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# What Kind of Constitution for What Kind of Polity?

*Responses to Joschka Fischer*



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**What Kind of Constitution  
for What Kind of Polity?**

**– Responses to Joschka Fischer –**

*Christian Joerges, Yves Mény &  
J.H.H. Weiler (editors)*

## Websites:

The contributions to this volume may also be found at:

<http://www.iue.it/RSC/symposium/>

<http://www.law.harvard.edu/programs/JeanMonnet/papers/00/symp.html>

Joschka Fischer's speech and official translations may be found at:

[http://www.auswaertiges-amt.de/2\\_aktuel/index.htm](http://www.auswaertiges-amt.de/2_aktuel/index.htm)

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## Prologue

### The Fