU 'constitutional' processes.

4. The fourth point concerns the development of a vocabulary of reform. My interpretation of 'fighting constitutional taboos', as suggested as a constructive strategy by Griller's paper on the *Constitutional Architecture*, is the task of engaging with finding a shared reform vocabulary for a constitutionalised EU. This has been a problem for the EU so long as its reform processes have been episodic rather than continuous. Following Johan Olsen, this is an essential precondition of successful processes of institutional engineering, especially in complex scenarios such as the EU:

[5] J. Tully, *Strange Multiplicity*, Cambridge: Cambridge University Press, 1995 at 30.
[6] Although the metaphor is taken up with gusto by Johan Olsen, 'Organising European Institutions of Governance', ARENA Working Papers WP 00/2, where he uses the analogy of the building of St. Peter's, Rome.

> ‘successful reform is more likely if a shared reform vocabulary evolves in the EU and there is a convergence in causal and normative beliefs and identities. A precondition for such a development is that reform is understood as occasions for interpretation and opinion formation as much as decision making.’[7]

Building an institutional account of the processes of reform of European institutions of governance, Olsen identifies a key challenge as that of establishing ‘processes of change which nurture and develop good settings for reflective processes where participants can critically examine their own normative and causal beliefs and identities’. Much the same insight will be developed in the section which follows, but using rather different premises to those of Olsenian institutionalism.

3. The challenge of a responsible and inclusive constitutionalism

In a series of sequential steps I shall in this section build a picture of how the EU can engage with the normative project of developing a responsible and inclusive constitutionalism. The attachment to these two perhaps contentious adjectives stems from an intuition – strengthened greatly since the events of September 11 2001 – of the pan-European space as an emerging middleground in which the often countervailing pressures of economic and cultural globalisation, ongoing religious and ethnic conflict and struggles against anti-democratic forces can play themselves out within a dynamic historical space of coordinated cooperation and competition.[8] Inclusiveness is a particular challenge to an EU with unsettled geographical boundaries and sometimes abbreviated national histories of ethnic and social inclusion. Responsibility is a global social and environmental demand, in a world where there are not only weapons of mass destruction but also human industrial capacities to destroy ecosystems and to create environmental disasters including famines and floods.

1. The first step enjoins explicit consideration of the challenge of developing ‘postnational’ constitutionalism in a ‘non-state’ polity. The fact that the EU is a non-state polity is more than simply a ‘setting’ for its constitutional practices and futures. The invocation of postnationalism suggests not abandonment of the anchoring of the national constitutions, which are hardly likely to be swept away in a Euro-philic tide of enthusiasm for building a United States of Europe, but rather the reinforcement of a constitutional politics which is specifically non-teleological and accepts contestation and non-fixity as a way of life, not a deviant practice. Thus Zenon Bañkowski and Emilios Christodoulidis have argued for the EU to be understood as an ‘essentially contested project’, drawing upon W.B. Gallie’s idea of the ‘essentially contested concept’.[9] They develop a crucial variation, however, by focusing on contestation rather than contestability or contestedness. Linking their argument to a pluralist and heterarchical conception of the EU legal order, they argue that

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[7] J. Olsen, ‘Reforming European Institutions of Governance’, ARENA Working Papers WP 01/7.

[8] For an analysis along these lines see K. Eder and B. Giesen (eds.), *European Citizenship: National Legacies and Transnational Projects*, Oxford: Oxford University Press, 2001.

[9] Z. Bañkowski and E. Christodoulidis, ‘The European Union as an Essentially Contested Project’, (1998) 4 *European Law Journal* 341; the reference is to W.B. Gallie, “Essentially contested concepts”, (1955-56) 56 *Proceedings of the Aristotelian Society* 167.

'the whole point of trying to describe the EU in terms of 'interlocking normative spheres' is to be able to see the whole system as a continuous process of negotiation and renegotiation; one that does not have to have a single reference point to make it either a stable state system or one that is approaching that end.'[10]

One of the key elements of that negotiation and renegotiation is the fact that the currency of the negotiation comprises emotionally charged and themselves contested concepts such as national identity and sovereignty, such that the 'statist heritage' is both carried forward into the evolution of the EU, and itself transmuted by the processes of transposition to the postnational dimension. Hence a dialogic and procedural conceptualisation of constitutionalism in the EU is, in my view, fundamental precisely to conceiving of the EU's constitutionalism as postnational. This is not meant to indicate that the EU is 'after' the nation state, in either legal or political terms, but precisely to capture the 'open-ended, indeterminate, discursive, sui generis and contested'[11] nature of the project. It problematises, for example, linear assumptions about progress from a union of states to an integrated polity, and posits a reflexive critique of institutions, legal forms and identity formations beyond statist limits, in which the nation state is one actor, but not a privileged one. If the EU has a constitution, then it is one in a state of relating to national constitutions and other national and international settlements. For these purposes, the national constitution is relevant to the development of EU constitutionalism, but it cannot make a privileged claim for recognition. Hence the discourse of postnationalism is essentially interrogatory, demanding that the practical and intellectual challenges to nation states posed by the twin developments of globalization and regionalization are reflected back upon taken-for-granted assumptions about the Westphalian system of states.

2. Following from this is the deployment of a definition of postnationalism as an open-textured concept used to express many of the dynamic and *sui generis* elements of the EU as *integration* process involving the *process* of polity formation and in particular constitutional processes. Indeed, the emerging constitutional edifice is poised between important normative questions about states, polities and citizens and longstanding questions about the nature, process and indeed putative finality of EU-based integration. In terms of the development of *integration*, the EU does not merely replicate the states out of which it first emerged and to which it remains indissolubly linked, but is sustained by a separate logic. The institutional and constitutional processes of polity-formation demand to be understood on their own terms, but in a way which respects the diversity of the Member States themselves. In other words, the so-called 'postnational' 'post-state' context of the EU matters. Only then can we engage in the task of institutional construction which the current debates demand. We need a perspective which captures simultaneously the indeterminacy of the political community (states, regions, peoples, etc.) which is implicated by the constitutional settlement in the EU and the complexity of its institutional arrangements especially in the post-Maastricht phase. We need a perspective which allows for the definition and redefinition of community as the process of constitutional settlement continues. This is where the demand for dialogue starts to become clear. However, it is vital to remember, for the purposes of this analysis of the possibilities in normative terms for an EU constitutional settlement, that there is a world of difference between saying: 'there ought to be a debate' and building a thorough-going model of relational or dialogic constitutionalism.

[10] Bañkowski and Christodoulidis, above n.9 at 342.
[11] A list of adjectives borrowed, with thanks, from Miguel Poiares Maduro.

3. In a closely related move we find the so-called no *demos* problem. Here the constructive potential of Union citizenship as an institutional framework can usefully be invoked. This offers one possible means to escape what Damian Chalmers terms the 'dialogue of the deaf' which occurs in relation to issues of both constitutionalism and democracy in the European Union, 'with those who believe in a European *demos* shouting past those who do not, and vice versa'.[12] The constructive potential of Union citizenship posits the possibility of processes and practices of citizenisation operating within a virtuous circle enhanced by the synergies between the formal legal figure of Union citizenship under the Treaties and the wider legal and political rights of citizenship established under the Treaties and secondary legislation.

4. The relationship between the EU and the Member States continues to be shifting and contingent, especially the conventional tools of state-building, including constitutionalism. These cannot be applied unchanged to the EU because they fail to provide help in answering the paradoxes posed here: the problems of postnationalism, of the undetermined community of affinity, and the contested nature of EU politics, in which left/right cleavages are entwined with differing, shifting, and often strategically focused levels of support for 'more Europe' or 'less Europe', as well as interacting with the identity politics of a changing, globalizing, regionalizing, and localizing geo-political space in Europe.

5. Procedural and relational constitutionalism demands that the EU's constitutional reformers – whoever they are – must overcome the internalisation of the constitutional debate. The challenges include engaging with the outside and with outsiders – third countries and third country nationals – and eschewing restrictive concepts of 'progress' and 'development' (whether socio-economic or cultural) which can often bedevil the attempts by Western states and polities to engage with the outside and outsiders. We have to engage with the concept of constitutional responsibility in an emerging constitutional polity, with unstable political and legal boundaries and an unformed concept of 'territory' (place and space). Partly, this means addressing the reality of constitutional pluralism in the EU as it exists at present, a pluralism which the current process of reform is not going to wish away. In addition, it means understanding that the problem of process is not simply a commonsense dissatisfaction with the state of reform mechanisms which apply at present (whether an IGC or a putative Convention in its likely post-Laeken mode), but also the normative challenge of providing a theorization of constitutionalism which takes seriously problems of inclusion and exclusion in a highly contested polity with little or no sense of 'demos' and with a shifting boundary between inside and outside.

6. In a final move, the challenge for the EU is to overcome the privatisation of public reason taking place under current conditions of globalisation and denationalization. For example, for Habermas,[13] the current model of social organisation being thrust upon small and medium-sized states by a currently dominant global economic regime comprises four problematic elements: an anthropological view of 'man' (sic) as a rational actor who exploits his own labour; a socio-moral vision of a post-egalitarian society that has come to terms with marginalisation, rejection and exclusion (by this, one presumes, has come to accept certain levels of these evils as tolerable); an economic conception of democracy that reduces citizens to the status of members of a market society and redefines the state as a service provider for 'purchasers' and 'clients'; and the strategic notion that there is no better form of policy than that which is self-designing. The dangers of these forms of privatisation in terms of limiting the possibilities of applying public

[12] D. Chalmers, *European Union Law. Volume One. Law and EU Government*, Aldershot: Dartmouth, 1998, at 186; for a summary of the arguments see also B Kohler-Koch, 'A Constitution for Europe?', MZES Working Paper 8, 1999 (www.mzes.uni_mannheim.de/).

[13] J. Habermas, *So, Why does Europe need a Constitution?*, Robert Schumann Centre, European University Institute, 2001.

reason to the task of problem solving or the allocation of public goods are legion. Certainly, if these conditions are allowed to go unchallenged, it is difficult to see the possibilities for applying the normative model which – by way of interim conclusion – I contend would be useful for the EU. In earlier work, I have made extensive use of the work of Canadian political theorist James Tully, which is based upon a linkage of constitutionalism and the negotiation of cultural recognition, combined with a normative presupposition (easy to share in the contested context of the EU) of the acute need for 'diversity awareness' amongst participants in a constitutional process.[14] In more recent work,[15] examining the co-existence of the principles of constitutionalism and democracy, Tully seeks to find both a public philosophy which can help us in the task of testing the constitutional and democratic legitimacy of contemporary polities, but also a pragmatic programme of research which tests such premises in real-world scenarios of polity-formation under contested conditions, of which the EU, like Canada which represents a useful comparator, is one. Tully suggests "working back and forth between actual networks of practices of democratic negotiation and critical clarification under the principles of constitutionalism and democracy. In a time when the legal and political order is constituted by open-ended networks of ongoing negotiated conciliation rather than rigid foundations, this kind of research must itself be an ongoing activity of reciprocal reflection involving a variety of relations of communication between philosophy and the public affairs it studies."

He then suggests four steps for this 'critical and practical research project', which he envisages as a permanent activity, involving initiation, negotiation, capacity testing and retesting, implementation and review. Initiation is a preliminary step, necessarily bottom-up, in which the formalized institutions of deliberation are set aside, in favour of allowing social forces to 'expose, criticize and overcome local relations of exclusion and to enter prevailing institutions or invent *ad hoc* practices of deliberation'. The perennial search to organise and categorise civil society in the EU, evident once again in the Governance White Paper seems inimical to this essentially chaotic premise of open-ended initiation. Negotiations can only take place, however, if initiation is successful. Beyond agreement, assuming it can be found, however, the construction of constitution-building as a permanent activity requires us to recognise that any given agreement can itself be subject to reasonable disagreement and so will be contested by democrats, or indeed anti-democrats. Their claims must be tested against the agreement, and negotiations reopened as necessary. This is an anti-finality point, as well as one which raises the acute difficulty of determining how commitment to democratic practices can effectively be set as an entry standard for participants in the process. Finally, Tully urges us not to forget the stage of implementation, arguing that here legitimacy tests need to be set just as urgently. Problems of creative compliance to the letter but not the spirit of a settlement on the part of nominally committed actors will be a particular problem. In other words, 2004 will never be a finality – even if its terms become largely set in stone because of the difficulties of amendment processes. Implementation and the capacity for review will always be just as important.

Some brief comments on the EU status quo regarding questions of process can usefully follow this statement of the outline premises of the argument and the normative standpoint taken. It has become quite commonplace in EU constitutionalist thinking to juxtapose the Intergovernmental Conference as a method of constitution-building (bad, exclusive, malfunctioning) and the so-called Convention, constructed after the model of the Fundamental Rights Convention of 2000 (good, inclusive, functional). In any event, of course, any post-Nice process of reform, whether it involves a thoroughgoing process of constitutional construction or

[14] Tully, above n.5.
[15] J. Tully, 'The Unfreedom of the Moderns in comparison to their ideals of Constitutional Democracy', ms October 2001.

a more limited reflection starting from the reference points provided by Declaration 23 on the Future of the Union will necessarily involve the authoritative determination of an IGC as provided for in the Treaty on European Union as well, as seems likely, as the more deliberative processes made possible in a Convention with the type of wider membership currently under consideration. But not everything about a Convention will necessarily be 'a good thing' in terms of the norms of inclusive and responsible constitutionalism posited here. Its workings can be captured by dominant forces. Its processes may be corrupted, subjected to the disciplines of neither the party politics of a conventional parliament nor the rules of diplomacy of a body such as an Intergovernmental Conference. It may be no more willing or capable of accepting and listening to minority, unpopular and antagonistic interests. In other words, a Convention should be subject to as much rigorous scrutiny in terms of the steps to test the constitutional and democratic legitimacy of a settlement and the processes whereby it is reached as the Intergovernmental Conference itself. It should not be assumed to have an *a priori* preferential status.

4. Conclusion

A motivating factor for this comment was the fear that the premises and assumptions of constitution-building which would inform the 'Great Debate' would draw upon a rather limited palette of colours. In other work which this comment has made use of, I have sought to suggest that the postnational 'positioning' of the EU, along with key procedural, dialogic and relational aspects of the process of EU polity formation which can be developed using some contemporary political theories of constitutionalism, assist in the task of understanding the emerging constitutional edifice as poised between important normative questions about states, polities and citizens and longstanding and unresolved questions about the nature and process of EU-based integration. Descriptively, one can point to the constructive impact of dialogic and procedural aspects of EU polity formation. Normatively, we can contend that a responsible and inclusive constitutionalism for the EU can only be constructed through a permanent activity of critical review and reflection upon the initiation, negotiation, conclusion, review and implementation of a myriad of constitutional settlements.

Constitution européenne

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1. Observations préliminaires

La question concernant la constitution européenne est dans sa teneur susceptible d'avoir différentes interprétations. Elle contient en effet plusieurs dimensions - celle politique et symbolique; celle de procédure - comment préparer un projet de la constitution, dans quelle voie et quels corps devraient l'adopter; la dimension matérielle-substantielle liée à la direction de solutions et à la portée de solutions, enfin au contenu concret des institutions constitutionnelles particulières.

Il est indubitable qu'à l'heure actuelle nous pouvons nous concentrer dans le débat en cours surtout sur deux premières questions, en laissant de côté cependant la troisième - car il serait évidemment déterminé par les résultats obtenus dans les deux premières stades de la discussion.

2. Pourquoi la constitution européenne?

La question évoquée sur la Constitution n'est pas le jeu du hasard et elle-même indique une étape sur laquelle nous nous trouvons dans nos débats communs sur la forme de l'intégration européenne. Au débat, je tiens à souligner très nettement, que je n'ai pas d'intention de me servir d'une notion de constitution dans le sens technique d'un document qui met en ordre l'étape d'intégration actuel, harmonisant les solutions institutionnelles existant, pétrifiant en un mot l'état atteint après plus de 40 ans d'efforts d'intégration.

Or, il ne s'agit pas ici d'une compilation suivante des solutions adoptées et la lisibilité du droit communautaire en vigueur, mais de quelque chose considérablement plus. La constitution doit préciser expressément un nouveau stade, et peut-être mieux - une nouvelle qualité de l'intégration européenne. Le fait lui-même de l'annoncer témoigne donc des finalités politiques déterminées de l'intégration, constitue un symptôme de la tendance de sortir au-delà d'une conception « d'une intégration pas à pas créée et réalisée selon la vision de l'un des pères fondateurs de la Communauté Jean Monnet (ou bien selon la version de Walter Halstein - « la théorie de bicyclette » il faut aller en avant, car autrement on tombera). Elle suppose donc une autre et plus courageuse forme de l'Europe intégrée, une nostalgie de la fondation d'une nouvelle construction politique et juridique qui donnerait une forte impulsion aux processus d'intégrations suivantes. Et ce n'est que sous cette condition - de telle conception des débats sur la constitution européenne, cela vaut la peine d'aborder ce sujet. En acceptant une telle

conception, laissons donc de côté le trame pragmatique et technique lié à la création de la Constitution en tant qu'un acte purement mettant en ordre l'étape d'intégration actuelle.

Si la discussion sur la constitution européenne doit être quelque chose de plus que le débat juridique purement formel, essayons de répondre à la question de savoir quel document elle doit être, et plutôt quels motifs politiques, symboliques ou bien historiques pourraient militer pour l'opportunité de sa création? A quoi doit nous servir la constitution? S'agit-il ici de nouer intellectuellement à l'idée du comte Richard Coudenhove-Kalergi, qui a élaboré un projet de la Constitution des Etats Unis d'Europe adressé aux dirigeants des Etats alliés. Il est curieux dans certaine mesure que le terme lui-même « la constitution européenne » n'apparaît pas assez souvent dans les débats sur l'avenir de l'intégration européenne[1], dominée évidemment par les disputes concernant une forme institutionnelle de l'Union, sur les relations entre les mécanisme intergouvernementaux et communautaires, enfin sur le rôle des Etats nationaux dans l'Europe future et la légitimation démocratique des organes de la Communauté. Si l'on discutait sur la constitution européenne c'était le plus souvent dans le contexte de la discussion sur la Charte de Droits Fondamentaux qui devrait être la racine, l'arrière axiologique de tel document, en principe sans préciser son rôle et son importance; Il est pourtant un fait symptomatique qui doit être remarqué et souligné ici que la conception d'intégration elle-même était toujours liée à une étape d'intégration suivante et elle apparaissait beaucoup plus souvent dans les présentations des partisans d'une intégration plus forte[2]. Revenons pourtant à la question, à quoi doit nous servir la Constitution européenne?

Comme d'habitude, il n'y a pas en ce qui concerne les sujets si fondamentaux et pour ainsi dire si grands - de réponses simples et équivalentes. Il existe en effet des arguments valables pour et contre tel débat à engager.

Commençons par ces raisons qui militeraient plutôt pour adopter une attitude malveillante, peu favorable à engager une telle discussion.

Premièrement donc on indique le caractère secondaire du débat constitutionnel par rapport aux disputes de fond concernant la future forme institutionnelle de l'Union. Il est insensé de mener le débat autour de la constitution - cela est à remarquer, si sont inconnues définitivement les finalités politiques de l'Union et quelle conception relative à l'architecture de l'Europe future trouveraient l'acceptation et le consensus parmi les Etats membres. A l'heure actuelle, comme on le sait, il existe quelques conceptions d'intégration au moins principalement différentes dans certains points - (voir les propositions de J. Fischer, Giscard d'Estaing, Blair ou Chirac)[3] - elles concernent par ailleurs les questions si centrales comme le problème d'existence d'une avant-garde de l'intégration, de modes de former un parlement européen, mais d'une structure (une ou deux chambres) et de l'étendue de compétences. La discussion autour de la Constitution européenne ne remplacera pas ce débat, et, au contraire, elle peut être traitée en tant qu'un

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[1] Cf. P. Buras, *Polska wobec dyskusji o przysz³oœci Unii Europejskiej,Raporty i Analizy /La Pologne face à la discussion sur l'avenir de l'Union Européenne, Rapports et Analyses/*, Warszawa 2001, Centrum Stosunków Miêdzynarodowych, p. 13; idem: *Dyskusja o finalité politique Unii Europejskiej, Przegl¹d stanowisk, Raporty i analisy / La discussion sur la finalité politique de l'Union européenne, Revue des attitudes, Rapports et analyses/,* Warszawa 2001, p. 8.

[2] Voir, *Rede in der französischen Nationalversammlung. Rede des Bundesministers des Auswärtigen Joschka Fischer am 20.Januar 1999 in Paris;* et *Pour provoquer le declic salutaire,* interwiev avec A. Juppe i J. Toubon, « Le Figaro » du 16 juin 2000.

[3] Voir *Un projet de Constitution pour l'Europe,* « le Figaro » du 16.VI.2000; *Eine Verfassung für Europa. Neogaullisten wollen « Verstärkte Gemeinschaft der Nationalstaaten »,* FAZ du 17.VI.2000 et « *Der Volksentscheid wäre nur ein Vorwand ». SZ-Interview mit Wladyslawx Bartoszewski, «* Süddeutsche Zeitung » du 8 IX 2000; voir aussi P. Buras, op. Cit. P. 8 et suiv.

sujet spécifique de substitution, sujet concernant la forme pendant que le contenu n'existe pas encore qui pourrait remplacer cette forme. Or cette discussion est prématurée et en tant que telle ne peut apporter des résultats aussi bien en ce qui concerne des solutions futures que la procédure de les adopter.

Deuxièmement, la notion de constitution - diront les adversaires de cette conception - est traditionnellement, historiquement jointe avec la notion d'Etat. La Constitution est justement d'une manière traditionnelle, un acte suprême déterminant un régime de l'Etat et le fonctionnement de ses organes les plus importants, institue ses principes fondamentaux, dont aussi les garanties des lois et libertés de l'homme, crée une superstructure de tout le système du droit, en définissant sa hiérarchie intérieure et l'étendue de la force obligatoire commune. Telles tâches peut-elle aujourd'hui remplir la Constitution européenne - demanderont les scepticiens? Peut-on déjà à l'heure actuelle parler de l'analogie entre la Constitution européenne et la constitution étatique classique? Le projet d'intégration - même le plus avancé parmi ceux délibérés à nos jours - est susceptible d'être comparé avec une conception de créer un organisme étatique fédéral dans son édition classique, qui apparaît dans les modèles européens et extra-européens des Etats fédéraux?

Troisièmement, si même on passe sous silence les réserves susmentionnées, il reste encore une raison pragmatique essentielle liée à la procédure elle-même d'adopter la constitution et d'élaborer ses éléments particuliers. Chacun des Etats-membres a ses propres traditions juridiques, ses propres sources d'inspiration et les modèles constitutionnels. En même temps c'est une sphère particulièrement sensible des règlements juridiques auxquels tout Etat membre est fortement attaché? La dispute institutionnelle principale concernant la forme des structures européennes particulières motivé par les visions diversifiées de l'intégration européenne doit être par conséquent élargie par les trames résultant des traditions constitutionnelles différentes. L'Europe est-elle capable de survaincre ces barrières et difficultés fondamentales; la méthodologie est-elle déjà maîtrisée en ce qui concerne l'élaboration du consensus quant aux questions qui évoquent les divergences si principales? La réponse des scepticiens est univoque - telles procédures et méthodes n'existent pas, donc il est permis de parler tout au plus de belles visions politiques des partisans d'une forte intégration - selon à la déclaration d'A. Michnik - et non pas d'un réel projet politique susceptible d'être réalisé en Europe contemporaine.

Quatrièmement enfin, l'Europe se trouve face aux défis fondamentaux qui pose devant elle un projet ambitieux d'élargissement de l'Union européenne. La discussion sur l'intégration européenne a-t-elle le sens - avant une vérification pratique réalisée - déjà dans l'Union élargie - de certaines solutions, par exemple celles qui concernent le mode de prendre des décisions par des organes d'Union avec une participation si nombreuses des Etats membres, ou bien avant une réalisation dans la pratique les mécanismes de balancement d'une structure intergouvernementale et communautaire?

Il n'est pas permis d'oublier également que le respect du processus en cours d'élargissement et d'une nécessité non lointaine de la ratification par tous les Etat membres peut incliner certains Etats candidats à garder certaine modération dans la prise d'une attitude décidée à l'égard des questions de friction ou bien particulièrement épineuses, car le choix d'une des orientations possibles peut créer à l'avenir un obstacle pour la ratification d'un traité d'accession.

Voici ce ne sont que certains arguments plus importants des scepticiens à l'égard de la même idée de la constitution européenne. Ils n'épuisent pas naturellement de la gamme de raisons toute entière, pour lesquelles la vision d'une constitution européenne doit rester à l'étape actuelle, attrayante, mais aussi une idée irréalisable, à laquelle peut être à l'avenir (plutôt plus

lointaine que plus proche) on reviendra et c'est pourquoi il vaut seulement en conserver la mémoire et peut-être la soigner.

Passons maintenant à la défense de cette idée, conformément à la règle de procès que l'accusé prend la parole comme le dernier. Je ne cache pas que je ne suis pas capable d'être pleinement objectif, car j'ai l'intention me prononcer en faveur de l'opportunité et du caractère sensé de l'idée de la constitution européenne. Je m'efforcerai donc maintenant d'évoquer des arguments positifs, en répondant à la question à quoi doit nous servir la constitution européenne?

Il convient de commencer par une constatation que ce ne sont pas toutes nos idées sur la constitution étatique formées sous l'influence d'une tradition juridique connue surtout continentale qui peut être automatiquement transférées sur le plan de la discussion relative à la constitution européenne. Ayant en vue toutes différences, il existe pourtant ici des points de contact clairs, peut être non autant, et certainement pas seulement dans une couche substantielle et la méthode des règlements, mais dans une couche symbolique et politique, dont il était déjà question plus haut. La Constitution reste toujours un couronnement du système juridique et politique et sans refuser son importance normative et purement pratique, il vaut apercevoir son rôle symbolique en tant que l'expression de l'unité autour des valeurs et principes y énoncées ainsi que le rôle difficile à estimer d'instrument de la communauté des citoyens, de la conscience d'une appartenance commune à un cercle déterminé politique, culturel et civilisateur. Avec le rôle ainsi conçu de la constitution, il est permis de lier les plus grandes espérances dans la construction de la conscience et de l'identité européenne. La seule existence du projet de la constitution européenne constitue justement une expression symbolique des efforts en faveur de renforcement des facteurs qui intègrent les sociétés européennes, elle est le témoignage de rechercher ce qui exprimerait d'une manière la plus complète l'essence de l'unité et de l'identité européenne. La question peut toujours être posée de savoir si nous avons besoins d'avoir telle preuve, si nous éprouvons en effet le déficit spécifique « d'une identité européenne » qui justifierait en réalité le besoin d'entreprendre des actions préventives principales.

Cette idée est répétée enfin à cent cinquante manières et à toute occasion, elle trouve sa confirmation dans de nombreuses normes conventionnelles créant l'Union européenne. Avons-nous besoins de quelque chose de plus? Cela a-t-elle une transposition pratique quelconque? Or, il paraît que la notion d'identité européenne n'est pas du tout suffisamment définie d'une façon claire et ne s'associe pas à tout le monde à la même ressource des principes, valeurs et idées. Il nous semble que beaucoup plus important sont ici pourtant deux éléments accessoires. Premièrement la Communauté a été fondée en tant que structure d'une Union économique étroite et non pas en tant que structure politique. Aujourd'hui nous sommes déjà, il est permis d'y croire, à une autre étape. La construction d'un organisme politique exige de recourir plus nettement aux autres valeurs, principes et idées. La Constitution pourrait être grâce à son rang, une telle proclamation particulière de l'intégration politique de l'Union européenne, et dans ce sens, exprimer généralement ce qui constitue l'objectif final des efforts intégrationnistes. Dans ce sens également la Constitution serait un point de référence entièrement nouveau pour l'identité européenne, principalement différente des traits créant la Communauté. Secondement - en présence d'une perspective d'élargissement - une expresse manifestation des principes aurait de l'importance toute particulière pour de nouveaux pays membres qui ont derrière eux une interruption de plus de 40 ans dans la participation active à la formation d'une vision de notre continent.

Et ici on peut passer à un point suivant des considérations sur l'opportunité d'adoption de la Constitution européenne liée à une question au-dessus mentionnée de savoir si, à nos jours, le moment est-il déjà approprié à entreprendre cette question.

A cette question je réponds affirmativement, ayant une pleine conscience d'existence de nombreux problèmes institutionnels; ceux de compétences, structurels et organisationnels dans le cadre de l'Union, problèmes qui n'ont pas été résolus. En réalité, il n'est pas permis de nier que nous sommes dans le point particulier, dans lequel ont lieu les débats fondamentaux concernant ces questions. Il est également évident que si l'on regarde le problème de la constitution européenne de cette perspective qui est propre aux travaux sur la constitution nationale, il faudrait certainement reconnaître que le moment est mal choisi et prématuré - étant donné l'absence de la solution des différents essentiels à l'intérieur de l'Union elle-même du futur élargissement de nouveaux pays membres. Telle perspective n'est pas pourtant convenable. En effet autrement que dans le cas de la constitution nationale qui est un acte définitif clôturant le processus de former des structures et du régime de l'Etat - la Constitution européenne pourrait être un acte ouvrant un stade nouveau de l'intégration sans préjuger encore d'une manière définitive de la forme des solutions institutionnelles.

L'objet de la Constitution ainsi comprise serait donc la précision de point de seuil spécifiques de l'intégration - ce serait le lien approprié pour déterminer le fond axiologique ou bien du fondement de l'intégration[4] . Il paraît en effet que ce n'est que la constitution qui pourrait indiquer nettement ces éléments qui doivent être pris en considération dans la construction de la nouvelle architecture européenne - pour maintenir sa propre balance et proportion. Ce serait le lieu le plus approprié pour exprimer, quoique d'une manière générale, un rapport entre l'idée de la communauté et l'Etat membre, entre le statut d'un Européen et celui de citoyen, entre le droit communautaire et le droit national; ici doit être aussi exprimé l'impératif de rechercher au moins d'un équilibre entre les mécanismes intergouvernamentaux et ceux communautaires, enfin c'est la constitution doit garantir une légitimation démocratique des organes les plus importants de l'Union, notamment du Parlement européen. C'est justement par ladite légitimation démocratique qu'il est possible de construire d'une manière la plus efficace le sentiment de l'identité européenne et faire crédible aux yeux d'un Européen moyen le processus de l'intégration en consolidation.

Répétons: il ne s'agit pas de solutions constitutionnelles précises dans cette forme qui apparaît dans les Constitutions nationales - il ne s'agit que d'indiquer les points de seuil. Cela remplirait une double fonction - celle d'une constitution cadre, et d'autre part cela pourrait d'une façon autonome dynamiser le processus d'intégration, préciser les directions des débats politiques sur l'avenir et stimuler les travaux en cette matière. Cette idée a bien exprimé le ministre polonais des Affaires étrangères, M. Wladyslaw Bartoszewski, en disant entre autres: « Les Européens doivent inventer une nouvelle méthode d'intégration, en maintenant les objectifs invariables de l'intégration formulés dans les traités, c'est-à-dire assurer aux peuples d'Europe la sécurité, le bien-être et la solidarité. La nouvelle méthode d'intégration doit être celle qui s'adapte aux temps nouveaux et à une nouvelle Union[5] .

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[4] Ainsi p. Ex. W. Bartoszewski *Przyszy ksztat Unii Europejskiej, polski punkt widzenia/La forme future de l'Union européenne, un point de vue polonais,* (www.msz.gov.pl.).

[5] cité après P. Buras, op. cit., p. 14.

3. Le fondement axiologique de la Constitution européenne

Comme il en était question plus haut, un élément nécessaire du traité constitutionnel serait un exposé univoque de la philosophie politique de l'Europe intégrée - je comprends par cela la précision de la finalité de l'intégration « montant dans les catégories des solutions institutionnelles précises, mais dans les catégories valeurs, qui doivent être respectées dans les actions communautaires et qui expriment un sens axiologique de l'intégration. Dans ces catégories axiologiques doivent être également exprimée les rapports à la ligne: les structures communautaires - les Etats nationaux - les citoyens. D'où doit aussi couler un net message que la forme nouvelle de l'architecture européenne ne s'appuie pas sur la construction « d'un super-Etat », sur la contestation de la particularité des Etats nationaux, mais elle permet une coopération des Etats sur plusieurs plans et sur plusieurs niveaux, des Etats Unis par les buts communs de la construction de la démocratie, de la sécurité et de la garantie des droits fondamentaux. C'est pourquoi il est particulièrement important, comme il paraît, la détermination des espaces de compétences appartenant à la sphère d'exclusivité de l'Union, de celles qui seront maintenues dans le domaine des mécanismes intergouvernementaux, et dans la gestion des Etats membres. C'est justement la constitution européenne doit proclamer clairement et expressément les principes de solidarité et de subsidiarité, précisant d'une part les rapports à l'intérieur de l'Union elle-même et une thèse axiologique principale du mécanisme de décisions à prendre, et d'autre part une position des Etats membres à l'égard des structures communautaires. Ce sont les principes particulièrement importants dans la perspective d'élargissement de l'Europe et dans celle de la réalisation possible des projets supposant une différenciation du niveau et de la vitesse des processus d'intégration dans le cadre de l'Union elle-même. Ces principes, notamment le principe de solidarité, peuvent justement retenir la vision de la construction de l'Europe inquiétant les nouveaux Etats candidats, dans laquelle aurait lieu une marginalisation progressive de certains Etats membres réduits au niveau des membres « de deuxième catégorie ».

Un élément indispensable de la constitution européenne doit devenir la Charte des Droits Fondamentaux, car c'est justement dans cet espace des garanties des droits et des libertés de l'individu peut s'exprimer d'une manière la plus pleine l'axiologie de l'intégration européenne. Je ne développe pas cette trame, car il est l'objet d'un panel distinct de la discussion.

4. La méthodologie des travaux sur la Constitution européenne

La conception méthodologique des travaux sur un projet de la Constitution aura une transmission directe non seulement sur la qualité du document, mais surtout elle définira sa chance à l'avenir, déterminée par la possibilité de construire un large consensus. Ce document doit être, comme on l'a remarqué plus haut, une vision de l'intégration européenne, préciser ses éléments les plus importants, donc il doit, par sa nature, prendre en considération la construction de l'Europe considérablement élargie, englobant le nombre d'Etats membres beaucoup plus grand. C'est justement ce fait qui doit fortement déterminer une conception des travaux sur le projet de la Constitution. Il serait nécessaire, au début, d'engager un débat plus large dans les milieux des corps politiques de l'Union quant à l'opportunité et les thèses générales de tel document. Une étape suivante et principale doivent être les travaux sur le texte du projet, en remarquant que les expériences découlant des travaux sur le projet de la Charte des Droits Fondamentaux - poursuivis dans le cadre d'un groupe spécial sous la direction du professeur Herzog, constituent un bon point de référence et le modèle pour l'élaboration du projet de la Constitution - il est nécessaire ici une participation aussi bien des experts éminents - des juristes, que la contribution de l'idée politique, développée sur la base, dessinée dans le

point d'entrée à titre d'introduction, de la vision de l'intégration européenne. Pour créer telle idée, il est indispensable la participation du Parlement européen ainsi que des parlements nationaux.

Une nouvelle architecture de l'Europe ne peut pas prendre naissance sans une participation authentique et signifiante dans son élaboration par les Etats candidats à l'Union. Telle participation serait non seulement une condition nécessaire de l'authenticité de tel document dans une opinion des sociétés des Etats-candidats, mais aussi un symptôme d'une volonté réelle de la part de l'Union européenne du traitement des Etats-candidats en conformité avec le principe de partnership et de solidarité. L'Europe recherchant une identité commune, les racines de sa propre culture et civilisation ne peut pas être construite autrement qu'en exploitant son hétérogénéité, la richesse des cultures et des traditions historiques. Il vaut peut être rappeler que les sociétés de ces Etats ont démontré une leçon remarquable de bâtir un large consensus politique et social autour des idées ravissantes de la liberté et de la démocratie. Sans le talent de rechercher un consensus et de poursuivre des négociations les nouvelles démocraties en Europe centrale ne pouvaient apparaître, pour lesquels le point de départ seraient les négociations concernant une nouvelle construction constitutionnelle poursuivies en Pologne en 1989 à la table ronde.

Il serait un signal très positif et éloquent pour l'avenir de l'Union européenne certainement élargie, une préparation du projet de la Constitution européenne à la conférence intergouvernamentale en 2004.

Rethinking the Methods of Dividing and Controlling the Competencies of the Union

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1. Introduction

Talking about "who does what in the EU", at first sight, concerns the system of power sharing between the national and the European level of government.[2] The German Länder initiated the debate with a view to preserving some meaningful freedom of action and political discretion to those democratically elected bodies in the Union who are closest to the citizens. But it also concerns the horizontal division of powers among the institutions, the degree of democratic legitimacy of the decision-making process and, in particular, the extent of qualified majority voting in the Council. What kind of powers may be entrusted to the European institutions and within which limits very much depends both on efficiency of the procedures and the effectiveness of democratic control – be it direct by the European Parliament or indirect controlling the ministers in the Council. Finally, the issue is closely connected to the protection of fundamental rights and freedoms of the citizens who could not consent to the transfer of public authority to institutions which are not strictly bound to respect the fundamental rights and to follow, in framing their policies, the orientations and values expressed by the fundamental rights. Consequently, "rethinking the methods of dividing and controlling the competencies of the Union" must be understood as an exercise which is interdependent with the progress of the institutional debate aiming at more transparency, democratic accountability and efficiency - on the one hand - and with the readiness to give the European Charter of Fundamental Rights binding effect so to be enforced by individuals against any use of European power by which he or she might be affected,[3] on the other.

Talking about the division of powers does not imply that all these powers have always existed, at the national (regional) or the European level. Given that e.g. legislative power for the harmonisation of legislation throughout the European Union didn't exist before the foundation of the European Communities, this perspective would be too narrow. Therefore, the process of integration does indeed entail the progressive creation of new powers as well as the reorganisation of existing powers at both levels of governance, in accordance with new challenges and political aspirations of the citizens. Competencies in the area of the

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[2] For a detailed analysis of the debate see Mayer, "Die drei Dimensionen der europäischen Kompetenzdebatte", (2001) 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (forthcoming).

[3] See the general considerations and proposals made by Pernice, "Kompetenzabgrenzung im Europäischen Verfassungsverbund", (2000) *Juristenzeitung*, 866 et seq. (also published in: www.whi-berlin.de/pernice3.htm); for other contributions to the subject see the speech of Prime Minister Wolfgang Clement, *Europa gestalten - nicht verwalten*, FCE 10/2000, http://www.whi-berlin.de/Clement.htm.

environment, for example, have been created at national and European level well after the Treaty of Rome; European powers to combat international terrorism may well be the next to be extended. Therefore, the question we face is not the division of powers in a static structure, but in an evolving, dynamic multilevel system of governance. The aim of achieving legal certainty by detailed definitions must be balanced by securing the degree of openness and flexibility necessary for the effective functioning of the system. Given the political character of the use of competencies in practice as well as the dynamics of interpretation and necessary limits to legal certainty, any attempt to improve the existing situation would fail, if the work at constitutional texts was not coupled with procedural arrangements.

A third preliminary remark concerns the adequacy of possible procedures for the definition and delimitation of European competencies: a number of political and academic actors have already expressed their support for a new catalogue of competencies[4] or even a new constitution for the European Union comprising a solution for the question of competencies.[5] Though it is laudable to engage in such exercises with a view to designing models how a revised treaty or constitution could be structured and look like, the final solution to the problems we face is a political one and can only be the result of the political process. This political and "constitutional" character of the exercise should be reflected in the procedure chosen. It should, in the first stage, be organised following the "Convention" model. The proposals and options of the Convention should then be submitted, in a second phase, to an IGC and a final summit for discussion and adoption. A European referendum should be held on the "European Constitutional Treaty" so elaborated, to underline its character of a new European social contract.[6] After it has become definitively clear in Nice that the traditional procedure under article 48 EU is neither efficient nor democratic, it is inevitable to adapt the procedure for "constitution-making" in Europe.

If this exercise is a political one, there is, on the other hand, no reason to re-invent the wheel. Most of the problems which were at the origin of the debate do indeed not concern the attribution of competencies and their limits, but the excessive exercise of given Community which are, in principle, not disputed: the application of the state aid regime, the structural policies and certain measures in the field of environment.[7] My conclusions and recommendations, will therefore try to find some pragmatic improvements of the existing system (D) and are based on a brief oversight of the existing catalogue of competencies in the European Treaties and the constitutions of other federal systems (B) as well as on some remarks on the characteristics of the European multilevel constitutional system which requires solutions different from those found in federal states (C).

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[4] See the early draft of the Berlin Chancellery of State Franßen-de la Cerda, *Verbesserte Kompetenzabgrenzung zwischen der Europäischen Gemeinschaft und den Mitgliedstaaten*, Skzl EB 4 of 21 January 1999; Fischer/Schley, *Organizing a Federal Structure for Europe. An EU Catalogue of Competencies* (2000).

[5] Economist 28 October 3 November 2000, 21 et seq.; Juppé/Toubon/Gaymard, *Esquisse d'une Constitution Européenne*, presented 28 June 2000 at the Colloque: "Quelle constitution pour quelle Europe" in the Sénat – Palais du Luxembourg; Union pour la Démocratie Française, *Projet pour une Constitution de l'Union européenne* (2000).

[6] See Pernice, "The European Constitution", Sinclair House Talks Bad Homburg May 2001, (2001) 21 *Human Rigths Law Journal* (forthcoming); see also Pernice/Mayer/Wernicke, "Renewing the European Social Contract. The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism", in: Andenas/Gardener (eds.), *Can Europe Have a Constitution?*, Kings College London, February 2000 (forthcoming).

[7] See in particular Clement*, supra*, note 3 . For an overview on the issues raised by the German Länder see Mayer, supra, note 2, at II.

B. Models for a new order of competencies in the European Union

Before examining new systems or structures for the division and control of the competencies of the European Union, it is necessary to understand the existing system and the difficulties it creates (I). The comparison with other federal systems allows building upon the experience of countries around the world without ignoring the fundamental differences between the European system and federal states (II). Existing proposals for a revised European system of competencies will be examined against this background (III).

I. The catalogue of competencies in the European Treaty

The European Treaties includes of a very detailed and differentiated - and therefore complex - catalogue of competencies and means for their control. Without going too much into detail, it seems possible to describe the system by the following five characteristics:

1. The principle of limited, attributed competence: article 5 EC provides that “the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. Accordingly, articles 1(2) and (5) EU state that the objectives of the Union shall be achieved “as provided in this Treaty...” and that the institutions “shall exercise their powers under the conditions and for the purposes” provided for by the provisions of the EC Treaty and the Treaty on European Union. Thus, the European institutions have no power unless expressly provided for in the Treaties. This presumption for Member State competence, is underlined by the principle of subsidiarity as defined in article 5(2) EC and specified by the Amsterdam Protocol (no. 30) and Declaration (no. 43) on the Application of the Principles of Subsidiarity and Proportionality.

2. Though there is no systematic distinction, most of the competencies conferred on the European level of government by the Treaties are competencies for legislative action. As opposed to the American approach of "dual federalism", implementation and financing of European policies is largely left for the Member States. Article 175(4) EC says so expressly for the environment and the Amsterdam Declaration on the Application of the Principles of Subsidiarity and Proportionality clearly confirms it. In its *Milchkontor* judgement the Court of Justice has established that the Member States are bound, under article 10 EC, to implement European policies in accordance with their respective national administrative law in an effective, non-discriminatory and loyal way.[8] The implementing powers referred to in article 202, last indent, and article 211, last indent, EC concern either legislative acts specifying Community legislation or, exceptionally, administrative powers of the Commission which need to be exercised at the European level, such as competition and state aids or the administration of the structural funds. These exceptions, however, confirm the rule of national implementation, a rule which is important for the vertical division of powers, for the political coherence of the system and for securing that measures which directly affect the citizens are taken as closest to them as possible.

3. While article 3 EC contains a general list of areas in which the European Community may act, four categories of provisions dealing with legislative competencies can be distinguished in the Treaties:

· *Competencies defined by areas*, for the conduct of concrete Community policies, such as customs (articles 26, 27 and 135 EC), agriculture (articles 32 to 38 EC), visas, asylum,

[8] [1983] ECR 2633.

immigration etc. (article 61 to 69 EC), transport (articles 70 to 80 EC), competition and state aids (articles 81 to 89 EC), the co-ordination of economic policies (articles 98 to 104), monetary policy (articles 105 to 111 EC), employment (articles 125 to 130 EC), commercial policy (articles 131 to 134 EC), social policy (articles 136 to 148 EC), research (articles 163 to 173 EC), environment (articles 174 to 176 EC) etc. Specific powers for co-ordination and common action are, in addition, conferred to the European Union by the provisions on the common foreign and security policy and on the police and judicial co-operation in criminal matters in the EU Treaty. All these competencies are each of very different reach and intensity, and defined by areas of action, by the indication of specific objectives, by the means of action and by the procedures to be followed.

· *Competencies defined by objectives* for the achievement of specific goals of horizontal character and, in particular, of the internal market, such as the general provision of article 94 EC and the specific provisions of article 95 EC for goods, articles 40, 42 and 47 EC for the free circulation and social security of workers, the freedom of establishment, and the freedom to provide services. Even broader is the revision clause of article 308 EC, under which any measure may be taken, in case of the lack of a specific competence, if deemed necessary to meet an objective of the Treaty in the framework of the common market. These provisions are not related to specific policy areas, and measures taken to achieve the objectives defined therein may reach in any other policy area, including those for which the Union has (expressly) no specific power to legislate or to act otherwise. Only where legislative powers e.g. for harmonisation is expressly excluded (e.g. articles 149 to 152 EC on education, culture, public health), such general provisions may not be used.

· *Negative competencies*, i.e. provisions which expressly exclude certain kinds of action of the Union in specific areas. The most important clauses of this kind are the provisions just mentioned in the areas of education, culture, public health etc. which exclude any kind of harmonisation of legislation. Article 152(5) EC goes further in securing that the Community action "shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care". Article 137(6) EC states that Community competence in social matters "shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs", articles 64(1) and 68(2) EC as well as articles 33 and 35(5) EU make sure that "the exercise of the responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security" is not affected by European provisions, and under article 135 EC the European measures on customs co-operation "shall not concern the application of national criminal law or the national administration of justice".

• "*Abolished" competencies*, i.e. prohibitions to act, both for the Member States and for the Union,[9] such as the prohibition to establish customs duties or other barriers to trade between Member States (articles 23, 25, 28 to 31 EC), barriers to the free movement of persons (articles 43 and 49 EC) and capital (article 56 EC) or the prohibition of tax discrimination (articles 90 to 92 EC). The prohibition, under articles 10, 81, 82 and 86 EC to establish or promote restrictions on competition and the prohibition of state aids contrary to the common market may also be added to this category. These provisions do not confer any competence on the European institutions, except the power of the Commission to control the prohibition and to take action in

[9] See the category of "compétences abolies", developed by Simon, *Le système juridique communautaire* (2nd ed. 1998), 83 et seq., on the basis of considerations made by Constantinesco, *Compétences et pouvoirs dans les Communautés européennes* (1974), 231 et seq., at 248.

the case of violation, and the powers conferred to the Court of Justice to rule on cases brought to it in relation to such infringements.

A mix of the above-mentioned powers can be observed with the provisions on the economic and social cohesion (articles 158 to 162 EC). The policies of the structural funds are closely linked, in practice, to the application of the rules on state-aids, with the result that the Member States' freedom of action in their regional policies is heavily restricted.[10]

4. The decision whether or not the Treaties provide for a European competence in a given case, and to what extent the principle of subsidiarity is respected is entrusted to the hands of the institutions. Each institution is bound to respect the limits of competencies conferred on it, and the political practice shows that the cases where such limits have been exceeded are very rare. It is, in particular, the "in-built" control by the ministers in the Council, by which the interest of the Member States to safeguard their respective competencies and preserve their freedom of political action and discretion is secured. However, in practice, governments sometimes tend to use the "European channel" to implement policies which - for political reasons - they are unable to achieve at the national level.[11]

5. It is up to the Court of Justice to decide cases submitted to it, to examine and judge in any case upon the legality of the European measures and legislation in question. The *tobacco* case, in which it found that the Directive on the prohibition of advertising for tobacco products was ill-founded and, therefore, void, has already become a famous example.[12] An increasing tendency of the Court to find balanced solutions between the objectives of integration and the interest of the Member States to preserve their freedom of action, now expressed by article 6(3) EU and the principle of subsidiarity, can already be found in its opinion on the power of the Community to adhere to the European Convention on Human Rights.[13] Although the question of limits of competencies under the Treaties and the principle of subsidiarity is largely political, the Court could turn into a reliable arbiter between the national and European institutions in such questions.

II. Comparative analysis: The division of competencies in federal states

Although there is a great variety of ways in which competencies are divided and delimited in federal states, it seems to be possible to distinguish broadly three categories or models. As the debate in the European Union basically relates to the legislative competencies and the above-mentioned principle, that implementation and financing of the European policies are a matter for the Member States, shall not be questioned, it is appropriate to focus on how legislative competencies are assigned to the different levels of governance in other federal systems.

1. Special assignment of federal competencies

Most common is a system - comparable to the European approach - of explicit assignment of legislative competencies to the federal level with residuary legislative power on the state or regional level. Thus, whenever there is no responsibility assigned to the federal level, the state

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[10] See the remarks made by Clement*, supra*, note 3.
[11] Kohl, "Europa auf dem Weg zur politischen Union", in: Konrad Adenauer Stiftung (ed.), *Europa auf dem Weg zur politischen Union. Documentation of a congress of the Konrad Adenauer Foundation,* 1993, 11 et seq., 14 et seq.; cf. also Pernice, *supra*, note 3, at 874.
[12] [2000] ECR I-2247.
[13] [1996] ECR I-1759.

level is competent to legislate on the matter. This model is open for exclusive as well as concurrent or other legislative competencies on the federal level, with concurrent competencies understood as legislative powers that the state level may use as long as the federal level has not passed any legislation in a particular policy area. A good example is the German Grundgesetz: it provides for catalogues of exclusive, concurrent and framework legislative competencies assigned to the federal level (articles 71et seq.), whereas the Länder have residuary legislative power (articles 30 and 70). This model – with minor deviations – can also be found in the constitutions of the United States[14], Brazil[15], Australia[16] and Austria[17].

2. Residuary powers of the federal level

In a second model explicit legislative powers are assigned to the state or regional level while the residuary legislative competence remains at the federal level. This model is basically followed by the constitution of Canada[18]. The process of devolution in the United Kingdom[19] seems to follow the same line, although the UK is far from being a federal system.

3. Bipolar assignment of competencies

A third model takes its bearings from a bipolar or dual structure of competency assignment: explicit legislative competencies assigned to both the federal and the state level. However, a distinction shall be made between a strict and an open bipolar system. In the strict bipolar system, only exclusive competencies are dealt with. The federal constitution confers exclusive competencies to the different levels of governance and the responsibility for a specific policy belongs either to the states or to the federation. This system can be found in Belgium. In the open bipolar system, the federal constitution not only refers to exclusive competencies on both levels but also to concurrent or parallel legislative powers, and distributes such powers (partly

[14] Legislative competency assignment to the federal level (article I Section 8 Constitution of the United States), residuary competence on state level (Amendment X), exclusive and concurrent ("Dormant Commerce Clause") competencies (see Brugger, *Einführung in das öffentliche Recht der USA* (1993), at 56 et seq.), supremacy of federal law in case of inconsistency (article VI clause 2 Constitution of the United States).

[15] Catalogue of exclusive legislative competencies assigned to the federal level (article 22 Constitution of the Federative Republic of Brazil), catalogue of concurrent legislative competencies (article 24 Constitution of the Federative Republic of Brazil).

[16] Enumeration of exclusive (article 52 Constitution of Australia) and parallel (article 51 Constitution of Australia) legislative competencies assigned to the federal level, residuary competence on state level (article 107 Constitution of Australia), in case of inconsistency federal law shall prevail state law (article 109 Constitution of Australia).

[17] Catalogue of exclusive legislative competencies assigned to the federal level (articles 10, 11 Federal Constitutional Law of Austria), enumeration of basic/framework legislative competencies assigned to the federal level (article 12 Federal Constitutional Law of Austria), detailed bipolar listing of legislative competencies in educational matters (articles 14, 14a Federal Constitutional Law of Austria), residuary legislative power (article 15 (1) Federal Constitutional Law of Austria) on state level.

[18] Catalogue of exclusive legislative competencies assigned to the state/provincial level (article 92 Constitution Act, 1867), residuary legislative power on federal level, though enumeration "for greater certainty" (article 91 Constitution Act, 1867).

[19] See Bogdanor, "Devolution: The Constitutional Aspects", in: The University of Cambridge Centre for Public Law (ed.), *Constitutional Reform in the United Kingdom: Practice and Principles* (1998), 9 et seq.; Pahl, "'Devolution' und Europa - Die neuen Regelungen zur Mitwirkung der Regionen des Vereinigten Königreichs in EU-Angelegenheiten", (2000) 23 *Integration,* at 245.

including even powers for the administrative implementation and financing) by very detailed and specific rules (Switzerland[20], India[21]).

4. Modalities of assignment and control

A general overview also allows two further distinctions to be made with respect to the delimitation of competencies in federal systems:

Attributed powers may be described in terms of specific tasks or may be delimited on the basis of policy areas. Most common among competency catalogues is a mix of both forms. The assignment of general competencies just for the attainment of certain objectives, such as the establishment or functioning of the internal market, however, seems to be reserved to the European Union.

In all analysed systems competency delimitation conflicts are decided by supreme courts or federal constitutional courts[22]. The alternative of a rather political control has been chosen in Belgium, where a special Court of Arbitration (article 142 Constitution of Belgium) decides on competency conflicts between Regions, Communities and the Federal State.[23]

III. Proposals under discussion in the European debate

A number of draft constitutions or at least proposals for drafting a new catalogue of competencies exist already. One similarly to the bipolar Swiss model provides for the full assignment and distribution of powers between the two levels of government (1), others take over the existing system of assigned competencies, while splitting the Treaties into two parts (2) and two French proposals plead for the special assignment of European competencies by the treaty or by organic laws adopted under the treaty (3). The Economist opts for specially assigned competencies to the Union in the framework of a European Constitution which shall co-exist with the revised Treaties (4) and the German Länder are still searching for a compromise in view of a more systematic order of competencies combined with some procedural safeguards (5).

1. The bipolar or dual system developed by Fischer and Schley

The proposal of *Fischer* and *Schley*[24] merely follows the strict bipolar approach[25]. However, the model goes beyond the dual listing of responsibilities which belong exclusively to the Member States and the European level by introducing the additional distinction between primary and partial competencies on both the national and the supranational level. Primary competencies cover cases in which the powers of the Member States and the European level are normally

[20] Very detailed catalogue of exclusive, concurrent and supplementary competencies for both the federal and cantonal levels (articles 54 et seq. Federal Constitution of the Swiss Confederation), residuary competence on cantonal level (articles 3, 42 Federal Constitution of the Swiss Confederation, 1998).
[21] Catalogues of exclusive state (State List), exclusive federal (Union list), and concurrent legislative competencies (Concurrent list) in the Seventh Schedule of the Constitution of India, federal level has residuary legislative competencies if the relevant matter is not enumerated in the state or concurrent list (article 248 (1) Constitution of India).
[22] See e.g. article 93 (1) no. 3 of the German Grundgesetz or article III Section 2 Constitution of the United States.
[23] For more details see: Alen, *Treatise on Belgian Constitutional Law* (1992), 117 et seq. and at 145 et seq.
[24] Fischer/Schley, *supra*, note 4.
[25] A model which was already proposed by the "Commission on European Structures" in 1994, see Weidenfels (ed.), *Europe '96. Reforming the European Union* (1994), 18 et seq.

exercised in a given policy area, whereas the partial competencies state the exceptions to this rule with regard to the other level.

Developing a model for the Treaty-based reorganisation of the division of competencies between the European Union and its Member States, *Fischer* and *Schley* propose the use of the subsidiarity principle of the Treaties with its "necessity" (insufficient) and "effectiveness" (better) clause for the compilation of a "competency test" to determine the distribution of competencies between the European Union and the Member States. The principle of subsidiarity is thereby mutated from a rule on the use of competencies into a rule governing their distribution. For this purpose, they propose a set of criteria for scrutinising and reorganising European responsibilities in a *dual catalogue of competencies*. Applying these criteria, they eventually give a short description of each competence. They suggest, in addition, a new procedure for the transfer of competencies in order to make sure that the integration process - despite the precise delimitation of responsibilities - can develop in a dynamic way.

Though the approach looks very attractive and promises both, a high degree of legal certainty and dynamism, it is questionable if it can accommodate the special features of the European Union. Could a European Treaty define the competencies of the Member States without interfering too much with their constitutional autonomy? If additional competencies could be conferred on the Union under a simplified procedure with a view to more flexibility, another crucial difference between the Union and a federal state, the principle of consent, i.e. the veto on basic constitutional questions, would disappear. As long as the specific features of the EU are to be maintained, it is preferable, therefore, to be content with the assignment and definition of European competencies and its institutions and not to interfere more than necessary with the autonomy of the Member States. This does not exclude, however, a broader use of “negative competencies” mentioned above, by which certain kinds of action are excluded from the scope of European competencies with a view to protecting national freedom of action.

2. Simplification by splitting - the EUI and Bertelsmann proposals

The drafts of the *EUI*[26] and the *Bertelsmann Group for Policy Research*[27] propose a reorganisation of the presentation and form of the Treaties, while largely respecting the present legal situation. It is clear, therefore, that these proposals cannot produce substantial changes to the existing system of competencies in the European Union.

Yet, it is worth mentioning that both the EUI and the Bertelsmann Group for Policy Research propose that the Treaties should be divided into two parts, with a Basic Treaty and a separate Treaty containing more specific regulations. In the Basic Treaty, they restructure the whole primary law in a consistent way and set out the fundamental features of the European Union. The main purpose of this exercise is clarification and simplification. An enormous body of complex rules is reduced to a short, clearly structured text for the benefit of the citizens of the Union. This basic treaty would have the advantage of enhancing legal certainty and respect for

[26] European University Institute, Robert Schuman Centre for Advanced Studies, *A Basic Treaty for the European Union. A study of the reorganisation of the Treaties. Report submitted on 15 May 2000 to Mr Romano Prodi, President of the European Commission*, http://europa.eu.int/comm/archives/igc2000/offdoc/repoflo_en.pdf.

[27] Bertelsmann Group for Policy Research at the Center for applied Policy Research, *A Basic Treaty for the European Union. Draft Version for the Reorganisation of the Treaties* (May 2000) http://www.cap.uni-muenchen.de/download/treaty.pdf; a synthesis of all the attempts at consolidating the founding Treaties in a single document is given by Schmid, “Konsolidierung und Vereinfachung des europäischen Primärrechts – wissenschaftliche Modelle, aktueller Stand und Perspektiven”, in: v. Bogdandy/Ehlermann, *Konsoldieriung und Koheränz des Primärrechts nach Amsterdam* (1998) Europarecht, Beiheft 2.

the primary law, while endowing the Union with a symbolic and identity-creating document with an effect similar to the Charter of Fundamental Rights. The more readable document might eventually lead to more transparency and acceptance of the European Union.

It is questionable, however, whether the complexity of the "European constitution" would be reduced and legal certainty regarding the division of competencies between the Union and its Member States would be enhanced. To really understand who does what, people and experts would have to read the Basic Treaty *and* the persisting provisions of the European Treaties, establish which has prevalence over the other in case of conflicts or open questions, and eventually have to refer to the different provisions to make a specific argument. The exercise would therefore result in more complexity instead of reducing it. To achieve a clearer delimitation of competencies was neither the task nor the purpose of the authors, anyway.

3. Flexible mechanisms in a European constitution: the Juppé and UDF proposals

A draft paper by a group of French politicians around *Alain Juppé*[28] seems to be close to the first model of attributed competencies mentioned above (B.II.1). It distinguishes three categories of legislative competencies: exclusive competencies assigned to the European Union level in the Treaties, shared competencies (compétences partagées) enumerated in an organic law - "loi organique", which can be altered more easily than Treaty provisions, which would still require a more formal procedure than ordinary secondary legislation, and residuary legislative powers of the Member States. Within the framework of a wider approach including institutional reforms, it is proposed to introduce a special political control for the exercise of powers conferred on the Union in particular with regard to the principle of subsidiarity, by a new "second chamber" which shall be composed of representatives of national parliaments ("Chambre des Nations"). It takes up, in this respect, an idea of the French Senate, which has apparently been calling for such a Second Chamber for a long time.[29]

The draft-constitution of the UDF[30] is another French proposal based on the model of assigned competencies. It distinguishes between exclusive legislative competencies (compétences fédérales) and shared European competencies (compétences partagées), both to be determined in and exercised according to the conditions laid down in organic laws as well as the principles of subsidiarity and proportionality (Art. 9, 6, 1). The principle of subsidiarity is applied not only to the exercise of existing competencies, but also as a rule governing the assignment of competencies to the Union (Art. 6). A residuary legislative competence rests with the Member States (Art. 7) which they may exercise collectively outside the Treaty framework. The exercise of competencies is subject to the control by the Court of Justice (Art. 19).

Both French proposals seem to rely on a "hierarchy of norms" – an approach by which the flexibility of the assignment and the division of competencies is found in the special procedure designed for such decisions of a constitutional character. The aim does not seem to be more legal certainty or the effective preservation of the freedom of action of the Member States. Though the system would be simpler and more transparent, and both proposals consider, by a "Chamber of nations" or by the Court of Justice, a control for the respect of the limits of competencies including subsidiarity, their main purpose is drafting a constitution as simple as possible, replacing the existing Treaties and setting the Union on a new basis.

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[28] Juppé/Toubon//Gaymard, *supra*, note 5.
[29] See Hoeffel, *Rapport d'information fait au nom de la délégation du Sénat pour l'Union européenne sur une deuxième chambre européenne*, No. 381 Sénat session ordinaire de 2000-2001.
[30] Union pour la Démocratie Française, *supra*, note 5.

4. A British proposal for a European Constitution: the Economist

A different path is taken by the proposal of a European Constitution submitted by The Economist[31]. The European Constitution is proposed to be a basic document that is, like the Basic Treaty of the EUI, designed to co-exist with the Treaty of Rome and with the other Treaties of the Union. However, these would be amended substantially. The proposal includes an enumeration of legislative competencies for the European Union in the Constitution (Art. 13 et seq.) or in the Treaties (Art. 1) and residuary competencies for the Member States (Art. 1). It does not distinguish between different types of competencies. Powers can also be returned to Member States, if all Member States agree (Art. 17). The proposal provides for a new chamber of representatives of national parliaments, the "Council of Nations", and charges this body with the task of constitutional oversight (Art. 6). The Council will even have the power to overrule the Court of Justice (Art. 6 and Art. 9) in constitutional matters.

Compared to the ideas Tony Blair expressed in Warsaw last year,[32] this proposal seems to be more courageous in so far as it suggests a European Constitution. It does not, however, either add much to reducing the complexity of the system or clarify the delimitation of competencies. Tony Blair suggested a political charter of competencies which would serve as a guideline for the institutions in applying the provisions of the Treaties, and - like Juppé and the French Senate, and followed insofar by the Danish minister of foreign affairs, Lykketoft - a parliamentary chamber for the political control of subsidiarity and the limits of European competencies.[33]

5. The German debate on a catalogue of competencies

After almost two years of discussion in Germany, a first important conclusion seems to be that the original idea of a catalogue of competencies "a la tedesca" is dead. This is not because such a catalogue would transform the Union into a federal state, as was stated recently by Andrew Duff.[34] But it has become clear that the system of the German constitution, including catalogues of exclusive, concurrent and framework competencies, criteria for their exercise and a control by the Constitutional Court did not prevent a continuous process of centralisation eroding the competencies of the Länder. The debate is still going on. While the Länder are close to finding a compromise among themselves[35] and the foreign office is making up its mind, the think tank of the Christian democrat party under the guidance of *Wolfgang Schäuble* is preparing a comprehensive paper in which the general approach for the European competencies in the framework of a European Constitutional Treaty will be outlined and proposals for a clearer and more balanced attribution of powers in each policy area of the Union will be made. Finally, a working group of the Social Democrat Party has worked out and published, mid October, some thoughts on a concept for the division of competencies, pointing

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[31] Economist, *supra*, note 5.
[32] Blair, *Europe's Political Future,* Speech by the Prime Minister to the Polish Stock Exchange, Warsaw, Friday 6 October, http://www.fco.gov.uk.
[33] Blair, *supra*, note 32; Lykketoft, Speech of 26 August 2001 at the Außenpolitische Gesellschaft, reported in: *Frankfurter Rundschau* No. 198 of August 27, 2001, 2: "Die Suche nach Gegengewichten".
[34] Duff, ELDR Task Force Paper on the Future of Europe, *Towards a Liberal Laeken* (2001), www.andrewduffmep.org, at point 11.7.
[35] At their meeting of 11/12 October 2001 in Goslar they seem to have agreed upon a first paper on a common position.

out that the key question is that of the exercise, not of an excessive attribution of competencies to the Union.[36]

What can be said so far, is that

- the German Länder and the Schäuble group will insist on a more systematic and transparent approach. This does not only mean to distinguish more systematically different categories of competencies, such as exclusive, basic/framework and competencies for complementary action. But it also includes the idea to determine different forms and categories of European action: direct regulation, harmonisation, mutual recognition, measures of co-ordination, (financial) support and administrative action;

- there is a discussion on a more precise drafting of article 95 EC, namely with a view to conditioning any measure of harmonisation more strictly by the proper functioning of the internal market, the introduction, in addition, of more precise specific powers for harmonisation in technical standards etc. and the abolition of article 308 EC which is considered superfluous at this progressed stage of integration;

- serious thought is given to the question, to what extent agriculture policies and certain competencies in other areas such as transport and research can be re-transferred to the Member States, so to secure them more freedom of action;

- there is a strong questioning also on the system and operations of the structural funds: if more than 50% of the national contributions finds its way back to the funding Member State, would it not be safer, more transparent and cheaper to limit financial transactions to the amounts which represent a real transfer? Thought is given to substitute the structural funds on these lines by a "fund of solidarity";

- a more precise drafting of certain provisions of the Treaties is proposed to enhance legal certainty and to give the Court of Justice - or a special Court for Competencies to be created - more ground for a strict legal control;

- a number of procedural safeguards are discussed, such as provisions for an earlier participation of the Member States in the legislative process, the internal control of subsidiarity in the Commission by a "subsidiarity officer", an independent control of subsidiarity and the respect of the limits of European competencies during the law-making process by an expert committee or a "Parliamentary Subsidiarity Committee";

- it is finally suggested to establish a right for the regions to seize the European Court of Justice in matters of competence and subsidiarity.

A number of the proposals mentioned above need further consideration. To abolish article 308 EC, however, would put at serious risk the dynamic development of the Union and be in nobody's interest. The revision of the Treaties is too heavy an instrument for creating legal basis in a specific case of need. Touching the rules on the agriculture policies would question a basic deal between Germany and France, but the question is, to what extent it would be in the interest

[36] SPD working group European Integration, paper no. 10 (September 2001) on "Kompetenzausübung, nicht Kompetenzverteilung ist das eigentliche europäische Kompetenzproblem", http://www.fes.de/indexipa.html

also of France and other Member States to reconsider the pros and cons of the present situation, namely with a view to enlargement. Neither the rules on the economic and social cohesion, nor the structural funds, finally, will be sufficient to solve the social and economic problems eventually linked to the internal market under the conditions of the Economic and Monetary Union. It will be necessary, therefore, to consider new ways for a system of horizontal financial transfer within the framework of a new financial constitution for the European Union.

The German debate, therefore, has left the "catalogue" issue far behind and rather seems to move towards proposals which bring the call for clarification and delimitation in balance with a clear demand for concentration on certain core policies, including new and enhanced supranational powers in areas where the EU has so far remained ineffective:

- international trade policy and the establishment of a legal framework of the global order,
- foreign and security policy, including a common defence and action for the solution of regional conflicts,
- a common policy in matters of immigration, visa, refugees and asylum, including the question of a balanced burden sharing
- the creation of a real European legal area through enhanced judicial co-operation
- combat of organised international crime and terrorism, a matter that has got a new dimension since the events of September 11, 2001.

With these important changes in mind, it is clear that the option of Nice to simplify the Treaties "with a view to making them clearer and better understood without changing their meaning" could not be the guideline for the preparation of IGC 2004. What the post-Nice process is about, will instead be a reorganisation of the Treaties including the assignment of new and the delimitation of old competencies, based on the common values as expressed by the objectives and the Charter of fundamental rights, understood as a catalogue of "negative competencies" with regard to the protection of the citizen's rights[37] and existing social institutions at the national level.[38]

C. EU-power sharing in the light of multilevel constitutionalism

Evaluating the numerous proposals discussed and considering concrete steps to clarify and, if necessary, complete the European system of competencies in a revised Constitutional Treaty should be based on a common understanding of the very nature of the Union. My view is, that it is not an international organisation the "masters" of which are the Member States and the acts of which reach their citizens because of a validating act of each Member State. I suggest to conceptualise it as a multilevel constitutional system, composed of - as the case may be - local, regional, national and European levels of political integration and action, and, thus, a system of (multi-)layered competencies established to meet the needs of the citizens most effectively each at the appropriate level. Let me first give some elements of the theoretical approach on which my considerations are based (I), and draw, in a second step, some conclusions for the criteria and methods for dividing and controlling the Competencies of the Union (2).

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[37] In this sense: Ehmke, *Wirtschaft und Verfassung* (1961), at 29 et seq.; Häberle, *Öffentliches Interesse als juristisches Problem* (1970), at 666; Alexy, *Theorie der Grundrechte* (1985), at 223 et seq.; more generally: Mayer, *supra*, note 2, at I.1.b), and applied on the EC: ibid., I.1.d).

[38] Pernice, Editorial: "Europäische Grundrechte-Charta und Abgrenzung der Kompetenzen", (2001) *EuZW* (forthcoming).

I. Elements of Multilevel Constitutionalism

Multilevel constitutionalism[39] is the legal "pendant" to the political theory of multilevel governance in Europe[40]. To describe what it means in our context, the following five elements are crucial:

1. In the process of globalisation, states are increasingly unable to meet the challenges and serve effectively the needs of their citizens regarding peace, security, welfare etc. The "postnational constellation" described by J. Habermas[41] requires supra- and international structures serving as complementary instruments to fill this growing lacuna. On the basis of a functional - or as I would call it: "postnational" - concept of constitutionalism[42], it does not seem necessary to assume that only states can have a constitution. But generally, the term rather means the legal instrument by which the people on a certain territory agree to create institutions vested with public authority, i.e. powers to achieve certain objectives in their common or general interest, and define their respective rights with regard to such institutions and their status as citizens of the organisation, "community" or polity so created.[43]

2. There are many ways, historically, how constitutions have been made. One, if not the most appropriate and attractive, could be to empower representatives of the groups of people concerned to negotiate a draft that is later submitted to ratification. This is exactly how, on the basis of the integration clauses, conditions and procedures set out in the constitutions of the Member States, the European Treaties have been adopted and developed: as an expression of the common will, as an instrument to pursue certain common goals, the citizens of the Member States - through their respective governments and constitutional processes have agreed to create supranational institutions, entrust them with certain competencies to be exercised according to the procedures laid down in the Treaties, and have defined their own common status as citizens of this Union, their rights and freedoms. The statehood of the Member States and national citizenship are not called into questioned, but a new constitutional layer establishing a complementary public authority has been added for matters of common interest, drawing its legitimacy from the subjects who are subject to its policies.

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[39] For the concept see: Pernice, "Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and 'Multilevel Constitutionalism'", in: Riedel (ed.), *German Reports on Public Law Presented to the XV. International Congress on Comparative Law*, Bristol, 26 July to 1 August 1998 (1998), 40 et seq.; further developed in: Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?", (1999) 36 *CMLRev.,* 703 et seq.; Pernice/Mayer, "De la constitution composée de l'Europe", (2000) 36 *RTD eur*, 623 et seq. at 631 et seq.; cf. also: Schuppert, "Anforderungen an eine Europäische Verfassung", in: Klingemann/Neidhardt (eds.), *Zur Zukunft der Demokratie. Herausforderungen im Zeitalter der Globalisierung* (2000), 237 et seq. at 256 et seq.; v. Bogdandy, "A Bird's Eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective", (2000) 6 *ELJ*, 208 et seq. at 226 et seq.; Bauer, "Europäisierung des Verfassungsrechts", (2000) *JBl*., 749 et seq. at 751.

[40] See Marks/Hooghe/Blank, *European Integration and the State*, at 7; Mayer, *Kompetenzüberschreitung und Letztentscheidung* (2000), at 36.

[41] Habermas, "Die postnationale Konstellation und die Zukunft der Demokratie", in: ibid., *Die postnationale Konstellation. Politische Essays* (1998), 91 et seq.; Zürn, *The State in the Post-National Constellation - Societal Denationalization and Multi-Level Governance*, ARENA Working Papers WP 99/35, www.arena.uio.no; Schuppert, "Demokratische Legitimation jenseits des Nationalstaates. Einige Bemerkungen zum Legitimationsproblem der Europäischen Union", in: Heyde/ Schaber (eds.), *Demokratisches Regieren in Europa? Zur Legitimation einer europäischen Rechtsordnung* (2000), 65 et seq. at 76 et seq.: 'Die postnationale Konstellation oder die EU als dynamisches Mehrebenensystem'.

[42] See Pernice, "Europäisches und nationales Verfassungsrecht", (2001) 60 *VVDStRL*, 148 et seq. at 155 et seq.

[43] For the application of this concept to the constitutional tradition of the United Kingdom see Thym, "European Constitutional Theory and the Post-Nice Process", in: Andenas/ Usher (eds.): *The Treaty of Nice, Enlargement and Constitutional Reform* (forthcoming).

3. This process has strong impacts on the realities of national constitutions, the powers and the functions of the institutions of the Member States and on the national legal systems. Every revision of the European Treaties, which the Court so rightly calls the "constitutional charter of a legal community",[44] entails an implicit or explicit modification of the national constitutions, it may "destitute" powers at the national level and constitute them at the European level. Although "autonomous" in their origin, both constitutional levels strongly depend on each-other: the European authority could not function without the national institutions and legal systems on which it is based, and the national authorities have to rely on and operate through the European institutions if they want to achieve the results which they on their own, would not be able to reach.

4. As a result of European integration, the citizens of the Member States have adopted multiple identities - local, regional, national, European - which correspond to the various levels of political community they are citizens of. Rules of conflict make sure that, at whatever level decisions are taken, the system produces for each case only one legal solution. In applying European law which prevails over conflicting national law, national authorities act as European agencies, while on the other hand, national authorities are strongly involved in the process of European policy-making, so that the European functions of the national governments and parliaments more and more outweigh their national responsibilities.[45]

5. To conceptualise the process of European integration as a process of "multilevel constitutionalism", by which the allocation of powers shared by the national and European levels of government is continuously reorganised and re-shifted, while all public authority - national or European - draws its legitimacy from the same citizens and, therefore, means to raise awareness of the fact that the European Union is as much our own instrument of political action as are the Member States and their regions, and not a foreign, nameless power. The "European constitution" therefore already exists and it is to be understood as a composed multilevel constitutional system comprising two or more constitutional levels which are closely interwoven, interdependent and connected to each other. It is the multilevel character of this system which allows and the complexity of the system which requires, a revision of its structure, procedures and constitutional texts, if possible resulting in a consolidated Constitutional Treaty of the European Union.

II. Consequences: Criteria for a revised system of power sharing in the EU

A first important consequence of this approach is that the discussion on whether or not the post-Nice process shall aim at a European constitution is futile. A constitution, at least in a "postnational" sense, already exists and the question we face is how to improve and simplify it and, maybe, bring it closer to the traditional perception of formal constitutions. It was Jacques Chirac who clearly gave this perspective in his speech to the German parliament in June 2000.[46] A second consequence would be to realise that reconsidering the competence-order of the Union also means reconsidering the distribution of powers under the national constitutions. A third consequence is that it is the perspective and the interest of the citizen which matters, not

[44] [1991] ECR I-6079 at 6102 - EWR I; and already [1986] ECR 1339 at 1365 et seq.; more recently [1996] ECR I-1759 at 1789.

[45] For the qualification of the national parliaments as European parliaments see: Pernice, "The Role of National Parliaments in the European Union", in: Melissas/Pernice (eds.), *Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004* (2001), forthcoming.

[46] Chirac, *Notre Europe*, Discours prononcé par Monsieur Jacques Chirac, Président de la République Française, devant le Bundestag", 27.6.2000, www.botschaft-frankreich.de, at 12.

the preferences of national administrations and ministers who might find it odd to leave certain powers to the European level, which they may prefer to exercise autonomously. The case law of the Court of Justice shows how heavily national governments rely upon national prerogatives and a restrictive interpretation of the Treaties, namely the provisions on the four freedoms and non-discrimination, contrary to the interests of citizens who invoke these provisions as individual rights. The decisive criterion therefore is what the citizens want to be dealt with at the European level, even if their relative democratic influence and control is minimised. This, again, is by and large a political consideration.

Though there is little doubt about the justification of all the powers the European Union disposes of at present, it is a common view that the Treaties are so complex that nobody really understands who is responsible for what. The multilevel structure of the European political system as such implies a high degree of complexity. This complexity is multiplied by the mere fact that those who take a stake in the policy-making at European level are not only European politicians - elected members of the European Parliament or Commissioners appointed by the Member States - but to a large degree representatives of national institutions. Democracy, however, is based on transparency and on the accountability of those who take decisions. The more the Treaty provisions on competencies are differentiated and detailed out with regard to their objectives, conditions and modalities of their exercise, the more difficult it is to establish clear responsibilities. Simplification means transparency, but contrary to what is suggested in Declaration no. 23 of the Nice summit, simplification implies modification in substance following some logic and system.

D. Conclusions and recommendations for the division of powers in the EU

What is at issue, therefore, is to simplify and clarify the attribution of competencies to the European Union, to concentrate on core responsibilities which have to be assumed at the European level and to enhance the capacities of the system for political monitoring and control of the limits of the competencies assigned to the European Union and of the principle of subsidiarity. Against this background, the following measures are recommended for further consideration:

I. Consolidation of the Treaties into one European Constitutional Treaty

Declaration (no. 42) to the Treaty of Amsterdam stresses the necessity for a consolidation of the Treaties. Contrary to what the three “wise man” have suggested[47] and what the EUI has elaborated in its careful study,[48] this should not lead to another splitting of the European primary law but to one consolidated “Constitutional” Treaty in which people can find the objectives of the Union, the Charter of Fundamental Rights, provisions defining the competencies and policies of the Union, the institutions including the appointment procedures and the procedure(s) for decision-making. Though it is clear that the objectives already give guidelines for the use of the assigned competencies, and fundamental rights, in addition, limit their use in favour of the individual and as a safeguard for social standards and regimes achieved in the Member States, the core of this Constitutional Treaty would have to be a system of competence attributions

[47] Cf. v.Weizsäcker/Dehaene/Simon, "Die institutionellen Auswirkungen der Erweiterung. Report to the European Commission", 18 October 1999, *FAZ* no. 244, 20 October 1999, 9 et seq.
[48] European University Institute, *supra*, note 26.

including the powers of co-ordination and common action provided for, so far, in the second and third pillar of the EU Treaty.

II. A general clause on the division of functions and mutual loyalty

The principle, mentioned above, that policies and legislation in a given area shall be a matter of the Union to the extent that common action or rules applying equally to all the citizens of the Union is deemed necessary, and implementation should be a matter for the Member States and their regions whose administrations are closer to the citizens, know more about the specific conditions on the spot and are therefore able to achieve more adequate and better results, this principle of a functional separation of powers between the two levels of action should be spelled out more clearly in the new Treaty. Article 5(1) EC is not sufficient to this effect. Implementation means the transposition of Community directives by national legislators, but also the administrative execution and control of application of European law. Article 5 EC and, in particular, its paragraph 3 reserve for national authorities a maximum of political discretion, freedom for creativity and autonomy.

This responsibility of national and regional authorities is a major element for the functioning of the Union and a condition for effective government in the multilevel system. It requires *mutual* respect and loyalties, not only discipline of the Member States. Therefore, article 10 EC should be amended by a provision addressed to the institutions of the Union requiring them expressly to have regard and consideration for particular national and regional interests and difficulties. While article 6(3) EU requires the respect of the national identities of the Member States, this provision would underline a specific feature of European identity, which is - in the light of multilevel constitutionalism - based on mutual respect and co-operation of the institutions at two levels of government which are not in a hierarchical order but equal instruments of the citizens in pursuing common goals.

If powers for administrative implementation and execution at the European level are the exception, they should be reduced to a strict minimum and conferred to the Commission by express provisions of the Treaty or secondary law.

III. System and categories of European competencies

A more systematic approach to the attribution of competencies to the Union is needed. Areas and matters of exclusive competence (customs, trade policies, monetary policy) must be distinguished from areas for which competencies are shared between the Union and the Member States (agriculture, transport, environment, social, regional, consumer, health, research, immigration, asylum policies etc.) and areas where the Union just provides the framework for the co-ordination of national policies or intergovernmental co-operation and no legislative powers (economic and employment, foreign, security and defence policies, home affairs, criminal justice etc.). Simplification would be achieved, if the existing differentiation between the various forms of action, decision-making procedures, voting-modalities in the Council and participation of other institutions could be abolished in favour of one common procedure, which should be co-decision of the Council and the European Parliament after consultation of the relevant committees. Though the catalogue of possible forms of action in article 249 EC (regulation, directive, decision, recommendation) may be completed by framework directives, common strategies, joint actions and common positions, the choice of the

appropriate instrument should be left to the political process and the institutions, with due regard to the principles of subsidiarity and proportionality.

It is clear that this exercise would not only imply a new order of competencies, but also major changes in substance. All the complexity of the present Treaty is a result of difficult and long negotiations resulting in detailed exceptions and qualifications, specific conditions and procedures coupled with protocols and declarations annexed to the Treaties. But the compromises negotiated between diplomats, ministers and Heads of State or Government are unreadable and, in part, impracticable - such as the new provisions in article 133(5)–(7) EC amended by the Treaty of Nice -, and in any event did not produce the desired effect of making clear who does what. It is time to reduce the rhetoric of international diplomacy to the very essence of powers attributed to the Union, and to give it insofar the responsibility to meet the expectations of the citizens.

IV. Definition of competencies and "negative competence clauses"

Some of the provisions of the present Treaties need stricter definition, some others a broader scope. While article 133 EC regarding the common commercial policy should clearly state that services including transport are covered by this policy, article 95 EC would need to be redrafted in order to reduce its scope to measures directly preventing restrictions of trade or serious distortions of competition. Likewise, article 308 EC should refer to the internal market and its functioning, and not allow for such schemes as food aid or programmes such as PHARE and TACIS.[49] The Parliamentary Subsidiarity Committee, proposed below, may play a special role in the context of these provisions.

To secure national room for action in certain areas or matters, related to subjects for which the competence is given to the Union, the already existing practice to include "negative competence clauses" may be extended to other areas. It should be clear, however, that there is no policy area where the need for limited action at the European level can totally be excluded. The negative clauses, therefore, could refer to a revised article 308 EC, to allow such exceptional limited action subject to its specific procedural requirements.

V. Procedural safeguards: a Parliamentary Subsidiarity Committee

What degree of specificity provisions on competencies in the Treaty may have and their interpretation and application in practice will always be a matter of political and hermeneutic discretion. Though it is - and should always be - the task of the European Court of Justice to exercise a final control[50], those who really have an interest in preserving room for national legislation should have a stake in the decision-making process: the national parliaments. Some way in line with the ideas of a Second Chamber developed by the French Senate, Juppé/Tourbon and Tony Blair, it seems to be appropriate to underline the European function of national parliaments by giving them a consultative role for the respect, by the European institutions, of the principle of subsidiarity and the limit of the European competencies.

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[49] Crit. also Dashwood, "The Limits of European Community Powers", (1996) 21 *ELRev*., 113 at 120 et seq. relating to article 100a EC, and at 123 et seq. on article 235 EC.

[50] For the discussion of alternative proposals, including a "Court of Review" (European Constitutional Group), a "Common Constitutional Court" (Di Fabio) or a "Constitutional Council" (Weiler), see Mayer, *supra*, note 2, at I.2.

This would - and should - however, not be a Second Chamber stricto sensu, since the Council in its legislative capacity already functions as the second chamber of the Union. Instead, it could be a second branch - or a special committee[51] - of the Council and might even be present during its deliberations. In full knowledge of the various positions of the ministers, it could be consulted in any case of doubt on questions of subsidiarity and competence before the Council takes any final decision. Its (reasoned) opinion would not be binding, but well compel the ministers to re-examine their position and give good arguments why they consider to be competent and respectful of subsidiarity in the given case. All the arguments exchanged in this open and public discourse would be submitted to the Court of Justice, if a Member State or another privileged complainant brings an action to the Court.

Such a "Parliamentary Subsidiarity Committee" (PSC) should be composed of at least two representatives of each national parliament, one representing the party or parties supporting the government and one from the opposition. The presence of the opposition would contribute to political neutrality of the Committee and secure some divergence of the Committee's view from the position of the ministers. It could also include representatives of regional parliaments, in so far as they have autonomous legislative competencies they may wish to preserve.

To enhance the role of national parliaments in this context, the PSC could, in addition, be involved more directly in the decision-making process, where a specific political control is needed because of the vagueness of the competencies entrusted to the Union. This would be the case, in particular, for competencies defined by purpose and not by area, such as articles 95 and 308 EC. In these cases, the Committee could have a veto or a right to request postponement of the decision to be taken by the Council. It should, furthermore, be the task of the PSC to prepare regular reports on the respect of subsidiarity and the competencies of the Union by the legislation during the previous year.[52]

VI. Political guidelines for the use of European competencies

Given the remaining uncertainties on the question of whether, in a given area of European competence defined by the Treaty, the Union should act or leave the legislation to the Member States, it seems to be useful to complete the more or less vague attribution in the provisions of the Treaty by a political declaration setting out all necessary differentiation. This proposal could be the "Charter of competencies" proposed by Tony Blair. In the framework of environmental policies, for example, it seems obvious that combating climate change with all its international and internal implications, including burden sharing between the Member States, should be a matter for the Union. On the other hand, the Member States can well deal with the preservation of the soil or of inland water quality individually. The same would apply to transport, agriculture, health, education and other policies, even to the application of the competition and state aid rules to certain sectors which are, in certain Member States, regarded as matters of public services.
Such political guidelines could be established by either the PSC or by the PSC together with the Council and the European Parliament. Although they would not be mandatory in any respect, concrete measures of the Union could be checked against them and specific arguments would have to be made in the case of deviation from its provisions. The guidelines themselves would be subject to regular revision following the procedure of their enactment, they would be a

[51] See for the concept of a parliamentary subsidiarity committee Pernice, *supra*, note 3.
[52] For a system of regular reports see already Mayer, *supra*, note 2, at I.2.c.bb).

flexible criterion for monitoring the delimitation of competencies between the European Union and its Member States and not inadequately block the dynamics of European integration.

Repenser les méthodes de partage et de contrôle des compétences de l'Union européenne

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Le commentaire ne peut faire état que de nuances avec le Rapport, dont le mouvement général, les orientations comme les conclusions, sont largement partagées. J'ai apprécié la tonalité générale du rapport, qui cherche, à partir de l'existant et sans idée préconçue, à montrer comment on pourrait mettre à jour les compétences respectives de la Communauté et des Etats membres, tout en les actualisant dans la perspective de la prochaine CIG.

Il m'a semblé que le Rapport prenait en compte essentiellement les compétences de la Communauté européenne, sans insister sur la différence essentielle entre les formes et procédures de coopération (PESC et JAI) et les compétences et procédures communautaires, sans non plus évoquer la question des liens entre l'Union et la Communauté. Peut-on parler, comme le fait la Déclaration 23, des « compétences de l'Union », quand celle-ci n'a pas reçu expressément la personnalité juridique ? Faut-il, à l'occasion de cet exercice de *Rethinking the Methods of Dividing and Controlling the Competencies of the Union,* chercher à fusionner Communauté et Union ? Faut-il les maintenir séparées et complémentaires (le *statu-quo* n'est-il pas une source d'ambiguïté peu compatible avec l'exigence de transparence ?)

A) Sur les remarques introductives :

a) - (p. 2) : « *Talking about the division of powers shall not imply that the powers in question already exists, either at the national (regional) or at the European level. This perspective would be too narrow, given that e.g. legislative power for thre harmonisation of legislation throughout the European Union never existed defore the European Communities were founded.* »

Je me demande si cette observation est parfaitement compatible avec ce qu'indique la Déclaration 23 ; selon ce texte, le processus qui mènera à la Déclaration de Laeken et qui la prolongera jusqu'en 2004, devrait porter, entre autres, sur la question suivante : « *comment établir, et maintenir ensuite, une délimitation plus précise des compétences de l'Union et des Etats membres, qui soit conforme au principe de subsidiarité.*»

Il s'agit bien d'abord d'établir une délimitation plus précise des compétences, donc de suivre une démarche d'allocation des compétences (*Kompetenzerteilung)*, ces compétences étant aussi bien celles de l'Union que celles des Etats membres.

Mais que signifie « établir » les compétences de la Communauté :

s'agit-il de codifier les compétences existantes, à droit constant?

Ou s'agit-il de modifier la consistance et le contenu des compétences actuelles de la Communauté, en les adaptant à l'évolution de ses missions et aux demandes collectives?

En d'autres termes, la Déclaration oblige à choisir entre deux possibilités, selon qu'elle invite à :

1) revoir chacune des compétences actuelles

en proposant d'en augmenter certaines qui existent déjà?

en proposant d'en créer de nouvelles?

voire d'en rétrocéder certaines aux Etats membres?

2) ou à procéder à un exercice simplement déclaratoire, à droit constant?[1]

Le Rapporteur choisit clairement, et à plusieurs reprises, de ne pas se laisser enfermer dans les limites apparemment posées par la Déclaration 23. Or on peut penser que la Déclaration a précisément pour objet de ne pas laisser le débat sur les compétences déborder le cadre des actuelles compétences attribuées par les traités.

b) - (p . 3) :

Le Rapport souligne la nécessité de garantir le caractère politique et constitutionnel de l'exercice par une procédure appropriée : Convention → CIG → Conseil européen → puis référendum dans chaque Etat membre est importante. Le rapport remarque que : « *it is inevitable to adapt the procedure for 'constitution making' in Europe after it has become definitively clear in Nice, that the traditional procedure under art . 48 EU is neither efficient nor democratic ».*

La critique de la procédure de révision des traités sur lesquels l'Union est fondée est faite depuis longtemps : Maastricht et Amsterdam avaient déjà provoqué, en leur temps, ce genre de réactions : « plus jamais ça ! ». Cette indignation ancienne et un peu rituelle n'a pas empêché Nice…Mais le rapport n'indique pas comment et en quel sens il faudrait modifier la procédure de révision. La révision de la procédure de révision doit respecter les contraintes de l'actuelle procédure de révision : double unanimité des représentants des gouvernements et des procédures nationales de ratification. Faut-il maintenir cela ou passer à un système majoritaire ? Seul un mode majoritaire d'adoption du nouveau Contrat social européen permettrait de sortir des contraintes de l'unanimité, mais il faudrait l'unanimité pour l'établir, à moins de changer de paradigme juridique. On évoquera l'art. 82 du Projet de traité sur l'Union européenne (1984) qui disposait :

« *Le présent traité est ouvert à la ratification de tous les Etats membres des Communautés européennes.*

[1] Par ailleurs, parmi les questions sur lesquelles le processus de Nice pourra porter, figure celle de: « *simplifier les traités afin qu'ils soient plus clairs et mieux compris, sans en changer le sens* » : n'y a-t-il pas là une limite ou une indication en faveur d'une conception déclaratoire, à droit constant ? le Rapporteur pense (pour les raisons exposées à la p. 13) que cette indication « *(…) could not be the guideline for the preparation of IGC 2004* ».

Lorsque le présent traité aura été ratifié par une majorité d'Etats membres des Communautés dont la population forme les deux-tiers de la population globale des Communautés, les gouvernements des Etats membres ayant ratifié se réuniront immédiatement pour décider d'un commun accord des procédures et de la date d'entrée en vigueur du présent traité ainsi que des relations avec les Etats membres qui n'ont pas encore ratifié. »

Le nouveau *Traité-constitutionnel,* le nouveau *Contrat social européen* n'entrerait ainsi en vigueur qu'entre les Etats qui le ratifieraient, le double chiffre pertinent (nombre d'Etats, pourcentage de la population) devant être ajusté au nombre d'Etats qui participeront à la CIG de 2004. L'avantage est qu'on ne se situe pas dans la logique de la révision, prisonnière de l'exigence de la double unanimité, mais dans celle de la conclusion d'un nouveau traité, qui ne lierait que les Etats qui sont prêts à le ratifier.

La procédure nationale de ratification devrait permettre à la population de s'exprimer par référendum, comme le souhaite le Rapporteur. Ce procédé démocratique convient bien à la fondation d'un nouvel ordre politique, où il s'agit d'édifier démocratiquement une communauté de destin. Toutefois, ce procédé de démocratie semi-directe n'est pas prévu par les constitutions de certains Etats membres (Allemagne, Belgique), qui sont restées fidèles à une conception représentative de la démocratie. Dès lors se vérifie bien l'interaction entre le niveau européen et le niveau national et la réalité du concept de *multilevel constitutionalism* utilisé et creusé par le Rapporteur. Il faudrait donc admettre une phase de révision des constitutions nationales dans certains Etats comme préalable à l'organisation d'un référendum exprimant le consentement des Etats à être lié par le nouveau *Traité constitutionnel*. Ne risque-t-on pas alors de faire dépendre l'entrée en vigueur du nouveau *Traité constitutionnel* du succès des révisions constitutionnelles nationales ? Sans compter que, dans bon nombre d'Etats membres, le référendum peut (ou doit) être utilisé pour une révision de la constitution nationale, sans oublier l'intervention attendue des juridictions constitutionnelles. L'autonomie constitutionnelle des Etats membres ne risque-t-elle pas, comme cela a déjà été le cas, de freiner le développement constitutionnel de la Communauté, voire de le bloquer ?

c) - (p. 4) : « *Most of the problems which were at the origin of the debate are not problems of the attribution of competencies and their limits, but of an excessive exercise of given and undisputed competencies of the European Community (…) ».*

On peut être tout à fait d'accord avec cette appréciation : mais en même temps il faut comprendre que cela signifie l'échec de la subsidiarité. Malgré son introduction comme mode d'exercice des compétences non - exclusives, malgré le protocole sur la subsidiarité, ce principe n'a pas joué le rôle politique qui en était attendu. Car il apparaît que la gestion des compétences communautaires, mais aussi leur nature, conduit presque inévitablement vers une aspiration au niveau communautaire de domaines qui, dans la conscience de l'opinion sinon en droit, relèvent du niveau national : l'exemple français de l'interférence entre le doit communautaire de l'environnement et la pratique de la chasse, ou la directive sur la composition du chocolat le montrent.

Est-ce seulement l'exercice de compétences communautaires indiscutées qui est en cause ou la nature même de certaines de ces compétences? La nature téléologique, fonctionnelle, globale et transversale de certaines finalités de l'action de la Communauté, comme le marché intérieur par exemple (notion à l'œuvre dans l'art. 95 CE : rapprochement des législations, et dans l'art. 308 CE : dispositions appropriées pouvant être adoptées en cas d'absence de pouvoirs d'action de la Communauté) favorisent un comportement institutionnel et normatif qui

ne peut être que *catch all oriented…*L'objectif de la libre – circulation des marchandises, personnes, services et capitaux a un effet attractif qui, se cumulant avec l'effet du principe de non – discrimination à raison de la nationalité, a eu et aura des incidences sur des secteurs, apparemment de compétence nationale, de plus en plus étendus et variés, qui, à cause de leur lien avec le marché intérieur, vont se trouver en quelque sorte « aspirés » par l'application de règles communautaires et par l'intervention de la Cour de justice.

L'une des questions difficiles de la délimitation des compétences provient ainsi de la nécessité de passer d'un modèle de détermination fonctionnelle des compétences à un modèle où celles-ci seraient définies par matières. Dans ce deuxième cas, ne faut-il pas aussi subdiviser une compétence comme celle en matière d'environnement et y distinguer des zones d'intensité différentes ? (Cf. p. 20 du Rapport)

On peut enfin ajouter, en paraphrasant le Rapporteur, que : « *Most of the problems which have to be solved after this debate are in fact problems of insufficient attribution of competencies*. » Le cas de la politique commerciale commune est ici emblématique, mais ce n'est pas le seul.

B) Sur le fond :

– (p. 11) : *III Proposals under debate, 5.- The German debate on a catalogue of competencies*

D'accord avec l'observation du rapporteur : « *After almost two years of discussion in Germany, a first important conclusion seems to be that the original idea of a catalogue of competencies «a la tedesca » is dead.»* Oui et non, d'ailleurs, comme il le montre lui-même en évoquant (p. 12) une série de questions qui dérivent de la conception et de la pratique allemandes de la répartition des compétences et qui y sont actuellement débattues entre Länder et Bund.

Parmi ces questions, certaines peuvent inquiéter, comme le Rapporteur l'admet, non seulement parce que ces réformes soulèveraient des objections chez un certain nombre d'Etats membres, mais parce qu'elles mettraient en question le principe de l'acquis communautaire et son intangibilité :

- la reconfiguration de l'art. 95 CE

- l'abolition de l'art. 308 CE

- la re-nationalisation de certaines politiques communes

- la révision du système des fonds structurels et sa réduction à une sorte de *clearing*

- la croyance (un peu naïve) que la précision accrue des traités pourrait conduire la Cour à un contrôle plus strict

L'observation selon laquelle le débat doit prendre en compte une reconfiguration des compétences, avec l'inclusion de nouveaux champs, correspond certainement à une demande sociale justifiée : les domaines proposés (p. 13) correspondent aux nouvelles fonctions sociales dont les opinions et les gouvernements attendent qu'elles soient satisfaites au niveau européen. Le nouvel ordre des compétences dépasse alors la simple tâche déclaratoire…

b) – p. 16 : C *II Consequences* :

« *A constitution, at least in a ‘ postnational’ sense already exists and the question is how to improve and simplify it and, may be, bring it closer to the traditional perception of what is a constitution.»*

Le Rapporteur écarte, dans ces passages, l'idée qu'il serait utile que le processus *post*-Nice tende vers une constitution européenne : celle-ci existe déjà dans le sens 'postnational' (sans doute un écho du 'patriotisme constitutionnel' ?), mais le rapporteur plaide pour un rapprochement de cette constitution avec la perception traditionnelle que ce terme revêt. Que veut-on dire exactement?

parle-t-on de la constitution comme norme suprême d'un ordre hiérarchisé? la constitution européenne serait supérieure aux constitutions nationales, comme la logique de la primauté le pose déjà?

parle-t-on de la constitution comme expression de la volonté politique constituante originaire d'un peuple? en ce cas, il faut constater qu'il y a une pluralité de peuples européens et non pas un seul corps politique.

Juste est l'idée, à notre avis, que la simplification ne puisse se faire sans modification de substance des compétences (p. 16, *in fine*) : on retrouve la Déclaration 23 que le Rapporteur, pour ce motif entre autres, considère comme non limitative de l'exercice de remodelage des compétences auquel la CIG de 2004 est appelée.

c) – p. 18 : *D III. Systems and categories of European competencies :*

Le Rapporteur plaide pour une réduction de la variété des procédures décisionnelles, mais pour l'élargissement de la typologie des actes (aux règlements, directives, décisions, avis et recommandations de l'art. 249 CE, devraient s'ajouter les décisions - cadre, les stratégies, les positions et les actions communes. Ceci pose à nouveau la question de l'unicité de l'ordre juridique : que devient l'Union ? Se fond-elle dans la Communauté ou est-ce l'inverse ? Les actes de la seconde catégorie répondent aux formes de coopération instaurées par le traité sur l'Union : ils n'ont ni la même nature ni la même portée que ceux qui expriment les procédures communautaires : notamment ils ne produisent pas, en principe, d'effet direct et doivent être mis en œuvre par les Etats membres. La teneur des compétences dans les second et troisième piliers est finalement assez semblable à celles d'une organisation internationale classique de coopération et assez différente de celle des compétences communautaires. Mais des interférences peuvent exister entre ces deux zones de compétences et la Cour pourra vérifier le respect de la délimitation entre les compétences de l'Union et celles de la Communauté.

L'idée de regrouper toute la variété des procédures décisionnelles communautaires en une seule : la procédure de co-décision, semble rationnelle, mais peu raisonnable. Les diverses procédures décisionnelles ne sont pas le fruit du hasard, mais expriment les équilibres convenus entre les gouvernements, l'association des institutions et leurs modes de délibération variant selon les secteurs. Il faut sans doute en réduire le nombre mais une procédure décisionnelle unique, servant de base à toute une variété d'actes juridiques, est-elle concevable en l'état actuel ?

Le Rapporteur n'explore pas l'idée selon laquelle les types de compétences devraient être associés à des procédures distinctes donnant lieu chacune à des actes spécifiques et hiérarchisés. Ne serait-il pas possible d'isoler des dispositions de caractère constitutionnel,

soumises à une procédure majoritaire de révision, d'autres types d'actes correspondant à des compétences de nature différente. Faut-il, dans le même ordre d'idées, prévoir une procédure de révision simplifiée, qui n'exigerait pas l'étape des ratifications nationales ?

d) – p. 19 : *D V Procedural Safeguards : a Parliamentary Subsidiarity Committee* :

L'implication des parlements nationaux dans les affaires communautaires est une question ancienne : la proposition d'une Commission parlementaire de la subsidiarité, formée de parlementaires nationaux, qui ne serait pas une seconde Chambre législative permanente, mais pourrait fonctionner auprès du Conseil ou dans le cadre du Conseil, satisfait des aspirations parlementaires nationales et rejoint, comme le Rapporteur l'a bien observé, des propositions de parlementaires nationaux déjà soumises à discussion. Intéressante est l'idée de faire siéger dans cet organe des représentants des régions à compétence législative, plutôt que de chercher à remodeler le Comité des régions.

Clarifying the Delimitation of Powers

A Proposal with Comments[1]

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In a different context from the present one, Stephen Weatherill wrote that: "recognition of the modern reality of shared competence … is capable of providing a means of correcting the misleading impression of an over-ambitious Community that is liable to damage national and local identity."[2] This phrase indicates the aim of my contribution to the debate at this meeting. I submit that there is no need for a major reshuffling of the system of allocation powers between the EU and its member states, but that the *reality* that almost all EU competences are *shared* with the member states should be written in the text of the Treaty, so as to dispel the *impression* that the European Union's powers threaten to damage national or regional identity. In a first part, I will introduce the draft text of a new Treaty article that could meet this need, and in a second part I will give some explanations on the elements of this draft new Treaty article. Needless to say, the formulation of a specific Treaty article is simply intended to stimulate the debate, and does not involve a claim to have found the "magic formula". It is a contribution to the effort, recommended in professor Pernice's report, to come to "a more systematic approach for the attribution of competencies to the Union".[3]

I. The proposal

1. The Nature of the Post-Nice Mandate

One of the questions to be addressed in the post-Nice process is, according to the English text of the Declaration attached to the Treaty of Nice, "how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity".

It is necessary to consider whether what the Declaration is calling for is largely a clarification of the *existing* division of policy competences, or whether a more *radical change* in the role and powers of the European Union is desired. At least two different possibilities suggest themselves. One is that the call for clearer delimitation of competences reflects a political wish to reverse part of the process of integration to date, in 'returning' powers which the EC/EU has hitherto exercised, to the state or sub-state level. The second is that there is not so much a wish to

[1] A large part of this text is drawn from an as yet unpublished paper written jointly with my EUI colleague Prof. Gráinne de Búrca, but she is not responsible for the deletions and additions I made for this particular occasion.
[2] S. Weatherill, *Law and Integration in the European Union*, Oxford, 1995, p. 290.
[3] I. Pernice, *Rethinking the Methods of Dividing and Controlling the Competencies of the Union*, report for this meeting, p.17.

definitively remove some of its existing powers from the EU or to reduce its policy role, but rather a desire to *clarify* its role, the scope of its powers and the conditions for their exercise. Although some of the comments and proposals which have already been made, in particular by actors from the German Länder, indicate a desire for the renationalisation of certain EC powers, this paper proceeds (without further argument) on the basis that there is a broad political consensus in favour of greater *precision* and greater *clarification* in the division of powers (which necessarily entails some change), rather than in favour of making very substantial amendments to the existing policy competences of the EC and EU.

The Nice Declaration, in fact, does not suggest that a *Kompetenzkatalog* should be drawn up in accordance with the wishes expressed earlier on by the German *Länder.* Indeed, there are many other ways in which the "delimitation" could be made "more precise". On the other hand, the term delimitation (*délimitation* in French, *Abgrenzung* in German, *afbakening* in Dutch) indicates that something more radical is intended than the allocation of the *exercise* of powers which the principle of subsidiarity, as it is expressed in Article 5 of the EC Treaty, attempts to do.

The Nice Declaration aims at two different but complementary reforms: new provisions on the demarcation of powers between the EU and the member states, but also new procedural devices for "monitoring" respect for this allocation of powers. The word "monitoring" conveys a slightly different meaning from that in other language versions of the Nice Declaration: in French: "*comment établir, et maintenir ensuite, une délimitation…",* in German: *"wie eine… Abgrenzung… hergestellt und danach aufrechterhalten werden kann*". In the French and German versions, the emphasis is on the objective to be achieved, namely that the "new" delimitation of powers, once set out in the Treaty text, should be protected against its "creeping" erosion; whereas the English text puts the emphasis on the method ("monitoring") to be used for this purpose. In any case, the intention is clearly to think out some new forms of institutional design which would help to ensure observance of the division of powers chosen. Many suggestions have been made already, including: a special European Constitutional Council deciding division of powers issues[4], a "parliamentary subsidiarity committee" to be consulted in the course of the EU legislative process,[5] a second house of the European Parliament exercising political control over the delimitation of powers[6]. Procedural innovations could be helpful in ensuring respect for the delimitation of powers. However, I will not comment on this aspect of the debate here, but will only deal with the question of the *substantive* delimitation of powers.

2. The Aim of the Proposal: An Intermediate Description of EC Powers

At the present time, there are essentially two types of Treaty provisions dealing with the delimitation of powers: on the one hand, the very general norms of Article 5 EC, which include the principles of enumerated powers, of subsidiarity and of proportionality; and on the other hand, the very specific legal basis articles scattered across the entire text of the EC Treaty and the EU Treaty. A clarification of the system could be achieved by including in the Treaties a new *intermediate* article, which defines the main categories of EC/EU powers, describes their nature

[4] J. Weiler, "The European Union Belongs to its Citizens: Three Immodest Proposals", *European Law Review* (1997) 150, at 155.
[5] I. Pernice, "Kompetenzabgrenzung im Europäischen Verfassungsverbund", *Juristen Zeitung* (2000) 866, at 876, as well as Pernice's report for the present meeting, at p.18.
[6] See Tony Blair's Warsaw speech to the Polish Stock Exchange, 9 November 2000.

and indicates which of the specific EC/EU powers belong to each category. In the following paragraph, I make an attempt to draft such an intermediate Treaty article.[7] It is numbered "Article 5bis" so as to indicate that its natural location in the EC Treaty would be immediately behind the present Article 5 which contains the basic principles on delimitation of powers. Article 5 itself would not have to be modified (apart from some details perhaps); similarly, the mechanism of concrete allocation of powers through the legal basis articles would not have to be modified, although one could of course modify, or clarify, the scope of some of these articles.[8]

If, however, the three pillars of the Union were merged in 2004 into a single Treaty text, whether a short Basic Treaty or a longer Consolidated Treaty, then the proposed new article would obviously have to apply to all the areas now covered by the various pillars.

In the interest of clarity and visibility, the proposed "Article 5bis" is kept very brief. Some of the finer distinctions emerging from the present system of delimitation of powers are thereby neglected in the interest of overall clarity. In the second part of this paper, I will make comments on the choices I made when drafting this proposed addition to the Treaty system of delimitation of powers.

3. A Proposed Text of Article 5bis EC

"1. The European Community has *exclusive* powers for the international trade in goods and for the protection of marine biological resources. The Member States may act in these fields only when authorised or required to do so by the European Community.

2. The European Community has *complementary* powers in the field of culture, education, vocational training, health, employment, economic policy and industrial policy. The Member States retain their law-making powers in these fields. The European Community's role is to co-ordinate or support Member State policies in these fields.

3. In all other policy areas covered by this Treaty, the European Community and the Member States have *shared* law-making powers. The European Community exercises its powers in accordance with the principles of subsidiarity and proportionality. The Member States exercise their powers within the limits set by the other provisions of this Treaty and by secondary Community law.

4. The powers and duties of the European Community and of the Member States, as defined in the previous paragraph, apply to the harmonisation of national laws and regulations where this is necessary for facilitating the exercise of the common market freedoms, and for the establishment and functioning of the internal market.

5. The powers of the Community mentioned in paragraphs 2 and 3 may be exercised internally and, where relevant, externally. The external dimension includes unilateral action by the European Community as well as the adoption of treaties between the European Community and third states."

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[7] For another attempt of the same nature, though different in its detailed formulation, see the final pages of A. von Bogdandy, "Die Vertikale Kompetenzordnung der Europäischen Union: Bestand und Perspektiven der Reform", *Europäische Grundrechte Zeitschrift* (2001, forthcoming).

[8] Professor Pernice, in his report for this meeting, mentions Article 133 EC and Article 95 EC as possible candidates for modification or clarification.

II. Comments

1. Exclusive Powers (Paragraph 1)

The notion of exclusive powers (*compétences exclusives*) was introduced in EC law by the case-law of the European Court of Justice. In a small number of cases, the ECJ specified that a certain power of the EC was exclusive so that the member states were no longer allowed to adopt separate legislative measures or conclude separate treaties with third countries. The concept made its appearance in the text of the EC Treaty at Maastricht, when it was specified in Article 3b EC (today Article 5) that the principle of subsidiarity applies in areas "which do not fall within the exclusive competence" of the Community. The article does not specify which are these areas, and there has been considerable speculation on this point in the legal literature ever since. The debate over the meaning of exclusive Community competence has been lively but entirely inconclusive.[9] The Amsterdam protocol on subsidiarity and proportionality has not provided clarification on this point either.

Therefore, on this point, the next IGC could usefully clarify matters by expressly listing which policy areas come within the EC's exclusive competence. The text proposed above takes the most restrictive definition, by including only the international trade in goods and the protection of the biological resources of the sea. It would be for the IGC to decide whether or not *monetary policy* and *international trade in services* (or other areas) should be added to the list. Anyway, the interest of inserting a paragraph of this kind in the Treaty would be to *clarify* that the list of exclusive EC powers is, in fact, very limited.

2. Complementary Powers (Paragraph 2)

The concept of complementary powers (*compétences complémentaires; Ergänzungskompetenzen*) is proposed in Wolfgang Clement's speech as one of the three main categories of future EU powers.[10] Although the term is not widely used in the EC law literature,[11] this type of power effectively exists in the EC Treaty, mainly with regard to the new policy fields added by the Treaty of Maastricht. For instance, Article 149 on education states: "The Community shall contribute to the development of quality education by encouraging co-operation between Member States and, if necessary, by supporting and supplementing their action…". Similar phrasing is used to define the EC's role in the fields of vocational training, culture and health. The EC competences in the field of economic policy and employment policy (the latter added in Amsterdam) are phrased a bit differently; there, the emphasis is on *coordinating* member state activities rather than *supporting* their activities. But both support and co-ordination can be ranged under the heading "complementary powers". What distinguishes these areas of EC policy, is that the power to adopt binding laws is basically left in the hands of the member states (or their regions). This is sometimes made explicit in the text of the EC Treaty. To take Article 149 again (but similar phrases can be found in Articles 150, 151 and 152), the Community is allowed to take incentive measures in the field of education "excluding any harmonisation of the laws and regulations of the Member States".

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[9] See more generally G. de Búrca, "Reappraising Subsidiarity's Significance after Amsterdam", *Harvard Jean Monnet Working Paper (1999)* (with further references to the literature on this debate).

[10] W. Clement, *Europa gestalten – nicht verwalten. Die Kompetenzordnung der Europäischen Union nach Nizza* (Berlin, Humboldt University, 12 February 2001), point IX (the English translation of his speech uses the term "supplementary" rather than "complementary").

[11] But see H. Bribosia, "Subsidiarité et répartition des compétences entre la Communauté et ses Etats membres", *Revue du marché unique européen* (1992) 165, at 183.

Again, as with exclusive powers, the actual listing of policy areas fitting within this category is a matter for political debate. It is questionable, for instance, whether *health* still fits in this category. Since the Treaty of Amsterdam, some aspects of health policy were brought within the category of shared law-making powers of the EC (see Article 152(4)(a) and (b) EC Treaty), and the political evolution since Amsterdam gives further support for the view that health should no longer be considered as a merely complementary power of the EC.

3. Shared Powers (Paragraph 3)

The vast bulk of EC powers are law-making powers that are "non-exclusive", but there is no clear agreement on how to define them in more positive terms. The term "shared powers" (*compétences partagées*) is often used, but also the term "concurrent powers" (*compétences concurrentes*). Similar terms are used in the constitutional law of federal and regional states, though they may describe different legal realities.[12]

Armin von Bogdandy, in a recent paper, proposes to distinguish, within the existing system of EC powers, between *concurrent powers* and *parallel powers*.[13] The main difference seems to be that concurrent powers can be used by the EC in such an exhaustive way that, eventually, no more room is left for autonomous law-making by the member states, whereas parallel powers are characterised by the fact that separate member state action will always remain possible. My impression is that this distinction, though theoretically valid, has limited practical importance, so that both these types of powers can be included, for the sake of clarity, within a broader category of *shared powers*. In all areas falling within this broad category, the exercise of EC powers does not exclude the continuing exercise of law-making powers by the member states, but makes it subject to respect for the principle of the primacy of EC law. In some cases, it is true, the European Community has enacted such a wide-ranging system of norms that very little autonomy is left to the member states. An example of this is agriculture. Yet, even here member state law-making capacity continues to exist, and is only precluded to the extent that it conflicts with specific norms of EC law, so that there is no obstacle against ranging also agriculture among the shared powers, together with areas such as environmental policy, where member state room of manoeuvre is much larger.

The text of paragraph 3 as proposed above, and particularly its initial words, would have the advantage of clarifying that *shared powers* are the main rule, today and in the future. This view would be reinforced, rather than weakened, by the fact that no list of areas is given in this paragraph.

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[12] On this point, a small illustration may be given of the conceptual pitfalls of comparing national constitutional systems for the purpose of reforming the EU system of allocation of powers. In German constitutional law, a distinction is made between the concurrent federal powers listed in Article 74 GG and the framework federal powers listed in Article 75 GG. The proposed new text of Article 117 of the Italian Constitution introduces the term "materie di legislazione concorrente", and defines them as follows: "*Nelle materie di legislazione concorrente spetta alle Regioni la potestà legislativa, salvo che per la determinazione dei principi fondamentali, riservata alla legislazione dello Stato*." This definition corresponds to the "framework powers" rather than to the "concurrent powers" in Germany.

[13] A. von Bogdandy, cit.

4. Internal Market Powers (Paragraph 4)

It is proposed to devote a separate paragraph 4 to the "internal market" powers of the EC, not so much because of their undoubted importance, but because of their peculiar nature, which does not make them part of either exclusive or shared powers. However, in their legal regime, they do follow, and should continue to follow, the rules applying to shared powers. This is what is intended by the reference, in paragraph 4, to "the powers and duties of the EC and of the member states defined in the previous paragraph".

It has sometimes been claimed, mainly by the Commission,[14] that the establishment and functioning of the internal market is an *exclusive* EC power. This is a functional power which, by definition, can only belong to the EC institutions and not to the member states (from this perspective, it exclusively belongs to the EC), but this functional power invariably covers many policy areas in which the member states have retained an autonomous capacity to legislate. So, if one looks at the concrete policy content of an internal market measure, one cannot really say that it comes within the scope of exclusive EC powers. Further, the Commission regularly invokes the principle of subsidiarity in the explanatory memoranda to legislative proposals in the internal market field, which suggests that it does no longer seek to claim that they fall within the Community's exclusive competence.

The functional character of these powers implies that measures based on them will often impinge on policy fields that have not, as such, been entrusted to the EC or in which the EC is given only a minor role by the text of the Treaty. There are many examples of this phenomenon in the legislative practice of the European Community. Just a few for the sake of illustration:

- In 1993, the EC adopted a Directive on the return of works of art illegally removed from the territory of a member state. This was an internal market measure, based on Article 100a (now Article 95), although it directly affects what many member states define as cultural policy, for which the EC did not have a (sectoral) competence.

- The EC has adopted a number of directives on the recognition of diplomas. These are measures facilitating the free movement of professionals in the European Union, and are legally justified as such, but they also have a noticeable impact on the exercise of member states' education policies.

Because of their particular nature, the functional powers are the ones that have caused most political controversy and are, more than the others, at the basis of the demand for a "more precise delimitation". But, precisely because of their functional nature, such a more precise delimitation may also be more difficult to achieve here. On the other hand, it may be exactly in the field of these functionally defined and hence potentially expansive powers that closer attention to monitoring their exercise could be paid. This would not necessarily be done only by strengthened ex-post judicial review, but by building in better institutional safeguards and taking more seriously (both by the Commission and the Council as well as by their committees and working groups) concerns such as those enunciated in the Amsterdam protocol on subsidiarity and proportionality. A commitment to systematically considering the impact of the exercise of these functionally defined powers on "protected" Member State powers, whether in the field of health, education, culture or another, would be desirable. As the Amsterdam protocol demonstrates, however, the existence of guidelines seems to be insufficient to discipline the European institutions at present, and it may be that a specific commitment of the kind

[14] See also the Opinion of Adv.Gen. Fennelly in the *Tobacco Advertising* case, paragraph 142.

suggested above should be spelt out within the definition of the functional powers themselves, and not only in a general subsidiarity-type provision or protocol.

5. External Powers (Paragraph 5)

There are, today, specific Treaty provisions "which expressly authorise the Community to engage in international co-operation in areas where the main thrust of policy is directed towards activity on the internal plane".[15] Such provisions were introduced by the Single European Act (for research policy and environmental policy) and by the Treaty of Maastricht (for monetary policy, education and vocational training, culture and health). But there are still areas of EC policy for which the Treaty does not mention the external dimension at all: agriculture, transport, social policy, competition. The Treaty Title, introduced by Amsterdam, on visas, asylum and immigration is "external" by its very nature, but it does not specifically grant powers for the EC to conclude agreements with third countries. These "gaps" are filled by the doctrine of *implied* external powers. As the ECJ has held, "whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect."[16] On this basis, the EC is, for instance, entitled to conclude international treaties on the protection of workers in the transport sector as a complement to its internal regulatory competence to do so. Paragraph 5 of the proposed new Article 5bis is meant, quite simply, to codify (and thus render more visible) this Court-based doctrine of implied powers.

6. The Residual Power of Article 308 EC

Article 308 allows the European Community to adopt measures necessary for attaining the objectives of the Treaty, where no other, more specific powers can be used.[17] It thus serves as a residual power to fill gaps in the system of allocation of powers to the EC. The European Court of Justice, for its part, insisted that this Article "cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole".[18] Despite these reassuring words, there has been widespread concern, for instance among the *Länder,* that this article was used by the Council as a basis for the surreptitious erosion of member state powers. In his recent speech, Wolfgang Clement reiterated the traditional *Länder* demand that Article 308 should be deleted.[19]

A deletion of this article would be a harmful constitutional change. It has served as the legal basis for about 700 EC legal acts so far. An argument often heard is that Article 308 may have been useful in earlier stages of the European integration process, but that the EU is now an "adult" organisation with a very large number of expressly granted powers, so that there is no longer a need for a residual power like that provided by Article 308 – or rather, that the

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[15] A. Dashwood, "The Attribution of External Relations Competence", in A. Dashwood and C. Hillion (eds), *The General Law of E.C. External Relations*, London, 2000, p.115.
[16] ECJ, Opinion 2/94, paragraph 26.
[17] The full text of Article 308 is as follows: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."
[18] ECJ, Opinion 2/94, paragraph 30.
[19] W. Clement, *Europa gestalten - nicht verwalten*, cit.

disadvantages (in terms of erosion of member state powers) now outweigh the advantages (flexibility) of this provision.

One may doubt whether this is true. Long-standing practice over the years shows that, however precisely one seeks to define EC powers in the Treaty text, there will always be circumstances in which all member state governments are happy to use Article 308 in order to address an issue of common concern for which the Treaty text does not give the necessary powers. The value of a flexible clause like Article 308 was underlined by two related political events in the early 90's: the reunification of Germany, and the changes in Central and Eastern Europe. In both cases, action by the European Community was considered to be legally or politically necessary, but the existing Treaty system did not provide for fully adequate means of action. The Member States and the EC institutions were happy to resort to Article 235 (as it then was) in order to take swift action. A similar situation occurred with the third phase of Economic and Monetary Union. Despite the very detailed nature of the Maastricht Treaty provisions on EMU, there was no express legal basis for the introduction of the Euro in the absence of a Council decision stating which member states were to adopt the common currency; hence, the Euro Regulation 1103/97 had to be based (to everybody's satisfaction) on Article 235.

In the course of the last IGC, the Portuguese Presidency circulated a note in which it identified three areas of Community policy for which Article 308 was repeatedly used in the last decade (even after the Amsterdam Treaty changes): the establishment of Community agencies, non-trade co-operation with non-developing third states, and energy.[20] The Presidency, having identified this regular pattern, suggested the creation of a specific legal basis in the EC Treaty for all three areas. An agreement was found on only one of these three subjects: the Treaty of Nice will introduce a new Article 181a EC providing an express power to carry out "economic, financial and technical co-operation measures with third countries." For the two other subjects identified by the note of the Portuguese Presidency, Article 308 will presumably continue to be used in the future. But even if the Treaty of Nice had created an express legal basis for these matters as well, there would have been good chances that Article 308 would again prove useful for some other, as yet unidentified, purpose on which all states would happily agree. Article 308 has proved to play a useful role, all through the history of the EC, and it would be a great loss if it were eliminated.

However, a less drastic option would be to reconsider its present formulation, for instance by tightening the substantive conditions for its use, so as to exclude the possibility of its exercise in a way which would impinge on aspects of specific Member State powers which are reserved or protected under other Treaty provisions. If Article 308 is to be modified, one should also consider the deletion of the words "in the operation of the common market". They are the remnant from a time when (under the original Treaty of Rome) the powers of the EEC were essentially restricted to establishing and regulating the operation of the common market. Today, however, Article 308 is used more often in situations which have only a very tenuous link with the operation of the common market, and these words have arguably now become unduly restrictive.[21] While this proposal seems to liberalise the conditions for the use of Article 308, contrary to the concerns expressed by the German *Länder*, it does not necessarily mean that other substantive and procedural conditions, such as those suggested above, could or should not be added. However, what it does indicate is that a restriction on the exercise of a residual power which was drafted at the time the EEC was largely only a common market and not the

[20] CONFER 4711/00 of 22 February 2000 (accessible on the IGC website).
[21] But see, for an argument to the contrary, A. Dashwood "The Limits of European Community Powers" (1996) 21 ELRev 113

more integrated social and political entity which it now is, may be inappropriate to the reality of the European Union today.

7. Competence Issues in the Second and Third Pillars

The Nice Declaration refers to the delimitation of powers between the *European Union* and its member states. One should therefore not restrict the analysis to the EC Treaty, but also include consideration of the second and third pillar of the European Union. In the EUI's Report on the reorganisation of the Treaties of last year,[22] it was pointed out that there is nothing in these other pillars that corresponds to the basic EC rules on division of powers, as formulated in Article 5 EC. The authors of the Report added (in footnote 27 to the Basic Treaty proposal) that they thought that, in a future Basic Treaty, the text of Article 5 EC could be made to apply to all parts of EU law. Similarly, the Article 5bis proposed here could then also be made to apply to the second and third pillars, and the words "European Community" would then have to be modified into "European Union" (assuming that the latter would officially be recognised as the name designating the overall integration framework).

The powers of the EU in the present second and third pillar areas would, arguably, fit in the *shared powers* category of paragraph 3,[23] except for defence, for which Article 17 EU emphasises the complementary nature of EU powers. As things stand today, defence would therefore have to be added to the list of complementary powers in paragraph 2 of "Article 5bis".

[22] European University Institute, Robert Schuman Centre for Advanced Studies, *A Basic Treaty for the European Union. A Study of the Reorganisation of the Treaties*, Report submitted on 15 May 2000 to Mr Romano Prodi, President of the European Commission, http://europa.eu.int/comm/archives/igc2000/offdoc/repoflo_en.pdf

[23] On this point I disagree with the suggestion made by professor Pernice in his paper for this meeting, on p. 17, that in the second and third pillar the Union merely has (or should have?) powers of coordination.

Droits de l'Homme : La Charte des droits fondamentaux et au-delà

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A l'issue d'une procédure d'élaboration éminemment originale, la Charte des droits fondamentaux de l'Union européenne a été solennellement proclamée, comme prévu, lors de la Conférence de Nice, le 7 décembre 2000. "Ensuite - indiquaient les conclusions du Conseil européen de Cologne du 3-4 juin 1999 - il faudra examiner si, et le cas échéant, la manière dont la Charte pourrait être intégrée dans les traités". Tel est un des points qui, aux termes de la Déclaration 23 annexée au traité de Nice, doit faire l'objet de réflexion dans le cadre du processus en cours d'adaptation des institutions.

On a beaucoup évoqué, notamment dans de nombreux travaux universitaires aux quels les titulaires de chaires Jean Monnet ont souvent contribué, la genèse de la Charte, les conditions de son élaboration et son contenu; il ne nous semble pas utile d'y revenir. En revanche, avant de chercher à explorer quelques perspectives concernant le statut à venir de la Charte dans le droit de l'Union (II), il est nécessaire de s'interroger sur ce qu'elle est aujourd'hui et sur les conditions actuelles de son application (I).

I. La Charte aujourd'hui

On s'attachera principalement aux qualifications juridiques même si, par la force des choses, certaines considérations politiques affleurent et doivent être prises en compte pour éviter les contresens ou erreurs d'interprétation. La Charte aujourd'hui revêt au moins trois qualifications différentes. Au plan formel, elle a été insérée dans un instrument dit **accord interinstitutionnel** et publiée au JOCE (C 364 p.1, 18 décembre 2000). L'accord interinstitutionnel, dont l'existence est pour la première fois officiellement reconnue par une déclaration qui figure dans l'acte final de la conférence de Nice - déclaration relative à l'article 10 TCE -, est le fruit d'une pratique devenue coutumière dans la Communauté. Le Parlement, le Conseil et la Commission, pour faciliter l'application de dispositions du traité CE, peuvent conclure des accords qui ne modifient pas les dites dispositions. Ces accords engagent les unes vis à vis des autres les institutions mentionnées. Tel est le cas de la Charte qui, cependant, avant d'être proclamée solennellement par les trois institutions, a fait l'objet d'un processus d'élaboration très différent de celui qui est habituel pour ce type d'accords.

Une deuxième qualification de la Charte tient justement aux perspectives assignées à l'organe chargée de son élaboration - qui s'est ultérieurement autoproclamé Convention -. Selon les termes des conclusions du Conseil européen de Cologne, la Charte devait "contenir les droits de liberté et d'égalité, ainsi que les droits de procédure tels que garantis par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et tels qu'ils résultent des traditions constitutionnelles communes aux Etats membres, **en tant que principes généraux du droit communautaire**". On retrouve sans mal dans ce passage la formulation même utilisée par la Cour de Justice des Communautés européennes dan ses célèbres arrêts qui ont donné corps à la protection communautaire des droits fondamentaux (17 décembre 1970, *Internationale Handelsgesellschaft,* aff.11/70, R.p.1125; 28 octobre 1975, *Rutili*, aff.36/75, R.p.1219; 15 mai 1986, *Johnston,* aff.222/84, R.p.1651; 15 octobre 1987, *Heylens*, aff.222/86, R.p.4097) et qui a été reprise d'abord dans l'article F.2 du traité sur l'Union européenne (Maastricht), puis dans l'article 6.2 TUE (Amsterdam). Même si le mandat de Cologne ne s'arrête pas là puisque la Charte "doit en outre contenir les droits fondamentaux réservés aux citoyens de l'Union" et que dans l'élaboration il fallait "par ailleurs prendre en considération des droits économiques et sociaux...dans la mesure où ils ne justifient pas uniquement des objectifs pour l'action de l'Union", il y a des arguments sérieux pour considérer que la Charte dans la mesure où elle rend "visibles" les droits fondamentaux - pour reprendre une autre formule du mandat de Cologne - procède essentiellement à une formulation, un **"restatement" des principes généraux du droit de communautaire**/droits de l'Union tels qu'un juge aurait pu ou a pu les découvrir à partir des diverses sources énumérées dans ledit mandat.

Enfin la proclamation d'une Charte des droits fondamentaux élaborée par une Convention dans laquelle siégeaient, à côté des représentants des chefs d'Etat et de gouvernements, des représentants du Parlement européen, des parlements nationaux et de la Commission, est riche de **signification politique**, voir constitutionnelle, même si le document n'a pas à ce jour de force juridique obligatoire - bien que la Charte ait été rédigée "comme si" elle devait revêtir un jour une telle valeur -. Les déclarations de droits remplissent une fonction de justification du pouvoir politique puisqu'elles expriment sa raison d'être. Cette caractéristique observée à propos du pouvoir étatique joue également pour d'autres formes d'organisation politique, telle l'Union européenne. Une déclaration de droits sert également à poser les fondements du corps politique constitué par l'ensemble des personnes qui se reconnaissent dans ces droits. Ainsi la proclamation de la Charte des droits fondamentaux de l'Union européenne, même dépourvue de valeur juridique obligatoire, est un pas significatif dans la voie de la constitutionnalisation de l'Union comme ensemble politique démocratique. A ce titre la Charte comme simple **document politique** a vocation à **irriguer la vie et les institutions de l'Union.**

Ce triple caractère de la Charte, sans choix précis d'une qualification plutôt qu'une autre, affleure dans la manière dont celle-ci est aujourd'hui appliquée.

(A) Application par les institutions qui participent au pouvoir normatif

La Charte a été publiée comme un accord interinstitutionnel entre le Parlement, le Conseil et la Commission. Ce type d'acte lie politiquement et moralement les institutions qui y ont souscrit même s'il ne crée ni droits, ni obligations pour les tiers, Etats membres ou autres sujets de droit communautaire. S'agissant de la Charte, la Commission et le Parlement européen ont précisé le sens qu'ils entendaient donner à leur engagement, notamment dans le cadre de leur activité normative.

1) La Commission

Dans deux communications du 15 septembre puis du 11 octobre 2000, la Commission a indiqué que tôt ou tard la Charte devrait être reprise dans les traités et que le texte de la Charte, dés sa proclamation, ne manquerait pas de déployer ses effets, y compris sur le plan juridique. Ce point de vue a été confirmé par le président Prodi dans le discours qu'il avait préparé pour la proclamation de la Charte: "Pour la Commission, la proclamation signifie l'engagement des institutions à respecter la Charte dans tous les actes et toutes les politiques de l'Union". Le 13 mars 2001, la Commission a pris une décision (Sec (2000) 380/3) selon laquelle, à l'avenir, toute proposition d'acte législatif ou réglementaire devra faire l'objet d'un contrôle préalable de compatibilité avec la Charte. Toutes les propositions de texte législatif (directive) ou réglementaire qui présentent un lien spécifique avec les droits fondamentaux contiendront un **considérant supplémentaire** précisant que l'acte respecte les droits et les principes contenus dans la Charte. Cette formule pourra au besoin être complétée par une phrase indiquant de manière précise les articles concernés. Ce contrôle se pratique désormais, notamment dans les domaines de la politique d'asile et d'immigration ainsi que de la coopération en matière pénale qui sont devenus des priorités depuis le Conseil européen de Tampere (octobre 1999). On peut citer, à titre d'exemple, deux propositions récentes de directives, l'une relative au statut des ressortissants des pays tiers résidents de longue durée (Doc. COM (2001)127 final du 13 mars 2001) et l'autre relative à des normes minimales pour les demandeurs d'asile dans les Etats membres (Doc. COM (2001)181 final du 3 avril 2001, JO C.213 E du 31 juillet 2001, p.286). Ces deux propositions, comme en témoigne leurs exposés des motifs, présentent des liens spécifiques avec les droits fondamentaux inscrits dans la Charte - droits économiques et sociaux des demandeurs d'asile ou des résidents de longue durée, non-discrimination, droit à une protection juridictionnelle -.

Le Conseil et le Parlement, en leur qualité de co-législateurs, seront amenés à examiner les propositions de la Commission, y compris les considérants visant la Charte.

2) Le Parlement européen

L'attitude du Parlement européen a été précisée par sa présidente lors du discours qu'elle avait préparé pour la cérémonie de signature: "...dés à présent, même si ce devait être par anticipation sur sa pleine transcription juridique dans le traité, la Charte sera la loi de l'Assemblée(...)élue au suffrage universel. Elle sera dorénavant notre référence pour tous les actes du Parlement européen qui auront un lien direct ou indirect avec les citoyens de toute l'Union; elle nous engage". On peut en conclure qu'en matière de référence à la Charte dans le champ normatif, le Parlement devrait à l'avenir faire preuve d'une vigilance au moins égale à celle de la Commission.

Pour les textes relevant du deuxième pilier, c'est au ***Conseil*** qu'il appartient de s'engager dans la voie de références éventuelles à la Charte puisque la Commission n'a pas de pouvoir de proposition et que le Parlement est seulement tenu informé (article 21 TUE). Dans le cadre du troisième pilier, la Commission peut en revanche disposer d'un certain pouvoir de proposition (article 34.2 TUE) - ex. proposition de décision cadre visant à instaurer un mandat d'arrêt européen.

Il n'est pas interdit aux autorités nationales de s'inspirer de la Charte dans leur activité normative; certaines n'ont pas hésité à s'engager dans cette voie (voir, en France, le rapport du Comité d'éthique relatif à la loi sur la bioéthique, octobre 2000).

(B) Perspectives d'application par les juges

L'absence de valeur juridique obligatoire de la Charte n'interdit nullement aux justiciables d'en invoquer les dispositions et au juge, national ou communautaire, d'y trouver une source d'inspiration. La Cour de Justice des Communautés européennes a maintes fois tiré de textes d'origines diverses les éléments de sa jurisprudence qui a visé à protéger les droits fondamentaux en se fondant sur ce qu'elle estimait constituer les principes généraux du droit communautaire. A fortiori la Charte devrait apparaître comme l'expression la plus achevée de ces principes généraux notamment dans les domaines où elle innove, c'est à dire là où elle ne se contente pas de reproduire des éléments de droit originaire ou dérivé mais revisite la CEDH ou se risque dans des champs nouveaux en s'appuyant sur de grands textes internationaux ou sur les traditions constitutionnelles communes des Etats membres aux quelles elle donne une formulation. Les avocats généraux ont déjà montré à plusieurs reprises leur intérêt pour la Charte, tandis que les juges demeurent prudents.

1) Les prise de position des avocats généraux

De façon très significative, un certain nombre d'avocats généraux invoquent la Charte comme expression des principes fondamentaux du droit communautaire. Concluant dans le cadre d'un renvoi préjudiciel de la *High Court of Justice* d'Angleterre sur une question portant sur l'interprétation de la directive 93/104 sur l'aménagement du temps de travail et, plus particulièrement, sur les conditions d'obtention du droit à un congé annuel payé, l'avocat général Tizzano a affirmé (*BECTU c. Secretary of State for Trade and Industry,* C-173/99, conclusions présentées le 8 février 2001, pont 28) que "dans un litige portant sur la nature et la portée d'un droit fondamental, il est impossible d'ignorer les énonciations pertinentes de la Charte ni surtout son évidente vocation à servir, lorsque ses dispositions le permettent, de paramètre de référence substantiel pour tous les acteurs - Etats membres, institutions, personnes physiques et morales - de la scène communautaire. En ce sens, donc, nous estimons que la Charte fournit la confirmation la plus qualifiée et définitive de la nature de droit fondamental que revêt le droit au congé annuel payé" (article 31.2 de la Charte). Il s'agit là d'une prise de position très vigoureuse en faveur de la Charte comme expression des droits fondamentaux applicables dans la Communauté et à tous les acteurs (pas simple engagement interinstitutionnel), comme élément d'interprétation d'une directive, quand bien même la Charte n'a pas été intégrée dans les traités.

Très ferme également apparaît la position de l'avocat général Jacobs dans des conclusions sur une affaire portant sur la brèvetabilité d'inventions biotechnologiques (9 octobre 2001*, Royaume des Pays-Bas c. Parlement européen et Conseil de l'Union européenne,* C-377/98, conclusions présentées le 14 juin 2001, points 197, 210, 211). "Il ne saurait faire aucun doute, selon nous - déclare-t-il -, que les droits invoqués par le Royaume des Pays-Bas sont effectivement des droits fondamentaux, dont l'ordre juridique communautaire doit assurer le respect. Le droit à la dignité est peut-être le droit le plus fondamental de tous, et il se trouve à présent consacré à l'article 1er de la Charte des droits fondamentaux de l'Union européenne, qui énonce que la dignité humaine est inviolable et doit être respectée et protégée. Le respect du consentement libre et éclairé, à la fois des donneurs d'éléments du corps humain et des bénéficiaires de soins médicaux peut également et à juste titre être considéré comme un droit fondamental; c'est ce que reflète à présent l'article 3, paragraphe 2, de la Charte UE qui impose que soit respecté, dans le cadre de la médecine et de la biologie, "la consentement libre et éclairé de la personne concernée, selon les modalités définies par la loi". Il convient dés lors de constater que tout instrument communautaire portant atteinte à ces droits serait illégal" (point 197). Un peu plus loin (point 210), l'avocat général cite, outre la Charte, la Convention du Conseil de l'Europe sur les droits de l'homme et la biomédecine. Dans le

cas particulier cependant, il considère que le droit des brevets ne constitue pas le cadre approprié pour imposer et contrôler cette exigence de consentement (point 211).

On peut enfin citer les conclusions de l'avocat général Léger dans une affaire intéressant le droit d'accès aux documents des institutions que l'article 42 de la Charte consacre comme un droit fondamental (*Conseil c. Hautala et a*., C-353/99 P, conclusions présentées le 10 juillet 2001. " Certes -indique-t-il -, il convient de ne pas ignorer la volonté clairement exprimée des auteurs de la Charte de ne pas la doter de force juridique obligatoire. Mais toute considération relative à sa portée normative mise à part, la nature des droits énoncés dans la Charte des droits fondamentaux interdit de la considérer comme une simple énumération sans conséquence de principes purement moraux. Il importe de rappeler que ces valeurs ont en commun d'être partagées par les Etats membres, qui ont choisi de les rendre visibles en les consignant dans une charte, afin de renforcer leur protection. La Charte a indéniablement placé les droits qui en font l'objet au plus haut niveau des valeurs communes aux Etats membres.(...)Comme le laissent supposer la solennité de sa forme et de la procédure qui a conduit à son adoption, la Charte devrait constituer un instrument privilégié servant à l'identification des droits fondamentaux. Celle-ci est porteuse d'indices qui contribuent à révéler la véritable nature des normes communautaires de droit positif".

Dans d'autres cas des avocats généraux ont fait un usage plus discret des termes de la Charte. Ainsi l'avocat général Mischo dans une affaire concernant un fonctionnaire européen (*D. et Royaume de Suède c. Conseil de l'Union européenne,* C-122/99 P et C-125/99 P, conclusions présentées le 22 février 2001, point 97) renvoie à l'article 9 de la Charte où il trouve une confirmation de la distinction entre mariage, d'une part, et union entre personnes du même sexe, d'autre part. A vrai dire l'avocat général tire du texte de l'article 9 de la Charte et des "explications" qui l'accompagnent des conclusions exactement contraires à l'esprit libéral qui inspirait les rédacteurs de la Charte; il omet par ailleurs de se référer à l'article 21 de la Charte qui interdit toute discrimination à raison de l'orientation sexuelle. C'est dire que le texte de la Charte peut faire l'objet d'interprétations divergentes.

Dans une autre affaire concernant un fonctionnaire du Parlement européen, l'avocat général Jacobs a étayé son argumentation en citant la Charte: "...la Charte des droits fondamentaux(...)qui, en soi, n'est pas juridiquement contraignante, proclame un principe généralement reconnu en énonçant à l'article 41, paragraphe 1, que "toute personne a le droit de voir ses affaires traitées impartialement, équitablement et dans un délai raisonnable par les institutions et organes de l'Union" (*Z. c. Parlement européen,* C-270/99 P, conclusions présentées le 22 mars 2001, point 40).

L'avocat général Alber a fait référence à un droit relativement nouveau consacré par l'article 36 de la Charte, l'accès aux services d'intérêt économique général (17 mai 2001, *TNT Traco SpA c. Poste Italiane,* C-340/99, R.I- , conclusions présentées le 1er février 2001, point 94); dans l'arrêt de la Cour on ne trouve pas trace d'une quelconque référence à la Charte. On peut encore évoquer les conclusions de Mme Stix-Hackl, faisant référence dans une note en bas de page à l'article 31.1 de la Charte qui prévoit que tout travailleur a droit à des conditions de travail respectant sa sécurité et sa santé (*Commission c. Italie,* C-94/00, conclusions prononcées le 31 mai 2001, note 11) (On notera également les conclusions de l'avocat général Stix-Hackl dans *Nilsson*, C-131/00, présentées le 12 juillet 2001, de l'avocat général Geelhoed dans *Baumbast et R. c.Secretary for the Home Department*, C-413/19, présentées le 5 juillet 2001, point 59, à propos du respect de la vie privée et familiale, et dans *Mulligan e.a. c. Minister of agriculture and food Ireland et Attorney General,* C-313/99, conclusions présentées le 12 juillet 2001, point 28, à propos du droit de propriété, de l'avocat général Léger dans *Wouters*, C-309/99, présentées le 10 juillet 2001, à propos de l'Etat de droit).

Dans tous les cas qui ont été cités la Charte n'est pas utilisée comme source autonome de droit communautaire, mais comme expression utile et particulièrement achevée de droits fondamentaux dont il appartient au juge d'assurer le respect. On notera que les avocats généraux citent indifféremment des droits consacrés par la Convention européenne des droits de l'homme (droit de propriété, respect de la vie privée) et des droits nouveaux (droit à la dignité, droit à l'intégrité de la personne dans le domaine de la médecine et de la biologie, droits sociaux, droit à une bonne administration, droit d'accès aux documents, etc.), leurs conclusions étant souvent plus percutantes dans l'hypothèse de droits nouveaux. Les conclusions les plus explicites soulignent l'évidente vocation de la Charte à servir de paramètre de référence substantiel pour tous les acteurs de la scène communautaire: Etats membres, institutions, personnes physiques ou morales (notamment concl. Tizzano dans *BECTU*). Les avocats généraux ne manifestent aucune hésitation quant au champ d'application de la Charte comme expression des droits fondamentaux de l'Union européenne. Ils se situent dans une configuration juridique qui s'inspire de la découverte de principes généraux à laquelle procède régulièrement le juge communautaire et n'a rien à voir avec celle de l'accord interinstitutionnel à valeur éventuellement conventionnelle.

2) La prudence de juges

A ce jour on ne dispose d'aucune prise de position explicite de la Cour de Justice à propos de la Charte et d'une décision d'attente du TPI. Dans une affaire *Mannesmannröhren-Werke AG c. Commission* (T-112/98, 20 février 2001, R.II-729) portant sur une question de concurrence et sur le droit de refuser de fournir une réponse impliquant la reconnaissance d'une infraction (question de l'auto-incrimination), la requérante avait très tardivement demandé au **Tribunal de Première Instance** de prendre en considération la Charte proclamée le 7 décembre 2000 à Nice "au motif qu'elle constituerait un élément juridique nouveau sur l'application aux faits de l'espèce de l'article 6.1 de la CEDH". De fait, compte tenu de la divergence des jurisprudences des cours de Luxembourg et de Strasbourg en matière d'auto-incrimination, c'eût été une occasion de tester la portée de l'article 52.3 de la Charte ("Dans la mesure où la (...)Charte contient des droits correspondant à de droits garantis par la CEDH, leur sens et leur portée sont les mêmes"). Le tribunal a jugé que la Charte proclamée le 7 décembre 2000 "ne pouvait avoir aucune conséquence sur l'appréciation de l'acte attaqué qui était adopté antérieurement" (point 76). Par un raisonnement *a contrario* on pourrait voir dans cette formule l'acceptation implicite de ce que le respect de la Charte s'imposerait à la Commission pour les actes adoptés après la proclamation de celle-là. En revanche la **Cour de Justice,** dans l'arrêt qu'elle a rendu dans l'affaire *BECTU*, a préféré ne pas mentionner la Charte, mais s'appuyer sur la Charte communautaire des droits sociaux fondamentaux à laquelle font référence et l'article 136 TCE et la directive 93/104, pour conclure que le droit au congé payé annuel constitue un "principe de droit social communautaire revêtant une importance particulière" (point 26). Dans l'affaire *Poste Italiane* la Cour n'a pas non plus fait référence à l'article 36 de la Charte (accès aux services d'intérêt économique général) comme le lui suggérait son avocat général. Peut-être, dans l'un et l'autre cas, les circonstances n'étaient-elles pas les plus appropriées pour introduire une première référence à la Charte. On peut se demander également si les juges n'ont pas quelques réticence à l'égard d'un texte qui, certes ne supprime pas leur aptitude à découvrir de nouveaux droits fondamentaux qu'ils pourraient introduire dans le droit positif en tant que principes généraux du droit communautaire, mais en balise le champ, texte synthétique et complexe qui par ailleurs soulève de très délicats problèmes d'interprétation.

La Cour de Justice pourrait avoir l'occasion de se prononcer sur les effets juridiques de la Charte en droit communautaire dans le cadre de plusieurs renvois préjudiciels actuellement pendants et

portant sur des questions de droits fondamentaux; la Commission dans ses conclusions en intervention invoque la Charte lorsque cela apparaît pertinent. Ainsi la Cour a été saisie d'un renvoi préjudiciel de la *Verwaltungsgericht Stuttgart* qui pose la question de la conformité au droit communautaire du service militaire en Allemagne, obligatoire uniquement pour les hommes. Il est tiré argument des articles 20, 21 et 23 de la Charte. Cette affaire pourrait donner à la Cour, si elle l'estime pertinent, l'occasion de se prononcer sur la question épineuse du champ d'application de la Charte à l'égard des Etats membres et l'interprétation de l'article 51.1 ("Les dispositions de la Charte s'adressent...aux Etats membres uniquement lorsqu'ils mettent en œuvre le droit de l'Union"; contra: explications sous l'article 51, "lorsqu'ils agissent dans le cadre du droit communautaire"). (Pour d'autres exemples de renvois préjudiciels qui pourraient être l'occasion de référence par la Cour à la Charte, voir: C-466/00, *Arben Kaba c. Secretary of State for the Home Department* et C-63/01, *Evans c. Secretary of State for the Environment, Transport and the Regions et Motor Insurers Bureau,* sur le droit à la protection juridictionnelle et à un procès équitable pour tous les droits et libertés garantis par le droit de l'Union (article 47 de la Charte); C-187/01, *Procédure pénale c. Hüseyin Gözütok,* premier renvoi préjudiciel en matière de 3ème pilier, sur la base de l'article 35 TUE, qui pose la question de l'application du principe *non bis in idem* dans le cadre de l'espace de l'Union européenne et non pas dans le cadre d'un seul Etat (article 50 de la Charte)).

Les tribunaux nationaux ne sont probablement pas de reste; mais il est difficile d'avoir connaissance de leurs décisions. A titre d'exemple, le Tribunal constitutionnel espagnol, dans un arrêt du 30 novembre 2000, à propos de la question de la protection des données à caractère personnel, a cité l'article 8 de la Charte comme élément confirmatif de son raisonnement quant à l'existence d'un droit fondamental à la protection de ces données.

(C) Rayonnement politique de la Charte

La signification constitutionnelle ou ressentie comme telle de la Convention, en raison notamment de sa composition, donne à la Charte une légitimité particulière qui explique le rayonnement politique de celle-ci, indépendamment de toute considération sur sa valeur juridique. A la charnière du juridique et du politique, on observe que le Médiateur européen, qui a été entendu par la Convention lors de l'élaboration de la Charte, depuis la proclamation de celle-ci l'utilise comme référence (article 41, droit à une bonne administration, article 42, droit d'accès aux documents). La Cour des Comptes qui n'a pas du tout été impliquée dans le processus d'élaboration pourrait s'estimer concernée, par exemple par l'article 42. Mais la question majeure est celle de savoir si la Charte va devenir la référence unique et obligée chaque fois que, dans l'Union européenne, il est question de liberté, de démocratie, de respect des droits de l'homme et des libertés fondamentales. A cet effet on peut distinguer trois cercles dans lesquels l'influence de la Charte pourrait se faire sentir, avec une intensité variable: les Etats membres, les pays candidats, la conduite de la politique extérieure de l'Union [1].

1) Les Etats membres

En matière de respect des droits de l'homme et des libertés fondamentales par les Etats membres, il convient de s'attacher à deux dispositions du traité sur l'Union européenne, proches et cependant distinctes. L'**article 6.2** indique que l'Union respecte les droits fondamentaux tels qu'ils sont

[1] Voir: A. von Bogdandy, *The European Union as a human rights organization? Human rights and the core of the European union,* Common Market Law Review 2000, p. 1307-1338, at p. 1318.

garantis par la Convention européenne des droits de l'homme et tels qu'ils résultent des traditions constitutionnelles communes aux Etats membres, en tant que principes généraux du droit communautaire. C'est dans cette perspective que l'on a tendance à situer la Charte. Aux termes de cet article 6.2 TUE et de l'article 51.1 de la Charte, qui s'inspirent de la jurisprudence de la Cour, les Etats membres sont tenus au respect des droits fondamentaux pour autant que leur action se situe dans le champ de la mise en œuvre du droit communautaire/droit de l'Union (l'article 51.1 de la Charte utilise l'adverbe "uniquement"). En revanche l'**article 6.1** TUE se situe dans uns perspective plus vaste. Il indique que l'Union est fondée sur les principes de la liberté, de la démocratie, du respect des droits de l'homme et des libertés fondamentales, ainsi que de l'Etat de droit, principes qui sont communs aux Etats membres. Quant à l'article 7 TUE - en voie de modification par le traité de Nice -, il institue un système de sanction politique à l'encontre de tout Etat membre qui se rendrait coupable d'une "violation grave et persistante de principes énoncés à l'article 6.1". Il s'agit ici du respect des droits de l'homme et des libertés fondamentales par les Etats membres non pas "uniquement" lorsqu'ils mettent en œuvre le droit communautaire ou le droit de l'Union, mais par les Etats membres dans l'ensemble de leurs activités et comportements dans les ordres internes et externes. Par ailleurs l'ambition est autre: il ne s'agit pas seulement de rendre possible un contrôle juridique du respect des droits (article 6.2), mais d'imposer aux Etats membres un test général de démocratie (articles 6.1 et 7). Quelles que soient les différences de rédaction entre l'article 6.2, dans la perspective duquel les avocats généraux semblent situer la Charte, et des articles 6.1 et 7, il parait difficile d'admettre que la Charte ne constitue pas pour l'application de l'un et des autres un instrument commun de référence. C'est bien la position qui avait été adoptée en septembre 2000 par le groupe des trois sages qui, ayant à statuer sur le sort de l'Autriche dans le cadre d'une procédure préalable à une éventuelle mise en œuvre de l'article 7, n'a pas hésité à se référer à la Charte dont le texte n'était cependant pas encore finalisé.

Le rayonnement politique de la Charte, considérée comme document de référence pour l'ensemble du comportement des Etats membres, y compris en dehors du champ du droit communautaire, peut expliquer en partie l'**extraordinaire multiplication des plaintes et pétitions** - la Charte n'est pas expressément citée, mais elle est incitative - adressées par des particuliers à la Commission, ainsi que des questions écrites et orales posées par des membres du Parlement européen. Toutes visent à attirer l'attention de la Commission sur des violations alléguées de droits fondamentaux dans tel ou tel Etat membre. On peut citer, à titre d'exemple, la nouvelle loi concernant les sectes en France (Q P-1546/01 du député Sichrovski, non encore publiée au JO), la liberté religieuse de communautés bouddhistes en Grèce (Q E-2200 du député Cappato, JO C 151 E/2 du 22 mai 2001) et la question d'une référence à la religion sur la carte d'identité dans ce même Etat membre. La Commission, avant d'envisager une quelconque intervention sur le plan juridique en tant que gardienne des traités (procédure de manquement), doit s'interroger sur le point de savoir si les questions qui lui sont soumises entrent effectivement dans le champ d'application du droit communautaire (voir jurisprudence *Wachauf*, 13 juillet 1989, aff.5/88, R.p.2609, et *ERT,* 18 juin 1991, C-260/89, R.I-2925, ainsi que les problèmes d'interprétation de l'article 51.1 de la Charte). Par illeurs un afflux massif de plaintes portant sur des cas concrets pourrait conduire à soupçonner l'existence d'un problème grave et persistant touchant plus généralement au respect de droits fondamentaux dans un Etat membre et susceptible de justifier une initiative de la Commission hors des voies judiciaires (article 7 TUE).

2) Les pays candidats

Aux termes des accords dits "européens" préalables à l'adhésion, les pays candidats sont d'une part tenus de s'aligner sur l'acquis communautaire, qui englobe les droits fondamentaux en tant

que principes généraux du droit communautaire (article 6.2 TUE) et, d'autre part, de se plier à une "conditionnalité politique" dont le contenu correspond assez exactement au test général de démocratie de l'article 6.1 TUE. Dés lors tout porte à croire que la Charte a vocation à servir d'instrument de référence dans l'une et l'autre perspective. Lors des travaux d'élaboration de la Charte, les pays candidats ont été auditionnés par la Convention. Ils ont fait état de leur intérêt pour la démarche qui devait conduire à l'adoption de la Charte, tout en soulignant que celle-ci ne devrait en aucun cas alourdir les engagements conventionnels (ex. droits sociaux) souscrits par eux dans les accords européens. Quelles que soient les réserves ainsi exprimées, l'article 49 TUE pose comme condition d'entrée dans l'Union le respect des principes énoncés à l'article 6.1 (test de démocratie et de respect des droits de l'homme). La Charte a évidemment vocation à servir de référence dans l'application de ce test de démocratie aux pays candidats, avec cette seule différence que là où l'exigence est immédiate pour les Etats membres, elle pourra s'imposer par étapes aux pays candidats.

3) La conduite de la politique extérieure de l'Union

Les Etats tiers constituent le troisième cercle. Au plan juridique ils ne sont pas tenus par la Charte, alors que les institutions communautaires doivent la respecter et en tant qu'accord interinstitutionnel et en tant qu'expression des principes généraux du droit communautaire, lorsqu'elles négocient des accords extérieurs. Au plan politique on peut s'attendre à un rayonnement de la Charte dans le champs des relations extérieures de la Communauté et de l'Union. L'article 11 TUE précise que lorsque l'Union définit et met en oeuvre une politique étrangère et de sécurité commune, elle se donne pour objectif, notamment "le développement et le renforcement de la démocratie et de l'Etat de droit, ainsi que le respect des droits de l'homme et des libertés fondamentales". L'article 177.2 TCE assigne des objectifs semblables, en utilisant pratiquement les mêmes termes, à la politique de la Communauté dans le domaine de la coopération au développement. Si l'on accepte le raisonnement ébauché plus haut selon lequel il ne devrait pas y avoir de différence de standard entre les concepts de droits de l'homme et libertés fondamentales au sens des article 6.1 et 6.2 TUE, alors on peut affirmer que la Charte en fournissant un catalogue explicite des droits fondamentaux, devrait permettre à la Communauté et à l'Union d'apporter une réponse claire à ceux qui les accusent de ne pas retenir la même conception des droits fondamentaux au plan interne et au plan externe. L'action diplomatique doit évidemment respecter la souveraineté des partenaires et certains droits ou certaines libertés, praticables dans l'Union, peuvent ne pas l'être en d'autres lieu. La Charte exprime les valeurs de la société européenne selon des standards politiques, économiques, sociaux, voire de civilisation, qui lui sont propres; elle peut cependant servir d'instrument de référence. Dans cette perspective on peut signaler certaines initiatives telle la Communication de la Commission au Conseil sur le commerce équitable (COM (1999) 619, 29 novembre 1999) qui vise à généraliser l'indication sur les produits importés, tel par exemple le chocolat, que la fabrication ne résulte pas du travail d'enfants de moins de seize ans. Le label éthique serait ainsi une illustration de la mise en ouvre possible au plan international de l'article 32 de la Charte.

Ces conditions très diverses d'application de la Charte peuvent éclairer la réflexion sur le statut à venir de celle-ci.

II. Quel statut à venir pour la Charte?

La Déclaration sur l'avenir de l'Union adoptée lors de la conférence de Nice prévoit que dans le cadre du processus de révision devrait notamment être examinée la question du statut de la Charte. La première possibilité, qui correspond aux vœux plus ou moins avoués de certains, serait de ne rien faire. Juridiquement, et à la lumière de ce qui a été exposé précédemment, l'hypothèse n'est pas absurde. Tout continuerait comme avant et peut-être mieux qu'avant, grâce à la Charte. Celle-ci continuerait à déployer sa force persuasive à l'égard des détenteurs du pouvoir normatif dans l'Union, comme la Convention européenne des droits de l'homme a influé sur le législateur britannique avant son incorporation par le *Human Rights Act* de 1998. L'évolution jurisprudentielle s'opérerait en douceur et l'on peut imaginer une utilisation politique graduée de la Charte comme texte de référence en matière de démocratie et de respect des libertés fondamentales. Un parallèle est possible avec le rôle joué en France et au-delà par la Déclaration de droits de l'homme et du citoyen de 1789 avant son incorporation dans le préambule de la Constitution de 1946, puis de 1958.

Toutefois, on peut se demander si le *statu quo* à propos de la Charte est encore possible. Au pré-sommet européen de Biarritz s'est manifesté, parmi les chefs d'Etat et de gouvernement, un refus politique - refus confirmé à Nice - de voir intégrer dés ce moment la Charte dans les traités, y compris à travers une simple référence à l'article 6.2, comme l'une des sources susceptibles d'éclairer la découverte et la formulation de principes généraux du droit communautaire. En revanche, la question du statut à venir de la Charte est inscrite de la Déclaration 23 annexée au traité de Nice, déclaration politique qui a également un sens: dans la perspective de l'adaptation institutionnelle qui doit s'opérer à partir de 2004, il faudra notamment préciser le sort réservé à la Charte. Les différentes réunions préparatoires au Conseil européen de Laeken (décembre 2001) sont l'occasion de s'interroger sur l'opportunité d'en rester aux thèmes définis à Nice ou bien de les étendre, certainement pas d'en laisser en chemin.

S'il s'avère que quelque chose doit être fait en vue d'intégrer la Charte dans les traités, il importe d'explorer l'échelle des solutions possibles et leurs conséquences.

(A) Simple déclaration

La solution minimaliste conduirait à introduire la Charte sous la forme d'une simple déclaration annexée au traité sur l'Union européenne. La Charte serait présentée comme un texte situé, élaboré par une Convention et proclamé à Nice par les trois institutions que l'on sait. Elle apparaîtrait dans sa teneur intégrale, avec préambule et dispositions générales (article 51 à 54). Au plan juridique, la différence avec la situation présente d'une Charte proclamée ne serait pas perceptible. L'introduction de la Charte dans une déclaration annexée au traité aurait surtout une portée politique. Elle signifierait que les Etats membres ont souhaité aller jusqu'au bout de l'opération lancée au Conseil européen de Cologne parce qu'ils prennent au sérieux la formulation des droits fondamentaux et le travail effectué par voie de convention.

(B) Référence à la Charte dans l'article 6.2 TUE

Cette solution a, on le sait, déjà été envisagée avant la conférence de Nice (décembre 2000). Mention de la Charte serait faite, à titre supplétif, après la référence aux principes généraux du droit communautaire, de sorte que le système antérieure serait éventuellement enrichi par l'adjonction de la Charte, mais pas bouleversé. La Charte elle-même, dans son intégralité, figurerait en annexe sous forme par exemple de déclaration, comme un texte situé dans le temps. Cette

solution, la plus simple, aurait l'avantage de lever les hésitations des juges tout en ne changeant rien au rôle persuasif de la Charte à l'égard des détenteurs du pouvoir normatif dans l'Union. Son autorité politique serait probablement renforcée. On notera qu'il y a des précédents d'accords interinstitutionnels ensuite intégrés dans les traités, mais plutôt sous forme de protocole (cf. Protocole sur l'application des principes de subsidiarité et de proportionnalité annexé au traité d'Amsterdam). Faut-il envisager d'aller plus loin et d'intégrer véritablement la Charte dans les traités?

(C) Intégration de la Charte dans les traités proprement dits

On rappellera que l'intégration d'un catalogue de droits fondamentaux avait été envisagée dans la projet de traité sur l'Union européenne voté par le Parlement européen le 14 février 1984 sur la base du rapport Spinelli[2]. Quelle que soit la forme que pourrait revêtir le statut constitutionnel de l'Union européenne, l'intégration de la Charte dans les traités, avec même valeur juridique que ceux-ci - les "explications" pourraient être annexées au traité sous la forme d'une déclaration -, soulève toute une série de questions juridiques, sans parler de la signification "constituante" d'un chapitre sur les droits fondamentaux figurant dans le traité à venir. On s'attachera ici uniquement aux questions juridiques.

1) Substance

Un certain nombre de problèmes de compatibilité entre la Charte et les traités risqueraient de se poser. Il paraît difficile, voire dangereux, d'apporter des amendements à la substance d'un texte tel que la Charte, adopté dans des conditions très particulières. Qui en aurait la compétence? Et par ailleurs le risque n'est pas nul de voir se défaire l'équilibre laborieusement atteint. Mieux vaudrait **adapter le traité lui-même.** On songe en particulier aux articles sur la citoyenneté qu'il faudrait amender et parfois supprimer afin d'éviter les duplications avec la Charte. En revanche, il ne parait pas nécessaire d'envisager par exemplela modification de l'article 13 TCE, relatif à la non-discrimination, dont le contenu est plus étroit que l'article 21 de la Charte qui porte sur le même sujet. En effet les objectifs poursuivis ne sont pas les mêmes. L'article du traité CE porte habilitation normative, dans des conditions particulières de procédure et dans un champ de compétence défini, alors que les dispositions de la Charte édictent simplement une interdiction de discrimination, mais dans un champ plus large. Beaucoup d'autres exemples pourraient être cités concernant l'égalité homme/femme, les droits sociaux (ex. droit de grève) ou des droits nouveaux qui ne figurent pas dans les traités. La Charte, inscrite dans les traités, le serait dans ses termes actuels; elle ne porterait pas pour autant habilitation législative nouvelle au bénéfice de la CE/UE.

Le contenu du préambule, dont l'objet est d'indiquer les objectifs poursuivis par les rédacteurs de la Charte, ne soulève pas de difficultés particulières. Il pourrait soit être maintenu tel quel, soit, pour des questions de présentation, intégré dans le préambule même du traité constituant si celui-ci était réécrit.

[2] Cinq ans plus tard, la Parlement européen a adopté une Déclaration des libertés et des droits fondamentaux (12 avril 1989, JOCE C.120, 16 mai 1989 p.51).

2) Dispositions générales

Plus délicate est la question des **dispositions générales de la Charte** dont on peut se demander s'il faut les maintenir inchangées ou bien les amender en tout ou en partie. Maintenir telles quelles les dispositions générales de la Charte, introduite dans les traités, c'est-à-dire revêtue de valeur juridique obligatoire et, vraisemblablement, soumise à la juridiction du juge communautaire, conduit en réalité à introduire un traité dans le traité. En effet, pour ce qui est du contenu substantiel de la Charte, si les clauses générales étaient maintenues des solutions spécifiques devraient être appliquées en ce qui concerne les relations avec les conventions internationales existantes, notamment la Convention européenne des droits de l'homme (articles 52.2 et 53 de la Charte) ou les constitutions des Etats membres (article 53 de la Charte), sans compter que l'article 51 sur le champ d'application de la Charte apparaîtrait dépourvu de sens à partir du moment où la Charte aurait été intégrée dans les traités. A l'inverse, supprimer les dispositions générales de la Charte et appliquer à ses cinquante articles de substance le droit commun communautaire pose problème. La Charte a été adoptée comme un tout et bien des Etats membres opposeraient un veto si telle clause définissant la porté des droits garantis ou le niveau de protection venait à disparaître. A titre d'illustration, quelques observations méritent d'être faites à propos de plusieurs questions que tentent de régler les dispositions générales.

- *Relation entre la Charte et les traités CE/UE*

L'article 51.2 indique que la Charte ne doit créer "aucune compétence ni aucune tâche nouvelles pour la Communauté ou pour l'Union". On peut comprendre cette formule, comme indiquant que la Charte ne peut pas modifier les compétences normatives de la Communauté ou de l'Union. Supprimer une telle disposition pourrait créer un doute quant à l'étendue du champ de ces compétences au moment où il est surtout question, non pas de les restreindre, mais de les clarifier. Par ailleurs l'article 52.2 de la Charte indique que les droits reconnus par la Charte "qui trouvent leur fondement dans les traités communautaires ou dans le traité sur l'Union(...) s'exercent dans les conditions et limites définies par ceux-ci". Le souci de cohérence est clair et louable, mais la formulation "qui trouvent leur fondement" apparaît pour le moins ambiguë. Doit-on considérer, par exemple, que les droits de non-discrimination reconnus à l'article 21 de la Charte "trouvent leur fondement" dans le traité CE dans les hypothèses telles que couleur, langue, appartenance à une minorité nationale, qui justement ne figurent pas à l'article 13 du traité CE? La situation peut être considérée comme semblable pour les hypothèses de discrimination qui figurent dans les deux textes mais à propos desquelles le Conseil des Communautés n'a pas encore pris de mesures sur le fondement de l'article 13 TCE. Dans ces cas, les "conditions et limites" définies par les traités doivent-elles s'appliquer? On peut ajouter d'autres hypothèses, encore plus problématiques, où les dispositions de la Charte ont leur fondement non pas dans les traités mais, au dire des "explications", dans la jurisprudence de la Cour de Justice ou du Tribunal de Première Instance. C'est le cas par exemple pour l'article 41 relatif à une bonne administration et pour les exigences précises formulées à l'article 41.2. Les limitations prévues à l'article 52.2 ont-elles matière à s'appliquer? On en vient à se demander si la suppression de l'article 52.2 et de ses ambiguïtés n'aurait pas finalement un effet simplificateur; le juge apprécierait sans contrainte les modalités d'une harmonisation entre des dispositions désormais toutes incluses dans le traité.

- *Relation entre la Charte et la Convention européenne des droits de l'homme*

Cette question a été longuement discutée à la Convention. L'article 52.3 prévoit finalement que lorsque la Charte contient des droits "correspondant à des droits garantis par la Convention

européenne des droits de l'homme", leur sens et leur portée sont les mêmes, avec une réserve cependant en faveur du droit de l'Union lorsque celui-ci accorde une protection plus étendue. L'interprétation de cet article pose problème à plus d'un titre. D'abord il est difficile de trouver des correspondances exactes entre les droits garantis par la Charte et ceux garantis par la CEDH. Les "explications" - qui n'ont pas de valeur définie - en proposant des listes n'y sont qu'imparfaitement parvenues. Ainsi l'article 5 de la Charte, qui porte sur l'interdiction de l'esclavage, ajoute par rapport au texte de la CEDH la prohibition de la traite des êtres humains. L'article 9 relatif au droit de se marier, par rapport à la CEDH introduit la possibilité d'unions entre personnes du même sexe. L'article 47 définit le droit au juge en termes beaucoup plus compréhensifs que l'article 6.1 de la CEDH. Plus délicates sont les situations où le droit inscrit dans la Charte a plusieurs sources dont, notamment, la CEDH. On peut citer à titre d'exemple l'article 8 de la Charte sur la protection des données à caractère personnel qui s'inspire de l'article 8 de la CEDH sur la protection de la vie privée et de la correspondance, mais aussi d'une convention du Conseil de l'Europe et d'une directive communautaire. Dans tous ces cas y a-t-il correspondance?

Face à de semblables difficultés d'interprétation, on peut se demander si, une fois la Charte insérée dans les traités il serait judicieux ou non de maintenir cet article ambigu dans sa formulation, mais clair dans son intention qui n'est autre que d'encourager la convergence des interprétations, notamment jurisprudentielles des cours de Luxembourg et de Strasbourg. On peut ajouter, sans vouloir trancher le débat, qu'une partie seulement des dispositions de la Charte couvre des domaines dont traite la CEDH. Pour supprimer les risques de divergence dans les domaines où il y a interférence substantielle, la meilleure solution serait assurément celle d'une adhésion de l'Union à la CEDH, solution dont les modalités sont très sérieusement examinées par le Conseil de l'Europe. La présence d'une Charte des droits fondamentaux dans le traité constituant de l'Union européenne n'apparaît nullement comme un obstacle à une telle adhésion. Beaucoup d'Etats dotés de constitutions qui comportent des déclarations de droits sont parties à la CEDH.

- Relation entre la Charte et le droit international ainsi que le droit national des Etats membres

Abordant la question du niveau de protection, l'article 53 indique qu'aucune disposition de la Charte ne doit être interprétée comme limitant ou portant atteinte aux droits de l'homme reconnus, dans leur champ d'application respectif, par le droit de l'Union, le droit international et les conventions internationales auxquelles sont parties l'Union, la Communauté ou tous les Etats membres, notamment la CEDH, ainsi que les constitutions des Etats membres. Cet article crée pour la Charte un régime en partie dérogatoire au droit commun communautaire, dont on peut ici encore se demander s'il devrait subsister une fois la Charte intégrée dans les traités. En effet il retient la même formule pour des catégories de normes qui entretiennent des relations très différentes avec le droit communautaire.

En ce qui concerne le **droit international général** - non conventionnel -, l'article 53 affirme que la Charte ne doit pas se comprendre comme limitant ou portant atteinte aux règles de protection internationale des droits de l'homme. Cette affirmation parait parfaitement acceptable et compatible avec une analyse moniste de la relation entre droit communautaire et droit international qui implique la primauté de ce dernier. De même, à propos des traités auxquels la Communauté ou l'Union serait partie, l'article 53 ne fait que confirmer la règle de droit international selon laquelle l'une ou l'autre de ces entités ne saurait, par l'adoption d'un acte qui lui est propre - ici la Charte -, échapper aux obligations internationales antérieurement contractées. Pour ce qui est des accords auxquels sont parties tous les Etats membres de l'Union européenne, au premier rang desquels la CEDH, il est évident qu'ils ne lient pas la Communauté ou l'Union; c'est donc par une démarche

volontaire de ses Etats membres que l'Union peut dire dans la Charte qu'elle entend que cette dernière soit interprétée dans un sens compatible avec ces accords. Ceci va d'ailleurs dans le sens de l'article 307 TCE par lequel les Etats membres s'engagent à recourir à tous moyens appropriés pour éliminer les incompatibilités entre le traité et d'autres conventions qu'ils auraient pu conclure antérieurement.

La question du rapport avec les **constitutions nationales** soulève des difficultés pratiques plus immédiates. L'article 53 réitère la même formule quant à la nécessité d'interpréter la Charte de façon à ne pas limiter ou porter atteinte aux droits reconnus par les constitutions nationales dans leur champ d'application respectif. Il parait à première vue difficile de réconcilier la primauté ici donnée aux normes constitutionnelles nationales avec l'affirmation très forte de la jurisprudence *Internationale Handelsgesellschaft* (17 décembre 1970, 11/70, R.p.1125) selon laquelle le droit communautaire ne peut se voir opposer aucune règle de droit national quelle qu'elle soit, c'est à dire y compris constitutionnelle. Une tentative de réponse pourrait consister à dire que la Charte prévoit de ne pas l'emporter sur les constitutions nationales "dans leur champ d'application respectif". Mais cette réponse conciliatrice est à l'évidence dépourvue de pertinence; d'une part elle affaiblit l'affirmation communautaire de primauté; d'autre part elle ne va pas assez loin pour rejoindre le point de vue des juridictions constitutionnelles des Etats membres. En effet le droit constitutionnel national revendique sa vocation à une application généralisée; dans le champ des libertés fondamentales il est particulièrement malaisé de tracer une frontière entre ce qui relève des champs d'application respectifs de la Charte et de telle constitution, la situation étant d'ailleurs variable selon les constitutions. La jurisprudence des cours constitutionnelles allemandes et italiennes confirme cette observation que le droit constitutionnel national appréhende tout le champ des droits fondamentaux. Les arrêts classiques de ces cours ne disent jamais que les normes constitutionnelles nationales cessent de s'appliquer là où intervient l'application du droit communautaire. Elles affirment au contraire que la protection constitutionnelle nationale continue à s'appliquer, pour constater justement que la protection assurée par le droit communautaire est satisfaisante (*SpA c. Administrazione delle Finanze*, 8 juin 1984; *Wunsche Handelsgesellschaft*, 22 octobre 1986, dit "*Solange II*"; bananes ou *"Solange III"*, 7 juin 2000). Les cas de confrontation directe, en matière de droits fondamentaux, entre droit de l'Union et constitutions nationales, assez rares jusqu'à présent, risquent de se multiplier du fait de la Charte, et plus encore si la Charte est intégrée dans les traités. La formule de l'article 53, ne retenant ni le point de vue communautaire classique de la primauté du droit CE sur l'ensemble du droit national, ni le point de vue exprimé par les juridictions constitutionnelles sur la question de la protection des droits fondamentaux, ne contribue pas à simplifier un débat qu'il est sage de ne pas provoquer mais difficile d'éviter. Les révisions constitutionnelles antérieures à la ratification des traités CE/UE modifiés et les mécanismes nationaux de contrôle *a priori* de constitutionnalité des lois ne permettent pas de prévenir tous les risques de contradiction.

3) Contrôle

On a assez dit, pendant l'élaboration de la Charte, qu'un document insusceptible d'être invoqué en justice par les individus n'avait pas grand sens pour la protection des droits fondamentaux. La Charte, intégrée dans les traités, sera vraisemblablement soumise au mode CE/UE de contrôle juridictionnel, incluant les recours contentieux et le renvoi préjudiciel. Compte tenu du caractère relativement restrictif des conditions de recevabilité du recours en annulation (article 230 TCE), la question a été posée de savoir s'il ne faudrait pas créer au bénéfice des personnes justiciables du droit CE/UE une voie de recours spécial leur permettant de faire constater une infraction à la Charte résultant de tout acte de droit CE/UE les concernant, y compris les mesures

réglementaires. Cette question est liée à celle d'une mise en place, dans des traités simplifiés, d'une véritable hiérarchie des normes permettant une distinction entre actes réglementaires et actes législatifs. On pourrait aussi imaginer, dans le système CE/UE et en ce qui concerne la protection des droits garantis par la Charte, un mécanisme de contrôle de "constitutionnalité" à l'initiative des particuliers, comme cela existe dans plusieurs constitutions nationales. Outre l'organisation pratique d'un tel recours, la question se poserait de l'aggravation de l'encombrement du prétoire des juges de Luxembourg, déjà très préoccupant.

Tels paraissent être les scénarios possibles, à la lumière de l'expérience actuelle d'application encore très récente de la Charte. La solution la plus ambitieuse d'intégration dans les traités n'est pas la plus certaine beaucoup s'en faut. Si elle était retenue, il faudrait probablement revoir certaines dispositions générales, tout en gardant en mémoire que celles-ci ont beaucoup compté dans l'équilibre globalement atteint et dans l'acceptation du contenu substantiel de la Charte par certains Etats membres. Or ce contenu, il ne faut pas y toucher sauf à prendre le risque de tout défaire.

The Future of the EU Charter of Fundamental Rights

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The main aim of this paper is to identify some alternative options concerning the future of the EU Charter of Fundamental Rights ("the Charter"). There are four main parts to the paper. Part I considers how we got to where we are and why that affects the debates about the future of the Charter.[2] Part II comments on what we have at the moment: the status, role and content of the existing Charter. Part III looks at some of the options for the future of the Charter. Part IV examines some of the deeper issues underlying the debates about these options. Part V offers a brief conclusion.

Part I

How we got to here

The immediate background to the discussion on a Charter was the decision by EU Heads of State or Government at the Cologne European Council on the 3rd and 4th of June to establish such a Charter.[3] The European Council decided also to establish an ad hoc body to draw up the draft charter. The composition of this body was established at the European Council in Tampere on the 15th and 16th October 1999.[4] The Cologne Council established further that this body should present a draft document in advance of the European Council in December 2000. It anticipated that the European Council would propose to the European Parliament and the European Commission that, together with the Council, "they should solemnly proclaim on the basis of the draft document a European Charter of Fundamental Rights. It would then have to be considered whether and, if so, how the Charter should be integrated into the treaties." Meetings of the body responsible for preparing the draft Charter (renamed the "Convention") took taken place from December 1999 until the autumn of 2000. After agreement by the Convention, the Presidents of the European Parliament, the Council of the European Union and

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[2] The material in the part of the paper is drawn from the evidence submitted to the House of Lords, European Committee by Christopher McCrudden, Sandra Fredman and Mark Freedland, House of Lords, Select Committee on the European Union, EU Charter of Fundamental Rights (Session 1999-2000, 8th Report), HL Paper 67 (London: The Stationery Office, 2000). I am grateful for the permission of my colleagues to use our submission in this way. See also, Sandra Fredman, Christopher McCrudden and Mark Freedland. An E.U. Charter of Fundamental Rights, [2000] Public Law 178.

[3] Conclusions of the European Council in Cologne, 3 and 4 June 1999, Annex IV.

[4] Conclusions of the European Council in Tampere, 15 and 16 October 1999, Annex ("Composition, Method of Work and Practical Arrangements for the Body to Elaborate a Draft EU Charter of Fundamental Rights, As Set Out in the Cologne Conclusions").

the European Commission proclaimed the Charter on The 7th December 2000 on the fringes of the Nice European Council.[5]

This process was, however, the culmination of a long debate within Europe over the form which recognition of fundamental rights within the European Union/Community should take. An understanding of the broader history in which this debate takes place is vital to an appreciation of several of the subsequent issues. In brief, there has been an explosion of activity on human rights since the Second World War at the international, regional and national levels. Internationally, the development of a set of core human rights treaties covering civil and political rights, economic and social rights, racial and gender discrimination, freedom from torture, and the rights of the child, amongst others, are well known. Less well appreciated, perhaps, is the development by the International Labour Organisation of a significant set of Conventions in the field of workers' rights.

To this should be added the development of human rights norms specifically for Europe by the Council of Europe and, more recently, by the OSCE. The former, of course, gave rise to the notably successful European Convention on Human Rights, but also (and more recently) to the important Social Charter (revised in 1996), the Framework Convention on National Minorities, the Convention on Minority Languages, and the Convention of Human Rights and Biomedicine, as well as the important additional protocols to the European Convention on Human Rights, most recently the twelfth protocol to the ECHR on discrimination (which has not yet come into force).

Developments at the national level have been equally important. All Member States of the Community now have vibrant constitutional traditions for the protection of human rights. Some have specifically incorporated many of the international and regional human rights instruments mentioned previously. Others have, in addition, domestic constitutional texts that incorporate protection of fundamental rights, sometimes with interpretation by specialised constitutional courts.

As long ago as the late 1960s, the absence of formally proclaimed human rights provisions in the Treaties establishing the European communities gave rise to considerable unease in several Member State constitutional courts, particularly in the Federal Republic of Germany. The doctrine of the supremacy of Community law adopted by the European Court of Justice (ECJ) in the 1960s carried the logical consequence that even constitutionally protected norms (including human rights guarantees) in the Member States were subordinate to Community legal rules of any type. The ECJ developed a jurisprudence that subjected the exercise of Community competence to the requirement that it comply with "general principles" of Community law, which the Court insisted included fundamental rights. Where legislative or executive action by Community institutions breached those fundamental rights recognised as common to the Member States, the ECJ could declare them unlawful. The "fundamental rights" identified by the ECJ drew on the constitutional traditions of the Member States and, in particular, the European Convention on Human Rights. This jurisprudence was subsequently extended to encompass also the acts of Members States acting under Community law, although the precise ambit of this was (and is) subject to considerable debate.

The relationship of the Community to human rights was also the focus of attention of the European Commission and the European Parliament from the mid 1970s. This resulted in 1977 in a joint declaration by the EC institutions on human rights, and in the subsequent unsuccessful proposal by the European Commission in 1979 for the EC to accede to the European

[5] [2000] OJ C 364/8, 18 December 2000.

Convention on Human Rights. Further proposals on fundamental rights were made by the Parliament in 1989 and 1996. Increasingly during the 1990s, fundamental rights surfaced as an issue to be considered in the Inter-Governmental Conferences in Maastricht and Amsterdam. The Maastricht Treaty of 1993 incorporated a limited reference to human rights in the context of the European Union Treaty, adopting terminology familiar from the Court's rulings, whilst ensuring that the ECJ would have no jurisdiction to enforce these commitments in the context of the Second (common foreign and security policy) and Third (justice and home affairs) Pillars. The Amsterdam Treaty of 1997 went somewhat further, extending the jurisdiction of the ECJ on legislation relating to the creation of an area of freedom, security and justice under the EC Treaty and in the revamped Third Pillar, incorporating provisions relating to human rights in the process of accession of new Member States, permitting suspension of Member States for systematic breaches of human rights (but generally without ECJ involvement in this process[6]), and enacting new specific "human rights" legislative competences, for example in the area of discrimination, but not going so far as to provide a general human rights competence. In addition, the Community has actively pursued aspects of human rights protection in the context of external relations more generally. We can see, therefore, that there has already been considerable movement on human rights issues, stopping short, however, of an enforceable European Community Charter of rights.

In Opinion 2/94, the ECJ considered the issue of Community accession to the ECHR and decided that a Treaty amendment would be necessary before the Community could accede. The ECJ accepted the important role of fundamental rights within the EC legal order whilst refusing to allow the use of existing Treaty provisions to circumvent the need for a Treaty revision, thereby putting the emphasis on the need for a major political initiative -- a partial reason explaining the current debate.

A particular feature of the way the debate over an EU Charter of Fundamental Rights has developed has also been the importance of reports by independent committees, appointed by the Commission or encouraged by it, in preparing the way for new initiatives (not least the current Charter). Most recently, in the context of the new human and social rights initiatives, we can identify the important role played by the Comité des Sages[7] in 1996 before the Amsterdam Treaty. In considering the issues raised by the Charter, therefore, it is important to bear in mind that two further influential projects reported on the issues involved during the latter part of the 1990s, prior to the process of drafting a Charter. The first, arising from a project funded by the Commission at the European University Institute in Florence, resulted in the adoption of a "human rights agenda" by another Comité des Sages,[8] and the publication of a detailed report by a group led by Professor Alston at the European University Institute in Florence, on which the "agenda" was based. Most recently, a further Commission-appointed group, led by Professor Simitis of Frankfurt, reported in 1999, recommending a way forward on the issue.[9] According to Búrca, however, “[t]he German presidency was decidedly unenthusiastic about many of the substantive suggestions which were made in the first and more detailed of the two reports (for example the setting up of a specific Commission directorate with responsibility for human rights, or the establishment of a human rights monitoring centre …) but was attracted to the theme of

[6] See Nice Treaty.
[7] For a Europe of Civic and Social Rights: Report by the Comité des Sages chaired by Maria de Lourdes Pintasilgo (1996)?
[8] Leading by Example: A Human Rights Agenda for the European Union for the Year 2000: Agenda of the Comité des Sages and Final Project Report (1998).
[9] Affirming fundamental rights in the European Union: Report of the Expert Group on Fundamental Rights (1999).

the second report, which focused on the perceived need for an E.U. Bill of Rights."[10] In part, it appears that this was part of a continuing German concern about the status of the fundamental rights in the German constitution vis-à-vis as compared with EC/EU law.

Alongside these developments, sometimes in tandem, sometimes separately, came an increasing emphasis on social and equality rights, particularly in the workplace. This began, of course, with the inclusion of Article 119 on equal pay between men and women in the original Treaty of Rome. It continued with the development by the ECJ of an emphasis on equality between men and women at work in the 1970s, and proceeded with the development of various legislative initiatives by the European Commission. The Single European Act of 1986 extended the legislative competence of the Community in the area of worker rights and permitted qualified majority voting in Council, albeit only for health and safety measures. In 1989, all Member States, except the United Kingdom, promulgated a Community Charter of the Fundamental Social Rights of Workers, although this was not legally enforceable. The Maastricht Treaty adopted further provisions in Title III of the European Community Treaty, and established a Social Protocol that enhanced further legislative competence in this area (except with regard to the United Kingdom). The Amsterdam Treaty brought the so-called "opt-out" by the United Kingdom to an end and established a revised and expanded competence to develop social-policy making which would bind all 15 Member States in common. Arising from this, the Community has adopted the framework directive on employment discrimination and the directive on racial discrimination, for example. Given these extensive human rights developments, we can see that the relationship between Community law and human rights has been a long-standing one.

Why is this history relevant to the future of the Charter? The reason lies not simply in the tendency we all have to use history as scene setting, but also because how we explain the past to ourselves profoundly seems to influence how we feel we should act in the future.

The orthodox story of the history of human rights protection in the European Community involves several interrelated elements. There is a perception of the European Convention on Human Rights and its institutions as set apart from the movement for economic and political integration, culminating in the formation of the European Economic Community. The story is told of the European Convention on Human Rights as a regional manifestation of an internationalist human rights movement stalled at the United Nations because of the Cold War. There is a view of the European Court of Human Rights as advancing the cause of universal human rights in this regional context setting aside any other political agendas. In contrast, there is much attention paid to the role of the European Court of Justice, driven by its integrationist vision, acting pragmatically to stave off a growing revolt among national constitutional courts at the doctrine of the supremacy of Community law by "finding" human rights among its general principles.

But there is a different story that has been told. Some remind us that the movement advocating what became the European Convention on Human Rights saw it as part of, and not separate from, the European integration movement. We are told that the movements had many of the same people central to them.[11] We see the European Court of Human Rights, in applying a pragmatic conception of human rights, draws heavily on what it perceives as a *European* consensus in arriving at its decisions, and does not view its role simply as the branch office of the United Nations. We are told that the European Court of Human Rights is the forum for

[10] Gráinne de Búrca, The drafting of the European Union Charter of fundamental rights, 26 European Law Review (2001), 126, at p. 129.
[11] Brian Simpson, Human Rights and the End of Empire (OUP, 2001).

continuing a deliberative debate over the nature of human rights, rather than an institution for declaring an already manifest, clear vision of human rights.

Just as a more pragmatic version of the European Court of Human Rights can be identified, so too a less pragmatic view can be offered of the European Court of Justice's interpretation of Community law's general principles as including protection of human rights, viewing it as the natural culmination of the importance the "Founding Fathers" of the Community attached to human rights from its very beginnings. According to Menéndéz, fundamental rights "have always been at the heart of the European project and … the explicit affirmation of rights comes hand in hand with the transformation of the Communities."[12] Without challenging the orthodox history he offers "a less court-centred explanation of the leading cases … based on a characterisation of the Luxembourg judges as responding to *clear signals* coming from the political process."[13] Seen from this perspective the Court used their interpretative abilities "to crystallise an emerging political consensus."[14] Seen from this perspective, the role of the European Court of Justice seems more similar in some respects than the orthodox history of the European Court of Human Rights would lead us to believe.

One's reactions to several of the options considered subsequently are likely to be influenced by one's reading of this history. Two issues, in particular, are sufficiently important to highlight immediately. First, has the development of human rights in Community law been ECJ-initiated and controlled, or was it developed by the ECJ in *response* to signals from the representative institutions? Second, can the ECJ be trusted to interpret human rights "properly", or does it simply advance human rights when it fits its agenda of European integration, and ditch them when it does not? Which reading of history one adopts will significantly affect one's view of how the Charter will and should develop, because it will affect the view one takes of the future role that the ECJ is likely to take. If the incorporation of human rights into Community law is seen as a pragmatic, policy led process by the Court, then one set of conclusions are likely. If, on the other hand, the incorporation of human rights is seen as a partnership between the Court and the other institutions genuinely drawing out fundamental principles on which the Community is built, then a different set of conclusions on future policy is probable. Equally, if the European Court of Human Rights is seen as doing a very different job from the ECJ, then that is likely to lead to a different reaction to several options than if their roles are perceived to be somewhat similar.

Part II

What we have at the moment

As Telkens perceptively reminds us, "[t]he drafting of a text of law, all the more so of a text of fundamental rights, is the result of a subtle reasoning between precision and intelligibility, concision and extension."[15] The English language text of the Charter contains fewer than 3,500 words. It is elegantly conceived, beautifully drafted, and a masterpiece of compromise and ambiguity. I shall concentrate here only on the latter elements. To understand the nature of

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[12] Agustin José Menéndéz, Chartering Europe: The Charter of Fundamental Rights of the European Union (Arena Working Papers, WP 01/13) (available at: www.arena.uio.no/publications/wp01_13.htm), p. 1.
[13] Menéndéz, p. 2 (emphasis in original).
[14] Menéndéz, p. 4 (emphasis in original).
[15] Françoise Tulkens, Towards a Greater Normative Coherence in Europe/ The Implications of the Draft Charter of Fundamental Rights of the European Union, 21 Human Rights Law Journal 329 (2000), p. 331.

these compromises and ambiguities, it is useful to examine a little more systematically what different interests saw a Charter as furthering.

The Charter could address the expansion of the Community to encompass the former Communist central and eastern European states where human rights were seen to need underpinning.[16] The Charter could address the perceived need to secure the greater effectiveness of existing measures in the social rights field. The developing rhetoric of a "peoples' Europe", emphasising a common European citizenship, should result in a more formalized statement of citizens' rights. The fear in some quarters that the ECHR institutions might prove unable to handle the effective implementation of human rights in Eastern Europe and might become weakened more generally as a result meant that the Community should have its own Charter of Rights and not be dependent on the ECHR. The ECHR was, in any event, somewhat out-dated and in need of a revamping which would be impossible within the Council of Europe, given its decision-making structure. The need to increase the legitimacy of the increasing competence of the Community/Union in areas where human/social rights implications arise, such as in the context of justice and home affairs,[17] and monetary union (with its potentially adverse effects on social spending),[18] especially as more issues became subject to majority voting, emphasised the need for a clear statement of rights that could be seen as counterbalancing greater economic integration. The human rights position in some existing Member States was seen as unstable, with growing right-wing parties and increasing racism; an EC/EU Charter of Rights could provide the basis for concerted action at the Union/Community level against these developments. There was an appearance of inconsistency and double standards as the Community/Union required adherence to human rights norms by applicants for membership and other third-party states to which the Community/Union has not clearly bound itself. There was an uncertain legal basis for existing human rights activity by the Commission and Council; a report had noted the "embarrassing realisation that in this field the Community has had to act by stealth and questionable constitutional means"[19].

The globalisation of the European economy was seen by some as leading to adverse social effects inside and outside the Community, contributing to the demand for social rights to be better protected; the Charter could address this problem. A Charter of Rights could deal with the apparent inconsistency of different human rights standards across the three Pillars of the Union. There was a lack of clarity under the existing Treaties as to the status of the ECHR, the Council of Europe Social Charter, and the ILO Conventions, with different human rights norms being given apparently different weights in different contexts; a Charter could bring some greater consistency to treaty interpretation. The absence of one single source that individuals could point to as containing a coherent, integrated and explicit list of rights applicable in the Community context was a major failing when the Community/Union was moving towards conceiving itself as a "constitutional" unit. There was a perceived need to underpin the effectiveness and legitimacy of the ECJ's human rights jurisprudence, if it was to continue to provide an effective check on administrative and legislative activity at the Community level.[20]

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[16] Editorial Comments: The EU Charter of Fundamental Rights still under discussion, 38 Common Market Law Review (2001), 1, pp. 5-6.
[17] Tim Eicke, The European Charter of Fundamental Rights – unique opportunity or unwelcome distraction, [2000] European Human Rights Law Review (2000), 280, p. 285.
[18] Aalt Willem Heringa, Editorial: Towards an EU Charter of Fundamental Rights?, 7 Maastricht Journal of European Law 111 (2000), p. 285.
[19] Final Project Report, p. 30.
[20] António Vitoríno, The Charter of Fundamental Rights as a Foundation for the Area of Freedom, Security and Justice, Exeter Paper in European Law No. 4 (Centre for European Studies, University of Exeter, 2001), p. 13.

There was, in fact, a plethora of different justifications brought forward at various times. It will be clear that, taken together, they often point to entirely different models of a human rights Charter. So too, there were also clear countervailing pressures limiting the type of Charter that would develop,[21] which complicated matters further. Some saw the Charter as a potential threat to national interests and economic growth. Others saw it as an undesirable example of the creeping constitutionalization of Europe. Yet others worried about the effects of the Charter on other organizations and systems, in particular that of the European Convention on Human Rights. Some considered it as intending to give, by stealth, greater competence to European institutions in fields they had previously been excluded from. Arising from these concerns several limits emerged in the drafting of the Charter. The Charter should reflect adequately existing national constitutional traditions, the need for subsidiarity, and the desirability of diverse conceptions of human rights. The Charter should not be legally binding. The Charter should not threaten the ECHR system. The Charter should not expand the range of rights protections already guaranteed.[22] The Charter should not place unacceptable limits on the need to continue the liberalisation of the European and national economies.

The need for compromise was, therefore, at the heart of the drafting process and is evident both throughout the text of the Charter,[23] and in the ambiguity of its "promulgation". The nature of the compromise can most clearly be seen in the Preamble,[24] but as many commentators have implied since its promulgation, the Charter text itself is also all things to all people. It is not legally binding, but has legal effects, and it was drafted "as if" it were legally binding. It updates the European Convention on Human Rights, but is consistent with it.[25] It gives pride of place to the ECHR, but doesn't exclude many of the other relevant European rights texts. It doesn't mention the jurisprudence of the European Court of Human Rights in the text of the Charter, but it does in the Preamble.[26] There is a detailed explanatory memorandum prepared for the Presidium that is of considerable importance in understanding the text of the Charter, but it is not authoritative. The Charter places considerable importance on the role of national constitutions, but doesn't give them over-riding importance. It is European in orientation, but

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[21] See, e.g. Elizabeth Wicks, "Declaratory of Existing Rights" – The United Kingdom's Role in Drafting a European Bill of Rights, Mark II, [2001] Public Law 527, on the negotiating position of the United Kingdom.

[22] De Burca, p. 130.

[23] Koen Lenaerts and Eddy Eddy de Smijter, A "Bill of Rights" for the European Union, 38 Common Market Law Review 273 (2001), p. 281-2.

[24] "The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice. The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment. To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter. This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights. Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations. The Union therefore recognises the rights, freedoms and principles set out hereafter."

[25] Vitorino says that the Charter innovates "by simplifying, modernising or supplementing some of the instruments it takes a points of reference", p. 20.

[26] Reflecting a compromise over a divisive issue, see Lenaerts and De Smijter, p. 296.

recognises the importance of human rights as international and universal. It accepts the indivisibility of political, civil, economic, social and cultural rights, but it appears to distinguish significantly between them in the way they are drafted, in the ambit of the exceptions that apply to them, and in their enforceability. It is primarily addressed to the Community/Union institutions and the Member States when "implementing" European law, but it includes rights that only Member States have responsibility for. It places the citizen at the heart of European integration, but it would appear to accept the very limited access to European courts that European law currently allows. It reflects the fundamental rights jurisprudence of the ECJ, but it restates it. It acts as a "showcase" of existing rights, but is neither a complete exposition of the rights the Treaty requires the Community to uphold, nor limits the discretion of the ECJ to develop further rights.[27] And so on.

Even the process by which the Charter was drafted was a considerable compromise. It was (especially by comparison with the Intergovernmental Council decision-process) extraordinarily open and participative, with almost instantaneous access to papers on the Internet and open meetings at which civil society could press its views. We can see the process of drafting the Charter, therefore, as an open and inclusive process, one that brilliantly combined representative democracy with unparalleled access to the process of decision-making and more participatory forms of democracy?[28] However, we can also view the drafting of the Charter as one where a relatively narrow set of interests dominated proceedings in practice, and the Secretariat (drawn from the Council of Ministers bureaucracy) pulled the strings. Indeed, de Búrca concludes that, "this was not to be a genuinely participative process but one which, albeit deliberative in nature, was to be composed only of institutional representatives from the national and European level."[29] She later points to "the secretariat to the convention body, which was drawn mainly from the general secretariat of the Council." as "[o]ne of the less obvious but nonetheless significant influences on the drafting of the Charter". [30]

The point of this part of the paper, is, I hope, already apparent: the question of what we should do with the Charter depends significantly on what we think the Charter is currently, what we think it is for, and the legitimacy of the drafting process. In many significant respects we do not really know what it is, there are significant differences of opinion as to what it is for, and there are very different views as to how to react to the process of drafting. We are, therefore, in the position of considering options, and perhaps even shaping the agenda for future debate, in a state of considerable uncertainty about the implications of the Charter as currently drafted, and lacking a consensus on its democratic legitimacy, but that is hardly a novel state of affairs in the development of the Community.

Part III

Options for the future

In this third part, I will sketch out some options for the future of the Charter, concentrating in particular on the run up to the 2004 European Council. These options are intended neither to be

[27] Lammy Betten, The EU Charter of Fundamental Rights: a Trojan Horse or a Mouse?, 2001 International Journal of Comparative Labour Law and Industrial Relations 151, p. 161.
[28] Editorial comment, p. 6
[29] de Búrca, p. 131.
[30] de Búrca, p. 134.

comprehensive, nor to be "politically realistic". Nor should readers assume that I support any of these options. They are intended, rather, to stimulate discussion.

1. Redrafting the Charter?

One issue that has not yet surfaced as a serious possibility, to my knowledge, is whether the text of the Charter should be comprehensively redrafted. There is something to be said for this. Since its promulgation, there has been a very substantial academic literature on almost every aspects of the Charter, and more is sure to appear in the next few months and years. It would be hubris of the highest order to imagine that the drafters of the Charter anticipated and considered how to deal with every issue. Although, in many respects, the Charter is drafted to be intentionally ambiguous, points of unintentional ambiguity may well be identified in the future. Should we regard the Charter as amounting, therefore, to "work in progress", and conceive of the possibility of redrafting it after a sober second look? We need to consider this issue seriously because I assume (perhaps wrongly), that the 2004 European Council could redraft it itself as part of the process of horse-trading that may emerge when the status of the Charter comes to be considered. If this is correct, then it may well be more desirable to consider an alternative approach, perhaps reconstituting the "Convention" to consider specific issues referred to it by the Council, the Parliament and the Commission. The alternative, of course, to redrafting, in whole or in part, is to decide that the Charter text is, in practice, as good as it is going to get and that we must decide the existing Charter's future status taking it is a whole, and not allow ourselves the luxury of envisaging a redraft, leaving the resolution of ambiguities and uncertainties to future judicial interpretation.

2. Legal status?

One of the few unambiguous statements that can be made about the legal status of the existing Charter is that its current legal status is unclear. In particular, there is evidently a significant debate taking place within the European Court of Justice on the extent to which the existing promulgated Charter does have legal effects, and if so, of what kind and extent.[31] Under certain conditions, therefore, the issue of legal status could become moot, as the Commission indicated the Communication it issued in the closing days of the drafting of the Charter.[32] The Court may have confirmed the legal status of the Charter in such a way that it would appear to be pointless to resist formal incorporation into the treaties. Some have already anticipated this development. "In practice," says Vitoríno, "the only questions that matter are when and how the Charter will be incorporated in the treaties."[33] One option, therefore, on the issue of legal status, is simply to leave it to the ECJ and allow that body to decide what weight, if any to give the Charter, even after the 2004 Council. In other words, the legal status of the existing Charter could simply be delegated to the Court.

In some ways that is an attractive option, in particular because it heads off confrontation between two (currently) significant group of Member States, one of which wants the Charter to be accorded a formal legal status by a future European Council, and another bloc which most definitely does not. An argument against this approach comes from a perception that one

[31] Betten, p. 158, says that the significance of the opinions of the Advocates General is "not yet clear".
[32] Communication from the Commission on the legal nature of the Charter of fundamental rights of the European Union, COM (2000) 644 final of 11 October 2000. This position is broadly supported by Lenaerts and De Smijter, p. 299.
[33] Vitoríno, p. 16.

function of the Charter is to control the ECJ in how it develops its "general principles" jurisprudence;[34] leaving the status of the Charter to the Court seems a funny way of "controlling" it. In considering this argument, it may be useful to distinguish between two different senses of how the Court may (or may not) be controlled. Control might be desired either in terms of when the Court applies its fundamental rights jurisprudence (in which case leaving the status of the Charter open does little to control the Court), or control might be desired in terms of the content of the rights contained in the Court's jurisprudence (in which case, the Charter may well serve to control the Court, even if its legal status is left open).

Assuming, however, that the issue of legal status is still a live issue and has not been overtaken by decisions of the ECJ, and assuming further that the European Council in 2004 doesn't decide explicitly or by default to leave it to the ECJ, should the Charter be accorded formal legal status by a decision of the European Council, and how might this be achieved? In part, this depends on what effect a purely "political" Charter is likely to have. For some, the potential political significance of the Charter is considerable even without formal legal effect, in that by setting out for the first time the list of rights that the Community aspires to, it increases the chances of the further democratic refinement of these rights", and gives us "the opportunity to further explore the potentiality of rights standards through transnational political action."[35] In part, therefore, our reactions to whether we think a purely political Charter is useful will depend on whether we think the Charter will, even without a legal status, have a beneficial expressive function. If not, then we are much more likely to want a firm legal basis for the Charter, not only because of the stronger expressive message this may convey, but also because we want the Charter to be instrumentally valuable in ways that a purely political Charter cannot accomplish. And if it is to be accorded legal status, then we shall have to consider how, technically, this is to be accomplished.

3. Role of the European Court of Justice?

If the Charter is to be justiciable, within which forums should adjudication take place? Assuming, for the moment, that the Community/Union does not accede to the ECHR, there appear to be two options. The first is to rely on the existing Community courts, in particular the European Court of Justice. Tulkens has argued, however, that "in the interests of ensuring its credibility, the protection of fundamental rights must be achieved under the control of an international institution acting as a third party. The [ECJ] can not exercise this control when Community acts are concerned, as it belongs to the Community. The external control is part of the requirements of contemporary public international law."[36] A second option is to consider the possibility, as the Comité des Sage discussed, that there might be a new additional court dealing with human rights questions specific to the Union/Community, perhaps made up of "non-permanent judges from the Member States' constitutional or supreme courts".[37] Suggestions have, of course, been made by some that a new judicial institution could be established with a much wider jurisdiction, to decide cases about whether the EC has overstepped the bounds of its attributed competence more generally. This might be a means of circumventing the climate of mistrust that seems to be clouding the ECJ in such sensitive cases and might have a role to play in the fundamental rights field too. On the other hand, the potential for severe jurisdictional conflict between the

[34] Menéndéz, p. 9
[35] Menéndéz, p. 9.
[36] Tilkens, p. 331.
[37] Comité des Sages, p. 10.

two judicial institutions is ever present.

If the ECJ is to be involved, then we might also consider more specifically the approach that the ECJ should be encouraged or required to take in human rights interpretation, for example the approach the ECJ takes to explaining its reasoning in such cases. The ECJ continues to give single judgments, without dissents or concurrences. This seems to assume that there is indeed a single right answer, or at least, that the court should give the impression that there is such a thing. In other jurisdictions, dissenting opinions perform the function of airing alternative and opposing approaches, perhaps particularly in human rights issues, so that the evolution of human rights interpretation becomes on open and dynamic process. The German Federal Constitutional Court, for example, changed its procedure to include dissents. In the case of the ECJ, permitting dissents would also allow the majority decision to be less of a compromise between conflicting viewpoints, and perhaps be more rational, internally consistent, and clearer as a result. Should dissenting and concurring opinions be permitted in order to open up the process of reasoning on human rights issues in the ECJ? Or does the existing system protect judges from pressure from their own member states, in whose hands their renewal lies? What other implications would a judicially enforced Charter have on aspects of the Court system? Should ECJ judges be appointed for fixed non-renewable terms, as is the case for judges in the German Federal Constitutional Court, or until retirement as in the United Kingdom? Should there be greater democratic participation in the selection of judges for the ECJ, perhaps with the European Parliament having a role? These issues have, of course, been discussed in the context of the ECJ's role in interpreting EC law generally. The question we need to consider is whether a significantly increased role in interpreting human rights norms should lead us to reconsider the approaches we have taken to these issues in the past.

4. Standing?

Assuming that the Charter is given some formal legal status, then the issue of legal standing to enforce the Charter becomes a pressing one. If the Charter were inserted in the Treaty, and leaving aside the issue of how the Charter is to be enforced in the context of Union law, I assume that the primary enforcement procedures that would then come into play would be the traditional mechanisms of Commission infraction proceedings against a Member State infringing the Charter when implementing Community law, action the institutions against each other before the Court for breach of the Charter, and use of the preliminary reference procedure from the Member States' courts where the issue of the compatibility of Member State action when implementing Community law and Community legislation with the Charter could be referred to the ECJ. The issue arises, however, as to whether *individuals* should be able to go *directly* to the Community courts alleging an infringement against a Member State or one of the Community institutions. Currently, the standing of an individual before the Community courts has been perceived as very limited.[38] Were the Charter to be given legal effect by being incorporated in the Treaty, should the standing requirements be broadened, for example, by adopting the ECHR test of whether the person taking a case is a "victim"?[39] Although only an apparently technical legal question, this issue goes to the heart of the extent to which the Charter should be viewed as shifting what Engle has called the "political opportunity structure" within the Community.[40] Do we want to increase the opportunity for individuals to engage with

[38] Eicke, p. 291. See, in particular the article by Jo Miles, Cambridge Law Journal.
[39] Eicke, p. 291.
[40] Christoph Engel, The European Charter of Fundamental Rights: A Changed Political Opportunity Structure and its Normative Consequences, 7 European Law Journal (2001), 151.

these issues directly before the Court? And what effect would that have on the existing relationships between Member States and the Community institutions, and between the Community institutions?

5. Human rights policy?

Irrespective of whether the legal status of the Charter is formalised by Treaty amendment, and made justiciable, the question arises as to how far non-judicial mechanisms of implementation should be adopted by the Union/Community. The Commission has already provided that all legislation be screened or audited for compliance with Charter rights.[41] "Mainstreaming" is already accepted as a central strategy for achieving equality between men and women at EU level, however much in practice it leave much to be desired. How far should similar proactive obligations be placed on all EU institutions? Another relevant issue is whether there should be bodies outside the existing institutions given the task of monitoring the implementation of the Charter, and drawing attention to potential breaches.[42] In domestic contexts, there is now increasing use of human rights commissions with their own powers of investigation. These play a more proactive and positive role than courts traditionally play in the enforcement of human rights. Indeed the United Nations High Commissioner for Human Rights has the role of promoting the Paris Principles, a set of guidelines setting out best practice in the composition and powers of such bodies. Should a European Human Rights Commission be established with such functions as regularly auditing compliance with the Charter by member states acting within the sphere of Union/Community law and EU institutions?

More broadly, should the treaties now be amended so that the furtherance of the human rights becomes a formal aim of Community policy? The time has probably passed when Opinion 2/94 can be seen as not ruling out the possibility of all kinds of legislation on human rights under the current Treaty but simply ruling out accession to the ECHR without a Treaty amendment.[43] If so, and if a human rights policy is desired, then an amendment to the Treaty seems necessary. Weiler argued, before completion of the Charter, that a more important initiative, "would be a simple Treaty amendment which made the active promotion of human rights within the sphere of application of Community law one of the policies of the Community alongside other policies and objectives in Article 3 and a commitment to take all measures to give teeth to such a policy expeditiously."[44]

6. Enforcement of "solidarity" rights?

The Charter is a major innovation in Europe human rights treaty drafting in bringing political, civil, economic, social, and cultural rights together into one document. It is well known that some Member States were deeply uneasy about including many of what became the "solidarity" rights in the Charter, and compromises to meet these concerns are evident in the texts of these provisions. More broadly, however, some have seen the decision by some governments not to press for a formal legal status to be accorded to the Charter as the ultimate compromise necessary to ensure acceptance of these solidarity rights in the text of the Charter at all.

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[41] Sec (2000) 380/3.
[42] Eicke, p. 291.
[43] See P. Alston and J.H.H. Weiler, "A Human Rights Agenda for the Year 2000" in The E.U. and Human Rights.
[44] J.H.H. Weiler, Editorial: Does the European Union Truly Need a Charter of Rights?, 6 European Law Journal (2000), 95, p. 97

Several questions arise about the drafting of the solidarity rights, and the conclusions we should draw from that drafting. In particular, to what extent does the Charter accord the provisions included in the part headed "Solidarity" the status of rights at all? There was some discussion in the literature on such rights outside the context of the drafting of the Charter about whether social rights are appropriately included in such bills of rights, whether this would be best done by setting out the detailed rights in the bill of rights itself, or by setting out a goal to be achieved and imposing positive responsibilities to enact specific legislation. In particular, there was discussion as to which rights should be regarded as having an immediate effect, and which should be subject to further detailed exposition (either at the national level or the regional or international level). Some rights, particularly social rights are regarded by some as less susceptible to individual adjudication than civil rights. Social rights are sometimes seen as fundamental principles that must be put into effect by specific policies relevant to a particular country against the backdrop of its economic and social development, rather than as "rights".

The approach the Charter takes to drafting, as we have seen, attempts to balance the impulse to the indivisibility of all rights, with concerns about workability, and over centralization. Several of the provisions in the Solidarity section of the Charter are subject to heavy qualification and are often dependent on how each Member State has legislated in the area. More confusingly, the Charter refers to a distinction between "rights" and "principles" but does not indicate on its face which provisions fall into which category.[45] Some have interpreted the distinction, however, as implying that the solidarity-type rights qualify only as "principles" and would thus not be justiciable in a future, legally enforceable Charter. Others disagree, viewing the rights as currently drafted as justiciable. For Betten, for example, the only issue is whether such justiciability would survive the Charter being formally being given legal effect, not whether the Charter is currently drafted to permit this.[46] A key question for the future, therefore, is what we should do about this uncertainty. Again, do we leave this to judicial determination on the basis of the existing text, or do we envisage some further language giving greater guidance on the issue?

However, a negative response to the question of whether should they be enforced as individual rights by litigation before courts far from exhausts the possibilities for enforcement. A negative answer to this question may in part explain why the European Social Charter is enforced, not by individual rights of complaint, but by an obligation on contracting parties to submit reports on their implementation of the Social Charter. Governments are required to carry out a regular audit of their achievements (or lack of achievements) under specified heads and to account for themselves before an independent committee. This reporting procedure is not dependent on an individual to draw attention to abusive practices. Would an equivalent reporting mechanism within the EC/EU be a useful device? Even in the absence of individual litigation, should social rights be "enforced" by imposing responsibilities on Member States (regarding their implementation of Community/Union law) and Community institutions to report annually to a specially constituted committee? Is the type of reporting procedure envisaged in the European Employment Strategy based on annual Guidelines an appropriate model? How far, in particular, might proposals in the White Paper on governance regarding benchmarking be usefully developed in this context?

What procedures would be required to make such a reporting requirement effective? Does the reliance on governments to produce such reporting information mean that there is an absence of independent accounts of the facts? (An affirmative answer led to the inclusion in the

[45] Vitoríno, p. 25. See also, Editorial Comment, p. 3-4.
[46] Betten, p. 156.

European Social Charter (ESC) context of an additional protocol providing for a system of collective complaints, according to which European and national trade unions and employers' associations, as well as authorized national non-governmental organizations, can lodge complaints against a Contracting Party.) Should a similar provision be incorporated in the context of a EU Charter? Would a EU procedure benefit from including a remedial aspect to the reporting procedure, requiring Community institutions, for example, to submit specific plans for remedying defective compliance, and allowing monitoring of such plans? What should be the composition of a body responsible for receiving reports and complaints, and its relationship to decisions of the existing Council of Europe ESC committee? In this context, it would be useful also to consider the possibility of overlap with the United Nations human rights treaties reporting mechanisms. Does this overlap constitute a potential problem, if only in terms of efficiency? Should attempts be made to try to integrate reporting/audit mechanisms in order to avoid unnecessary duplication?

7. Relationship to ECHR

As a result of a series of contentious debates, the Charter seeks to preserve the role of the European Court of Human Rights as the authoritative interpreter of the rights in the ECHR. The Charter, in effect, requires the Community courts (if the Charter were made enforceable) to interpret rights in the Charter that "correspond" to rights in the ECHR as having the equivalent meaning to that decided by the European Court of Human Rights. The issue of which rights in the Charter are equivalent to those in the ECHR is not set out in the Charter, but in the explanatory memorandum commissioned by the Presidium.[47] Lacking authoritative status, however, the question becomes whether, were the Charter to be made formally legally enforceable, this list of "corresponding" ECHR/Charter provisions should be given a more authoritative status.

Rather like the spectre at the feast, however, a much more substantive issue continues to haunt discussion of the future status of the Charter: whether the Union/Community should accede to the European Convention on Human Rights. Rather less prominent, but also worth considering, is the related question of whether the EU/EC should accede to the European Social Charter.[48] I shall concentrate here only on the former issue, without denying the importance of the latter.

We have been reminded of the difficulties that a proposal to accede would have, not only in the context of EC Member States' unease, but also the potential difficulties that the requirement of unanimity to amend the European Convention on Human Rights could cause.[49] Although many forests have been felled to provide the paper on which past discussions on these issues have been printed, and no attempt here is made to fully reflect the wide range of options available on these issues, it may be worth mentioning two issues arising from possible accession that continue to attract some attention in the recent literature, relating specifically to the relationship between the European Court of Justice and the European Court of Human Rights. The problem identified is how to ensure, after accession, that the autonomy of Community law remains intact, whilst ensuring that the Convention continues to be interpreted consistently.

Some have suggested that two options are worth considering:[50] the use of the advisory opinion mechanism that already exists in the European Convention on Human Rights, possibly

[47] Convention document CHARTE 4473/00.
[48] See Betten.
[49] Heringa, p. 114.
[50] Tulkens, p. 331.

combined with a variation on the preliminary reference procedure, resulting in a procedure whereby the ECJ could refer a question relating to the ECHR to the Court of Human Rights, which would then give an advisory opinion to the ECJ on the meaning of the Convention, which the ECJ would then apply. More problematic, and less discussed, is the sensitive issue of which judges of the Court of Human Rights should sit on cases dealing with the Community/Union and, in particular, whether judges from countries that are not members of the Community should sit on cases arising from the application of Community law. In this context, the possibility has been raised that the membership of the Court of Human Rights dealing with such cases is open for discussion.

This latter issue is but one element in a larger concern about the stability of the ECHR institutions and approach in a situation where it has expanded its jurisdiction so rapidly and significantly to the east. As Tulkens notes,[51] there are fears about the future development of the Convention, including the risk of the lowering of standards of protection by the Court of Human Rights in order to accommodate new states. Is this a realistic fear (Tulkens does not think so)? And if it is, what implications does it have for the future of the Charter?

8. Effect on Member States?

The role of the Charter, as drafted, is substantially to constrain the Union/Community institutions and Member States "implementing" Community/Union law. The Charter is not addressed to Member States more generally. It is not, directly at least, addressed even more broadly to individuals and other legal entities. The function of the Charter, then, in seeking to constrain only the Union/Community (broadly defined), is largely to give greater specificity to existing legal developments. If the role of the Charter were substantially to address Member States and other legal entities as well as the Community institutions, then the Charter would be seen as involving a much greater shift of power and responsibility to Community/Union institutions. So the scope of application to the Member States is a crucial question, and here the drafting of the Charter and surrounding documentation seems, again, to send somewhat conflicting messages.[52]

Is the application of the Charter to Member States when "implementing" Community law the same as the existing (evolving) ECJ jurisprudence on the application of fundamental rights? The actual language of the Charter seems to indicate that the Charter is narrower in its application to Member States than the existing ECJ jurisprudence; the explanatory memorandum accompanying the Charter seems to indicate that the intention was to reflect (at least some) existing ECJ jurisprudence that is broader. Should this issue be resolved by further drafting, or simply left to the ECJ, if the Charter is given a formal legal status?

Part IV

Some deeper issues underlying debate about the future of the Charter

These specific, often apparently rather technical debates, mask a deeper set of issues. What role do we envisage "rights" playing in the construction of Europe? Do we think of "rights" as part of the set of free-market liberal principles and freedoms around which the EEC, EC and EU were successively constructed, and on the basis of which the EU continues to develop? Or do

[51] Tulkens, p. 329.
[52] De Burca, p. 137.

we think of "rights" as essentially a counter-balance to free-market liberalism and freedoms, and as such part of the further development and underpinning of the European social model? Or do we think of "rights" primarily in the context of a notion of European citizenship and civic society, with “rights” playing a “constitutional” role in furthering European integration. This part of the paper begins to explore some of these deeper questions, albeit briefly.

1. “Integrationist” function of the Charter of Rights?

Should we see the debate about the role of the Charter as an part of an essentially contested *constitutional* discussion that arises from the continuing debate over the depth of future integration? Viewing the future of the Charter within this discourse is complicated, in part because the argument that rights can have this integrationist effect is formulated in different ways.

One formulation goes something like this: Nationalism embodies a strong element of narrow group identity and the existing treaties encapsulate this in preserving the Member States in a central role in the development of the Community. The aim of integrationists is to replace this with a broader European identity. The function of a Charter of Rights is partly constitutional, in that, like other modern national constitutions, it attempts to identify the basic values that Europe is committed to. Recognising a common set of rights in a document that all can commit to, at least in part, is seen as an important element in building a new political society, providing the possibility at least of common identification by all with the basic document, if not with the institutions. From this perspective it is important that the rights identified should not be too narrow in their focus or prove ineffective in practice. The narrower the range identified, or the less effective in practice, the less likely it is that individuals will identify with the bulk of rights on the list and hence the integrationist effect will be weakened. The more the rights specified appeal across the existing national communities, and the more effective they are in practice, the more likely it will be that rights can be seen as things that bind the communities together rather than divides them, and those institutions seen to be most closely identified with those rights will indirectly attract greater legitimacy. Particularly where much of the rest of the constitutional structure in Europe is explicitly or implicitly Member State-based, a broad-based list of rights can thus enable a set of common values to identified that transcends the Member State, offering an alternative vision of the future. By setting out a common vision, a shared set of ideals in a Charter of Rights, we enable ownership of an important element of the Community to be shared across communities. Therefore, a Charter covering civil and political rights is likely to lead to more integration and, for that reason alone is to be viewed with favour (or suspicion, depending on your views on European integration). A Charter with *social and equality rights* is even more desirable (or even more to be resisted) because it would be even more integrationist in its effects. A *legally binding* Charter, with social and equality rights is most desirable (or most to be resisted) because it would be most integrationist in its effects.

For others, however, assumptions about the integrationist effect of rights in the European context are exaggerated, unproven, or wrongheaded. From one perspective, rights do not *create* a polity, do not create a common political identity, but rather are expressions of an identity that already exists. If such a polity does not already exist, then the Charter will not help to create it; if such a polity does exist already then a Charter is unnecessary to create it. To either support or oppose the Charter on the grounds that it can increase integration is to assume that the tail wags the dog rather than the other way round. Unless there is an already functioning common political identity, the attempt to inculcate rights will be unsuccessful and so, from that point of view, the debate about the role of the Charter is irrelevant to the debate about

integration. Rights are not constitutive of political identity, in other words, but the other way round. Di Fabio, for whom the problem may go even deeper, puts forward a somewhat different perspective. He warns that a Charter may *weaken* integration under certain conditions. Writing before the Charter was completed, he warns, that if it were to become, "a cornucopia of social promises that are neither judicially enforceable nor legally operational, [it would] harm[] European integration and promote "a centralization of Europe that can potentially over-strain the European Union's bases of legitimacy."[53]

2. The Charter of Rights and the European social model?

As this warning from Di Fabio illustrates, there is another dimension to the debate about the future of the Charter. Setting aside the issue of the relationship between the European Community/Union and the Member States, one of the other most hotly contested issues in European political debate is the future of the "European social model". The debate about the relative balance that is appropriate between social protection and competitiveness, and the ability to sustain substantial social spending in the context of an increasingly globalized economic system, are issues that go to the heart of European political controversy (and indeed globalization more broadly). The debate about the future of the Charter is, in part, bound up with this broader debate. What is the appropriate relationship between rights and competitiveness, and between rights and social policies generally? What, indeed, is the appropriate discourse within which the Charter should be discussed. Is the relationship between fundamental rights and the discourse about competitiveness, employment, and the creation of wealth and prosperity in Europe such that any tensions between rights and competitiveness should be resolved within a single discourse about the core values of the EU as embodied in its foundational Treaties?

To the extent that an affirmative answer is given, the issue then becomes the extraordinarily difficult and contentious one of whether solidarity and equality rights are foundational of economic success, or a drag on it. In this unresolved debate, the Charter becomes a powerful symbol for both sides. On the one hand, some see the Charter's espousal of equality and solidarity rights as a move by those who oppose the development of a liberal, market driven "American" model of economic growth and development. For others, the Charter's inclusion of these rights (if that is what they are) symbolises the acceptance within a foundational document of the Community of the view that such rights provide the *basis* for economic growth and development. Higher social protection, from this perspective, may trigger higher productivity.[54] Without it Europe is on the road to becoming a low skill labour market unable to compete with the sweat shops of the third-world, and unable to compete with the high skill economies.

3. Rights as foundational to European political discourse?

Seen from one perspective, the political vision of the European Union is an ambitious one. It is, essentially, one that places considerable importance on political participation. It offers an

[53] Udo Di Fabio, A European Charter: Towards a Constitution for the Union, 7 Columbia Journal of European Law (2001), 159, p. 161.

[54] See, for example, the arguments advanced by Werner Sengenberger, Labour standards: An institutional framework for restructuring and development, in W. Sengenberger and D. Campbell (eds.), Creating Economic Opportunities: the Role of Labour Standards in Industrial Restructuring (International Institute for Labour Standards, Geneva, 1994), p. 3. See also David Charney, regulatory Competition and the Global Coordination of Labour Standards, (2000) Journal of International Economic Law 281.

opportunity to everyone to engage, to participate in shaping the future of a new political community. It is a truism that one of the major problems with that ideal is that it places a severe burden on everyone to act as a participant in the unfolding political drama. That sounds wonderful in theory, but can it be put into operation? The burdens of participation can seem at times to be overwhelming. How can a single parent who is worried about where the next pair of children's shoes is coming from, or a pensioner suffering from a recurrent and debilitating health problem, or a community activist unable to read and understand the interminable bureaucratic jargon that pours forth from government, or someone who is fearful that she will lose her job if she expresses her unpopular sexual preferences, participate effectively in the political process. It is difficult, time consuming, draining, and potentially risky work-- much better, it might seem, to leave it to our full-time political representatives! But given that our political representatives are engaging in distant institutions in far-off Brussels, Luxembourg and Strasbourg, an inability to participate effectively beyond this means that the vision of a society of fully participating individuals recedes into the far distance.

This is where the debate about rights, particularly solidarity and equality rights, may come in. On the one hand, those who see the evolution of European politics depending, not on mass popular participation, but on elite, representative politics, or who doubt the role of rights in encouraging political participation at all, remain sceptical of the utility of the Charter in this context. Some, indeed, see the relationship between the Charter and political discourse much more negatively. Some see it as containing a “wish list” that, if accepted at anything other than as purely rhetorical would withdraw a considerable of issues from political debate. Others would argue that it is inappropriate to allow courts to give definitive answers to controversial political questions: instead, it should be left to the member states through their own legislatures or constitutional courts to make such contentious decisions. Indeed, this problem has already surfaced within existing ECJ human rights jurisprudence. This problem is not unique to the EU or the ECJ: it clearly confronts all human rights adjudication. However, at EU level it seems to be exacerbated by the absence of a consensus on the legitimacy of integration.

On the other hand, rights, enforceable rights, rights that are secured, are thought by some to be necessary, though not sufficient, to *enable* participation in the political process to take place on an equal, respectful basis, one where there is, if not a level playing field, one which is not substantially biased against any group of participants. Here we come, then, to the relationship between politics and the Charter. For some proponents, the Charter helps to guarantee those rights that enable political participation to take place on a platform of security, equality, and dignity. These rights are not a “wish list” of everything that one would like to see politics deliver without having to engage in politics -- the Charter cannot replace politics, it is not anti-political. Such a Charter, and the rights it contains, is one which meshes with, while at the same time transcending, the *Realpolitik* of European political dialogue.

4. Rights as intrinsically important?

So far, the deeper debates canvassed above link the value of the Charter, at least in part, to wider debates about integration, economic development and political discourse. There is, however, a debate over whether the attempt to place discourse about the Charter in the context of any of these other debates is appropriate. The question raised here is whether the rights contained in the Charter should be seen as justified on consequentialist or non-consequentialist grounds. For those who see human rights deontologically, the Charter is justified first and foremost because it promotes values that are intrinsically, not instrumentally, valuable. To the extent that this view is adopted, then the previous issues are at best side issues. However, a

deontological approach to rights raises other significant questions about the content of the Charter, in particular whether the rights the Charter contains *are* of such fundamental value as to be justified on these grounds. For those viewing the Charter from such a perspective, some of the rights contained appear not to have such importance, such as access to placement services, and the inclusion of these non-intrinsically justified "rights" risks undermining those other rights in the Charter that are clearly justified deontologically, such as the right to dignity.[55]

5. Human rights law as autonomous?

Human rights law raises immensely controversial issues of interpretation. There is often profound disagreement about the appropriate reach of human rights protections. The emotional and political force that an allegation of a violation of human rights now has often adds significantly to the salience of this controversy. In most jurisdictions in which courts play an active role in the legal protection of human rights, there is a significant debate about the extent to which the judiciary is either legitimate or competent in carrying out such a role. In part, this debate focuses on whether the purported distinction between legal and political approaches to human rights is convincing. When a judge interprets a human rights provision in a Bill of Rights, for example, is the judge really interpreting *law*, or making a political judgment? This question goes not only to the issue of the independence of the judiciary, but to the larger question of the autonomy of human rights law itself, its separateness from political and economic forces in the society. If human rights law is not "autonomous" (or relatively so), then the judge interpreting it might be said not to be acting as a judge in the traditional sense, but as a politician. If a politician, he or she has (in democratic societies) no greater ability or legitimacy in doing so than any other political actor, and arguably a good deal less. This goes to the debate over whether a Charter of Rights contributes to or competes with democratic discourse.

There is, however, an additional aspect to the debate over the autonomy of human rights law, and this relates to the autonomy of such law vis-à-vis other areas of legal interpretation. An equivalent debate outside the area of Community law may help to illustrate the point. A question that that arisen in the context of the debate over whether a "social clause" should be included in the GATT is whether the dispute settlement bodies in the WTO should be put in the position of interpreting international human or labour rights questions in the context of adjudicating on the meaning of the GATT agreements. One argument is, of course, that such clauses should not be included because they "corrupt" the GATT system. Another objection that has been raised to this development, however, is from those who come from a human rights and labour rights perspective. Some of them also view the idea of the WTO dispute settlement system interpreting international and labour rights provisions as unacceptable, but because these rights should only, or primarily be interpreted by international human or labour rights bodies themselves. To permit other international bodies to interpret them, they say, would be to undermine the need for these types of provisions to be interpreted autonomously and to risk introducing an unacceptably economistic approach to rights interpretation.

Translated to the European context, do we view the European Court of Justice as an appropriate body to adjudicate on the European Convention on Human Rights if the European Court of Human Rights is largely excluded from directly considering the issues? For those who consider human rights law as autonomous, then the answer tends to be "no", or at least "not without significant changes to the ECJ". From this perspective come arguments about the potential for special EC human rights courts, reference procedures between the ECJ and

[55] See, for example, Wicks, p. 534-5.

European Court of Human Rights, and the need to safeguard the interpretations of the Court of Human Rights. On the other hand, those who do not regard human rights law as autonomous but simply as law, tend to have less fear of a significantly expanded human rights role for the ECJ.

6. Coping with ambiguity?

A final underlying issue concerns how we should deal with ambiguity in legal texts and political debate. In many ways, ambiguity has been at the heart of the Charter process up until now. Some, at least, of the options discussed previously assume that it better to resolve ambiguities and uncertainties than to perpetuate them. But is it?

On the one hand, we may view the uncertainty that arises from ambiguity as harmful, limiting the ability of individuals and communities to choose among competing options secure in the knowledge of what the legal result with be. So too, as a political matter, some Member States may be willing to continue to support the Union and the Community only if they are much clearer than in the past where the train is headed. In some contexts, ambiguity is destructive.

On the other hand, there may be considerable benefits from continued ambiguity. Ambiguity may enable both sides of a dispute to claim victory (or at least deny defeat). It may encourage disputing parties to continue in dialogue rather than walk away from each other. It may transfer the dispute to a body in which, or to a time when, a solution can be more easily reached. But it is clearly true that although we can delay some choices and transfer others, eventually decisions may have to be made.

One of the crucial judgements that will have to be made about the future of the Charter is which position will be most beneficial for the European Council to adopt with regard to the Charter in 2004. Will studied and intentional ambiguity continue to be desirable? Or will the time have arrived for bullets to be bitten, and decisions made?

Part V

Conclusion

The question of what to do with the Charter in the future is controversial because of disagreements on a considerable range of different issues. There is disagreement on what the history of human rights protection in Europe teaches us. There is disagreement on what the current Charter is and what it does. There is disagreement on the place that a future Charter of Fundamental Rights should have in the future of European integration, and (indeed) what the future of European integration should be. There is disagreement over the role of the Charter in the development of the European social model. There is disagreement over the role that rights serve in democratic government. There is disagreement over the nature of human rights, and the autonomy of the law that seeks to protect them. There is, finally, disagreement over the benefits of ambiguity. It has been my argument in this paper that an informed understanding of the specific options set out in the paper on how to treat the Charter of Fundamental Rights in the future requires an understanding of each of these sets of disagreements. A complex, but vital, task awaits all those concerned with the future of Europe.

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Human Rights: The Charter and Beyond

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The focus of these comments is principally on two issues relating to the future of the EU Charter of Fundamental Rights: first, on some practical dimensions of the implications of incorporation of the Charter into the existing Treaties; and secondly, a number of broader reflections on the impact of the Charter on the normative foundation of the EU - whatever decision is taken in terms of its future legal status - and more concretely on its actual powers and competences.

1. Options for the future legal status of the Charter:

The question of the possible 'integration' of the Charter into the Treaties is raised and various options for this are discussed in both Professor Dutheil de la Rochère's and Professor McCrudden's contributions to this volume. Professor Dutheil de la Rochère points specifically to the likely inconsistency or incompatibility of some of the final 'horizontal' clauses of the Charter with the existing EC Treaty, and both she and Professor McCrudden also discuss other possible ways of giving it a degree of legal effect, such as by leaving the question of the interpretation and effect of the Charter to be decided by the European Court of Justice, or by listing it in Article 6(1) or 6(2) of the Treaty on European Union as one of the human rights instruments which the EU and its Member States have declared themselves bound to respect.

One point which, although perhaps obvious, is nonetheless worth making is that the weaker the legal status accorded to the Charter, the less the apparent inconsistencies, incompatibilities, tensions or overlaps with provisions of the EC Treaty will matter, but at the same time the advantage of constitutional legitimization and normative commitment to these values will be reduced by the dilution of the legal effect accorded to the instrument. Conversely, the stronger the nature and degree of legal recognition given to the Charter, the more the relationship of particular provisions contained within it with existing provisions of the EC Treaty will need to be taken seriously and addressed. Not only are there likely to be tensions between the final and so-called horizontal clauses of the Charter and the existing balance established in the EC and EU Treaties, but there are also many specific provisions of the Charter which either duplicate or reflect particular 'rights' provisions of the EC Treaty or which incorporate provisions which are similar although not identical to those existing under the current Treaties. These tensions are not resolved by the provision in Article 52(2) of the Charter which provides that rights recognised by the Charter which are 'based on' the Community Treaties or the TEU are to be exercised under the conditions and within the limits of those Treaties, in part but not only because it is difficult to say exactly which Charter provisions are 'based on' the European Treaties given that there are additions and changes made in the case of many provisions. Several of those which are not substantially amended are nonetheless worded differently, and even in the case of straightforward replication, it is clear that some amendment of either the Charter or the Treaty would be required to avoid unnecessary duplication.

Several of the citizenship rights, for example, and the provision on non-discrimination (contrast e.g. the broader Article 21 of the Charter with Article 13 of the EC Treaty) would require some kind of harmonisation with provisions of the EC Treaty if the Charter really were to be fully integrated into the Treaties. A more difficult example of overlap and potential conflict is in the right of collective bargaining in Article 28 of the 'solidarity' section of the Charter, which includes strike action, and which would create considerable tension with Article 137 (6) of the EC Treaty which excludes Community power to act in respect of the right to strike. This would at the very least sit rather oddly with an obligation to promote the right to collective bargaining in respect of strike action contained in the Charter, even taking into account the reference to national laws in Article 28. Other curious features - which probably signify more than simply oversights or mistakes in drafting, but which may reflect some of the strained compromises and resolutions agreed in the difficult course of drafting the Charter - would clearly need to be revisited if the Charter were intended to be fully integrated into the Treaties. Many of the rights contained in the Charter which mirror or reflect existing provisions or rights contained in the EC Treaty, for example, also make express reference to the limits and conditions under which the latter are currently available (e.g. Article 21(2) of the Charter on nationality discrimination, Article 36 on access to services of general economic interest) whereas various others mirror the rights but exclude any explicit reference to restrictions (e.g. Article 21(1) of the Charter on the broad range of non-discrimination grounds, Article 42 on the right of access to documents, Article 45 on freedom of movement and residence). Some of the rights contained in the Charter which are partly derived from enabling provisions of the EC Treaty go beyond what the Treaty currently provides and impose no explicit limits on this (e.g. Article 15(3) of the Charter on the right of third country nationals to equivalent working conditions with EU citizens, which loosely draws on but clearly goes further than Article 137(3) EC), while other related Charter provisions are merely reflections of the existing enabling EC provisions and do not attempt to develop these potential rights any further by reference to other international norms (e.g. freedom of movement and residence for legally resident third country nationals in Article 45(2)). Again, it would seem that the capacity of Article 52(2) of the Charter as an interpretative device to address and resolve the variety of differences and tensions is limited.

The prospect of full integration of the Charter into the Treaties therefore inevitably raises the question of the need to adapt, reconcile and amend, and the issue then becomes whether it should be the overlapping or conflicting provisions of the existing Treaties or instead the provisions of the new Charter itself which would be amended. Here, as Prof Dutheil de la Rochère points out, the unusual and very significant process by which the Charter was adopted suggests that to amend it without reconvening a Convention of the same sort would undoubtedly be problematic, and the legitimacy and support gained by the novel process could well be impaired or lost. A second concern associated with the prospect of amending the Charter, apart from the significance with which the original process of its adoption has by now been invested (and the choice of a similarly-composed Convention body to discuss options for future constitutional reform of the EU preceding the 2004 Intergovernmental Conference clearly points to this significance), is the fact that it represented a difficult and delicate compromise between very different political and constitutional interests and visions. Accordingly, to amend certain parts which were agreed as part of a carefully balanced package risks undermining the particular compromise agreed and thereby doubly damaging the legitimacy of the instrument which emerged from that process.

The alternative to this would be to amend not the Charter but rather those provisions of the EC Treaty which are duplicated in, which overlap with, or which potentially conflict with the provisions of the Charter. This however raises equally difficult questions, since it seems

improbable that those who participated in the (unusually expeditious) process of drafting were actually envisaging the Charter as a partial replacement for parts of the EC or EU Treaties, nor that they contemplated the likelihood that their work might be implicitly amending those Treaties. The complex picture which emerges from the mandate and the conclusions of the Cologne and Tampere European Councils as well as from the drafting process itself seems to be that this document was envisaged as a creative distillation of the existing fundamental rights-commitments from the fluid EU *acquis*, from European human rights law, and to some extent with inspiration from international human rights instruments and national constitutions. To give precedence to the concrete terms of the text eventually adopted over similar or overlapping provisions of the EC and EU Treaties would be likely to alter the *acquis* in ways which were unlikely to have been worked through or even contemplated. At this point, I would simply suggest that if the route of full integration into the Treaties of the Charter is to be taken, a careful and thorough process of comparison would seem to be required, so that the relevant tensions and potential conflicts between the existing Treaty provisions and the Charter may be identified and that the implications of amendment or repeal of existing provisions fully understood.

In between the option of full Treaty integration on the one hand and leaving the status of the Charter as it currently stands (i.e. as a significant symbolic instrument which is being treated as legally relevant by several of the political institutions and by Advocates General, even if the Court of Justice is conspicuously refraining from commenting on its status at present) on the other, there are a number of intermediate options, several of which are identified by Professors Dutheil de la Rochère and McCrudden in their papers. For example, the Member States in 2004 could decide to leave the status of the Charter entirely to be determined by the Court of Justice. This could be an attractive option in terms of simplicity and in terms of the integrity of the Charter (in the sense that it would not need to be amended nor made strictly compatible with overlapping provisions of other EU treaties and instruments). It could however weaken somewhat the symbolic commitment which the entire process of drafting an EU Charter seems to have been intended to represent, and would result in a diluted constitutional status for the document. On the other hand, not only does it have the merit of simplicity, but this option would be continuous with the gradualist pattern of constitutional evolution (and in particular with evolution of the 'fundamental rights' law and jurisprudence of the EU) which the Community and the Union have known to date. However, if the dominant political mood in 2004 and the sense of the democratic debate which it is hoped will take place between now and then is in the direction of a stronger and more formal constitutional future for the EU, then the option of leaving the Charter's nature and scope to be determined over time by the Court of Justice would seem considerably less desirable.

This, to some extent, would also be true of the option of including a reference to the Charter in Article 6(2) of the Treaty on European Union, along with the current references to the European Convention on Human Rights and national constitutional traditions. While it would strengthen slightly the positive legal role of the Charter within the constitutional framework of the EU, it would certainly fall short of the classical constitutional model of a Bill of Rights situated at the heart of the written constitution, which is at least one of the possible scenarios being contemplated at present. As in the case of the first option of leaving the status of the Charter to be defined by the ECJ, the potential for tension, incompatibility or inconsistency could more easily be avoided by a softer form of constitutionalisation of this kind, just as confrontation of the existing tensions and incompatibilities between e.g. national constitutional traditions and the ECHR or between international human rights instruments and some of the EC's fundamental economic liberties is currently avoided by the practice of the institutions and the Court of Justice. While this may still remain a favourite topic for academic debate, the actual number of

instances of direct confrontation between national constitutional commitments to specific fundamental rights, or between a concrete application of a provision of the Convention on Human Rights, and a provision of EU law are rare, and there is no reason to expect that this pluralistic situation would change dramatically if the Charter were added to the list of instruments of reference in Article 6 TEU.

A further variant on this option, if the Charter were to mentioned in Article 6(2) would be for it to be contained in its full form (inconsistencies, tensions and all) in an Annex to the EU Treaties, possibly in the form of a declaration. The difficulty with seeking to strengthen its status further by annexing it in a protocol to the Treaties (as in the case of the subsidiarity and proportionality protocol added at the time of the Amsterdam Treaty) would once again be that this would raise all the problems of full integration into the Treaties which were discussed above. Since a protocol has the same legal status and force as all other provisions of the Treaty, the questions of duplication, incompatibility and overlap would have to be more directly addressed and could not so easily be accommodated or avoided.

2. The symbolic role of the Charter: a shift in the ethic of the EU?

The second dimension on which I wish to focus is that of the symbolic role of the Charter, and more specifically in relation to the ethic or the mission of the EU. In the broadest political sense, the drafting and proclamation of the Charter both heralds and concretises a shift in the normative underpinning of the EU as a polity. Although it can be seen that Articles 6 and 7 of the Treaty on European Union after the Maastricht and Amsterdam Treaties already suggested such a change, the drafting and adoption of the Charter arguably represents a qualitative leap forward in this respect.[1] The historic origins of the Union in the common market of the Coal and Steel and Economic communities have continued to play a powerful role in the normative foundation and the political shaping of the European polity, and remained its constitutional core even after the fundamental changes introduced and consolidated by the Maastricht and Amsterdam Treaties. This 'influence of the historic origins' has been evident not only symbolically but also in more concrete terms, in the way in which market goals have fundamentally shaped and continue to shape the policies and laws of the EC and EU. Indeed, recent legal controversies culminating in litigation over the scope of the tobacco advertising directive[2] and the biotechnology directive[3] serve to underscore the dominant influence of internal market goals in the shaping of all kinds of policies in which, arguably, other non-market values and ethical or health dimensions should be paramount.

The potential symbolic significance of the Charter in articulating and crystallizing a new normative basis and a new ethic for the EU is relevant on a number of levels. Firstly on the wider symbolic level, in that it can be seen to herald a reorientation of the historic mission of the Community, so that the creation of a European common market is no longer the dominant constitutional core of the EU but stands alongside a commitment to a range of fundamental values which transcend purely market goals. The second and more concrete level at which this reorientation is relevant is in terms of its specific impact on the powers and policy competences of the EC and EU. This question depends in part on how the first issue discussed above – the

[1] For some interesting papers discussing various aspects of the Charter and its significance, see the collection in E. O. Eriksen, J.E. Fossum and A. J. Menendéz, The Chartering of Europe: The Charter of Fundamental Rights in Context (Arena Report no. 8/2001).
[2] Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-
[3] C-377/98, *Netherlands* v *Council*, judgement of 9 October 2001.

future legal status of the Charter – is resolved. The stronger the legal status and force given to the Charter, the more this second dimension of policy competence will be highlighted. The broad symbolic potential of the Charter in marking a reorientation of the Community ethic will not be not affected to the same degree by whatever decision is made on the legal status of the Charter, although clearly the symbolic dimension would itself be considerably enhanced by the formal constitutionalisation of the Charter through its integration, in some form, into the Treaties.

Before addressing this question any further, the complicated picture of EU policy competence in the field of human rights to date will be set out, as a background against which to consider how various degrees of legal integration of the Charter might alter or strengthen that. It should also be pointed out, however, that it is not only a question of seeing whether the EC and EU might gain stronger legislative powers to act to promote human rights, but also whether the existing legislative and other powers of the EU are likely to be re-oriented and infused with a range of different values and considerations by the enactment of the Charter as a constitutional instrument.

There has been a constant tension in recent years between the economic power of the EU, its expanding size and status as an international player and the responsibilities and expectations which that generates, on the one hand, and the internal and constitutional forces of restraint on the other. This can be seen in the repeated calls for clearer limits to the powers and competences of the EU over the past ten years, but more clearly than ever in the context of this current high-level political debate on the constitutional 'finalité' or otherwise of the EU, and on the issue of division of competences, which is highlighted as one of the questions on the post-Nice agenda in the Declaration on the Future of the Union attached to the Nice Treaty. It was also seen reflected, for example, in the cautiously drafted competences of the previous two treaties of Maastricht and Amsterdam (such as the provisions on education, culture and health in Articles 149, 151 and 152 of the EC Treaty) and in the promotion of subsidiarity as both a legal (see Article 5 EC) and a political principle (as reflected *inter alia* in the Amsterdam Treaty protocol).

The political anxiety which is manifested in this debate on the *finalité politique* of the EU reflects the fact that, despite its growing power and strengthening identity as a political as well as an economic organization, the European Union remains an ambiguous entity which eludes satisfactory definition, whether in conceptual, legal or constitutional terms. If the EU continues to be conceived of as a special interest organization or association (to establish a well-functioning European market etc), the starting point for analysis is to ask what its function or purpose is, what its powers are and what it is designed to achieve. If, on the other hand, it is conceived of as a constitutional polity, the assumption is that its function is a more general one of political ordering and government. Clearly, the EU still lies somewhere between these two paradigms, and this explains something of the complexity and uncertainty of its powers and functions. It reflects and contains elements of a special interest organization, and certainly in its inception as the Coal and Steel Community it most closely fitted this paradigm. However, as it has evolved and grown it has developed characteristics, powers and an institutional form which are those of a more developed, although inchoate and partial constitutional polity.

The constituent European Treaties at present do not actually contain a great deal, particularly not of an enabling or empowering nature, on the subject of human rights. Since the Community legal system – as now confirmed by Article 5 EC is a system of limited, attributed competence whereby all legal powers must be traced back to the constituent treaties, this fact could appear to provide a fairly decisive answer to the question whether the EC has policy competence to act in the field of human rights. However, the issue does not end there for a number of reasons.

First, as is very well known, the ECJ has long declared respect for fundamental human rights to be part of the Community legal system, binding both on the EC institutions when they act and also on the member states when they are acting within the field of EC law.[4] This development occurred not just with the support of, but indeed at the instigation of member state courts, since it was seen not as an expansion of Community competence but as imposing normative limits on the EU's own powers by subjecting them to a kind of test for conformity with human rights values. This unwritten catalogue of rights has been held to be a kind of negative constraint on EU lawmaking and policymaking, but it remains open-ended – inspired by the European Convention on Human Rights, by national constitutional traditions and by other international treaties which the states have signed – even after the proclamation of the Charter. The ECJ jurisprudence from which it originated had already, prior to the Charter's adoption, been politically approved and a kind of loose codification of the case law was enshrined in the form of Article 6 of the Treaty on European Union, which declares that the Union is 'founded on' the principles of liberty, democracy and respect for human rights and fundamental freedoms.

In addition to the principles developed in the case law and confirmed by later acts of political approval, the two clearest and most concrete legal bases in the Treaty for EC action in the field of human rights are Article 177 existing since the Maastricht Treaty which concerns development policy agreements, and Article 13 existing since the Amsterdam Treaty which goes beyond the gender equality provisions of Articles 3(2) and 141 EC to enable other forms of anti-discrimination legislation to be adopted by the Community legislature. Finally, Article 7 TEU, as is (to be) amended by the Nice Treaty, contains a less explicit but suggestive Treaty provision with potential to justify significant European Union intervention in the field of human rights within its member states. This article, which follows the commitment of the EU and its member states in Article 6 TEU to respect human rights and fundamental freedoms, provides for the possibility of suspending the rights of a member state which is found to be in serious and persistent violation of these principles. Although the implications of the existence of this apparently drastic sanction were not seriously considered until the fracas over the coming into power of the FPÖ in Austria in 2000, they were made somewhat more explicit in the proposed amendment of Article 7 TEU by the Nice Treaty, so that the power of the EU to investigate the internal policies of any member state so as to monitor compliance with human rights is now spelt out more clearly.

All of the above – the legal principles developed and extended by the Court, the formal legal bases in development policy and anti-discrimination, the commitments to principle in Article 6 and the powers in Article 7 TEU, and now the promise of the Charter - appear to add up in legal-constitutional terms to a significant degree of competence in the field of human rights. However, this reality co-exists with a considerably more cautious 'official' or institutional view of the limits of the Community's human rights competence, in particular in the internal sphere, and this tension requires further explanation and understanding.

A first restraining influence is normally traced to the ruling given by the Court of Justice in Opinion 2/94, in which it declared that the Community lacked competence to accede to the European Convention on Human Rights.[5] One reading of the case is to say that it provides a fairly conclusive answer (particularly given the Court's constitutional role in interpreting the extent of Community powers under the Treaty) to the effect that, apart from its specific external development policy powers, the Community has no real powers or competence to act in the field of human rights, the provisions of the Treaties are exhaustive of the powers of the Community

[4] See A. Clapham, "A Human Rights Policy for the European Community" (1990) 10 YBEL 309; P. Craig and G. de Búrca, EU Law (2nd ed, 1998) ch.7.
[5] *Opinion 2/94 on accession to the ECHR* [1996] ECR I-1759.

and there is no power given by any explicit Treaty provision to enact general rules in the field of human rights. However, quite apart from the subsequent changes introduced by the Amsterdam and Nice Treaties, to leave it at that would be to ignore the room for interpretation left by the Court in its Opinion,[6] (something which Prof McCrudden, although skeptical in his comments, does not deny) particularly in relation to a question which the Court neither expressly accepted nor rejected, *viz*. whether the protection of human rights is in itself an independent objective of the Community, which could bring Article 308 of the EC Treaty into play. It would also ignore the fact that when legal texts are open-ended and ambiguous, as is the case with many parts of the EC and EU treaties including those which mention human rights, including the residual powers clause of Article 308, the question whether the Community has competence cannot realistically be characterized as a purely 'technical' legal one. Rather it is also a political and constitutional question which centres on the willingness of the various legal and political actors involved to develop and defend a human rights policy, and a more philosophical question concerning the justification for an entity such as the EU developing or not developing such a policy.

It is apparent that the institutional response to Opinion 2/94 and to developments since then, including the Charter, has been a cautious one, emphasizing the limits to the Community's competence in the human rights field, and warning against any attempts to erode the constitutional limits to its powers. This cautious approach to internal legal competences in particular was exemplified by the opinion given by the Council legal service on the proposed Commission regulation on democratization and human rights in 1997.[7] It is very apparent also, however, in Article 51 of the Charter, which provides that the Charter "does not establish any new power or task for the Community or the Union, or modify any of the powers and tasks defined by the Treaties". The explanatory memorandum to the Charter emphasizes this fact further. In other words, the Charter does not present itself as a source of or basis for positive legislative action, but simply as a codified or supplemented form of what already exists under the jurisprudence of the Court of Justice: i.e. a broad set of standards against which EU action and member state action within the scope of existing EU policies and powers is to be judged.

The question is whether this perspective is a convincing one and can be maintained if the legal status of the Charter is enhanced, and it is either annexed in some form to the Treaties, or listed in Article 6(2) TEU, or at its strongest, actually integrated into the Treaties. Quite apart from the symbolic significance of having drafted and adopted a rich and wide-ranging new human rights instrument by a novel and experimental political process, it seems difficult to imagine, in spite of the declaration in Article 51(2), that the policy competences of the Community and Union will not in various ways be affected by the further constitutional and legal strengthening of the Charter. In what sense can Article 51(1) of the Charter impose an obligation on the Member States and the European Union to "promote the application" of the rights contained within it, when many of the rights (especially the social rights) declared and contained within it are at best only weakly recognised as interests or entitlements at present, (or even, as in the case of the right to strike, explicitly excluded from EC powers of action) without implying that the powers of the Union - indeed arguably the *obligations* of the Union – have altered? This is a powerful tension which

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[6] This can be seen in the differing views expressed in the many commentaries published on the Opinion – see e.g. J.H.H. Weiler and S. Fries, "A Human Rights Policy for the European Community and Union: the Question of Competences" in P. Alston, M. Bustelo and J.Heenan The EU and Human Rights (OUP, 1999); N. Burrows (1997) 22 ELRev 58; G. Gaja (1996) 33 CMLRev 973; S. Peers (1998) 35 CMLRev 539; and A. Dashwood and A. Arnull in C.E.L.S. Occasional Paper no. 1, and C. Vedder, *Europarecht* (1996), 309.

[7] See the discussion of this opinion in J.H.H. Weiler and S. Fries, *ibid*. The proposal in question subsequently evolved and was adopted in 1999 as two separate regulations with different legal bases in the Treaty, one on development cooperation and the second on other forms of cooperation. See Regulations 975/1999 and 976/1999, OJ 1999 L 120 1, 8.

in my view cannot be circumvented or wished away but which will inevitably have to be addressed over time in the practice and application of the Charter. It seems difficult to maintain that the competences and powers of the Community will not at the very least be *altered* (such as in the orientation of its internal market and other legislation powers), but more significantly, that they are likely to be expanded in certain respects.

There is a clear tension between Article 51(2) and other dimensions and provisions of the Charter, and it remains to be seen whether this tension will be interpreted and addressed in a conservative way which preserves the status quo, or in a more dynamic way which is continuous with the evolving nature and influence within EU and EC law of its human rights jurisprudence to date. If there is an obligation on the EU positively to promote the rights contained in the Charter, can it really still be said that promotion of human rights is not an objective of the Union, also for the purposes of Article 308 EC? The high-profile commitment to the rights embodied in the Charter and to the set of objectives and values which those represent inevitably seem to point not just to a reorientation of the EC's and the EU's normative project and mission, but also to a change in the ways in which the EU pursues that project. To deny that this will inevitably involve change, (and indeed is already having effects, given the express determination of the Commission and the Parliament to treat the Charter as relevant in all of its policy-making even before any decision as to its future legal status is made) whatever the legal limiting clauses which have been written on to the new Charter, seems an unrealistic approach. Returning to the first point which was addressed in this paper, it is sufficient to say at this point that the significance of the change in the nature of the EU's powers and competences which are likely to be brought about by the Charter will be determined in part, but not entirely, by the strength and degree of legal status which is conferred upon it.

The White Paper and the Improvement of European Governance

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My presentation has three points:

1. A critical account of the strategies suggested in the White Paper concerning the improvement of EU governance,

2. some suggestions how to strengthen the Commission's approach in line with the basic philosophy of the White Paper,

3. presenting a deviant perspective on how to approach the issue of European governance.

1. Critical account

A close reading reveals that the White Paper has three main objectives: (1) to redress the institutional balance in favour of the European Commission, (2) to redesign rules and procedures to enhance the efficiency in policy formulation and implementation and (3) to put even more emphasis than in the past on openness, transparency, and participation.

Considering the context of the publication of the White Paper it is not surprising that it reflects the institutional interests of the Commission. The central message is that a return to the "Community method" will promote the quality of European governance and that this implies, above all, giving the Commission a more prominent role in EU policy formulation and implementation. A critical assessment has to take issue with the assumption that in face of present and future context conditions this role ascription is still appropriate.[1] My argument is that the propositions of the White Paper are derived from a deficient analysis of the nature of European politics and a technocratic understanding of political legitimacy. In order to prove my point I will provide evidence that (1.1) the White Paper argues in favour of redressing the institutional balance, (1.2) is biased in favour of efficiency and effectiveness and (1.3.) reflects an understanding of "good governance" that neglects basic principles of democratic legitimacy.

1.1. Redressing the balance of power between EU institutions

When reading the White Paper carefully the plea to "revitalise the Community method" (WP:29), demanding that "(e)veryone should concentrate on their core tasks" (WP:29) amounts to

[1] Scharpf's harsh criticism of the White Paper originates from exactly from the neglect of context conditions: "-…the White Paper is generally not interested in discussing the substantive problems confronting the EU and its Member states at the present time – and that is an omission with serious consequences for its definition of governance problems, and even more so for effectiveness and legitimacy of their proposed resolution" (Scharpf 2001:3)

strengthening the Commission. In part it is an endeavour to regain lost ground, in part it is an attempt to expand and even redefine the constitutional role of the Commission.

I don't want to review the propositions in detail but rather give a short-hand summary:

(1) choice of policy instruments

Concerning legislation the White Paper reveals a clear preference for the use of regulations and "framework directives". Regulations exclude any further interference by national parliaments (and in this way indirectly by national governments) because there is no transposition into national legislation. "Framework directives" look attractive because they are considered to by "less heavy-handed, offer greater flexibility as to their implementation, and tend to be agreed more quickly by Council and the European Parliament" (WP:20). The efficiency of the decision-making process is a major concern[2] and with this objective in mind it is logical that the White Paper goes on "(w)hich ever form of legislative instrument is chosen, more use should be made of 'primary' legislation limited to essential elements …". The technocratic bias is exposed by the subsequent statement which circumscribes the respective roles of the legislative bodies (Council and Parliament) and the Commission "… leaving the executive to fill in the technical detail via implementing 'secondary' rules" (WP:20).

The objective of regaining lost ground is evident in other propositions. Too. The co-decision procedure has brought Council and European Parliament more closely together. Under the given time constraints and faced with the difficult task of managing a complex negotiating system, bilateralism creeps in. leaving the Commission to be the odd man out and re-writing the Commission's proposal. The White Paper supports "early agreement", i.e. concluding the decision – making process on the first reading but insists on the Commission's participation. And in case that the agreement between Council and European Parliament threatens to downgrade the Commission's proposal, the White Paper sugests that it should make use of its right of withdrawal. On top, the White Paper advocates that the Commission should be freed from comitology control and that executive regulatory activities should when ever possible be delegated to EU agencies (preferably under the control of the Commission). When it comes to devising new tools of policy-making and policy implementation the proposition, again, entail an expansion of the European Commission's range of activities. (Héretier 2001).

At first sight all these propositions make sense and their case is well argued. But under closer scrutiny the evolution of the living constitution is more promising both in terms of democratic legitimacy and decision-making efficiency. Let's take the case of the new co-decision procedure. Upgrading the European Parliament's decision-making power and introducing time limits have been introduced in order to diminish the democratic deficit and avoid gridlock. Therefore, good normative reasons and sound procedural reasons support a closer collaboration between these two institutions. On what grounds should this development be redressed? What has the Commission to offer in terms of legitimate reasons and procedural efficiency to support its claim to have a greater say in the game?

Even when the Commission's original proposal is watered down – what certainly amounts to a frustrating experience – would it be legitimate for the Commission to withdraw its proposal and this way delay the decision-making process and impose on the European Parliament and Member State Governments its own will? The same argument holds true for the Commission's desire to have a greater say in formulating regulations. On what grounds should the Commission have a legitimate right to decide on "secondary rules"? The Commission is the

[2] The proposition is made under the headline "better and faster regulation"

guardian of the Treaty, i.e. of a political programme negotiated by Member States, not the guardian of a self-proclaimed "European" interest. Therefore, in my assessment the White Paper is not just over-ambitious in defining the Commission's role, but heading into the wrong direction. I attribute this ill perceived strategy to a mistaken perception of the nature of EU policy making.

1.2. The White Paper's emphasis on efficiency and effectiveness

The legitimacy of the EU is mainly based on "output legitimacy". For decades, European integration has been associated with delivering welfare and peace and, therefore, enjoyed broad popular support. Today, internal peace is not any longer at stake and the single market is a well established reality which is rather associated with unwanted pressures on individual welfare than with tangible improvement of material benefits. The advancement of European economic and monetary union is perceived to be an instrument of increased competition threatening to dismantle the national welfare state.

Public opinion polls give evidence that European integration has become an elite affair. Governments are pushing a reluctant public to accept their decisions both on Europe and in Europe. In view of such context conditions I challenge the White Paper's emphasis on efficiency and effectiveness. We have to take account of the fact that European governance is a highly political affair. Even when governments prefer to work together in order to take advantage of the superior problem-solving capacity of common action, the contents of this common action is bound to be conflict ridden. Similar problems in the individual Member State are not necessarily common problems. And above all, problem-solving strategies are not self explanatory. They have to meet quite diverse normative and factual preferences. What representatives of EU institutions consider to be an adequate policy may not necessarily match the expectations of citizens.

Hard choices have to taken, and they have to be taken on political grounds. On most issues policy-making is a matter of choice. Decision-makers have to choose between competing preferences and decide in favour or against well founded interests and long cherished ideals. This truism is not at all reflected in the White Paper. It rather reads as if policy making would amount to little more than an effort in co-ordination and accumulating the necessary expertise: Member states are blamed for keeping up the legislative process (WP:5) and for insisting on 'an unnecessary level of detail' (WP:18) in EC legislation. The remedy proposed is "investment in good consultation" (WP:20) and to leave it to the Commission "to fill in the technical details" (ibid). The promise is that this "may produce better legislation which is adopted more rapidly and easier to apply and enforce" (ibid). No one would object "better legislation" – but the choice is not between the bad and the better but between alternative options. There are different preferences, different criteria of evaluation and last, not least, distributive and re-distributive effects that have to be taken into account.

When member states are not willing to "speed up legislation" and continue to amend detailed procedures when transposing directives into national law, they do not do it out of idiosyncratic inclinations. They rather respond to or anticipate problems that their citizens are facing which finally will induce them not to comply. Politics is not a truth finding exercise, not looking for the "one best way solution" which could be provided by expert knowledge. Expert consultation very often is just reproducing the conventional wisdom held by an epistemic community and is hardly ever free of a political bias.

Governments may indeed be captured by partial interest groups but the Commission itself is faced with “capture”. Partial but powerful interests aim at including the Commission in a “winning” advocacy coalition. What are the controlling mechanisms at the national and the European level to avoid such capture? At the national level governments have to run for re-election and convince the electorate that they have not traded the common interest for the privileges of a small group. Such controlling mechanisms are missing at EU level.

Again, the whole story boils down to the question about the Commission’s legitimacy to take the lead. European governance is the exercise of power. Power is exercised in a different way and sometimes with different means than in member states, but it still is taking arbitrary decisions that affect peoples life. Therefore it has to be legitimated. Legitimacy is needed both for normative reasons and for functional reasons because illegitimate rule breeds political instability.

1.3. Openess, transparency, participation: principles to assure good governance

“The goal is to open up policy-making to make it more inclusive and accountable. A better use of power should connect the EU more closely to its citizens and lead to more effective policies.” (WP:8)

This is just another example of the White Paper’s neglect of conflict of interests and the dialectic of policy making: Openness and inclusiveness will most likely give voice to competing interests which in such a heterogeneous setting like the EU will be difficult to reconcile. The most pertinent question, namely how to manage political reconciliation effectively is not dealt with in the White Paper. Combining openness with inclusiveness may not lead to more effective policies but to block any policy output.

Furthermore, when talking about principles of good governance, the concern should not just be the smooth functioning of the system but the normative quality of European governance. Legitimacy is, or at least should be, at the core of any deliberations about the future of European governance. The White Paper refers to five principles of European governance which are close but do not meet the established consensus of what constitutes “legitimate governance”.

Openness in terms of improved transparency is a prerequisite for public accountability and openness in terms of better access to decision-making bodies is a pre-condition for political participation. Participation and accountability are two core elements in any democratic system. The way in which both categories are introduced in the White Paper is, however, disappointing. “Wide participation” is a vague concept that leaves out a clear cut commitment to the two essential elements that turn participation into a democratic device:

(1) equality: i.e. the equal chance to participate (or at least institutionalised mechanisms for a representative selection of participants),

(2) reliability: i.e. a commitment on the part of decision makers to “binding agreements”; without such a commitment “participation” is just the opportunity to raise a voice without promise to be heard.

The concept of accountability is treated in an equally disappointing way. Accountability has to be more than what is written in the White Paper. It is not sufficient that decision-makers just “explain and take responsibility” for what they do (WP:10). In a democratic system accountability is synonymous with institutionalised mechanisms to sanction unwanted behaviour.

Indeed, the European Union's "legitimacy today depends on involvement and participation" (WP:11), output legitimacy has to be supplemented by input legitimacy. But involvement, participation and accountability have to be organised in a way that they meet the criteria of democratic standards. We should not lower our democratic standards just because it is difficult to meet them in the European Union.

Unfortunately, the White Paper does not address the question of equal and effective participation nor of institutionalised accountability. The proposal for change for "better involvement" (as the headline reads, WP: 11) is - apart from normative reasons – disappointing with respect to practicability: There is a long list of potential to be involved and there are innovative ideas like " on-line consultation through the inter-active policy-making initiative" (WP:15) But I find it difficult to take the promise "to consult better on EU policies" (WP:16) serious when the obvious problem is not even mentioned: How to tackle the information overload and the delicate problem of selecting among the advice given? Already today approximately as many interest group representatives are working in Brussels as civil servants are working for the Commission. The comment of an experienced lobbyist that "ear-time is scarce" is absolutely to the point. How will the Commission and other EU institutions manage an exploding demand for interaction?

2. Improvements

The chapter on "Better involvement" may be used as an example for the improvement of the propositions within the conceptual framework of the present White Paper. Lets follow the White Papers argument that citizens should get more actively involved (WP:15). The most plausible approach would be to start with an analysis of the deficiencies of the present system. Many of them are well known and documented in some of the Commissions own papers (COM(2000)11final, 18.1.00). They are, however, not reflected in the White Paper. Just to recall some of the most obvious deficiencies:

(1*) The unbalanced representation of societal interests.* We all know that because of the logic of collective action (Olson) and the unequal distribution of the capacity to get organised, to raise a voice and have an impact on policy makers (Offe) we are faced with unequal interest representation which is even more pronounced at the EU than at the national level. Producer interests are well represented, well equipped with financial and human resources; they unfold many activities and enjoy well established contacts to EU institutions. Organisations representing the interests of the ordinary citizen are comparatively weak, ill equipped and less numerous. Building bridges from the local to the supranational level for grass root actors and forming trans-national alliances is a formidable task that only few can achieve. To make matters worse, they have little to offer to EU institutions which could turn them into an attractive negotiating partner.

(2) *Insecurity about the yardstick for "representativity".* To ask for information in order to know who is talking on behalf of whom, to get a better assessment on what sections of society are represented and how many citizens are involved is necessary but not sufficient. We are faced with quite a number of organisations that do not correspond to the ordinary type of interest association which is based on membership. Entrepreneurial organisations like Greenpeace can hardly be excluded on the basis of not meeting the above mentioned criteria of representativity.

(3) *Selectivity in the interaction between EU institutions and interest representatives.* Though resources are decisive for interest group activities, access andclose co-operation depends on the preferences of EU institutions. Case studies on individual policy initiatives give ample evidence that, in particular, the Commission chooses at free will who gets access and whose advice will be asked and listened to. EU institutions have a rich choice, they decided not to be constraint by any formal and informal rules. On top, they hardly ever have to face political sanctions for being unbalanced. This procedural practice is defended on grounds of convenience and efficiency but it lacks legitimacy.

The White Paper claims that the Commission is dedicated to involve "civil society" at a larger scale. This dedication makes it indispensable that a second thought should be given to the problematique of unequal representation, to the unresolved question of adequate criteria of representativity, to the issue of avoiding selectivity and communication overload. The White Paper does not provide any answers and, to make matters worse, it even does not raise the question. Some phrases read as if the authors confuse wishful thinking with reality[3] and some arguments are unbalanced. Information overload is mentioned with respect to the ad hoc consultation bodies. The Commission sees a need "to rationalise this unwieldy system" (WP:17) but it does not see any parallels to the envisaged involvement of "civil society". The proposal included in the White Paper give evidence that the Commission is far from an efficient management of its own consultation process: It still has to take stock "of existing sectoral consultative" (WP:17), and it aims at nothing more than "a code of conduct that sets minimum standards" (WP:17), and it "intends to establish…a comprehensive on-line database with details of civil society organisations active at European level, which should act as a catalyst to improve their internal organisation" (WP:15). This very modest regulatory impetus gives preference to the principle of "openness" and leaves it to the discretion of the individual civil servant within the Commission to whom they want to talk and listen to.

There is no deliberate strategy on objectives and no consideration on how best to use public "involvement": Why should "civil society" be involved:

- to improve the Commissions knowledge base?
- to get a better assessment of competing preferences? (WP:15 alludes to getting help "to arbitrate between competing claims and priorities…")
- to furnish support when negotiating with the Council and the European Parliament (not to forget about inter-departmental conflicts)?
- to strengthen legitimacy by expanding deliberation?
- to advance participatory democracy?

A White Paper should not be confused with a seminar paper. Nevertheless, a more stringent line of argument would be needed to make it convincing.

[3] Just to give one example: Organisations of the so called "civil society" are not first of all mobilising those suffering from exclusion or discrimination but are mainly organising those who have already the choice of exit and voice.

3. European Governance put in a new perspective

Why is European governance so problematic?

First, because revitalising the Community method proves to be a dead-end street because the remedies of the past will not cure the problems of the future. The EU has definitely moved from negative integration to a political enterprise. With more problems of high political salience on the agenda and profound cleavages still along national lines[4] member state governments are key players for three reasons:

(1) with few exceptions the average citizen (or at least the majority of citizens) trust their government to be able to "deliver" and when they are frustrated, they have the choice to vote for the opposition in the next election;

(2) they enjoy institutional legitimacy, i.e. apart from the electoral legitimacy they are part of an uncontested institutional system;

(3) the nation state is still considered to be the only "truly" legitimate place for hosting a society.

Compared to governing a nation state, legitimate governance in the European Union is precarious. Let's take the model conception of EU common policy. It start from two assumptions:

(1) Member states agree on formulating a common policy because joint problem solving provides some added value. In view of policy performance the EU is from a systematic point of view not inferior to domestic policies; the process may be more cumbersome and the compromise agreed upon not as close to the median voter as it may have been in a national setting. But the policy is expected to be more effective.

(2) Despite public debate on the Union's democratic deficit, there is still a widespread belief that the EU is the appropriate level for coping with quite a number of political issues and that – in principle – the institutions are apt to do it.

So far, there is little difference between both systems. Concerning the third dimension, however, the EU is evidently deficient. The orthodox reading is that we neither have a European demos nor a European state and without achieving one after the other (which should come first is object to intense controversies) the EU will lack legitimacy.

In my reading this orthodox view is outdated. In Europe, we live in a "post-Westphalian" system; the state of "modern times" is a construction of the late 19th century which is not longer a valid model to capture reality. Nevertheless, it is till occupying people's mind. The vision of a hierarchical, unitary entity is present in the White Paper, too. It implies that there has to be a political body (the Commission) being the guardian of the "common interest" in charge of speeding up decision making, engaged in strategic planning setting the long term objectives for the political community.

What is needed instead is the vision of a EU with nation states not just as a transitory but as a permanent type of polity; a construction as legitimate as the state. This EU polity is both: a compound and a unitary system. Some actors are still confined within their nation states and rely on national governments to pursue their interest through multi-level governance. Others

[4] Just take the example of the reform of the national pension systems; (Scharpf 2001:4)

move more easily across boundaries, they address EU institutions directly and take the EU as single playing field.

In order to function, this kind of polity does not need citizens with a predominant European identity. The ("imagined") political community still is the nation. The Union will be based on a "political society" with national, though "Europeanised" identities.

In this perspective many of the White Papers' propositions could be read in a different way. "Better involvement" would not aim at enhancing the European Union's legitimacy in terms of making the decision-making process more democratic (which it doesn't). Rather it may contribute to a learning process that might trigger a Europeanisation of identities and it may activate trans-national intermediary organisations that will contribute to the evolution of a European public space. Involvement, not just in consultations with EU institutions but in activities of European networks will transport the idea of a legitimate polity that is different from the state of modern times. But this will only happen when we give up the idea of the state as the one and only blueprint for the political organisation of a society. What is called for is a new "referentiel" (Jobert) to be elaborated jointly by scholars and politicians.

L'apport de l'Europe a la gouvernance mondiale : Pour un nouveau multilateralisme

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L'interdépendance entre la gouvernance européenne et la gouvernance globale

Il serait inconcevable d'aborder la question de la gouvernance interne à l'UE sans approfondir en même temps le rôle de l'Union dans la gouvernance globale. En automne 2001, l'homme de la rue répondrait facilement que « l'avenir de l'Europe, c'est l'Europe dans le monde », dans le sens que l'interaction profonde entre l'évolution de la construction européenne et celle de son environnement international est devenue de plus en plus évidente pendant la dernière décennie. Les sciences politiques, les théories des relations internationales, les études en droit international et la recherche historique et économique sur l'intégration sont d'accord quant au manque de crédibilité scientifique d'une approche purement introvertie de la gouvernance.

A juste titre, en automne 2000, au moment du lancement de l'exercice devant aboutir au Livre Blanc sur la Gouvernance, la Commission indiquait à son chantier 5[1] l'importance, d'une part, de situer la gouvernance européenne dans son contexte global et, de l'autre, de promouvoir une meilleure gouvernance globale et une maîtrise de la mondialisation. C'est aussi sur cette large base que la collaboration avec le groupe gouvernance de l'AJM s'est développée pendant la dernière année. D'ailleurs déjà dans le passé, à plusieurs reprises, les quatre disciplines afférant à l'AJM et à ECSA avaient présenté des contributions à ce propos[2]. Les ressources pour un progrès aux niveaux à la fois de l'analyse et de la conceptualisation donc existent et l'engagement de la Commission pour une réflexion plus approfondie sur ce sujet est pertinent et prometteur.

Combiner trois approches

Lorsque l'on traite de l'apport de l'UE à la gouvernance mondiale, il faudrait garder à l'esprit trois approches principales :

1. l'approche « bottom-up » : c'est-à-dire les implications globales de l'existence elle-même de la CE/UE en tant qu'intégration économique entre anciens ennemis;

2. l'approche comparative : le rôle des associations régionales dans le monde (UE, NAFTA, Mercosur, Communauté andine, ASEAN, SADC, ECOWAS etc.), en ce qui concerne d'un côté l'impact interne sur le nationalisme et la fragmentation locale et subnationale; et de l'autre, leur impact sur les organisations multilatérales;

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[1] Commission européenne, Préparation du Livre blanc sur la gouvernance européenne. Communication de M. le Président, Bruxelles, le 22 septembre 2000.
[2] Notamment à l'occasion des colloques « The EU in a changing World » en 1996, et de celui sur les aspects juridiques du WTO en 2000 ; ou encore, dernièrement, les papiers du Groupe gouvernance de l'Action Jean Monnet.

3. l'approche top-down »: situer l'évolution de l'UE dans le cadre complexe de l'évolution de la gouvernance mondiale, c'est-à-dire des tendances du système économique et politique international.

Le Livre Blanc a clairement choisi la première approche, inscrite en profondeur dans la tradition, un mélange de réalisme et d'idéalisme. Le principal apport de la CE/UE à la gouvernance globale est la stabilité de la région Europe : la paix entre les anciens ennemis. La clé de ce succès a été la méthode Monnet, la paix par l'intégration économique communautaire. Primo, les spécialistes de relations internationales l'ont défini « politique interne-externe » dans le sens que par la dynamique de l'intégration on parvient à l'imbrication des politiques étrangères des Etats membres. Le régime international CE/UE influence et encadre les options de la politique étrangère des Etats qui, dans plusieurs domaines « mettent en commun leurs souverainetés ». C'est une contribution à la paix internationale. Secundo, malgré leurs différences, les modèles socio-économiques nationaux ont donné lieu à un marché commun très prospère, ont permis celui que Delors a appelé « le triptyque de l'AUE » (compétition, concurrence et solidarité) et déclenché dans les années '90, l'UEM, une zone solide de stabilité monétaire.

En effet, au-delà de toute rhétorique sur le « modèle social européen » cet équilibre original de dé-régulation et de ré-régulation constitue une réponse à la mondialisation économique, un pas concret vers la maîtrise de la globalisation. Ce double résultat historique a un formidable impact géopolitique, qui suffirait déjà à justifier le processus de l'intégration. En plus, tertio, la démocratie, malgré ses défaillances, a été stabilisée au sein de tous les Etats membres, y compris les nombreux Etats marqués par des héritages historiques fascistes, par l'expérience de dictatures : le cadre européen a aidé le travail de réflexion sur la mémoire du passé, sur l'âge des conflits idéologiques extrêmes et sur l'holocauste, sans contexte plus que partout ailleurs dans le monde. Quarto, la sécularisation de l'Europe fait partie de cet acquis interne : la tolérance, nourrie par la mémoire, permet plus qu'ailleurs la coexistence de plusieurs religions et valeurs à côté du christianisme, ainsi que consacré par la Charte des droits fondamentaux (Nice 2000). Il est donc d'une part, non seulement légitime mais réaliste de construire l'apport de la CE/UE à la gouvernance globale par l'influence de ce qu'on appelle l'acquis de la construction européenne.

D'autre part, deux autres approches de l'interaction entre l'UE et la gouvernance globale deviennent de plus en plus urgentes. La première est la réponse à la question de savoir si l'intégration régionale européenne est un phénomène unique, entièrement « sui generis », ou si, malgré les différences évidentes, les autres associations régionales existantes dans les autres continents constituent des processus comparables de gestion dynamique des diversités nationales. L'économie politique, les études sociologiques et politiques comparées et les relations internationales ont produit une riche et nouvelle sous-discipline et une vaste littérature, largement anglo-saxonne, focalisée justement sur le néo-régionalisme dans le monde globalisé. La dialectique entre les groupements régionaux et la globalisation doient être approfondies aux niveaux tant économico-commercial que socio-politique et culturel. Cette approche est importante si l'on veut véritablement sortir de l'eurocentrisme des études européennes et retrouver une nouvelle voie vers l'universalisme européen au-delà d'un côté du relativisme culturel et de l'autre de l'imposition d'un seul modèle.

Dernièrement, celle que nous avons appelée l'approche « top-down » fait référence à l'impact sur la gouvernance européenne des dynamiques bouleversantes en provenance de l'extérieur, du système économique et politique international. Les attentes externes pour que l'UE joue un rôle accru au niveau de la gouvernance économique et politique de la planète se sont multipliées pendant la dernière décennie, depuis la fin du monde bipolaire, dans tous les

continents. Ces attentes se traduisent parfois en responsabilités, notamment en matière de aide humanitaire, de coopération au développement, de demande de mission de « peace keeping » et de « peace enforcing »,de contribution active à la réforme du multilatéralisme. Le dépassement évident des distinctions traditionnelles entre « low politics » et « high politics » et entre « inside and outside », la politicisation des relations commerciales et économiques, font que l'UE soit devenue un acteur politique, malgré les balbutiements de la PESC. En tant que deuxième acteur global l'UE a des responsabilités qu'elle n'a pas toujours choisies, au niveau de la gouvernance mondiale et elle subit beaucoup plus que dans le passé l'impact direct des changements soudains et des crises internationales comme celle que nous vivons depuis le 11 septembre 2001. De plus en plus, en particulier à l'occasion de crises internationales, en fonction des différentes perceptions et intérêts nationaux, les responsabilités externes provoquent des shifts politiques au sein des Quinze et du système politique européen, des formes multiples de différenciation dans l'Union, souvent en dehors du dispositif du Traité, y compris des coopérations renforcées. La question cruciale est de savoir si l'UE est en condition de maîtriser ces processus, ou bien si elle ne peut que les subir, et avec quelles conséquences pour la gouvernance.

En conclusion, pendant la dernière décennie, et notamment entre 2000 et 2001, la question de l'apport de l'UE à la gouvernance globale a évolué de façon spectaculaire et demande une mise au point et un supplément de travail de recherche, une recherche visant à intégrer les trois approches évoquées.

L'Union européenne et la governance globale : Les acquis et les questions ouvertes

Une fois précisée l'approche de la façon la plus intégrée et « comprehensive » possible, il s'agit d'attirer l'attention sur le fond, et d'indiquer les principaux points de repères pour l'agenda de recherche sur l'UE et la gouvernance globale :

1) L'acquis de l'UE comme acteur global. Malgré ses faiblesses et incohérences, l'UE est considérée par la littérature internationale comme le deuxième acteur global dans le monde de l'après guerre froide. Première puissance commerciale et premier acteur au niveau de la coopération au développement depuis des décennies, l'UE est devenue aussi la deuxième puissance monétaire, le premier pourvoyeur d'aide humanitaire et a commencé à développer son identité internationale dans des domaines explicitement politiques. Nous sommes donc nettement au delà du cadre de l'Europe des chantiers, où l'essentiel se trouvait être la « politique étrangère interne », c'est-à-dire la stabilisation de l'Europe occidentale par l'intégration économique et commerciale. Mais justement le succès exemplaire de la méthode Monnet pendant les décennies 1950-1990 est à l'origine de défis radicalement nouveaux : l'élargissement oriental en cours et les nouvelles responsabilités internationales de l'UE imposent un changement de la nature elle-même de la construction européenne. D'où l'insuffisance et l'ambiguïté de tout appel rhétorique au retour aux origines du processus de l'intégration. Ce n'est pas uniquement le contexte historique qui a radicalement changé. L'Europe est devenue un facteur proactif du système international et son évolution interne ne peut absolument pas être interprétée en dehors de l'impact des turbulences de cet environnement international en transition.

2) La dimension politique de la construction européenne. Nous assistons à deux processus convergents. Primo, les changements du système international intervenus en 1989/91, ont rendu obsolètes les visions purement fonctionnalistes de la gouvernance propres à la petite Europe et invitent l'UE à répondre aux attentes externes et internes concernant ses

responsabilités dans la gouvernance mondiale : il ne s'agit pas seulement d'une augmentation quantitative de ses relations extérieures au titre du premier pilier, mais aussi par la construction d'un deuxième et d'un troisième piliers politiques: la PESC, y compris la sécurité militaire et la PESD, et la politique de l'immigration et des visas. Secundo, ce qui est typique de l'Europe est l'interaction originale entre les multiples dimensions de ses relations extérieures, en particulier, la dimension politique accrue des relations extérieures dans les domaines de l'économie du commerce et de l'environnement.

C'est dans ce contexte qu'il faut situer aussi l'interaction entre le régionalisme supranational de l'UE et les problèmes connus dans la phase actuelle par les organisations multilatérales. L'incertitude internationale qui s'est manifestée avant Marrakech, à Seattle, et les vicissitudes de la préparation du nouveau round OMC, témoignent que les négociations multilatérales souffrent d'un grave déficit de gouvernance globale et requièrent de l'UE qu'elle joue un plus grand rôle au niveau de la réforme des organisations multilatérales.

Deuxièmement, l'UE est au centre de nombreux accords commerciaux préférentiels et soutient activement (et pas uniquement par son exemple réussi) l'approfondissement des accords régionaux en Afrique, aux Caraïbes, en Asie et en Amérique Latine : de l'avis d'une vaste littérature économique et politologique, la question se pose quant au rapport entre régionalisme et multilatéralisme dans la gouvernance globale, quant à la place de l'inter-régionalisme (et du birégionalisme en particulier) dans l'ère « post-hégémonique » où les USA ne sont plus en mesure de garantir à eux seuls la stabilité internationale.

Tertio, le débat UE/Etats-Unis à propos du protocole de Kyoto et en général les défis liés à la dégradation de l'écosystème, les dossiers onusiens de la lutte contre la pauvreté, contre le racisme, contre la drogue semblent attribuer à l'UE une place irremplaçable au niveau de la création et du maintien des régimes internationaux de coopération entre les Etats et les régions du monde. Le document sur le « développement soutenable », approuvé par le Conseil européen à Gothenburg, ainsi que l'importante démarche politique de M. Prodi à Washington en été 2001, semblent témoigner d'une prise de conscience de cet aspect historique. Cette demande de davantage d'Europe s'est dernièrement manifestée dans d'autres domaines politiques également : par exemple au moment de l'approbation du document de Durban contre le racisme en septembre 2001.

3) Les implications institutionnelles. Les responsabilités internationales accrues dans un cadre mondial instable, soumettent le système institutionnel de la CE/UE à un double stress, à une double sollicitation à plus de cohérence :

-la coordination verticale entre les deux dimensions institutionnelles des relations extérieures: l'initiative de la Commission et l'action diplomatique et politique des Etats ;

-la coordination horizontale, inter-institutionnelle (art. 3 du TUE), c'est-à-dire l'équilibre dynamique entre la Commission et le Conseil dans la mise en place cohérente des multiples dimensions des relations extérieures.

La nouvelle troïka (la Présidence tournante, le Haut Représentant de la PESC, le Commissaire chargé des relations extérieures) constitue, certes, un pas en avant dans la recherche d'un équilibre entre continuité de l'action extérieure et discontinuité des Présidences, mais elle demeure le reflet d'une faiblesse aux niveaux de la visibilité et de la crédibilité dans l'action externe. La période 2000/2001 a fourni plus d'une confirmation de l'urgence de remettre main à une réforme .

4) La légitimation du rôle international de l'UE. Le challenge de la légitimation et du contrôle démocratique de la politique étrangère est encore plus compliqué dans le cas de l'UE que dans celui, déjà considéré traditionnellement très ardu, des Etats membres. Le rapport entre gouvernance et légitimité doit garder la distinction entre les différents niveaux de l'action extérieure : celui de la routine de la coopération internationale et des relations diplomatiques, celui de la high politics où l'équilibre entre la discrétion et le poids des émotions est particulièrement lourd et le domaine intermédiaire : ce qui est nouveau est que ce dernier (incluant les enjeux du commerce international) est en voie de politisation et suscite de plus en plus les passions opposées de l'opinion publique. Il ne peut plus être monopolisé par les Ministères, la eurotechnocratie et les lobbying. Le Parlement européen demande de plus en plus à pouvoir s'exprimer de façon efficace. L'opinion publique ne peut plus être négligée. Entre 2000 et 2001, les réunions internationales ou européennes mouvementées de Nice, Stockholm, Gênes, Gand etc., interpellent l'UE à propos de la perception ambiguë de l'Europe de la part d'une partie de l'opinion publique.

Quelle doit être l'articulation entre l'UE et les organisations multilatérales internationales et globales (OMC, FMI, mais aussi G7) : la gouvernance régionale doit-elle s'identifier tout à fait à la gouvernance globale telle qu'elle est, ou est-il plutôt souhaitable de mettre en exergue un rôle accru et plus proactif des organisations régionales au niveau de la construction d'un nouveau multilatéralisme? Quels seraient les traits de ce nouveau multilatéralisme? Quelles valeurs, quel rapport à l'opinion publique, quelle amélioration de l'asymétrie Nord Sud? La légitimation d'un nouveau multilatéralisme passe, selon une vaste littérature scientifique, par les réponses innovatrices à trois défis : la participation de la société civile, le respect des droits de l'homme et de la démocratie et l'apport des organisations régionales de tous les continents à la réforme des organisations politiques (ONU), commerciales (OMC) et financières (FMI, Banque mondiale) existantes. Il s'agit de questions controversées et riches en implications transatlantiques. De l'avis d'une partie de la littérature scientifique, la clé serait essentiellement la cohésion interne de l'occident, option cependant jugée par certains insuffisante en l'absence d'une participation de façon égale des autres continents, notamment de leurs organisations régionales, à la gouvernance et au gouvernement politiques globaux : c'est notamment la conclusion de la lettre rédigée par le Président de l'UE, M. G.Verhofstadt (Lettre sur la mondialisation, septembre 2001)?

5) Cette dernière question a été dramatiquement relancée suite aux événements tragiques du 11 septembre. La crise internationale en cours aura des effets durables sur le système de la gouvernance globale. Une question se pose en particulier à la CE/UE : gouvernance globale pourquoi et comment? La question cruciale est celle de l'équilibre entre ordre et justice internationale ; elle présente de toute évidence une dimension gouvernance très importante. En solidarité avec les USA, nous assistons en effet à la naissance d'une alliance très large de la communauté internationale finalisée à la lutte contre le terrorisme, ce qui marque un tournant définitif par rapport au monde bipolaire. L'urgence de l'objectif n. 1, impose la recherche d'alliances les plus larges finalisées à l'efficacité politico-militaire. Deux questions pourtant se posent : cette coalition a comme objectif essentiel la restauration de l'ordre international bouleversé par un terrorisme sans précédent. Cependant les finalités internationales de la CE et de la PESC ne sont pas uniquement orientées vers l'ordre et la sécurité, mais aussi vers « le développement et le renforcement de la démocratie et de l'Etat de droit, ainsi que le respect des droits de l'homme et des libertés fondamentales »[3], en conformité avec nos principes et valeurs et avec les chartes des N.U., d'Helsinki et de Paris. La déclaration du Conseil européen

[3] T.U.E. art 11.2.

du 14.9.2001 l'a bien rappelé lorsqu'il a situé la lutte au terrorisme dans le cadre d'une action internationale visant les causes du grave malaise d'une partie importante de l'humanité.

Dans le cadre d'une crise internationale qui s'annonce de longue durée, les interprétations iréniques de la « multilevel governance » internationale devraient être révisées. D'un côté, l'UE, dispose certainement d'une large palette d'outils politiques précieux tant dans la lutte contre le terrorisme et ses causes, que pour le passage de la phase actuelle de restauration de l'ordre troublé, à la phase de la reconstruction d'un système multilatéral moins asymétrique et plus juste. Elle avance dans la coopération policière et dans le domaine de la justice (mandat d'arrêt européen, Europol, Eurojust…). De l'autre côté, dans les domaines de la politique de sécurité et de l'action militaire, nous assistons à des nouvelles hiérarchies entre les Etats et entre les questions à l'agenda international. Les Etats Unis ont choisi le multilatéralisme, certes ; mais le rôle marginal de l'OTAN s'accompagne d'une hiérarchisation de fait, où les Etats européens sont classés en fonction de leur apport militaire à l'alliance; et l'UE, la PESC sont absent. Les USA ont établi l'agenda et le tableau de bord de la nouvelle alliance; l'UE, comme le Japon de Koyzumi d'ailleurs, s'interrogent inévitablement quant aux implications économiques, monétaires, humanitaires, au niveau de la coopération, du nouvel agenda international. La primauté, inévitable et légitime, des USA au niveau de l' « agenda setting » ne peut qu'avoir des implications sur le plan des autres dimensions des relations extérieures.

En conclusion, les mutations de l'après 11.9.2001 interrogent le dossier de l'apport de l'UE à la gouvernance globale de façon fondamentale: c'est un défi lié tant à la gouvernance qu'au gouvernement interne et externe. Même le concept de gouvernance devrait faire l'objet de réflexion et libéré de l'influence idéologique du climat optimiste des années 1989-91. Le retour de la politique, y compris de la sécurité, au centre de l'agenda impose de mettre en doute la possibilité normative envisagée par J. Rosenau et surtout par K.O. Czempiel en 1992 d'une « gouvernance sans gouvernement. De mauvaises solutions au gouvernement de la planète se répercuteraient sur la gouvernance globale et régionale (de ses unités). Les nouvelles différenciations de fait entre les Etats membres et entre les institutions (au détriment de la Commission et du PE), en fonction des degrés de l'engagement externe en phase de crise internationale (voire l'exemple de la guerre en Afghanistan), affectent directement la construction européenne : non seulement la crédibilité de la PESC, mais aussi « la constitution matérielle » de la gouvernance et du gouvernement de l'UE. Comment l'UE peut-elle saisir l'opportunité de cette longue crise internationale pour renforcer son apport tant à la lutte au terrorisme qu'à ses causes indirectes, pour répondre à ces nouveaux défis par sa vision de la gouvernance mondiale et du multilatéralisme?

L'apport du Livre Blanc

J. Vignon a correctement présenté le Livre blanc de juillet 2001 comme un premier pas. On peut parfaitement comprendre que la partie consacrée à la gouvernance mondiale ne soit pas la plus solide ni la plus approfondie du Livre Blanc, puisque la préoccupation première était une interprétation des défis internes. L'ouverture et la transparence inédites du processus complexe de la rédaction témoignent certainement d'une discussion plus riche et prometteuse pour l'avenir, que ne le reflète le résultat actuellement disponible. Pourtant, même le draft de juillet 2001 soulève des questions importantes, tant au niveau analytique que normatif et méritant d'être développées :

La vision de l'UE comme acteur international

A la place des expressions utilisées dans la première ébauche présentée au Collège le 27 mars 2001 (« Europe puissance » dans le cadre d'un « monde multipolaire ») on vise à un profil plus modeste et understated: l'Europe est vue essentiellement comme un acteur civil, un « civilian power », qui par son exemple et son influence (plutôt que par sa puissance politique) peut contribuer à l'amélioration de la gouvernance mondiale.

Ce paradigme de l'Europe constituant une sorte de « Scandinavie du monde », c'est-à-dire une entité internationale agissant surtout au niveau des « low politics », par des moyens civils et « post-westphaliens » (exemple : le modèle de développement durable, la conditionnalité démocratique dans la politique commerciale etc.) est partagée par une vaste littérature internationale, soit sur base de motivations normatives (rejet du modèle politico-militaire de puissance) soit par réalisme, c'est-à-dire, l'incapacité de la CE/UE d'agir au niveau des « high politics » (il s'agit là, réadapté, de l'ancien argument de H.Bull)[4]. Il s'agit donc d'un point de départ pertinent et scientifiquement légitime.

Pourtant un effort de périodisation aurait aidé à mieux comprendre l'impact sur la gouvernance de l'évolution des attentes des citoyens vis-à-vis de l'UE : les dates de 1989/91, 2001 changent-elles inévitablement et avec quels effets les demandes des citoyens par rapport au rôle de l'UE dans la gouvernance globale?

En outre, l'équilibre entre la dimension civile de l'identité internationale de l'UE et la dimension politique change en fonction des circonstances (de la « fortuna » de N. Machiavel): la fin du système bipolaire, l'accélération de la mondialisation et de ses contradictions, l'évolution de la stratégie internationale américaine, devraient être davantage pris en compte pour mieux situer la vision de l'UE comme composant de la gouvernance globale.

Les implications au niveau de la gouvernance

D'un côté, l'accent est mis sur la cohérence entre les solutions données à la gouvernance interne et internationale : la référence aux cinq principes de la bonne gouvernance (ouverture et transparence; participation; responsabilité; efficacité et cohérence). Dans le cadre de l'approche que nous avons appelée « bottom-up », la priorité est de « réussir la réforme de sa gouvernance interne » pour la rendre plus convaincante dans ses démarches pour la réforme de la gouvernance globale. Le Livre blanc voit l'UE comme une entité démocratique qui peut influencer les autres pays et les institutions multilatérales dans la mesure où elle pratique la démocratie en son sein.

De l'autre côté, le livre Blanc semble ouvrir un nouveau chapitre, même s'il s'arrête au seuil de la question : il attire en effet l'attention sur l'interaction entre l'efficacité de l'action internationale et la légitimation de l'UE par rapport aux citoyens (sujet soulevé depuis le premier draft de septembre et approfondi, entre autres, par les papiers de E.Kirchner et Th Christiansen dans le cadre du groupe gouvernance de l'AJM). Les implications positives du succès et négatives des échecs internationaux de l'UE y sont notamment évoquées, ce qui pourrait faire penser à l'urgence de l'amélioration de l'efficacité externe, même en parallèle avec la réforme interne (en tout cas sans établir de succession temporelle, correspondant à un schéma idéaliste). C'est dans ce sens que vont les propositions visant une efficacité accrue de: renforcer la cohérence

[4] H.Bull (1982),Civilian Power Europe: A Contraddiction in Terms? In: Journal of Common Market Studies, no. 1/2, pp.149-164.

entre les Etats membres et parler davantage d'une seule voix, « renforcer sa représentation dans les enceintes internationales et régionales notamment dans les domaines de la gouvernance économique et financière de l'environnement, du développement et de la concurrence » ;

-d'enrichir l'action internationale de l'UE « par de nouveaux outils » (évoqués ailleurs dans le Livre blanc) visant le renforcement de l'efficacité et de la légitimité des organisations multilatérales, notamment « le contrôle collégial des progrès accomplis en direction d'objectifs arrêtés au niveau international ou encore la mise au point de solutions de co-régulation » complétant « les éléments de droit public international comme OMC et CIJ » (Livre Blanc p.31-32). Il s'agit de la proposition la plus originale puisqu'elle, de nouveau en ligne avec l'approche « bottom-up », applique l'acquis européen au niveau de la gouvernance globale. L'UE se confirmerait comme un laboratoire des régimes intergouvernementaux, au niveau de la gestion dynamique des diversités. Déjà le groupe de travail des premiers ministres de centre-gauche appelé « Good governance » et successivement réuni, depuis quelques années, à Washington, Florence, Berlin et Stockholm, avait envisagé des formes multiples de monitoring de la convergence des politiques nationales. Dernièrement, cette méthode a été évoquée comme outil dans la lutte contre le terrorisme. En conclusion, UE acteur civil, UE institutionnellement plus cohérente et mieux représentée et UE laboratoire de la gouvernance mondiale.

2002 : Un chantier pour la Commission

Au niveau des propositions du Livre Blanc, la Commission s'engage aussi à « lancer en 2002 une discussion sur la façon dont l'Union peut contribuer à une reforme en profondeur des organisations multilatérales et améliorer la coopération entre les organisations internationales et leur ouverture ». Les débouchés ? La Commission va proposer « une révision de la représentation internationale de l'Union » en partie dans le cadre des traités actuels et en partie impliquant des « changements à la prochaine CIG ».

Donc c'est explicite : l'exercice n'est qu'à son début. Un nouveau chantier est annoncé. A quelles conditions pourrait-il combler les déficits actuels et s'enrichir d'une réflexion sur l'actualité pratique et théorique ? Il serait dangereux de simplement rajouter un nouveau chapitre comme réaction aux nouvelles impulsions externes à l'UE. Néanmoins, il faudrait saisir l'opportunité : la phase actuelle pourrait affaiblir les réticences et les points de vue introvertis et défensifs présents dans les institutions ainsi que dans certaines opinions publiques nationales et renforcer l'engagement de l'UE dans la gouvernance et dans le gouvernement global; deuxièmement, l'UE pourrait mettre en exergue, sur le plan de la gouvernance, le fait qu'elle dispose d'un éventail de politiques externes pouvant faire la différence dans la lutte contre le terrorisme et ses causes indirectes, sociales, politiques, culturelles, économiques.

La Commission a un rôle particulièrement important à jouer. Il serait erroné de laisser ce sujet entièrement au Conseil et au Conseil européen. Certes, ce dernier a fait preuve par l'activisme de la Présidence belge, le document du 14 septembre et sa réunion du 21 septembre d'une capacité de réaction rapide et de son aptitude à établir une orientation stratégique. Mais celle-ci ne correspond pas nécessairement aux orientations des Etats membres et est loin de donner lieu à une action cohérente et continue. Là, c'est à la Commission de jouer un rôle fondamental.

Il serait très limitatif pour la Commission, au niveau de son apport à la gouvernance globale, de travailler essentiellement sur la base d'inputs externes (par exemple le mandat de Ecofin de fin 2001, concernant la prise de position sur la taxe Tobin) ou d'accepter un partage de tâches

avec le Conseil correspondant à une distinction entre relations économiques et politiques, entre low politics et high politics, ce qui est dépassé dans la réalité actuelle et limiterait son initiative.

Par contre les exemples positifs, même récents, ne manquent pas : on a cité le domaine du développement soutenable et du régime de Kyoto ; on pourrait rappeler aussi la préparation active de la réunion ministérielle de Doha par le Commissaire Lamy ; le souhait de la part de M.Patten d'un débat et d'une clarification sur le partage des tâches avec M.PESC ; ou le document de M.Vitorino sur l'application de la méthode ouverte de coordination au IIIe pilier, présentant des implications internationales évidentes ; ou, last but not least, le rôle joué par la Commission dans la préparation du Conseil européen du 21 septembre 2001 dans l'avancement dans l'intégration en ce qui concerne le IIIe pilier : l'approbation du Mandat d'arrêt européen et la coordination accrue des politiques nationales en matière de lutte contre le terrorisme. La pratique devance la conceptualisation.

Le débat annoncé pour 2002 est donc une occasion importante et devrait donner lieu à une concentration sur les points à l'agenda de la gouvernance globale : à propos des sujets les plus controversés, la Commission pourrait présenter des alternatives plutôt qu' un consensus et ainsi solliciter le Conseil et le PE. De toute façon, il s'agit d'avancer de la façon la plus cohérente sur deux plans, cohérents l'un avec l'autre :

a) d'un côté, ce qui peut être réalisé à Traité constant : tout d'abord la rationalisation des pratiques externes en vue d'une plus grande cohérence ; énormément peut être fait dans le cadre actuel en ce qui concerne le premier pilier, bien entendu, mais aussi le troisième pilier. Secundo, l'élaboration par les trois institutions européennes, de « public anchors », de lignes directrices susceptibles de mobiliser les opinions publiques internes autour des objectifs fondamentaux de l'action internationale de l'UE, la coopération au développement, l'aide humanitaire et aussi la réforme des organisations multilatérales ; un vaste débat devrait être soulevé et structuré par la Commission en collaboration avec le PE et le Conseil sur la question fondamentale : quel type de mondialisation et quel système économique et politique international souhaite l'Union européenne ; qu'elle réforme du multilatéralisme?

b) de l'autre côté, vers l'élaboration des propositions de réforme des Traités en vue de la CIG 2004. Le rôle international de l'UE ne peut qu'être inclus dans l'agenda de l'après-Nice et interagir avec le débat constitutionnel. Les sujets qui suivent devraient absolument y être inclus :

-La personnalité juridique internationale de l'UE, sujet dont Griller a explicité la portée constitutionnelle[5];

-La visibilité, la continuité et le processus décisionnel en matière d'action extérieure : la coordination horizontale entre les institutions et notamment entre Commission et Conseil (approfondissement de l'art 3 du TUE) ;

-La vision dynamique du partage des compétences entre UE et Etats membres (coordination verticale). Il ne s'agit pas uniquement du « left over » de Nice concernant le rôle de la Commission dans le commerce extérieur (art.133). C'est aussi l'occasion de trouver une réponse innovatrice à cette grande question générale : pourquoi une Constitution? Précisément, pour mieux équilibrer ce qu'on fait en commun, ce que l'on peut faire par une nouvelle coordination des Etats membres et ce qui subsistera de la compétence et initiative

[5] Stefan Griller, The Constitutional Architecture, papier présenté à la conférence de l'AJM « Le grand débat » (15-16 octobre 2001, Bruxelles), pp. 22-25.

individuelle des Etats membres (au-delà des visions téléologiques qui inquiètent tellement une partie de l'opinion européenne).

- le renforcement de la légitimité de l'apport de l'UE à la gouvernance globale. De faire appel aux ONG et à la société civile, c'est correct. Mais la légitimation d'un rôle international accru de l'UE demande que la place du PE et des parlements nationaux (y compris des partis politiques européens) soit structurée de façon efficace et centripète. La fragmentation de la participation et du débat tue la démocratie. Une voie à vérifier pourrait être le débat sur la stratégie annuelle des relations extérieures de l'UE : l'organisation d'une session annuelle du PE, précédée par une réunion de la COSAC - et/ou des parlements nationaux - portant sur les lignes directrices des relations extérieures. M. PESC en collaboration avec le Commissaire chargé des relations extérieures devraient y présenter un rapport de synthèse, qui devrait aussi faire l'objet d'une discussion au CAG et au Conseil européen. Dans le cadre de ce qui deviendrait un « gouvernement mixte » des relations extérieures, le Traité devrait prévoir un vote final du PE et du Conseil.

L'UE pour un nouveau multilatéralisme ?

Le Livre blanc défend la thèse très correcte selon laquelle beaucoup peut être fait dans le cadre des Traités actuels. Il ne s'agit pas uniquement de rationalisation technocratique, mais aussi de volonté politique des Etats et de clarté stratégique et conceptuelle. Ceci est vrai surtout depuis le 11 septembre puisque l'incertitude internationale ne permet malheureusement pas d'espérer en une grande réforme institutionnelle.

La question principale à laquelle la Commission sera confrontée au niveau conceptuel est celle de savoir si le concept de « gouvernance globale », certes nécessaire, est aussi suffisant pour pouvoir maîtriser la question de l'apport de l'UE à une meilleure régulation du système international. Il est, d'une part, nécessaire et même précieux puisqu'il permet d'aller au-delà du paradigme Stato-centrique et d'inclure les relations transnationales, économiques, commerciales, culturelles et politiques, institutionnalisées ou non. De ce point de vue-là, la version finale du Livre Blanc est plus cohérente avec l'esprit général du document, puisqu'on laisse tomber les concepts de « monde multipolaire » et de « Europe puissance ». En effet, l'expression « multipolarisme », utilisée dans le draft de mars 2001, a plusieurs significations selon les pays et selon les approches ; néanmoins dans la littérature scientifique internationale, elle fait allusion à la création de plusieurs pôles politico-économiques de nature et caractéristiques comparables : c'est un concept lié au scénario : balance of power, retour aux sphères d'influence, nouvelle version du système d'équilibre ou du concert européen. Ce concept peut, peut-être, correspondre à la vision internationale de la Chine néo-nationaliste du début du XXIe siècle et de la Russie de Poutin ; mais pour des raisons à la fois normatives et réalistes, pas à celle de l'UE. Certes, des hommes d'Etat et des courants politiques minoritaires en Europe conçoivent l'UE comme puissance politico-militaire en formation dans la perspective d'un monde multipolaire. Il est toutefois improbable que ce concept, loin de la problématique de la gouvernance, puisse correspondre à la vision et à la pratique de la Commission européenne.

Le concept de gouvernance est, d'autre part, insuffisant, puisque l'apport interne et externe de l'UE se situe dans un cadre international caractérisé aussi par des enjeux sécuritaires, conditionné par les rapports de force politico-militaires. Même si dans un cadre multipolaire, nous assistons à un retour en force du gouvernement politique ainsi que des hiérarchisations internationales, ce qui rend la perspective d'une « governance without government » plus problématique que dans la décennie '90, tant au niveau analytique que normatif. Il est vrai que

la fin de l'équilibre de la terreur a relativisé et changé la qualité des menaces et aussi la perception des menaces : l'insécurité économique, les flux migratoires massifs, la criminalité internationale et le commerce de la drogue, le terrorisme constituent de nouvelles menaces contre lesquelles l'UE en tant que puissance civile dispose d'une palette d'outils potentiellement plus efficaces que les grandes puissances militaires et l'OTAN.

Mais ceci n'implique pourtant pas du tout la disparition des enjeux sécuritaires, ni des rapports politiques de force. Bien au contraire, nous assistons à une percée de leur importance dans la réalité et dans la perception des citoyens, et par conséquent, de la surdétermination de l'économie internationale par la politique. Ceci implique, entre autre, que soit l'UE avance vers une véritable PESC, et ce en complément et en cohérence avec d'autres dimensions des relations extérieures, soit l'UE devra tout simplement s'adapter, de façon de plus en plus subordonnée et fragmentée, aux politiques globales décidées ailleurs.

Un nouveau concept de multilatéralisme demande à être approfondi, bénéficiant de l'héritage extraordinaire de cinquante ans d'institutions de Bretton Woods, mais à la hauteur du tournant en cours dans le système international, de la fin du monde bipolaire en 1991, à la « première guerre du nouveau siècle » en 2001. Les turbulences du système international au début du XXIe siècle laissent trois options ouvertes pour la CE/UE :

1. Elle s'adapte à la crise du multilatéralisme classique et à l'émergence d'un « multilatéralisme hiérarchisé ». La nouvelle administration des USA est en train de modifier en profondeur les paramètres de la gouvernance et du gouvernement du système international. Avec Clinton, l'UE était confrontée à une démarche classiquement multilatérale. On percevait un effort de concilier les nouvelles priorités internes avec les responsabilités externes et les organisations internationales existantes. Les grands projets inter-régionalistes (tant dans le cas de l'APEC que dans le cas de la FTAA) étaient conçus en tant que piliers du multilatéralisme économique global, selon la leçon théorique de Larry Summers et Fred Bergsten (OMC, FMI,G8, Kyoto). Il en allait de même sur le plan politique (OTAN et ONU). La Présidence de Bush a modifié, à deux reprises, les priorités américaines en matière de gouvernance globale :

Avant le 11 septembre : le multilatéralisme classique devient moins prioritaire et l'inter-régionalisme américain change de nature (voire par exemple le sommet des Amériques au Québec, FTAA, en avril 2001). Il risque de s'éloigner du multilatéralisme classique et par conséquent, la question de sa cohérence avec les intérêts de l'Europe et avec la diffusion du modèle européen de « deeper regionalism » est clairement posée.

Après le 11 septembre : Bush a relancé une version inédite du multilatéralisme, dans le cadre d'une alliance internationale qui ne rappelle pas du tout celle de la guerre froide : elle est plus vaste (elle inclut la Russie, la Chine et l'Inde et les pays arabes modérés, du moins aussi longtemps que chacun peut espérer en tirer profit). Cette alliance est pour le moment « single issue », c'est-à-dire basée sur la restauration de l'ordre international contre le terrorisme, mais pourrait vite déborder vers une politisation des enjeux économiques de la gouvernance. Elle est légitime et importante pour l'isolation du terrorisme. Elle renverse pourtant inévitablement les priorités entre politique et économie et pourrait même s'accompagner d'un recul de la globalisation économique, ainsi que d'une augmentation de la régulation internationale. Elle a besoin de la stabilisation des régimes alliés, qu'ils soient ou non des défenseurs exemplaires des droits de l'homme et de la démocratie. La présence politique internationale de l'Europe serait renationalisée, monopolisée par les plus grands Etats membres.

Dans ce cadre, le rôle international de l'UE pourrait être recentré sur l'aide humanitaire, l'influence de son modèle social, le poids de son commerce. On pourrait aussi imaginer une

théorie du partage des tâches entre la « gouvernance »interne de la part de l'Union européenne (en analogie avec le Japon) et le « gouvernement » du monde de la part des USA au niveau du système international. La PESC/PESD et toute notion forte de néo-multilatéralisme et de néo-régionalisme, c'est-à-dire l'apport plus politique de l'UE à la gouvernance mondiale, seraient inévitablement pénalisés.

2. Deuxième option de l'UE : la continuité. L'inertie joue en sa faveur. Elle s'engage dans la relance du vieux multilatéralisme des institutions de Bretton Woods, malgré les incertitudes de Marrakech à Seattle, les récents blocages au Conseil de sécurité de l'ONU, la place de plus en plus secondaire de l'OTAN, les problèmes graves de légitimation auprès d'une partie de l'opinion publique provoqués par l'absence politique de l'Europe dans la crise internationale en cours, etc.; même si utopique dans son anachronisme, cette option a de son côté les approches défensives, les appels au retour aux origines, les pratiques divergentes des Etats membres, les faiblesses de la troïka et les limites des marges de manœuvre des Présidences volontaristes.

3. Troisième option : La CE/UE s'engage (certes en collaboration avec les USA, mais aussi avec de nouveaux acteurs du tiers monde, les organisations régionales, le Japon, la Chine, l'Inde etc.) à saisir l'opportunité offerte par la crise internationale en cours et par la phase actuelle de transition pour élaborer les lignes d'une réforme en profondeur des organisations multilatérales.

C'est la démarche la plus difficile. A ce propos, l'UE n'est pas uniquement confrontée à un déficit de volontarisme, de tactique ou de stratégie. On est en train de faire l'expérience d'un véritable déficit de conceptualisation : quel type de gouvernance globale souhaite-elle, l'UE ? La pratique déjà en cours d'un « nouveau multilatéralisme » pour devenir cohérente et efficace demanderait un long travail de précision conceptuelle. Le concept de nouveau multilatéralisme devrait être approfondi : il ne souligne pas uniquement la participation de la société civile et le respect des droits de l'homme et de l'environnement en tant que co-éléments de la mondialisation économique, commerciale et technologique : la réforme des organisations de la régulation globale, tant politiques (ONU) qu'économiques (OMC, FMI, Banque mondiale, etc.) implique un changement des équilibres dans le gouvernement même du système politique international. Le Premier ministre G. Verhofstadt y a fait allusion dans la lettre citée de septembre 2001 sur « la mondialisation éthique », lorsqu'il a prôné le remplacement du G7 par une sorte de conseil constitué d'organisations régionales représentant tous les continents (UE, Mercosur, Communauté Andine, ASEAN, Union africaine, etc.) ainsi que dans son discours à Gand du 31 octobre 2001.

L'UE n'a pas assumé la responsabilité politique de cette perspective néo-multilatérale, ni de l'apport potentiel du régionalisme à la gouvernance mondiale. En ce domaine, la pratique des DG de la Commission et en général de la CE/UE dépasse largement la théorie. Pourtant, la crise internationale multiplie les raisons d'un renouvellement conceptuel qui puisse étoffer et structurer une vision dynamique et innovatrice, pas seulement défensive et introvertie, de la gouvernance globale. Le Livre blanc s'interroge sur les implications indirectes de la « région Europe » sur le système international ; on est donc conscient des implications externes inévitables de la poursuite de son modèle d'intégration régionaliste supranationale approfondie. On établit pour la première fois un lien entre la réforme interne et la réforme du multilatéralisme. La méthode institutionnelle interne correcte a également été déjà, au moins dans ses grandes lignes, largement intégrée dans le Livre Blanc : c'est celle de la complémentarité entre la Commission, le Conseil et la diplomatie des Etats membres. La piste est indiquée ; elle devrait être approfondie, adaptée au retour en force du politique, à la nouvelle imbrication entre gouvernance et gouvernement à laquelle on assiste au niveau du système international.

L'apport de L'AJM a un Livre Blanc sur la governance globale

L'AJM est-elle en mesure de contribuer à cet exercice? L'AJM dispose d'un patrimoine rare en ce qui concerne la légitimation des études européennes au sein de quatre disciplines académiques ; elle a aussi constitué un premier pas dans le rattrapage d'un dialogue entre le monde universitaire et les institutions démocratiques, européennes et, dans certains cas, aussi nationales. L'opportunité qui s'offre à l'heure actuelle à l'Europe de préciser son identité et son rôle politique internationaux peuvent favoriser la mobilisation des vastes ressources intellectuelles dont l'AJM potentiellement dispose pour un exercice collectif nouveau : l'élaboration d'un Livre blanc de la Commission sur la gouvernance globale. L'input pourrait venir aussi du Conseil, mais la Commission a tout intérêt à en assumer l'initiative.

Nous avons ici proposé des points de l'agenda qui nous semblent utiles pour un tel exercice, en particulier ses dimensions conceptuelle, stratégique, institutionnelle. D'autres seront certainement rajoutés. La méthode la plus originale et innovatrice a été dans le passé récent celle de l'interaction entre les réseaux des académiciens et les hauts fonctionnaires de la Commission. Cette méthode peut être approfondie et améliorée dans le sens d'une plus profonde interaction[6]. Le texte final de ce colloque constituerait l'apport de l'AJM soit au chapitre du Livre blanc 2001 soit à un nouveau « Livre blanc sur la gouvernance globale » de la Commission.

[6] Un groupe de pilotage mixte pourrait être constitué, international, interdisciplinaire, chargé de rédiger un texte martyre. La richesse des relations pratiques établies par les services de la Commission avec les associations régionales de tous les continents devrait faire l'objet d'une recensement et d'une réflexion. Suite à un débat à organiser par internet parmi les profs J.Monnet, on pourrait essayer d'aboutir à un nouveau texte à présenter à l'occasion d' un grand colloque AJM-Commission, un colloque de « policy recommandation », caractérisé par l'ouverture aux acteurs et aux décideurs.

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What is there to legitimize in the European Union… and how might this be accomplished?

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Introduction

'Legitimacy' is one of the most frequently used and misused concepts in political science. It ranks up there with 'power' in terms of how much it is needed, how difficult it is to define and how impossible it is to measure. Cynically, one is tempted to observe that it is precisely this ambiguity that makes it so useful to political scientists. Virtually any outcome can be "explained" (*ex post*) by it – especially by its absence – since no one can be sure that this might not have been the case.

For legitimacy usually enters the analytical picture when it is missing or deficient. Only when a regime or arrangement is being manifestly challenged by its citizens/subjects/victims/beneficiaries do political scientists tend to invoke lack of legitimacy as a cause for the crisis. When it is functioning well, legitimacy recedes into the background and persons seem to take for granted that the actions of their authorities are "proper," "normal" or "justified." One is reminded of the famous observation of U.S Supreme Court Justice, Potter Stewart, with regard to pornography: "I don't know what it is, but I know it when I see it." With regard to legitimacy, it would be more correct to say: "I may not be able to define (or measure) it, but I know it when it is not there."

Now, if this is true for polities – i.e. national states – that have fixed boundaries, unique identities, formal constitutions, well-established practices and sovereignty over other claimants to authority, imagine how difficult it will be to make any sense of the legitimacy of a polity that has none of the above! The European Union (EU) is, if nothing else, a "polity in formation." No one believes that its borders and rules are going to remain the same for the foreseeable future. Everyone "knows" that it is not only going to enlarge itself to include an, as yet undetermined, number of new countries, but it is also very likely to expand the scope of its activities and to modify the weights and thresholds of its decision-making system. If this were not enough, there is also the fact that the EU is an unprecedented experiment in the peaceful and voluntary creation of a large-scale polity out of previously independent ones. It is, therefore, singularly difficult for its citizens / subjects / victims / beneficiaries to compare this *object politique non-identifié* with anything they have experienced before. No doubt, there exists a temptation to apply the standards that they are already using to evaluate their respective national authorities, but eventually they may learn to use other normative expectations with regard to EU behavior and benefits.

Part I: Laying the Conceptual Foundations

One Definition and Five Implications

First, let us try to define legitimacy in a way that is generic enough to allow us to apply it to the widest possible range of polities.

Legitimacy is a shared expectation among actors in an arrangement of asymmetric power such that the actions of those who rule are accepted voluntarily by those who are ruled because the latter are convinced that the actions of the former conform to pre-established norms. Put simply, legitimacy converts power into authority – *Macht* into *Herrschaft* – and, thereby, establishes simultaneously an obligation to obey and a right to rule.

From this, I draw the following implications:

1. The basis upon which these norms are pre-established can vary from one arrangement to another – not only from one country or culture to another, but also within a single country/culture according to function or place. While it is often claimed that in the contemporary context "democracy" provides the exclusive basis for exercising authority, this denies the possibility (and obvious fact) that particular arrangements within an otherwise democratic polity can be (and often are) successfully legitimated according to other norms.[1] It also obscures the fact that "democracy" can be defined normatively and institutionalized historically in such a different fashion that power relations that are legitimate in one democracy would be regarded as quite illegitimate in another. The "coincidence" that all of the EU members are self-proclaimed democracies, recognize each other as such and require of new members that they conform to the same institutional pattern does not *eo ipso* provide the norms for its legitimation – indeed, well-entrenched differences among its members may actually make it more difficult.

2. The unit within which relations of sub- and super-ordination are being voluntarily practiced can vary in both time and space. While there is a tendency in the political science literature on legitimacy to accept passively the sovereign national state as the "natural" and "exclusive" site, there is no reason why other (sub- or supra-national) "polities" – provided that they have sufficient autonomy in making and implementing collective decisions – cannot have their own normative basis of authority. In the case of the EU, the problem is compounded by the simultaneous need to legitimate not only what the unit should be, i.e. to define what "Europe" is, but also the regime that should govern it, i.e. what its institutions should be.

3. The norms must be "shared" by the actors, both those who rule and those who are ruled. This implies, first of all, that they must know who they are and what their respective roles are. It also implies that the exercise of authority is "systemic," i.e. that it is embedded in a collectivity that is sufficiently interdependent and mutually trustful so that disputes over the validity of rules can be (and usually are) resolved by the intervention of third parties within them. Institutions such as courts specialize in this "referential" behavior, but most of the contestation over rules involves

[1] Although it would be more accurate to stress that these "other" arrangements based on expertise, legality, personal reputation or just plain administrative efficiency are themselves embedded in a more encompassing framework of national democratic institutions that, at least potentially, have the power to amend or overrule whatever decisions are made by non-democratic means. This contextual property is sometimes overlooked by enthusiasts for central bank autonomy, independent regulatory agencies, oversight boards, judicial review, and so forth.

less formal interactions within civil society and between firms in which the intervention of outsiders (actual or potential) is sufficient to produce a mutually accepted outcome. The citizens/subjects/victims/beneficiaries of the EU do not yet know who they are – and not all of them are members of it and, therefore, entitled to participate in its government. Moreover, they remain anchored in relatively independent polities of varying size and power whose roles within EU institutions have yet to be established definitively. Nor have they achieved the level of social interdependence that allows them to rely on informal – "pre-political" and "extra-juridical" – means for resolving disputes legitimately.

4. The actors involved may be individuals or collectivities of various sorts. The literature conveniently makes the liberal assumption that the unique judges of legitimacy are individual human beings. This allows it to rely heavily on notions of family socialization, "moral sentiment" and personal responsibility as the source of norms and the mechanism for their enforcement. And this, in turn, tends to lead one to the conclusion that it is only in polities which have previously established a high degree of cultural homogeneity – i.e. nation-states – that legitimate political authority is possible. When one introduces, however, the heterodoxical idea that most of the exchanges in modern political life are between organizations and, moreover, that these organizations share norms of prudence, legal propriety and "best practice" that transcend individual preferences and even national borders, it then becomes more possible to imagine how a "non-national" and "non-state" polity such as the EU might be able to generate valid and binding decisions. Which is not the same thing as to say that it will be easy for it to come up with such norms – given all the caveats introduced above, plus the fact that in such a "multi-layered" and "poly-centric" arrangement it may be very difficult to trace the origin and responsibility for them.

5. The basis for voluntary conformity is presumably normative, not instrumental or strategic. In a legitimate polity, actors agree to obey decisions that they have not supported made by rulers whom they have not voted for. They also agree to do so even if it is not in their (self-assessed) interest to do so – and they are expected to continue to do so even when the effectiveness of the polity is in manifest decline. Needless to say, it will not always be easy to assess this. Rulers often can control the means of communication and distort the flow of information to make it appear as if they were following prescribed norms; the ruled may only be pretending to comply in order to build up a reputation that they can subsequently "cash in" for material or other self-regarding purposes. Conversely, resistance to specific commands – whatever the accompanying rhetoric – may have nothing to do with challenging the legitimacy of the authority that issued them, just with disputes over the performance of individual rulers or agencies. Needless to say, in the case of the EU the compellingness of norms is even more difficult to observe. The intergovernmental nature of its key institutions virtually licenses actors to pursue national interests exclusively – or, at least, to proclaim to their citizens that they are doing so. The confidentiality of its many committees makes it almost impossible to detect when interaction produces a shared norm rather than a strategic compromise or a hegemonic victory. Add to all this, the propensity for national rulers who can no longer "deliver the goods" by themselves to blame the obscure and distant processes of European integration when they have to take unpopular decisions and you have a polity that is bound to appear less legitimate than it is.

One (Interim) Conclusion and Two (Very Important) Implications

From this conceptual analysis, I draw the following conclusion:

If we are to make any sense of the present and future legitimacy of the European Union, we have to reach a consensus concerning the apposite criteria – the operative norms – that actors should apply when establishing their presumably shared expectations about how its authority should be exercised.

[I say "should" because it is abundantly clear that in the present circumstance both scholars and actors within the integration process tend to presume an isomorphism between the EU and their respective national polities. This unavoidably leads to the conclusion that the EU suffers from a "democratic deficit."[2] And this, in turn, implies that the only way of filling that deficit is to insert "conventional democratic institutions" into the way the EU makes binding decisions, e.g. assert parliamentary sovereignty, institute direct elections for the President of the Commission and, above all, draft and ratify a "federal" constitution.[3] It is that interpretation that I wish to contest, although I am aware that the more that the EU uses distinctive criteria in the design and evaluation of its institutions, the more difficult it will be initially to convince its citizens that what it is doing is "really" democratic. Nevertheless, this is a political paradox that will have to be tackled – and, like many such paradoxes, it is only by learning from experience that the apparent contradiction can be resolved.]

I am taking two things for granted at this point: (1) that the apposite criteria for the legitimation of the EU (whatever they may be) should be "democratic" in some fundamental/foundational sense; (2) that the individual citizens and collectivities that are members of the EU, now and for the foreseeable future, share a "reasonable pluralism" in the interests and passions that they wish to satisfy through the integration of Europe.

Just a bit of explication of both points:

1. The meaning and, hence, the institutions and values of democracy have changed radically over time. Robert Dahl has spoken of several "revolutions" in its past practice (often without its proponents being aware of it) and argued that "democracy can be independently invented and reinvented whenever appropriate conditions exist."[4] The European Union is unavoidably part and parcel of these changes. Not only must it reflect transformations in the nature of actors (from individual to collective citizens) and role of the state (from redistribution to regulation) that

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[2] The evidence usually adduced to "prove" the existence of this deficit is far from convincing (to me). Most of the items cited (e.g. decline in voter turnout in Euro-elections, decline in favorable attitudes toward EU institutions, rising difficulty in ratifying treaties by national referendum, increase in electoral support for extreme nationalist parties) are either also true with regard to "domestic" democratic practices or only tendentially related to European integration. In short, it is quite possible that the alleged "democracy deficit" is as much or more national than supra-national!

[3] In other words, I agree with William Nelson's observation that institutions that "look" most democratic in one context, i.e. the national, may not be appropriate at all in a different setting, e.g. the supra-national. Nelson, p. 198. Introducing direct elections for the Euro-Parliament is one good illustration of this. Those whose principal formula for democratizing the EU is to increase the powers of that body should reflect on the consequences of this proposal when there are no corresponding parties, constituencies or even consistent platforms at the European level.

[4] *On Democracy* (New Haven: Yale University Press, 1998), p. 9.

are well underway in the 'domestic democracies' of its member states, but it must also recognize and adapt to its uniqueness as a non-national, non-state, multi-level and poly-centric polity that encompasses an unprecedented (for Europe) variety of cultures, languages, memories and habits and is expected to govern effectively on an unprecedented scale – all this, with very limited human and material resources.

2. Despite the heterogeneity of its national and sub-national components and, hence, the strong likelihood that major actors will not be "naturally" in agreement on either identical rules of the game or substantive goals, its members are "reasonably pluralistic," i.e. the range of their differences is limited and they are pre-disposed to bargain, negotiate and deliberate until an agreement is found. To use another expression of Rawls, those who participate in the EU enjoy an "overlapping consensus." [5] Moreover, they understand and accept that the outcome of the process of integration will itself be pluralistic, i.e. it will protect the diversity of experiences rather than attempt to assimilate them into a single "European" culture or identity.

Based on this (interim) conclusion, I am first convinced that it is neither feasible nor desirable to try to democratize the European Union *tutto e sùbito* – completely and immediately.[6] Not only would the politicians not know how to do it, but there is also no compelling evidence that Europeans want it. Nothing could be more dangerous for the future of an eventual Euro-democracy than to have it thrust upon a citizenry that is not prepared to exercise it, and that continues to believe its interests and passions are best defended by national not supranational democracy.

Moreover, the EU at this stage in its political development neither needs, nor is prepared for a full-scale constitutionalization of its polity. The timing is simply wrong. In the absence of revolution, coup d'etat, liberation from foreign occupation, defeat or victory in international war, armed conflict between domestic opponents, sustained mobilization of urban populations against the ancien regime and/or major economic collapse, virtually none of its member states have been able to find the "political opportunity space" for a major overhaul of their ruling institutions.[7] The fact that they all (with one exception) have written constitutions and that this is a presumptive *sina qua non* for enduring democracy indicates that at some time this issue will have to be tackled – if the EU is ever to be democratized definitively – but not now!

However, as I have explored in a recent book, it may be timely to begin sooner rather than later to experiment with improvements in the quality of embryonic Euro-democracy through what I call "modest reforms" in the way citizenship, representation and decision-making are practiced within the institutions of the European Union.[8] Even in the absence of a comprehensive, i.e. constitutional, vision of what the supra-national end-product will look like, specific and incremental steps could be taken to supplement (and not supplant) the mechanisms of

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[5] The Treaty of Amsterdam has formalized these common principles (even if they remain rather abstract): liberty, democracy, respect for human rights and rule of law. Member states found (unanimously) in violation of these vague criteria can be suspended from membership. More recently, a detailed "bill of rights" has been drafted and accepted at the Nice Summit, although it was not made legally binding.

[6] What I mean by "interim" is that, in the long run, the EU might well acquire the properties of a state and even of a nation – in which case, the deployment of conventional institutions of representation and decision-making and standard notions of citizenship might become much more desirable. However, for the foreseeable future. e.g. 20– 25 years, the problem will be to protect and enhance the legitimacy of political institutions that do not have these properties – and that means relying upon novel arrangements and novel norms to justify them.

[7] I can only think of one clear case: Switzerland in the early 1870s. It would be interesting to explore this exception, although the fact that this country had a "one-party-dominant-system" (*Freisinnige/Radical*) at the time must have been an important factor – and, not one that can be repeated at the EU-level.

[8] *How to Democratize the European Union … and Why Bother?* (Lanham: Rowman & Littlefield, 2000).

accountability that presently exist within its member states. Since, as seems obvious to me, the rules and practices of an eventual Euro-democracy will have to be quite different from those existing at the national level, it is all the more imperative that Europeans act cautiously when experimenting with political arrangements whose configuration will have to be unprecedented, and whose consequences could prove to be unexpected – perhaps, even unfortunate.[9] .[10]

I will not enter into the details of the twenty-some "modest (and some not so modest) reforms" that I proposed in this book for the simple reason that I am not convinced that, even in the unlikely event that all of them were to be implemented, their joint impact would succeed in legitimizing the EU. Introducing one or another of them *au fur et à mesure* might improve selected aspects of the regime's capacity to invoke voluntary compliance, but given the "systemic" aspect that was mentioned above, one should not expect miracles – least of all *hic et nunc*. For one thing, it would take some time for any of them to produce their intended effects – especially, since several of them are calibrated to take into consideration the pace and extent of Eastern Enlargement. All of them, despite their modesty, entail unforeseeable risks and are likely to generate unintended consequences – indeed, the entire exercise was predicted upon exploiting these political externalities to press gradually and stealthfully toward further democratization.

The second ("very important') implication is that marginal and attainable improvements in the legitimacy of the European Union are much more likely to come from changes in the admittedly "fuzzy" but innovative practices of **governance** than from reforms in the much more clearly delineated and conventional institutions of **government**.

While it may have been revived by the opportunistic manipulations of the World Bank and may have initially been focused in an over-optimistic fashion on improving the performance of politics in sub-Saharan Africa, use of the concept of governance has spread with astonishing rapidity and is being applied by both academics and practitioners in a very wide range of settings – up to and including the European Union where it is about to become the subject of an official pronouncement, i.e. a "White Paper." Despite the inevitable oversell and vagueness in such a fashionable concept, there must be something to it – or it would not have met with such success. I am convinced that behind all that capaciousness is a distinctive method/mechanism for resolving conflicts and solving problems that reflects some profound characteristics of the exercise of authority that are emerging in almost all contemporary societies and economies – and, not just in those that are trying to catch up to the more developed ones.

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[9] At this point, I have to enter (briefly) the "essentially contested" field of defining what I believe should be the apposite criteria for democracy in the case of the EU. Elsewhere, with Terry Karl, I have defined democracy in its most generic terms as "a political system in which rulers are held accountable for their actions in the public domain by citizens, acting indirectly through the competition and cooperation of their representatives." NB that this definition is not based on any specific institutions or practices in "real-existing" or "self-proclaimed" democracies, and not restricted to any particular level of aggregation. It is not "procedural" but "processual." Nor is it "substantive" in presuming either what the issues are that citizens will hold their rulers accountable for or what results the rulers will have to produce in order to satisfy citizen expectations. It avoids any presumption about the level or type of participation on the part of citizens – just that whatever it is it should be equally available to these citizens *qua* citizens. It does not even stipulate that everyone has the right to participate in all decisions that affect him or her. It focuses on the classical question: *quis custodiet ipsos custodes* and answers: "the citizens through some form of collective action by their representatives."

[10] In their otherwise very instructive book, David Beetham and Christopher Lord do presume that the grounds for legitimizing the EU will be "conventional," i.e. similar to if not identical with the norms that justify authority in national polities, despite the fact that they are sensitive to the different nature of the emerging Euro-polity. *Legitimacy and the European Union* (London: Longman, 1998). See also the edited volume by Thomas Banchoff and Mitchell P. Smith with the same title, *Legitimacy and the European Union* (London: Routledge, 1999) where the treatment is even more "conventional."

Governance is not a goal in itself, but a means for achieving a variety of goals that are chosen independently by the actors involved and affected. *Pace* the frequent expression, "good governance," resort to it is no guarantee that these goals will be successfully achieved. It can produce "bads" as well as "goods." Nevertheless, it may be a more appropriate method than the more traditional ones of resorting to public coercion or relying upon private competition. Moreover, it is never applied alone, but always in conjunction with state and market mechanisms. For "governance" is not the same thing as "government," i.e. the utilization of public authority by some subset of elected or (self-)appointed actors, backed by the coercive power of the state and (sometimes) the legitimate support of the citizenry to accomplish collective goals. Nor is it just another euphemism for the "market," i.e. for turning over the distribution of scarce public goods to competition between independent capitalist producers or suppliers. It goes without saying that, if this is the case, the legitimacy of applying governance to resolving conflicts and solving problems will depend upon different principles and operative norms than are used to justify the actions of either governments or markets. It will be my purpose in the remaining portion of this essay to elaborate upon this implication by specifying what these principles and norms might be.

But first, a brief excursus into defining "it":

Governance is a method/mechanism for dealing with a broad range of problems/conflicts in which actors regularly arrive at mutually satisfactory and binding decisions by negotiating and deliberating with each other and cooperating in the implementation of these decisions.

Its core rests on horizontal forms of interaction between actors who have conflicting objectives, but who are sufficiently independent of each other so that neither can impose a solution on the other and yet sufficiently interdependent so that both would lose if no solution were found.[11] As we shall see, in modern and modernizing societies the actors involved in governance are usually non-profit, semi-public and, at least, semi-voluntary organizations with leaders and members; and it is the embeddedness of these organizations into something approximating a civil society that is crucial for the success of governance. These organizations do not have to be equal in their size, wealth or capability, but they have to be able to hurt or help each other mutually. Also essential is the notion of regularity. The participating organizations interact not just once to solve a single common problem, but repeatedly and predictably over a period of time so that they learn more about each other's preferences, exchange favors, experience successive compromises, widen the range of their mutual concerns and develop a commitment to the process of governance itself. Here, the codewords tend to be trust and mutual accommodation – specifically, trust and mutual accommodation between organizations that effectively represent more-or-less permanent social, cultural, economic or ideological divisions within the society.

Note also that governance is not just about making decisions *via* deliberation, bargaining and negotiation, but also about implementing policies. Indeed, the longer and more extensively it is practiced, the more the participating organizations develop an on-going interest in this

[11] One frequently encounters in the literature that focuses on national or sub-national "governance" the concept of **network** being used to refer to these stable patterns of horizontal interaction between mutually respecting actors. As long as one keeps in mind that with modern means of communication the participants in a network may not even know each other – and certainly never have met face-to-face – then it seems appropriate to extend it to cover transnational and even global arrangements.

implementation process since they come to derive a good deal of their legitimacy (and material rewards) from the administration of mutually rewarding programs.

The fact that governance arrangements are typically thought to be "second-best solutions" is a serious impediment to their legitimation. If states and markets worked well – and worked well together – there would be no need for governance. It only emerges as an attractive option when there are manifest state failures and/or market failures. It is almost never the initially preferred way of dealing with problems or resolving conflicts. States and markets are much more visible and better justified ways of dealing with social conflicts and economic allocations. Preference for one or the other has changed over time and across issues following what Albert Hirschman has identified as a cycle of "shifting involvements" between public and private goods. Actors, however, are familiar with both and will "naturally" gravitate toward one of them when they are in trouble. Governance arrangements tend to be much less obvious and much more specific in nature. To form one successfully requires a good deal of "local knowledge" about those affected and, not infrequently, the presence of an outside agent to pay for initial costs and to provide reassurance – even coercive backing – in order to overcome the rational tendency not to contribute. As we shall see, this almost always involves some favorable treatment from public authorities as well as (semi-) voluntary contributions from private individuals or firms. What is novel about the present epoch is that, increasingly, support for governance arrangements has been coming from private and not just public actors and from trans- and supra-national sources – and not just from national and sub-national ones. And the European Union has been among the most active and innovative producers of such arrangements.

Whether the EU has been as successful in convincing its citizens that these arrangements are legitimate exercises of its authority is not clear, although one should note the impressive extent to which member states and mass publics have consented to the "authoritative allocations" of its myriad committees and the decisions of its Court of Justice. It is certainly premature to claim that the EU is a "producer" rather than a "consumer" of legitimacy – depending as it does so heavily on the borrowed authority of its member governments. As David Beetham and Christopher Lord have argued so persuasively, it is the interaction between the different levels of aggregation and identity that reciprocally justifies the process of European integration.[12] In such a complex and still contingent polity, it becomes rather difficult to discern who is loaning and who is borrowing legitimacy – and for what purpose.

Moreover, much of what is happening within the EU is more the result of expediency, pragmatic tinkering, the press of time, the diffusion of "best practices," *ad hoc* and even *ad hominem* solutions than of shared principles and explicit design. My (untested) presumption is that, if the EU were to elaborate and defend such principles and, then, design its arrangements of governance accordingly, it would improve their legitimacy.

Part II: Building the Legitimacy of Governance Arrangements

Inserting Some Generic Principles for their Design:

In the course of my (marginal) participation in a collaborative project with the somewhat preposterous title, "Participatory Governance for Achieving Sustainable and Innovative Policies in a Multi-Level Context," a number of themes emerged from my listening to the discussion by those who were really dong the field research. Subsequently, along with additional reading in

[12] *Op. Cit*. fn. x.

several “literatures,” I have collected, condensed and labeled a set of generic principles that might be used to guide the design of what I will call generically: European Governance Arrangements (EGAs).

I begin with the somewhat heterodoxical notion that EGAs are political institutions and, as such, have to root their legitimacy in distinctively political principles. Just performing well will not be sufficient to ensure that their commands will be voluntarily obeyed – if only because their regulations and assignments inevitably have uneven distributive and even redistributive consequences. Their beneficiaries/victims will eventually question not just the substance of what they do, but how they have made their decisions. Admittedly, agencies such as the World Bank that have been promoting the idea of governance insist that their “recommendations for good governance” are apolitical and have nothing to do with “interfering in the domestic politics of member states.” No one should be fooled by this. Setting up a governance arrangement inevitably involves making significant political choices – with even more potentially significant political consequences if it is done wrong.

At a minimum, three features of political design are involved if the agent creating a governance mechanism expects to obtain legitimacy for its decisions and, hence, ensure the greater efficacy and efficiency of its operations:

1. What is the purpose of delegating power to such an arrangement (chartering)?

2. Who should participate in it (composition)?

3. How should they reach decisions (rules)?

The logically prior notion of “chartering” rests on the presumption that a particular issue or policy arena is “appropriate” for a governance arrangement, *ergo* that it is not better handled by good, old-fashioned market competition or government regulation. Some particular composition of actors, each acting autonomously, is thought to be capable of making decisions according to rules, voluntarily accepted or consensually deliberated, that will resolve the conflicts and provide the resources necessary for dealing with the issue or policy arena designated by its charter. Moreover, these decisions once implemented will be accepted as legitimate by those who did not participate and who have suffered or enjoyed their consequences. And, if this were not enough, a successful EGA would also have to demonstrate that its capacity to resolve conflicts and provide resources is superior to anything that a national or sub-national arrangement could have done. Looked at from this perspective, there may not be that many arenas that should acquire “their” EGA!

Someone who has given considerable thought to this question is Eleanor Ostrom[13]. Through her empirical research on “self-organized, common-pool resource regimes,” she has come up with a list of attributes that increase the likelihood that such governance arrangements will be formed and will perform better than either markets or states. [14] Let us look at this list and comment on the validity of its assumptions for the “pre-design” of EGAs:[15]

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[13] *Governing the Commons. The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990). An abbreviated version is “Reformulating the Commons,” *Swiss Political Science Review*, Vol. 6, No. 1 (2000), pp. 29– 52. It is from this latter source that I have derived my comments.

[14] Not all EGAs, existing or eventual, fit her generic specifications. Only some of them deal with resources that are “subtractable,” i.e. whose consumption precludes its use/enjoyment by others. Many, but not all, involve goods from which it is difficult to exclude non-contributors. And virtually none of them are, strictly speaking, “self-organizing” since

Attributes of the Resource (i.e. of the issue or policy arena): [16]

Feasible Improvement: Resource conditions are not at a point of deterioration such that it is useless to organize or so underutilized that little advantage results from organizing. *It would not be appropriate to create an EGA to accomplish something no one cared about or that had degenerated so much under national or sub-national management that a Europe-wide approach would be doomed from the start*.

Indicators: Reliable and valid indicators of the condition of the resource system are frequently available at relatively low cost. *Here, the issue involves "Europeanizing" the flow of quantitative and qualitative information by eliminating national peculiarities and thereby encouraging the emergence of Europe-wide standards of "best practice."*

Predictability: The flow of resource units is relatively predictable. *For EGAs the major problem with this is the likelihood that predictability may differ from one member state to another or that, even where the indicators have been Europeanized, they may be subjected to "local" interpretation.*

Spatial Event: The resource system is sufficiently small, given the transport and communication technology in use, that appropriators can develop accurate knowledge of external boundaries, and internal micro-environments. *Taken at face value, this attribute would literally preclude a European level of governance. Needless to say, until the enlargement process is terminated, no one can know what the external boundaries of any EGA will be. The integration process (and technological developments) may have considerably decreased transaction costs (and will do so even more in the future), but they will always be higher than inside each member state. What this suggests is that the implementation of EGA decisions should be administered and "articulated" in such a fashion as to encourage adaptation to national and sub-national contexts – while running the risk of systematic cheating if monitoring mechanisms are inadequate. This also suggests the wisdom of tolerating, even encouraging, "flexibility" in the establishment of EGAs such that they may be composed of different member-states.*

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all of them involve some mandate from EU institutions that defines the scope of their activity and imposes political and legal limits on their decisions.

[15] Another literature I thought seriously about exploiting in my search for operative norms-*cum*-design principles was that on "deliberative democracy." Although there is much there that could eventually be useful from the perspective of ideological justification, I found it virtually impossible to extract relatively concrete suggestions from these treatises. Not only are the arguments usually advanced at a high level of abstraction with no attention to the specifics of how one might actually design an arrangement to be more "deliberative," but many of their root suppositions seem to render it irrelevant. For example, it would be a serious distortion to presume that most of the interactions within the various forums of the EU are aimed at establishing truth or persuading one's opponents. Bargaining and negotiation are the rule, and the "successful" result is usually a compromise, not a new norm, a shared truth or a conversion in position. Interlocutors in EU committees, no doubt, learn from each other and change their perceptions of interest – but it would be hazardous to presume that this creates a novel "communicative rationality" – least of all, one that "rationalizes domination." As is often the case with "philosophy-based arguments" in political life, they are based on a counterfactual ideal that cannot be approximated in the real world of imperfect information, limited rationality and continuous exchange of promises and threats. By establishing such a high level of validity, they tend to exclude the search for "second-best" solutions ("*le mieux est l'ennemi du bien*," the French would say) – and that is what governance is all about. From an even more practical perspective, EGAs are never composed of "all the affected parties" – just a very selective subset of their representatives. Indeed, they would not work if everyone (or every organization) got to deliberate. The trick is to compose them and, then, to conduct them in such a way that negotiations among a small group of self-interested actors can nonetheless produce a decision that will prove (until future contestation) to be acceptable to those who have not participated. For a heroic, but in my view ultimately frustrating effort to apply the "deliberative" label to the EU, see Erik Oddvar Eriksen and John Erik Fossum (eds.), *Democracy in the European Union. Integration Through Deliberation?* (London: Routledge, 2000). In their favor, it should be noted that the editors did insert a question mark after the title.

[16] My comments are in italics.

Attributes of the appropriators (i.e .of the composition of participants):

Salience: Appropriators are dependent on the resource system for a major portion of their livelihood. *Participants should be "stake-holders" and "knowledge-holders" with both a significant interest in the issue and the capacity to deliver the compliance of their followers-employees-clients to decisions made by the EGA.*

Common Understanding: Appropriators have a shared image of how the resource system operates and how their actions affect each other and the resource system. *Obviously, given differences in language and historical practice, "Europeans" are more likely to be deficient in this attribute than "nationals" – even though convergence across member-states in both performance and intellectual understanding has been impressive and growing. Also, one could question whether this should be taken as a "pre-requisite" for, or as a "product" of EGA activity.*

Low Discount Rate: Appropriators use a sufficiently low discount rate in relation to future benefits to be achieved from the resource. *Again, the obvious problem is that given the diversity in national political systems and levels of economic competitiveness, the time horizon for reaping the benefits (and paying the costs) of EGAs will vary systematically and not just randomly.*

Trust and Reciprocity: Appropriators trust one another to keep promises and relate to one another with reciprocity. *In this attribute, what is peculiar is not the obvious "historically rooted" suspicions between member-states and their substantial disparities in size and power, but the way in which the European integration process has functioned to provide reassurance against unkept promises, to monitor the performance of participants, and to distribute compensations through package-dealing over time – even between members with initially very different capabilities and levels of development. What on the surface would seem an unsurmountable barrier can only be overcome by embedding EGAs within the broader context of on-going EU institutions.*

Autonomy: Appropriators are able to determine access and harvesting rules without external authorities countermanding them. *This is precisely what will not and should not be the case for EGAs. They will only function legitimately if "chartered" in their tasks and composition by the EU and if their "harvesting rules" are subject to its oversight. One must never forget that their foundation is "treaty-based" between consenting member-states. One cannot presume implicit consent, either by these states or individual citizens – as may be the case in well-established national polities.*

Prior organizational experience and local leadership: Appropriators have learned at least minimal skills of organization and leadership through participation in other local associations or learning about ways that neighboring groups have organized. *There should be no generic problem here. Even recent "entrants" in the integration process seem to have very quickly acquired the requisite skills – and I see no reason why this will not be the case for prospective Eastern and Southern candidates. Again, however, one can question whether this should be treated as a desirable pre-requisite for the founding of an EGA or a likely product of its subsequent functioning.*

From this discussion, I arrive at some general norms that should guide the initial formation of EGAs, the composition of those who should be entitled to participate in them and the rules they should follow in making their decisions.

I. Six Generic Principles for the Chartering of EGAs:

1. THE PRINCIPLE OF 'MANDATED AUTHORITY': No EGA should be established that does not have a clear and circumscribed mandate that is delegated to it by an appropriate EU institution. Any EU institution should be entitled to recommend the initial formation and design of an EGA, i.e. its charter, its composition and its rules, but (following the provisions of the Treaty of Rome) only those approved by the Commission should be actually established, whether or not they are subsequently staffed, funded, "housed" and/or supervised by it.

2. THE 'SUNSET' PRINCIPLE: No EGA should be chartered for an indefinite period, irrespective of its performance. While it is important that participants in all EGAs should expect to interact with each other on a regular and iterative basis (and it is important that the number and identity of participants be kept as constant as possible), each EGA should have a pre-established date at which it should expire. Of course, if the EU institution that delegated its existence explicitly agrees, its charter can be renewed and extended, but again only for a definite period.

3. THE PRINCIPLE OF 'FUNCTIONAL SEPARABILITY': No EGA should be chartered to accomplish a task that is not sufficiently differentiated from tasks already being accomplished by other EGAs and that cannot be feasibly accomplished through its own deliberation and decision.

4. THE PRINCIPLE OF 'SUPPLEMENTARITY': No EGA should be chartered (or allowed to shift its tasks) in such a way as to duplicate, displace or even threaten the *compétences* of existing EU institutions. European governance arrangements are not substitutes for European government, but should be designed to supplement and, hence, to improve the performance of the Commission, the Council and the Parliament

5. THE PRINCIPLE OF 'REQUISITE VARIETY': Each EGA should be free – within the limits set by its charter – to establish the internal procedures that its participants deem appropriate for accomplishing the task assigned to it. Given the diversity inherent in these functionally differentiated tasks, it is to be expected that EGAs will adopt a wide variety of distinctive formats for defining their work program, their criteria for participation and their rules of decision-making – while (hopefully) conforming to similar principles of general design.

6. THE 'HIGH RIM' OR 'ANTI-SPILL-OVER' PRINCIPLE: No EGA should be allowed by its mandating institution to exceed the tasks originally delegated to it. If, as often happens in the course of deliberations, an EGA concludes that it cannot fulfill its original mandate without taking on new tasks, it should be required to obtain a specific change in its mandate in order to do so.[17]

II. Four Generic Principles concerning the Composition of EGAs:

1. THE MINIMUM THRESHOLD PRINCIPLE: No EGA should have more active participants than is necessary for the purpose of fulfilling its mandated task. It has the autonomous right to seek information and invite consultation from any sources that it chooses; however, for the actual process of drafting prospective policies and deciding upon them, only those persons or

[17] NB that this does not mean that "log-rolling" and "package-dealing" should not be an integral part of the integration process, just that EGAs are not the appropriate sites for such activity. Decisions involving the negotiation of tradeoffs across circumscribed issue areas should be the purview of other EU institutions, i.e. the Commission, the Council of Ministers, the European Council and, hopefully in the future, the European Parliament.

organizations judged capable of contributing to the governance of the designated task should participate.[18]

2. THE STAKE-HOLDING PRINCIPLE: No EGA should have, as active participants, persons or organizations who do not have a significant stake in the issues surrounding the task assigned to it. Knowledge-holders (experts) specializing in dealing with the task should be considered as having a stake, even if they profess not to represent the interests of any particular stakeholder.

3. THE PRINCIPLE OF 'EUROPEAN PRIVILEGE': All things being equal, the participants in an EGA should represent Europe-wide constituencies.[19] Granted that, in practice, these representatives may have to rely heavily on national and even sub-national personnel and funding and may even be dominated by national and sub-national calculations of interest, and granted that the larger the constituency in numbers, territorial scale and cultural diversity, the more difficult it may be to acquire the "asset specificity" that provides the basis for stake-holding, nevertheless, the distinctive characteristic of a European governance arrangement is contingent on privileging this level of aggregation in the selection of participants.

4. THE ADVERSARIAL PRINCIPLE: Participants in an EGA should be selected to represent constituencies that are known to have diverse and, especially, opposing interests. No EGA should be composed of a preponderance of representatives who are known to have a similar position or who have already formed an alliance for common purpose.[20] In the case of 'knowledge-holders' who are presumed not to have constituencies but ideas, they should be chosen to represent whatever differing theories or paradigms may exist with regard to a particular task.

III. Eight Generic Principles concerning Decision-Rules for EGAs:

1. THE PRINCIPLE OF 'PUTATIVE' EQUALITY: All participants in an EGA should be considered and treated as equals, even when they represent constituencies of greatly differing size, resources, public or private status, and "political clout" at the national level. No EGA should have second and third class participants, even though it is necessary (see Item II.2) to distinguish unambiguously between those who participate and those who are just consulted.

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[18] Another way of stating this point is to stress that all participants must possess some type or degree of "asset specificity" – i.e. they must demonstrably have material, intellectual or political resources that are apposite to the tasks to be accomplished. Needless to say, defining "the stakes" and those who hold them is bound to be politically contested, since the number of representatives and experts who can make that claim ("interest-holders" in my terminology) is potentially unlimited – thanks to the growing interdependence of policy domains. As an approximation, I propose that a relevant stake-holder be defined as a person or organization whose participation is necessary for the making of a (potentially) binding decision by consensus, and/or whose collaboration is necessary for the successful implementation of that decision. In practice, this is likely to be determined only by an iterative process in which those initially excluded make sufficiently known their claims to stake- and knowledge-holding so that they are subsequently included. Presumably, those initially invited to participate who turn out not to be indispensable for policy-making and implementation will leave of their own accord – although a persistent problem in EGAs is likely to be the absence of an effective mechanism for removing non-essential participants.

[19] This should not be interpreted to mean "EU-wide constituencies" since there may be significant stake-holders and knowledge-holders in prospective member-states and even in those that have explicitly chosen not to join the EU.

[20] To fulfill this principle, it may be necessary for the designers of EGAs to play a pro-active role in helping less well-endowed or more dispersed interests to get organized and sufficiently motivated to participate against their adversaries. Needless to say, this element of "sponsorship" intended to encourage a greater balance in adversarial relations can conflict with the subsequent principle of equality of treatment and status. It can also generate serious questions concerning the autonomy of such 'sponsored' organizations from EU authorities.

2. THE PRINCIPLE OF HORIZONTAL INTERACTION: Because of the presumption and practice of equality among participants, the internal deliberation and decision making processes of an EGA should avoid as much as possible such internal hierarchical devices as stable delegation of tasks, distinctions between "neutral" experts and "committed" representatives, formalized leadership structures, informal arrangements of deference, etc. and should encourage flexibility in fulfilling collective tasks, rotating arrangements for leadership and rapporteurship, extensive verbal deliberation, – and a general atmosphere of informality and mutual respect.

3. THE CONSENSUS PRINCIPLE: Decisions in an EGA will be taken by consensus rather than by vote or by imposition.[21] This implies that no decision can be taken against the expressed opposition of any participant, although internal mechanisms usually allow for actors to abstain on a given issue or to express publicly dissenting opinions without their exercising a veto. Needless to say, the primary devices for arriving at consensus are deliberation (i.e. trying to convince one's adversaries of the *bien-fondée* of one's position), compromise (i.e. by accepting a solution in between the expressed preferences of actors) and accommodation (i.e. by weighing the intensity of actor preferences). Regular and iterative interaction among a stable set of representatives is also important, although (see Item I.2) this should be temporally bounded.

4. THE 'OPEN DOOR' PRINCIPLE: Any participant should be able to exit from an EGA at relatively modest cost and without suffering retaliation in other domains – either by other participants or EU authorities. Moreover, the ex-participant has the right to publicize this exit before a wider public (and, the threat to do so should be considered a normal aspect of procedure), but not the assurance that, by exiting, he or she can unilaterally halt the process of governance.

5. THE PROPORTIONALITY PRINCIPLE: Although it would be counter-productive for influences to be formally weighed (see Item III.1) or counted (see Item III.3), it is desirable that across the range of decisions taken by an EGA there be an informal sense that the outcomes reached are roughly proportional to the specific assets that each participant contributes (differentially) to the process of resolving the inevitable disputes and accomplishing the delegated tasks.[22]

6. THE PRINCIPLE OF SHIFTING ALLIANCES: Over time within a given EGA, it should be expected that the process of consensus formation will be led by different sets of participants and that no single participant or minority of participants will be persistently required to make greater sacrifices in order to reach that consensus. Thanks to Item III.4, this situation should be avoided, if only because it will be so easy and "cheap" for marginalized actors to exit.

7. THE PRINCIPLE OF 'CHECKS AND BALANCES:' No EGA should take a decision binding on persons or organizations not part of its deliberations **unless** that decision is explicitly approved by another EU institution that is based on different practices of representation and/or of constituency. Normally, that EU institution will be the one that "chartered" the EGA initially, but

[21] NB this principle serves to distinguish EGAs from other institutions operating at the European level. For example, parliaments, courts, central banks and independent regulatory agencies ultimately take their decisions by vote, even if they engage in extensive deliberation and seek to form a consensus beforehand. Some expert commissions and many executive bodies may decide by imposition when the actor designated as "superior" exercises his or her 'sovereign' authority.

[22] A more orthodox way of grasping this principle would be to refer to "reciprocity" – although this seems to convey the meaning of equal shares or benefits across some set of iterations. "Proportionality" is similar, but allows for the likelihood that stable inequalities in benefit will emerge and be accepted on the grounds of differential contribution/assets.

one can imagine that the European Parliament through its internal committee structure could be accorded an increased role as co-approver of EGA decisions.

8. THE REVERSIBILITY PRINCIPLE: No EGA should be empowered to take decisions (even when co-approved as per Item III.7) that cannot be potentially annulled and reversed by "rights-holders," i.e. by European citizens acting either directly through eventual referenda or indirectly through their representatives in the European Parliament.

V. Five Other Generic Principles of EGA Design

1. THE PRECAUTIONARY PRINCIPLE: An EGA should in the substance of its decisions take into account the full range of knowledge and, where that knowledge is uncertain or incomplete, it should err on the side of assuming the worst possible consequence – ergo, it should avoid risks rather than maximize benefits when calculations about the latter are inconclusive.

2. THE FORWARD-REGARDING PRINCIPLE: An EGA should in the substance of its decisions take into account the furthest future projection of the consequences of its decisions. This obviously poses a serious difficulty in terms of the composition of its participants, (e.g. who can legitimately represent as yet unborn generations), but some "place at the table" should be occupied by persons or organizations representing as long a time perspective as possible.

3. THE SUBSIDIARITY PRINCIPLE: No EGA should deal with an issue or make decisions about a policy that could be handled more effectively or more legitimately at a lower level of aggregation, i.e. at the level of member states or their sub-national units. Inversely, no EGA should occupy itself with an issue that cannot be resolved and implemented at the level of Europe, but requires a higher level of aggregation, i.e. the Trans-Atlantic or Global one.

4. THE PRINCIPLE OF (PARTIAL) TRANSPARENCY: No EGA should take up an issue or draft a *projet de loi* that has not been previously announced and made publicly available to potentially interested parties not participating directly in its deliberations. Conversely, none of the participants in an EGA should make public the content of deliberations while they are occurring and the draft of a *projet* until a consensus has been reached. Once a decision has or has not been made, the participants are free to express their satisfaction/dissatisfaction with it to whomever they please.

5. THE PRINCIPLE OF PROPORTIONAL EXTERNALITIES: No EGA should take a decision whose effects in financial cost, social status or political influence (especially for those not participating in it) is disproportionate either to the expectations inherent in its original charter or general standards of fairness in society. When claims of disproportionate effect are made, these externalities should be investigated and, where found to be justified, compensated for by other EU institutions – in particular, by the European Parliament.

Concluding with some caveats

Participatory/democratic governance is not a panacea. It may contribute positively to enhancing the legitimacy of the EU, but only if it is "seconded" by reforms in the institutions of its government. Moreover, EGAs will not work to resolve all policy issues and they will not work unless firmly based on political as well as administrative design principles. And that means that difficult choices involving their charter, composition and decision-rules cannot be indefinitely avoided or finessed. Unless EGAs are "properly" designed, there is no reason to be confident that their decisions will be more sustainable or accepted as legitimate by those who have not

participated in them and joined in the consensus they are intended to promote. And, as emphasized above, governance arrangements never work alone but only in conjuncture with community norms, state authority and market competition.

I can foresee two key dilemmas that still must be addressed – even if progress is made on the difficult choices involved in designing EGAs. I will only raise them without further explication:

1. The proliferation of EGAs tends to occur within compartmentalized policy arenas (and more so in the EU than in member states). This leaves unresolved the larger issue of how eventual conflicts between their decisions are going to be resolved. Multiple "governances" at the micro- or meso-levels no matter how participatory, sustainable and legitimate on their own, may end up generating macro-outcomes, e.g. *via* externalities, that were not anticipated and that no one wants!

2. The criteria for the inclusion of participants and the making of decisions in EGAs are not generally compatible with the conventional norms for democratic legitimation used within national and sub-national polities – although experimentation with governance arrangements is occurring at all levels of aggregation. Before EGAs can be reliably deployed and generate a sense of obligation among broader publics, it may be necessary to spend a good deal of effort in changing peoples' notions of what democracy is and what it is becoming.

Vers une fédération d' états nations ?

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La construction européenne n'ayant ni précédent historique ni modèle théorique, les institutions qui l'incarnent sont demeurées longtemps, selon la formule de Jacques Delors, « un objet politique non identifié ». Certes, la conjoncture internationale n'ayant pas rendu possible jusqu'à présent, à l'instar des Etats, la création d'un gouvernement européen, la méthode communautaire inspirée par Jean Monnet a permis aux Communautés européennes de fonctionner. Et il en est résulté un grand marché, des politiques communes et une union économique et monétaire. Mais l'amorce d'une politique générée par le Traité de Maastricht, parallèlement à la Communauté, s'est contentée d'une gestion intergouvernementale, non sans que l'articulation entre les deux systèmes aît produit des dysfonctionnements.

L'élargissement de l'Union européenne à l'Europe centrale et orientale qui se profile à l'horizon risquant de rendre ce mode de fonctionnement ingouvernable, les chefs d'Etat et de gouvernement des quinze pays membres ont essayé à Nice d'adapter les institutions de l'Union à cette nouvelle situation. Mais en limitant leur ambition à un jeu de « mécano institutionnel », ils n'y sont pas parvenus. Et dans la Déclaration n° 23 annexée au Traité, ils ont été obligés de reconnaître la nécessite de refonder les structures de l'Union et, en faisant appel au concours des parlements européen et nationaux ainsi qu'aux réflexions de la société civile, ils ont implicitement convenu de leur incapacité de leur donner, à eux seuls, une base légitime. D'où le projet de convoquer lors du prochain Conseil européen de Laeken une nouvelle Convention, formée sur le modèle de celle qui a réussi en l'an 2000 à élaborer une Charte européenne des droits fondamentaux.

Or, ni plus ni moins que les conférences intergouvernementales précédentes, cette Convention ne pourra transposer au plan européen les types idéaux formulés par les juristes, qu'il s'agisse de la Confédération d'Etats ou de l'Etat fédéral. Le degré d'intégration correspondant au premier est déjà largement dépassé et, par rapport à l'acquis communautaire, il serait un retour au Conseil de l'Europe. Le second impliquerait l'édification à Bruxelles d'un super-Etat, dont aucun Etat membre ne voudra.

Par conséquent, la Convention inter-parlementaire comme le Conseil européen se trouvent condamnés à l'innovation. Mais comme il serait à la fois artificiel et risqué de construire sur la « table rase », ils devront inscrire ce souci d'innover dans la continuité. D'où l'intérêt que présente la piste de réflexion ouverte par Jacques Delors autour de l'idée d'une Fédération d'Etats nations qui aurait pour objet de prendre appui sur la méthode communautaire pour la hisser au niveau politique et démocratique.

Une double légitimité démocratique

La caractéristique essentielle de ce projet tient au fait qu'il tend à faire converger deux sources de légitimités démocratiques, l'une et l'autre irremplaçables. Il s'agit d'une part de la légitimité séculaire d'Etats nations eux-mêmes rompus à la pratique de la démocratie parlementaire et d'Etats candidats ayant la volonté de l'exercer ; rien ne saurait remplacer le degré d'intensité de la conscience citoyenne qu'ils ont réussi ou qu'ils ont vocation à réaliser, tant en matière d'éducation, de culture que de protection sociale. Il s'agit, d'autre part, de l'accès direct au niveau d'institutions fédératives que l'Europe doit pouvoir offrir à ses ressortissants, en vue de donner un contenu démocratique à la citoyenneté européenne appelée à compléter les citoyennetés nationales, sans, pour autant, les remplacer. D'où l'importance que représentent au plan européen à la fois la « démocratie représentative », qui doit trouver son aboutissement au sein du Parlement de Strasbourg, et la « démocratie participative » qui doit permettre à la société civile de s'exprimer parallèlement.

Or, ce sont ces deux sources de promotion politique et démocratique de l'Union européenne qui devront, à moyen terme, inspirer son architecture institutionnelle, sa légitimité diplomatique ne suffisant plus à provoquer l'adhésion des gouvernés, quand elle ne contribue pas à conforter l'euroscepticisme.

Un «gouvernement mixte »

La première institution à incarner cette exigence devra être la « branche exécutive » de l'Union. Après beaucoup d'hésitations sur ce point, il apparaît clairement que ni la Commission, ni le Conseil ne sont aptes à eux seuls à exercer cette fonction. Par conséquent, le futur gouvernement européen ne saurait résulter que de leur synergie, au point de donner naissance à un « gouvernement mixte » résultant de leur articulation. Or une telle synergie nécessite la réunion de plusieurs conditions. Elle implique notamment :

- l'établissement d'une symétrie d'attributions entre un nombre restreint de formations du Conseil de l'Union et de membres de la Commission, de telle sorte que chaque commissaire soit l'exécutif de chaque conseil et qu'à terme, mettant fin à une présidence semestrielle des Etats qui deviendra dysfonctionnelle à vingt-cinq ou à trente, il en assure la présidence ;

- la restructuration du Conseil « affaires générales » appelé à coordonner ces formations grâce à sa permanence rendue possible par la présence en son sein de ministres des affaires européennes à la fois disponibles et mandatés directement par leurs chefs de gouvernement nationaux ; ce Conseil devra siéger en présence du président de la Commission et, à terme, être présidé par lui ;

- le recentrage de la Commission européenne sur son rôle politique, ce qui exige une forte légitimation démocratique de sa composition qui pourrait résulter, comme le propose l'Association « Notre Europe » présidée par Jacques Delors, d'une corrélation entre les élections au Parlement européen et le choix du président et des membres du Collège ; certes, une telle mutation ferait perdre à la Commission son impartialité et son apparent apolitisme, mais sa démocratisation est à ce prix ;

- enfin, un tel système, dont la complexité n'aurait pas totalement disparu, nécessiterait d'être impulsé dans un souci de cohérence à l'aide du leadership personnalisé d'un homme d'Etat qui pourrait être, soit le président de la Commission, soit un président permanent du Conseil européen, soit les deux à la fois, à condition que leurs mandats respectifs soient clairement distingués et leur coopération organisée.

Une parlementarisation renforcée

L' «appel au secours » lancé par les chefs d'Etat et de gouvernement à l'issue du Sommet de Nice, qui trouve son illustration dans la Déclaration n° 23 dont est assorti le traité, implique à la fois un renforcement de la légitimité du Parlement européen et une association plus étroite des parlements nationaux en amont du processus de décision.

La légitimation renforcée du Parlement européen passe par la réforme de son mode d'élection qui devrait être régionalisé au moins dans les « grands Etats » et comporter une fraction de députés élus sur des listes transnationales. Ce qui justifierait la faculté pour le président de la Commission de poser la question de confiance devant lui et le droit pour le Conseil européen de le dissoudre sur proposition de la Commission.

L'association des parlements nationaux est plus complexe dans la mesure où la création d'une deuxième chambre (qui serait, en fait, une troisième) au sein du Parlement européen se heurterait à deux obstacles : elle compliquerait encore davantage un mode de décision qui l'est déjà passablement et elle reposerait sur un cumul de mandats difficile à faire fonctionner. Aussi, deux autres pistes doivent-elles être explorées. La première consiste à associer des parlementaires nationaux (présidents ou rapporteurs des commissions compétences) au sein de chaque délégation des Etats siégeant au Conseil chaque fois que celui-ci statue en matière législative, les ministres nationaux restant seuls maîtres du vote. La seconde, qui n'est pas exclusive de la première mais qui est plus ambitieuse, vise à pérenniser le recours à des Conventions temporaires. Chaque fois qu'une décision politique de nature stratégique devrait être prise au niveau de l'Union (élaboration d'un Pacte constitutionnel, révision de celui-ci, programmation pluriannuelle de ressources propres de nature fiscale destinées à alimenter le budget communautaire…), une Convention réunissant des parlementaires européens et des parlementaires nationaux serait convoquée, sans qu'elle constitue une assemblée permanente. Ainsi pourrait-elle indirectement constituer le garant du principe de subsidiarité.

L'essentiel, à travers ces propositions, consiste dans l'exigence de ne plus situer, dans la chaîne des processus de décision, les parlements nationaux au seul stade de la ratification où ils ne peuvent qu'enregistrer ou rejeter des projets établis en dehors d'eux, ce rôle devant être réservé, éventuellement et selon les Etats, aux électeurs appelés dans des circonstances exceptionnelles à se prononcer par voie de référendum.

Avant-garde ou arrière-garde ?

Naturellement, ce recours à des conventions mettrait un terme, en matière constitutionnelle et budgétaire, à la prise de décision à l'unanimité. Qu'en serait-il, alors, des Etats dont les représentants refuseraient majoritairement de s'associer aux décisions prises ? Pourraient-ils continuer à « tenir en otages » ceux qui veulent progresser ou devraient-ils se retirer de l'Union ? La question, à terme, ne saurait être éludée. Sans doute, serait-il sain que figure dans le futur Pacte constitutionnel de l'Union, de façon explicite, un droit de sécession, qui devrait avoir surtout un rôle de dissuasion. Mais, sans obliger, pour autant, les Etats à « se soumettre ou se démettre », l'on pourrait imaginer qu'au coup par coup, ceux qui ne seraient pas prêts à suivre le rythme de la majorité, mais n'excluraient pas l'éventualité de la rejoindre, puissent demeurer dans l'Union en demeurant liées à elle sur la base du statu-quo antérieur.

Ainsi, plutôt que de forcer quelques Etats animés d'une forte volonté politique à constituer une « avant-garde », sous une forme dépassant les « coopérations renforcées » et débouchant sur

un « traité dans le traité », verrait-on émerger des « arrière-gardes » provisoires, comme il en existe déjà à propos de l'Union économique et monétaire et de l'intégration des accords de Schengen.

Une formule de ce genre aurait, du moins, le mérite d'avoir été testée par l'Union européenne depuis déjà une décennie sans avoir provoqué l'explosion. Elle permettrait, à terme, à l'Union de ne pas se figer dans une posture à deux vitesses, mais de former une Fédération d'Etats nations dont la géométrie variable permettrait d'épouser le rythme d'évolutions.

L'on pourra, certes, considérer ces considérations prospectives comme utopiques. Mais beaucoup de rapports, qui ont émaillé l'histoire de la construction européenne et qui pouvaient paraître à l'heure de leur publication comme irréalistes, ont vu progressivement leurs propositions réalisées. L'essentiel en la matière n'est-il pas, en s'écartant de la table rase, de situer celles-ci dans la continuité d'un processus qui restera encore longtemps inachevé. Le mérite de l'hypothèse de la Fédération d'Etats nations est de s'inscrire dans cette perspective. Peu importe si l'expression paraît contredire la logique juridique à laquelle on a été pendant longtemps habitués, si elle a le privilège de faire choc et surtout de recueillir le consensus d'hommes et de femmes de gouvernement, plus sensibles à l'image politique qu'elle représente qu'à la cohérence de sa terminologie. Car de même que tout régime présidentiel inclut aussi un congrès et que tout régime parlementaire comporte un gouvernement, il va de soi qu'un tel type de Fédération associerait directement et démocratiquement les peuples aux Etats nations dont il serait formé.

Conclusions

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This conference had as its organizing principle the notion of Setting the Agenda and Outlining Options.

In this epilogue I do not attempt to summarize the various papers of the conference. I present, instead, my own views as to the Agenda and the Options inspired by the themes of the conference and by the various contributions. I greatly acknowledge the various contributions but I alone bear responsibility for what is written.

1. Process: IGC and Convention

IGC Technology

The IGC process itself, as presently practiced, has twice failed Europe. The final session of the Amsterdam IGC will be remembered by those present as high farce: The Dutch Presidency, in an appalling display of political shortsightedness, was determined to conclude the IGC there and then. This was a technocratic blunder: There were simply too many open agenda items to be discussed and negotiated seriously in the ludicrously short time available at a Summit. Leaving the hard issues to the end, setting deadlines and negotiating into the night may have been in the past the ingredients for success on some notable occasions. But you cannot use yesterday's negotiating technology in a Community of fifteen and more with an ever increasing complex agenda. The "deadline" method ended up simply greasing the race to the bottom: An inconclusive Treaty leaving all hard issues for the next day. Nice which used the same technology faired no better. Apart from the well prepared provisions opening the possibility for reform of the judicial architecture of the Union, Nice offers very little. The almost immediate opening of the *Après Nice* debate was visible testimony to its failure.

One clear lesson of these past experiences is the need to end that tired old practice of IGCs as the means for revision and adaptation. How many more failures does one have to have before one gets rid of the romantic notion that if you make a deadline and have people negotiate late enough into the night, they will emerge with sensible compromises?

Treaty amendment is akin to constitutional amendment in the Member States. It should be given the same deliberative weight. The next IGC should be regarded as a non-dramatic on-going affair. Until the Treaty amendment provisions can, themselves, be amended, the Union, respecting the letter of the law, would be well advised to have a permanent IGC in session with small batches of amendments submitted for approval to the regular summits – i.e. each Summit,

from now onwards should have time allocated to deal with Treaty amendment on an ongoing basis. An *acquis* of change will thus accumulate, will not be left hostage to last minute horse-trading. Difficult issues should *not* be left to the end but tackled, with Working Groups and the usual paraphernalia on an ongoing basis until resolved and then immediately adopted.

According to this vision of the IGC – when we reach 2004 80% of the amendments should have been not only negotiated but actually approved.

Even if this orientation is rejected, the underlying idea should receive careful attention as an Agenda item: Thinking carefully about the process itself and creating a process which will maximize the chances for success. The failure of Amsterdam and Nice to tackle the pressing problems on the Union agenda was at least in part due to a faulty deliberative and negotiation procedure.

The Convention

This is "the new kid on the block." The much touted success of the Convention which adopted the Charter is used now as a justification for adopting a similar technique for the 2004 *Grand Debat* and the possible adoption of a Constitution for Europe. It is probably too late to reverse this process, but the Convention idea should be discussed with great caution.

The Convention represents a historical shift in the Community method, a very serious tilt in the traditional institutional balance and a colossal failure of the Commission.

First some misconceptions about the Convention and the Charter have to be dispelled. The greatest achievement of the Charter is the fact that it came into being. But it is a seriously flawed document (See Section 4 supra) the adoption of which will not significantly enhance the protection of fundamental human rights in the Union and in some respects might retard them. The fact that the Convention had a large complement of Parliamentarians only superficially enhanced its democratic legitimacy since these parliamentarians were not operating in a representative capacity, did not have a clear mandate and were not accountable to their respective chambers.

The Convention also distorted the balance between the "Community" voice and the Member State voice, tilting it largely in the direction of the latter. The Charter contains clauses which undermine the Supremacy of Community law and it deals a further blow to any attempt to have the Community take human rights really seriously by having a veritable human rights policy. (See section 4 supra).

A hard look at the Convention calls at least some doubt whether it is a good instrument for the *Grand Debat*.

Historically, it would have been the Commission, as it did with the White Paper on the Single Market and the subsequent Cechini Report which would have set the Agenda and outlined the major options which would then go into the IGC cauldron. In recent years, first with the Reflection Group method, and now with the Convention, the Commission has been reduced in the most fundamental debates about the Community future, to that which is a betrayal of its very idea: A super-secretariat, helping to facilitate the implementation and achievement of the ideas, plans and designs of others (whilst fighting a rear-guard corporatist battle to preserve its prerogatives); In the 2004 *Grand Debat* the Commission should have, and present, a clear vision, set the Agenda, outline the options. Even if the Convention is charged itself in presenting

options, rather than a blueprint, the historical role of the Commission will be very seriously compromised.

Alas, the very sorry fate of the White Paper on Governance – a spectacular failure (regardless of the brave faces put up by Commission officials) wmay indicate that the current Commission simply does not have the internal cohesion, sense of purpose and political skill to lead the *Grand Debat*.

But it behooves the Commission to address this issue and not let such a historical change in the operation of the Community and Union to happen by default. The Governments of the Member States should consider seriously whether they want to repeat the exercise whereby a popular Convention produces a blueprint, which is then effectively rejected by the IGC – which is, when stripped of all sugar coatings, what happened to the Charter.

2. The Constitutional Architecture

To judge by the renewed popularity of the idea of a Constitution for Europe (even the Economist, with its typical panache for exaggeration and simplification, has added its two bits) one might get the impression that right now Europe is in some kind of constitutional desert. And now we have a later day Joshua *alias* Joschka (Fischer) and a Jacob *alias* Jacque (Chiraque) and a lot of fellow travelers eager to take us into a new Promised Land in which Europe (or at least the bit of Europe that counts) will have a constitution.[1] If a formal constitution is to be the European Promised Land, I think I will join Moses and stick to the desert.

The idea of a constitution is presented as an indispensable part and parcel of a legitimating reform package of an Enlarged Europe. It is not, of course, an original idea and can be traced back at least to Spinelli's Draft Treaty for European Union. Whether one can have a Europe which would respect the current constitutional *acquis* and embed it in a formal constitution adopted through a *European constituent power* and at the same time would not become a federal state in all but name is very doubtful.[2] I think it is a chimera. But the very idea of a formalized constitution requires some serious critical reflection. What appears to be progressive may in fact be regressive. This new fad of a new constitution for Europe may, in fact, be leading us away from the Promised Land into a familiar and boring desert.

Originally, in a fateful and altogether welcome decision, Europe rejected the federal State model. In the most fundamental statement of its political aspiration, indeed of its very *telos*, articulated in the first line of the Preamble of the Treaty of Rome, the gathering nations of Europe 'Determined to the lay the foundations for an ever closer Union of the peoples of Europe'. Thus, even in the eventual promised land of European integration, the distinct peoplehood of its components was to remain intact - in contrast with the theory of most, and the praxis of all, federal states which predicate the existence of one people. Likewise, with all the vicissitudes from Rome to Amsterdam, the Treaties have not departed from their original blueprint as found, for example, in Article 2 EC of the Treaty in force, of aspiring to achieve ' . . . economic and social cohesion and solidarity among *Member States*' (emphasis added). Not one people, then, nor one State, federal or otherwise.

Europe was re-launched twice in recent times. In the mid-1980s the Single European Act

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[1] Cf. C. Joergess, Y. Meny, J.H.H. Weiler (eds.) What Kind of Constitution for What Kind of Polity – Responses to Joschka Fischer (Robert Schuman Centre, IUE Florence; www.JeanMonnetProgram.Org)

[2] If a "constitution" by anything other than a European constituent power, it will be a Treaty masquerading as a constitution.

introduced, almost by stealth, the most dramatic development in the institutional evolution of the Community achieved by a Treaty amendment: majority voting in most domains of the Single Market. Maastricht, in the 1990s, introduced the most important material development, EMU. Architecturally, the combination of a 'confederal' institutional arrangement and a 'federal' legal arrangement seemed for a time to mark Europe's *Sonderweg* – its special way and identity. It appeared to enable Europe to square a particularly vicious circle: achieving a veritably high level of material integration comparable only to that found in fully fledged federations, while maintaining at the same time - and in contrast with the experience of all such federations - powerful, some would argue strengthened,[3] Member States.

At the turn of the new century, fuelled, primarily, by the Enlargement project, there is a renewed debate concerning the basic architecture of the Union. Very few dare call the child by its name and only a few stray voices are willing to suggest a fully fledged institutional overhaul and the reconstruction of a federal-type government enjoying direct legitimacy from an all European electorate.[4] Instead, and evidently politically more correct, there has been a swell of political and academic voices[5] calling for a new constitutional settlement which would root the existing discipline in a 'veritable' European constitution to be adopted by a classical constitutional process and resulting in a classical constitutional document. The Charter of Human Rights is considered an important step in that direction. What is special about this discourse is that it is not confined to the federalist fringe of European activists, but has become respectable Euro-speak both in academic and political circles.

Four factors seem to drive the renewed interest in a formal constitution rather than the existing 'constitutional arrangement' based on the Treaties.

The first factor is political. It is widely assumed, correctly it would seem, that the current institutional arrangements would become dysfunctional in an enlarged Union of, say, twenty five. A major overhaul seems to be called for. In the same vein, some believe, incorrectly in my view, that the current constitutional arrangements would not work. In particular, the absence of a formal constitution leaves all important constitutional precepts of the Union at the mercy of this or that Member State threatening both the principle of uniformity of, and of equality before, the law as well as an orderly functionality of the polity. One is forever worried: 'What will the German/Italian/Spanish, or whatever, constitutional court say about this or that.' A formal constitution enjoying the legitimacy of an all-European *pouvoir constituant* would, once and for all, settle that issue.

Europe certainly needs an overhaul of its Institutional Architecture, but this does not require a

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[3] See three classics: A.S. Milward et.al., The European Rescue of the Nation State (Berkeley University of California Press 1992); Stanley Hoffmann, Reflections on the Nation-State in Western Europe Today, in Loukas Tsoukalis, The European Community – Past, Present & Future (Oxford, Basil Blackwell 1983); A. Moravcsik, The Choice for Europe (Cornell University Press, Ithaca, N.Y.1998)

[4] See e.g. the IHT Op.Ed by Giscard d'Estaing and Helmut Schmidt International Herald Tribune, April 11th, 2000. For a more honest discussion, admitting the statal implications of the new construct see for example G. Federico Mancini, Europe: The Case for Statehood, 4 European Law Journal (1998), 29-42, and Harvard Jean Monnet Working Paper 6/98. and, of course, Jürgen Habermassuggestions The European Nation-State and the Pressures of Globalization, New Left Review no. 235 (May 1999), 46-59, and Die Einbeziehung des Anderen, Chapter III "Hat der Nationalstaat eine Zukunft?", 128-191, Suhrkamp, Frankfurt, 1996. There is an interesting political-legal paradox here. A 'flexible' Europe with a 'core' at its centre will actually enable that core to retain the present governance system dominated by the Council—the executive branch of the Member States—at the expense of national parliamentary democracy. Constitutionally, the statal structure would in fact enhance even further the democracy deficit.

[5] In the political sphere see for example the over-discussed Berlin speeches of Joschka Fischer and Jacque Chirac. For text and comments on these interventions, see the special symposium on the Harvard Jean Monnet Site: www.jeanmonnetprogram.org

Constitution. It can be done through a Treaty amendment just as well. It is simply a legal and political misconception to imagine that a revision of the institutional structure and decisional process of the Community and Union require a formal written constitution.

The second factor is 'procedural' or 'processual'. The process of adopting a constitution - the debate it would generate, the alliances it would form, the opposition it would create - would all, it is said, be healthy for the democratic and civic ethos and praxis of the polity.

This may be so, but it also may represent a huge political upheaval whereby the acquis of the Community to date will be seriously undermined. A new formal constitution will certainly require constitutional amendment of national constitutions in at least some of the Member States. And what if that fails?

The third factor is material. In one of its most celebrated cases in the early 1960s, the European Court of Justice described the Community as a '. . . new legal order for the benefit of which the States have limited their sovereign rights, albeit in limited fields'. There is a widespread anxiety that these fields are limited no more. Indeed, not long ago a prominent European scholar and judge wrote that there '. . . simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community'.[6] A constitution is thought an appropriate means to place limits to the growth of Community competences.

I will address this issue below. But it, too, does not require a constitution to solve it.

Of greatest interest to me is the final normative and conceptual drive behind the discussion. Normatively, the disturbing absence of formal constitutional legitimization for a polity that makes heavy constitutional demands on its constituent Members is, it may be thought, problematic. If, as is the case, current European constitutional discipline demands constitutional obedience by and within all Member States, their organs and their peoples even when these conflict with constitutional norms of the Member State, this, it is argued, should be legitimized by a constitution which has the explicit consent of its subjects instead of the current pastiche which, like Topsy, just 'growed'.

I want to explain why the unique brand of European constitutional federalism - the *status quo* - represents not only its most original political asset but also its deepest set of values. I also do not think that a formal constitution is a useful response to other concerns such as the issue of competences.

The advocacy for a European constitution is not what it purports to be. It is not a call for 'a' constitution. It is a call for a different form of European constitution from the constitutional architecture we already have. And yet the current constitutional architecture, which of course can be improved in many of its specifics, encapsulates one of Europe's most important constitutional innovations, the Principle of Constitutional Tolerance.

The Principle of Constitutional Tolerance, which is the normative hall mark of European federalism, must be examined both as a concept and as a praxis. First , then, the concept. 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. For many, thus, democracy is the objective,

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[6]Koen Lenaerts, Constitutionalism and the many faces of Federalism 38 A. J.Com. L 205 (1990) at 220. The Court, too, has modified its rhetoric: in its more recent Opinion 1/91 it refers to the Member States as having limited their sovereign rights ' . . . in ever wider fields.' Opinion 1/91, [1991]ECR 6079, Recital 21.

the end, of the European construct. This is fallacious. Democracy is not the end. Democracy, too, is a means, even if an indispensable means. The end is to try, and try again, to live a life of decency, to honour our creation in the image of God, or the secular equivalent. A democracy, when all is said and done, is as good or bad as the people who belong to it. A democracy of vile persons will be vile.

Europe was built on the ashes of World War II, which witnessed the most horrific alienation of those thought of as aliens, an alienation which became annihilation. What we should be thinking about is not simply the prevention of another such carnage: that's the easy part and it is unlikely ever to happen again in Western Europe, though events in the Balkans remind us that those demons are still within the continent. More difficult is dealing at a deeper level with the source of these attitudes. In the realm of the social, in the public square, the relationship to the alien is at the core of such decency. It is difficult to imagine something normatively more important to the human condition and to our multicultural societies.

There are, it seems to me, two basic human strategies of dealing with the alien and these two strategies have played a decisive role in Western civilisation. One strategy is to remove the boundaries. It is the spirit of 'come, be one of us'. It is noble since it involves, of course, elimination of prejudice, of the notion that there are boundaries that cannot be eradicated. But the 'be one of us', however well intentioned, is often an invitation to the alien to be one of us, by being us. *Vis-à-vis* the alien, it risks robbing him of his identity. *Vis-à-vis* oneself, it may be a subtle manifestation of both arrogance and belief in my superiority as well as intolerance. If I cannot tolerate the alien, one way of resolving the dilemma is to make him like me, no longer an alien. This is, of course, infinitely better than the opposite: exclusion, repression, and worse. But it is still a form of dangerous internal and external intolerance.

The alternative strategy of dealing with the alien is to acknowledge the validity of certain forms of non-ethnic bounded identity but simultaneously to reach across boundaries. We acknowledge and respect difference, and what is special and unique about ourselves as individuals and groups; and yet we reach across differences in recognition of our essential humanity. What is significant in this are the two elements I have mentioned. On the one hand, the identity of the alien, as such, is maintained. One is not invited to go out and, say, 'save him' by inviting him to be one of you. One is not invited to recast the boundary. On the other hand, despite the boundaries which are maintained, and constitute the I and the Alien, one is commanded to reach over the boundary and accept him, in his alienship, as oneself. The alien is accorded human dignity. The soul of the I is tended to not by eliminating the temptation to oppress but by learning humility and overcoming it.

The European current constitutional architecture represents this alternative, civilizing strategy of dealing with the 'other'. Constitutional Tolerance is encapsulated in that most basic articulation of its meta-political objective in the preamble to the EC Treaty mentioned earlier:

Determined to lay the foundations of an ever closer union among the peoples of Europe.

No matter how close the Union, it is to remain a union among distinct peoples, distinct political identities, distinct political communities. An ever closer union could be achieved by an amalgam of distinct peoples into one which is both the ideal and/or the *de facto* experience of most federal and non-federal states. The rejection by Europe of that One Nation ideal or destiny is, as indicated above, usually understood as intended to preserve the rich diversity, cultural and other, of the distinct European peoples as well as to respect their political self-determination. But the European choice has an even deeper spiritual meaning.

An ever closer union is altogether more easy if differences among the components are eliminated, if they come to resemble each other, if they aspire to become one. The more identical the 'Other's' identity is to my own, the easier it is for me to identify with him and accept him. It demands less of me to accept another if he is very much like me. It is altogether more difficult to attain an ever closer Union if the components of that Union preserve their distinct identities, if they retain their 'otherness' *vis-à-vis* each other, if they do not become one flesh, politically speaking. Herein resides the Principle of Tolerance. Inevitably I define my distinct identity by a boundary which differentiates me from those who are unlike me. My continued existence as a distinct identity depends, ontologically, on that boundary and, psychologically and sociologically, on preserving that sentiment of otherness. The call to bond with those very others in an ever closer union demands an internalization - individual and societal - of a very high degree of tolerance. Living the Kantian categorical imperative is most meaningful when it is extended to those who are unlike me.

In political terms, this Principle of Tolerance finds a remarkable expression in the political organization of the Community which defies the normal premise of constitutionalism. Normally in a democracy, we demand democratic discipline, that is, accepting the authority of the majority over the minority only within a polity which understands itself as being constituted of one people, however defined. A majority demanding obedience from a minority which does not regard itself as belonging to the same people is usually regarded as subjugation. This is even more so in relation to constitutional discipline. And yet, in the Community, we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic tolerance to accept to be bound by precepts articulated not by 'my people' but by a community composed of distinct political communities: a people, if you wish, of others. I compromise my self-determination in this fashion as an expression of this kind of internal - towards myself - and external - towards others - tolerance.

Constitutionally, the Principle of Tolerance finds its expression in the very arrangement which has now come under discussion: a federal constitutional discipline which, however, is not rooted in a statist -type constitution.

Constitutional actors in the Member State accept the European constitutional discipline not because as a matter of legal doctrine, as is the case in the federal state, they are subordinate to a higher sovereignty and authority attaching to norms validated by the federal people, the constitutional *demos*. They accept it as an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe to a norm which is the aggregate expression of other wills, other political identities, other political communities. Of course, to do so creates in itself a different type of political community one unique feature of which is that very willingness to accept a binding discipline which is rooted in and derives from a community of others. The Quebecois are told: in the name of the people of Canada, you are obliged to obey. The French or the Italians or the Germans are told: in the name of the peoples of Europe, you are invited to obey. In both, constitutional obedience is demanded. When acceptance and subordination is voluntary, and repeatedly so, it constitutes an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance.

The Principle of Constitutional Tolerance is not a one way concept: it applies to constitutional actors and constitutional transactions at the Member State level, at the Union level and among the Member States too. This dimension may be clarified by moving from concept to praxis, to an examination of Constitutional Tolerance as a political and social reality.

It is, in my view, most present in the sphere of public administration, in the habits and practices it instils in the purveyors of public power in European polities, from the most mundane to the most august. At the most mundane administrative level, imagine immigration officials overturning practices of decades and centuries and learning to examine the passport of Community nationals in the same form, the same line, with the same scrutiny of their own nationals. And a similar discipline will be practised by customs officials, Housing Officers, educational officials, and many more subject to the disciplines of the European constitutional order.

Likewise, a similar discipline will become routine in policy-setting forums. In myriad areas - whether a local council or a parliament itself - every norm will be subject to an unofficial European impact study. So many policies in the public realm can no longer be adopted without examining their consonance with the interest of others, the interest of Europe.

Think, too, of the judicial function, ranging from the neighbourhood *giudice conciliatore* to the highest jurisdictions: willy nilly, European law, the interest of others, is part of the judicial normative matrix.

I have deliberately chosen examples which are both daily and commonplace but which also overturn what until recently would have been considered important constitutional distinctions. This process operates also at Community level. Think of the European judge or the European public official, who must understand that, in the peculiar constitutional compact of Europe, his decision will take effect only if obeyed by national courts, if executed faithfully by a national public official both of whom belong to a national administration which claims from them a particularly strong form of loyalty and habit. This, too, will instil a measure of caution and tolerance.

What defines the European constitutional architecture is not the exception, the extreme case which definitively will situate the *Grundnorm* here or there. It is the quotidian, the daily practices, even if done unthinkingly, even if executed because the new staff regulations require that it be done in such a new way. This praxis habituates its myriad practitioners at all levels of public administration to their concealed virtues.

What, then, of the non-Europeans? What of the inevitable boundary created by those within and those without? Does not Constitutional Tolerance implode as an ethos of public mores if it is restricted only to those chosen people with the violet passports? Let us return to the examples mentioned above such as the new immigration procedures which group all Community nationals together. What characterizes this situation is that though national and Community citizens will be grouped together, they will still have distinct passports, with independent national identities, and still speak in their distinct tongues, or in that peculiar Eurospeak that sometimes passes itself off as English. This is critical, because in the daily practices which I am extolling the public official is invited and habituated to deal with a very distinct ‘other’ but to treat him or her as if he was his own. One should not be starry-eyed or overly naïve; but the hope and expectation is that there will be a spill-over effect: a gradual habituation to various forms of tolerance and with it a gradual change in the ethos of public administration which can be extended to Europeans and non-Europeans alike. The boundary between European and ‘non-European’ is inevitable, dictated if by nothing else by the discipline of numbers. In too large a polity the specific gravity of the individual is so diminished that democracy except in its most formal sense becomes impossible. But just as at the level of high politics, the Community experience has conditioned a different ethos of intergovernmental interaction, so it can condition a different ethos of public interaction with all aliens.

To extol the extant constitutional arrangement of Europe is not to suggest that many of its specifics cannot be vastly improved. The Treaty can be paired down considerably, competences can be better protected,[7] and vast changes can be introduced into its institutional arrangements. But when it is objected that there is nothing to prevent a European constitution from being drafted in a way which would fully recognize the very concepts and principles I have articulated, my answer is simple: Europe has now such a constitution. Europe has charted its own brand of constitutional federalism. It works. Why fix it?

But perhaps we should not worry too much. Here is a suggestion. The European Court of Justice for long has referred to the current Treaties as the "Constitutional Charter" of the Union. The present Treaties certainly need cleaning up, shortening and rationalizing very much in the footsteps of the Meny et.al Florence Project. Why not adopt such a cleaned up, amended and rationalized Treaty and simply call it The Constitutional Charter? Keep the old, with a new spruced up look and name?

3. The Question of Competences

Already during the debate accompanying the Maastricht Treaty, there erupted the dormant question of Community "competences and powers."[8] This question and the accompanying debate found their code in, for example, the deliciously vague concept of "subsidiarity." This question has been inevitably connected to the continued preoccupation with governance structures and processes, with the balance between Community and Member States, and with the questions of democracy and legitimacy of the Community to which the Maastricht debate gave a new and welcome charge.

What accounts for this eruption?

First, a bit of history. The student of comparative federalism discovers a constant feature in practically all federal experiences: a tendency towards concentrations of legislative and executive powers in the center or general power at the expense of constituent units.[9] This concentration apparently occurs independently of the mechanism allocating jurisdiction / competences / powers between center and "periphery." Differences, where they occur, depend more on the ethos and political culture of polities than on legal and constitutional devices.[10] The Community has both shared and differed from this general experience.[11]

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[7] The issue of competences is particularly acute since there has been a considerable weakening of constitutional guarantees to the limits of Community competences, undermining Constitutional Tolerance itself. See, B.Simma, J.H.H. Weiler, M. Zoeckler *Kompetenzen und Grundrechte -- Beschränkungen der Tabakwerbung aus der Sicht des Europarechts* (with Bruno Simma, Markus C. Zöckler) (Dunker & Humblot, Berlin, 1999). History teaches that formal constitutions tend to strengthen the centre whatever the good intentions of their authors. Any formulation designed to restore constitutional discipline on this issue can be part of a Treaty revision and would not require a constitution for it. For pragmatic proposals on this issue see J.H.H. Weiler, A. Ballmann, U. Haltern, H. Hofmann, F. Mayer, S. Schreiner-Linford *Certain Rectangular Problems of European Integration***,** with (www.iue.it/AEL/EP/index.html) (1996).

[8] *See generally* Weiler, *The Transformation of Europe,* 100 YALE L.J. 2403, 2431 - 53 (1991) at 2431-53.

[9] *See generally* EUROPE AFTER MAASTRICHT: AN EVEN CLOSER UNION? (Renaud Dehousse ed. 1994).

[10] *See* J.H.H. Weiler, *Limits To Growth? On the Law and Politics of the European Union's Jurisdictional Limits, in* STATE AND NATION - CURRENT LEGAL AND POLITICAL PROBLEMS BEFORE THE 1996 INTERGOVERNMENTAL CONFERENCE, IUSEF No. 15, 1-32 (1995).

[11] I am relying here on Jean Paul Jacqué & J.H.H. Weiler, *On the Road to European Union -- A New Judicial Architecture: An Agenda for the Intergovernmental Conference*, 27 COMMON MKT. L. REV. 185 (1990); Jean Paul Jacqué & J.H.H. Weiler, *Sur la voie de l'Union européenne, une nouvelle architecture judiciaire*, 26 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 441 (1990).

It has *shared* it in that the Community, especially in the 1970s, had seen a weakening of any workable and enforceable mechanism for allocation of jurisdiction/competences/powers between Community and its Member States.

How has this occurred? It has occurred by a combination of two factors.

a. Profligate legislative practices especially in, for example, the usage of what was then Art.235 EC.

b. A bifurcated jurisprudence of the Court which on the one hand extensively interpreted the reach of the jurisdiction/competences/powers granted the Community and on the other hand had taken a self-limiting approach towards the expansion of Community jurisdiction/competence/powers when exercised by the political organs.

To make the above statement is not tantamount to criticizing the Community, its political organs and the ECJ. The question is one of values. It is possible to argue that this process was beneficial overall to the evolution and well-being of the Community as well as beneficial to the Member States, its citizens and residents. But this process was also a ticking constitutional time bomb which one day could threaten the evolution and stability of the Community. Sooner or later, "supreme" courts in the member states would realize that the "socio-legal contract" announced by the ECJ in its major constitutionalizing decisions -- namely, that "the Community constitutes a new legal order ... for the benefit of which the States have limited their sovereign rights, *albeit within limited fields*"[12] -- had been shattered. Although these "supreme" courts had accepted the principles of the new legal order, supremacy and direct effect, the fields seemed no longer limited. In the absence of Community legal checks, they would realize, it would fall upon them to draw the jurisdictional lines of the Community and its Member States.

Interestingly enough, the Community experience differs from the experience of other federal polities, in that despite the massive legislative expansion of Community jurisdiction / competences / powers, there had not been any political challenge of this issue from the Member States.

How so? The answer is simple and obvious, and it resides in the decision-making process as it stood before the Single European Act (SEA). Unlike the state governments of most federal states, the governments of the Member States, jointly and severally, could control the legislative expansion of Community jurisdiction / competences / powers. Nothing that was done could be done without the assent of all States. This diffused any sense of threat and crisis on the part of governments. Indeed, if we want to seek "offenders" who have disrespected the principle of limited competence, the governments of the Member States, in the form of the Council of Ministers, conniving with the Commission and Parliament, would be the main ones. How convenient to be able to do in Brussels what would often be politically more difficult back home, and then exquisitely blame the Community! The ECJ's role has been historically not one of activism, but one of, at most, active passivism. Nonetheless, it did not build up a repository of credibility as a body which effectively patrols the jurisdictional boundaries between the Community and Member States.

This era passed with the shift to majority voting after the entry into force of the SEA and the seeds -- indeed, the buds -- of crisis became visible. It became a matter of time before one of

[12] *Van Gend en Loos*

the national courts would defy the ECJ on this issue. Member states would become aware that in a process that gives them neither *de jure* nor *de facto* veto power, the question of jurisdictional lines has become crucial. The Maastricht Decision of the German Federal Constitutional Court fulfilled this prediction, albeit later than anticipated.

Of course, the German decision was an egregious violation of the Treaty -- ironically, especially if understood in classical international legal terms. But this view is grounded in the classical, hierarchical, centrist view of the European legal order. How should one evaluate this development given the questions concerning the normative authority of European constitutionalism and a more horizontal, conversation-based view of that very same constitutionalism?

Somewhat inappropriately, given the conversation metaphor, we want to use some of the dynamics of the Cold War as a device for evaluating the judicial *Kompetenz-Kompetenz* aspect of the Maastricht Decision of the German Federal Constitutional Court.

According to this analogy, the German decision was not an official declaration of war, but the commencement of a cold war with its paradoxical guarantee of co-existence following the infamous MAD (Mutual Assured Destruction) logic. For the German Court actually to declare a Community norm unconstitutional, rather than simply threaten to do so, would be an extremely hazardous move so as to make its usage unlikely. The use of tactical nuclear weapons was always considered to carry the risk of creating a nuclear domino effect. If other Member State courts followed the German lead, or if other Member State legislatures or governments were to suspend implementation of the norm on some reciprocity rationale, a real constitutional crisis would arise in the Community -- the legal equivalent of the Empty Chair political stand-off in the 1960s. It would be hard for the German government to remedy the situation, especially if the German Court decision enjoyed general public popularity. Would the German Federal Constitutional Court be willing to face the responsibility of dealing such a blow to European integration, rather than just threatening to do so? Indeed, the subsequent Banana decision proves that it was not.

Nonetheless the logic of the Cold War is that each side has to assume the worst and to arm as if the other side would actually deal the first blow. The ECJ would then have to watch over its shoulder the whole time, trying to anticipate any potential move by the German Federal Constitutional Court.

If we now abandon the belligerent metaphor, it could be argued that this situation is not *per se* unhealthy. The German move is an insistence on a more polycentered view of constitutional adjudication and will eventually force a more even conversation between the European Court and its national constitutional counterparts. We would suggest that, in some ways, the German move of the 1990s in relation to competences resembles their prior move in relation to human rights.[13] It was only that move which forced the European Court to take human rights seriously.

The current move could also force the Court to take competences seriously. The Tobacco Advertising Decision of the Court could, it may be thought, have been prompted by the earlier challenges by national courts.

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[13] *See* German Federal Constitutional Court, judgment of May 29, 1974, 37 BVerfGE 271 ("Solange I"); judgment of October 22, 1986, 73 BVerfGE 339 ("Solange II").

But this view is not without its functional problems.

a. There is no "non proliferation treaty" in the Community structure. MAD works well, perhaps, in a situation of two superpowers. But there must be a real fear that other Member State Courts will follow the German lead in rejecting the exclusive Kompetenz-Kompetenz of the ECJ. The more courts adopt the weapon, the greater the chances that it will be used. Once that happens, it will become difficult to push the paste back into the tube.

b. Courts are not the principal Community players. But this square-off will have negative effects on the decision making process of the Community. The German Government and Governments whose Courts will follow the German lead, will surely be tempted to play that card in negotiation. ("We really cannot compromise on this point, since our Court will strike it down ...")

Here, too, we find an interesting paradox. The consistent position of the ECJ, as part of its constitutional architecture, has been that it alone has judicial *Kompetenz-Kompetenz* because the jurisdictional limits of the Community are a matter of interpretation of the Treaty. The German Federal Constitutional Court, as part of its reassertion of national sovereignty and insistence of legitimization of the European construct through states' instrumentalities and the logic of public international law, has defied the ECJ.

If, however, the European polity constitutes a constitutional order as claimed by the European Court of Justice, then this issue is far more nuanced. There has been no constitutional convention in Europe. European constitutionalism must depend on a common-law type rationale, one which draws on and integrates the national constitutional orders. The constitutional discourse in Europe must be conceived as a conversation of many actors in a constitutional interpretative community, rather than a hierarchical structure with the ECJ at the top. It is this constitutional perspective that, paradoxically, gives credibility to the claim of the German Court. A feature of neo-constitutionalism in this case would be that the jurisdictional line (or lines) should be a matter of constitutional conversation, not a constitutional *diktat*.

And yet, the solution offered by the German Federal Constitutional Court is no conversation either. Although the German Court mentions that these decisions have to be taken in cooperation with the ECJ, it reserves the last word to itself. A European *diktat* is simply replaced by a national one. And the national *diktat* is far more destructive to the Community, if one contemplates the possibility of fifteen different interpretations.

How, then, can one square this circle?

It is not, I insist, by putting our faith in some list of competences which will be written into a European constitution. The attempt to arrest centralization of power in this way has, in practically all federal states, failed. And the failure will be more painful if it is part of a Constitution since it will then have constitutional value!

The solution is to redesign who will interpret the reach of the functions and powers of the Community and Union.

One possible solution is institutional and I would like to outline only its essential structure. I have proposed the creation of a Constitutional Council for the Community, modeled in some ways after its French namesake. The Constitutional Council would have jurisdiction only over issues of competences (including subsidiarity) and would decide cases submitted to it after a law was adopted but before coming into force. It could be seized by any Community institution,

by any Member State or *national parliament,* by the European Parliament acting on a majority of its Members. Its president would be the President of the ECJ, and its members would be sitting members of the constitutional courts or their equivalents in the Member States. Within the Constitutional Council, no single Member State would have a veto power. The composition would also underscore that the question of competences is fundamentally also one of national constitutional norms, but still subject to a Union solution by a Union institution.

I will not elaborate some of the technical aspects of the proposal. The principal merit of this proposal is that it addresses the concern over fundamental jurisdictional boundaries without compromising the constitutional integrity of the Community, as did the Maastricht Decision of the German Federal Constitutional Court. Since, from a material point of view, the question of boundaries has an built-in indeterminacy, the critical issue is not what the boundaries are, but who gets to decide. On the one hand, the composition of the proposed Constitutional Council removes the issue from the purely political arena; on the other hand, it creates a body which would, we expect, enjoy a far greater measure of public confidence than the ECJ itself.

4. The Charter

The European Charter is with us and we should make the best of it. But it is still worth asking whether Europe really needed it: Will it actually enhance the protection of fundamental human rights in the Union? European citizens and residents do not, after all suffer from a deficit of judicial protection of Human Rights. Their human rights in most Member States are protected by their constitution and by their constitutional court or other courts. As an additional safety net they are protected by the European Convention on Human Rights and the Strasbourg organs. In the Community, they receive judicial protection from the ECJ using as it source the same Convention and the Constitutional Traditions common to the Member States.

So why a new Charter at all?

Most important in the eyes of the Charter promoters was the issue of perception and identity. Ever since Maastricht, the political legitimacy of the European construct had been a live issue; the advent of EMU with its barely accountable European Central Bank added fuel to a perception of a Europe concerned more with markets than with people. It may be true that the European Court guarantees legal protection against human rights abuses, but who is aware of this?

A Charter, its supporters said, would render visible and prominent that which until now was known only to dusty lawyers. Additionally, the Charter, as an important symbol, would counterbalance the Euro and become part of the iconography of European integration and contributing both to the identity and identification with Europe.

Has this been born out? Time will tell, but for now the Charter is a classical European story, akin to the concept of European Citizenship heralded with great triumph at Maastricht: An exercise characterized by highfaluting rhetoric by all and sundry and a simultaneous conspicuous failure to take decisive steps to integrate it into the legal order of the Union. We have become so habituated to this kind of Euro Double-speak, that we fail to notice.

Lawyers will point out with great excitement that the Court is already making reference to the Charter and that it may become “incorporated” in the legal order by judicial activity. I am not at all sure whether this is a positive development, both from pragmatic and normative perspectives. I wonder if a stony silence by the Court or a defiant refusal to take note of the

Charter would not, pragmatically, provide greater impetus to eventual political action. I also wonder, as indicated above, whether it is proper for the Court to go very far with judicial incorporation of the Charter given the fact that it was, let us not mince words, constitutionally rejected as an integral part of the Union legal order? One cannot chant odes to democracy and constitutionalism and then flout them when it does not suit one's human rights agenda.

Clarity was a second justification often invoked to justify the exercise. The current system of looking to the common constitutional traditions and to the ECHR as a source for the rights protected in the Union is, it is argued, unsatisfactory and should be replaced by a formal document listing such rights. But would clarity actually be added? Examine the text. It is, appropriately drafted in the magisterial language characteristic of our constitutional traditions: Human Dignity is Inviolable etc. There is much to be said for this tradition, but clarity is not one of them. When it comes to the contours of the rights included in the Charter, I do not believe that that it adds much clarity to what exactly is protected and what is not.

Note however, that by drafting a list and perhaps one day fully incorporating it into the legal order, we will have jettisoned, at least in part, one of the truly original features of the pre-Charter constitutional architecture in the field of human rights – the ability to use the legal system of each of the Member States as an organic and living laboratory of human rights protection which then, case by case, can be adapted and adopted for the needs of the Union by the European Court in dialogue with its national counterparts. The Charter may not thwart that process, but it runs the risk of inducing a more inward looking jurisprudence and chilling the constitutional dialogue.

Drafting a new Charter, it was said, would give the chance of introducing much needed innovation to our constitutional norms which were shaped by aging constitutions and international treaties. Issues such as bio-technology, genetic engineering, privacy in the age of the internet, sexual identity and, most importantly, political rights empowering the individual could be dealt with afresh placing the Charter at the avant-garde of European constitutionalism.

I leave it to the reader to judge whether the Charter has introduced such innovation. In some instances the language used by the Charter risks "deconstitutionalization" of certain rights. The formula quite frequently used of rights "…guaranteed in accordance with the national laws governing the exercise of these rights" may turn out to do considerable damage to constitutional protection of human rights. Whilst it is a formula one finds in constitutional orders of the Member States and international treaties, and whilst it is possible to develop a jurisprudence which separates the existence of a right from its exercise, in the particular circumstances of the Community, it will be very difficult ever to challenge constitutionally a Community (let alone a Member State) measure which replicated the existing law in this or that Member State. This may turn out to be a very regressive development for the protection of human rights.

Another regressive scenario is one under which there will be great pressure on the Court to reject any progressive interpretations of various formulae found in the Charter if this turns out to have been rejected by the Convention which drafted the Charter. For Example, a proposal to introduce to the Charter "the right for everyone to have a nationality" was rejected during the drafting process. It will be difficult for the Court to articulate such a right. Likewise, Genetic Integrity was dropped from Article 3 on the Integrity of the Person. This too might have subsequent interpretative consequences. Many more examples can be found. In general it will be much harder for the Court to crystallize a Community right when such was considered and rejected by a political constituent assembly. In some areas the Charter actually cuts down on protection now offered in the legal order of the Community. Article 51(1) actually reduces the categories of Member State acts which would be subject to European scrutiny, and Article 53 at

least raises problematic issues on the supremacy of Community law in this area.

But most troubling of all is the fact that the Charter exercise served as a subterfuge, an alibi, for not doing that which is truly necessary if the purpose was truly to enhance the protection of fundamental rights in the Union rather than talk about enhancing such protection.

The real problem of the Community is the absence of a *human rights policy* with everything this entails: A Commissioner, a Directorate General, a budget and a horizontal action plan for making those rights already granted by the Treaties and judicially protected by the various levels of European Courts effective. Much of the human rights story, and its abuse, takes place far from the august halls of courts. Most of those whose rights are violated have neither knowledge or means to seek judicial vindication. The Union does not need more rights on its lists, or more lists of rights. What is mostly needed are programs and agencies to make rights real, not simply negative interdictions which courts can enforce.

The best way to drive the point home is to think of Competition Policy. Imagine our Community with an Article 81 and 82 interdicting Restrictive Practices and Abuse of Dominant Position, but not having a Commissioner and a DG4 to monitor, investigate, regulate and prosecute violations. The interdiction against competition violations would be seriously compromised. But that is exactly the situation with human rights. For the most part the appropriate norms are in place. If violations were to reach the Court, the judicial reaction would be equally appropriate. But would there be any chance effectively to combat Anti-Trust violations without a DG4? Do we have any chance in the human rights field, without a similar institutional set up?

One reason we do not have a policy is because the Court, in its wisdom, erroneously in my view, announced in Opinion 2/94 that protection of human rights is not one of the policy objectives of the Community and thus cannot be a subject for a proactive policy.

Far more important than any Charter for the effective vindication of human rights would have been a simple Treaty amendment which would have made active protection of human rights within the sphere of application of Community law one of the policies of the Community alongside other policies and objectives in Article 3 and a commitment to take all measures to give teeth to such a policy expeditiously.[14] Not only was such a step not taken, but Article 51(2) made absolute that such a development would be even more difficult to take in the future.

The single most important thing the next IGC can do for human rights is not the adoption of the Charter (though at this point continued rejection of the Charter would be in and of itself very damaging) but the commitment to, and adoption of, a human rights policy within, of course, the sphere of application of Community law and not beyond.

5. Institutional Architecture – Empowering the Individual

I do not propose to enter into the much discussed debate about respective functions and powers of Council, Commission, Parliament in a Union or 27 or, indeed, alternatives to the classical architecture. The contribution of Schmitter is rich and needs no footnotes. Instead I want to draw attention to the need to build in mechanisms which will empower the individual.

The democratic tradition in most Member States is one of Representative Democracy. Our

[14] For a full fledge discussion of the need and content of such a policy, see Philip Alston and J. H. H. Weiler, An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights Harvard Jean Monnet Working Paper 1/99 www.law.harvard.edu/programs/JeanMonnet/

elected representatives legislate and govern in our name. If we are unsatisfied we can replace them at election time. Recourse to forms of Direct Democracy – such as referenda -- are exceptional. Given the size of the Union referenda are considered particularly inappropriate.

However, the basic condition of Representative Democracy is, indeed, that at election time the citizens "…can throw the scoundrels out" -- that is replace the Government. This basic feature of Representative Democracy does not exist in the Community and Union. The form of European Governance is – and will remain for considerable time – such that there is no "Government" to throw out. Even dismissing the Commission by Parliament (or approving the appointment of the Commission President) is not the equivalent of throwing the Government out. There is no civic act of the European citizen where he or she can influence directly the outcome of any policy choice facing the Community and Union as citizens can when choosing between parties which offer sharply distinct programmes. Neither elections to the European Parliament nor elections to national Parliaments fulfill this function in Europe. This is among the reasons why turnout to European Parliamentary elections has been traditionally low and why these elections are most commonly seen as a mid-term judgment of the Member State governments rather than a choice on European governance.

The proposal is to introduce some form of direct democracy at least until such time as one could speak of meaningful representative democracy at the European level. Our proposal is for a form of a Legislative Ballot Initiative coinciding with elections to the European Parliament. Our proposal is allow the possibility, when enough signatures are collected in, say, more than five Member States to introduce legislative initiatives to be voted on by citizens when European Elections take place (and, after a period of experimentation possibly at other intervals too.) In addition to voting for their MEPs, the electorate will be able to vote on these legislative initiatives. Results would be binding on the Community Institutions and on Member States. Initiatives would be, naturally, confined to the sphere of application of Community law -- i.e. in areas where the Community Institutions could have legislated themselves. Such legislation could be overturned by a similar procedure or by a particularly onerous legislative Community process. The Commission, Council, Parliament or a National Parliament could refer a proposed initiative to the European Court of Justice to determine – in an expedited procedure -- whether the proposed Ballot initiative is within the Competences of the Community or is in any other way contrary to the Treaty. In areas where the Treaty provides for majority voting the Ballot initiative will be considered as adopted when it wins a majority of votes in the Union as a whole as well as within a majority of Member States. (Other formulae could be explored). Where the Treaty provides for unanimity a Majority of voters in the Union would be required as well as winning in all Member States.

Apart from enhancing symbolically and tangibly the voice of individuals qua citizens, this proposal would encourage the formation of true European Parties as well as transnational mobilization of political forces. It would give a much higher European political significance to Elections to the European Parliament. It would represent a first important step, practical and symbolic, to the notion of European Citizenship and Civic Responsibility.

This, of course, is just one proposal. The agenda is clear: Not only Institutional reform but Empowerment of the Individual.

EUROPE 2004 – LE GRAND DEBAT
Brussels – 15 and 16 October 2001

EUROPE 2004 – LE GRAND DEBAT :

Setting the Agenda and Outlining the Options

Brussels, 15 - 16 October 2001

European Commission – Charlemagne Building

PROGRAMME

Monday, 15 October 2001

09h00: Registration of Participants

OPENING SESSION 10h00-13h00

10h00: **WELCOME ADDRESS**
Mrs Viviane REDING, Member of the European Commission

10h15: **OPENING SPEECH**:
Mr José Maria GIL- ROBLES, Member of the European Parliament, President of the European University Council for the Jean Monnet Project

SESSION 1: EUROPE 2004: THE GREAT DEBATE 11h00 – 13h00

11h00: **The Debate about the Future of Europe: Process and Actors**
Chairman: **Mr José Maria GIL- ROBLES**, European Parliament

Discussion Panel:
Introductory Report: **Prof. Paul Magnette**, Université Libre de Bruxelles, **Mr Giorgio Napolitano**, European Parliament,
Mrs Christine Roger, Head of Cabinet of Michel Barnier, **Mr Guy Braibant**, Group "Débat sur l'avenir de l'Europe", France

12h30-13h00: **Debate**

13h00: Lunch

SESSION 2: THE CONSTITUTION OF EUROPE 14h30 – 18h30

14h30-15h45: **1. The Constitutional Architecture**
Chairman: **Prof. Rainer ARNOLD**, University of Regensburg

Discussion Panel:
Introductory Report: **Prof. Stefan Griller**, University of Vienna,
Prof. Antonio-Carlos Pereira Menaut, University of Santiago de Compostela, **Prof. Jo Shaw**, University of Manchester, **Prof. Marek Safjan**, Constitutional Court – Poland

15h45-17h00 **2. Rethinking the Methods of Dividing and Controlling the Competencies of the Union**
Chairman: **Prof. Roland BIEBER**, University of Lausanne

Discussion Panel:
Introductory Report: **Prof. Ingolf Pernice**, Humboldt-University of Berlin,
Prof. Vlad Constantinesco, University of Strasbourg, **Prof. Bruno De Witte**, University of Maastricht

17h00-18h15: **3. Human Rights: The Charter and Beyond**
Chairman: **Prof. Antonio TIZZANO**, University of Rome

Discussion Panel:
Introductory Report: **Prof. Jacqueline Dutheil de la Rochère**, University of Paris II,
Prof. Christopher McCrudden, University of Oxford, **Prof. Gráinne De Búrca**, European University Institute - Florence

18h15-18h45: **Debate**

20h00: **Dinner**
Keynote Speech: **Mr Jacques DELORS**, President of “Notre Europe” in the presence of **Mrs Viviane Reding**, Member of the European Commission
Hôtel Astoria, 103 rue Royale, 1000 Brussels

Tuesday, 16 October 2001

SESSION 3: THE GOVERNANCE OF EUROPE 09h00-13h30

09h00-10h30: **1. The Commission White Paper and the future of European Governance**
Chairman: **Prof. Yves MENY**, European University Institute - Florence

Discussion Panel:
Introductory Report: **Mr Jérôme Vignon**, European Commission,
Prof. Beate Kohler-Koch, University of Mannheim, **Prof. Mario Telo'**, Université Libre de Bruxelles, **Prof. Renaud Dehousse**, Institut d'Etudes Politiques, Paris

10h30-12h00: **2. Beyond the White Paper: Institutional Models in a Europe of 27**
Chairman: **Prof. Rudolf HRBEK**, University of Tübingen

Discussion Panel:
Introductory Report: **Prof. Philippe C. Schmitter**, European University Institute - Florence,
Prof. Jean-Louis Quermonne, University of Grenoble, **Prof. Helen Wallace**, University of Sussex

12h00-13h30: **CONCLUDING SESSION**
Chairmen: **Mr Michel PETITE**, European Commission
Prof. Joseph H. H. WEILER, Harvard Law School/Jean Monnet Center, NYU School of Law

13h30: Lunch

EUROPE 2004 – LE GRAND DEBAT
Brussels – 15 and 16 October 2001

EUROPE 2004 – LE GRAND DÉBAT :

Setting the Agenda and Outlining the Options

Bruxelles, 15 - 16 octobre 2001

Commission européenne – Bâtiment Charlemagne

PROGRAMME

Lundi, 15 octobre 2001

09h00: Enregistrement des participants

SÉANCE D'OUVERTURE 10h00-13h00

10h00: **MESSAGE D'ACCUEIL**
Mme Viviane REDING, Membre de la Commission européenne

10h15: **DISCOURS D'OUVERTURE**:
M. José Maria GIL- ROBLES, Membre du Parlement européen, Président du Conseil Universitaire Européen pour l'Action Jean Monnet

SÉANCE 1: EUROPE 2004: LE GRAND DÉBAT 11h00 – 13h00

11h00: **Le débat sur l'avenir de l'Europe: processus et acteurs**
Président: **M. José Maria GIL- ROBLES**, Parlement européen

Panel de discussion:
Rapport introductif : **Prof. Paul Magnette**, Université Libre de Bruxelles,

M. Giorgio Napolitano, Parlement européen, **Mme Christine Roger,** Chef de Cabinet de Michel Barnier, **M. Guy Braibant**, Groupe « Débat sur l'avenir de l'Europe », France

12h30-13h00: **Débat**

13h00: Déjeuner

SÉANCE 2: LA CONSTITUTION DE L'EUROPE 14h30 – 18h30

14h30-15h45: **1. L'Architecture constitutionnelle**
Président: **Prof. Rainer ARNOLD**, Université de Regensburg

Panel de discussion:
Rapport introductif : **Prof. Stefan Griller**, Université de Vienne,
Prof. Antonio-Carlos Pereira Menaut, Université de Santiago de Compostela, **Prof. Jo Shaw**, Université de Manchester, **Prof. Marek Safjan**, Cour Constitutionnelle – Pologne

15h45-17h00 **2. Repenser les méthodes de partage et de contrôle des compétences de l'Union européenne**
Président: **Prof. Roland BIEBER**, Université de Lausanne

Panel de discussion:
Rapport introductif : **Prof. Ingolf Pernice**, Humboldt-Université de Berlin, **Prof. Vlad Constantinesco**, Université de Strasbourg, **Prof. Bruno De Witte**, Université de Maastricht

17h00-18h15: **3. Droits de l'Homme: La Charte des droits fondamentaux et au-delà**
Président: **Prof. Antonio TIZZANO**, Université de Rome

Panel de discussion:
Rapport introductif : **Prof. Jacqueline Dutheil de la Rochère**, Université Paris II,
Prof. Christopher McCrudden, Université de Oxford, **Prof. Gráinne De Búrca**, Institut Universitaire Européen - Florence

18h15-18h45: **Débat**

20h00: **Dîner**
Discours de **M. Jacques DELORS**, Président de "Notre Europe" en présence de **Mme Viviane Reding**, Membre de la Commission européenne
Hôtel Astoria, 103 rue Royale, 1000 Bruxelles

Mardi, 16 octobre 2001

SÉANCE 3: LA GOUVERNANCE DE L'EUROPE 9h00-13h30

09h00-10h30: **1. Le Livre Blanc et l'avenir de la gouvernance européenne**
Président: **Prof. Yves MENY**, Institut Universitaire Européen - Florence

Panel de discussion:
Rapport introductif : **M. Jérôme Vignon**, Commission européenne,
Prof. Beate Kohler-Koch, Université de Mannheim, **Prof. Mario Teló**, Université Libre de Bruxelles, **Prof. Renaud Dehousse**, Institut d'Etudes Politiques Paris

10h30-12h00: **2. Au-delà du Livre Blanc: les modèles institutionnels dans une Europe à 27**
Président: **Prof. Rudolf HRBEK**, Université de Tübingen

Panel de discussion:
Rapport introductif : **Prof. Philippe C. Schmitter**, Institut Universitaire Européen - Florence,
Prof. Jean-Louis Quermonne, Université de Grenoble, **Prof. Helen Wallace**, Université du Sussex

12h00-13h00: **SÉANCE DE CLÔTURE**
Présidents: **M. Michel PETITE**, Commission européenne
Prof. Joseph H. H. WEILER, Harvard Law School/Jean Monnet Center, NYU School of Law

13h30: Déjeuner

Liste des Participants – List of Participants

Prof.	ABAD	Mariano	Universidad de Oviedo
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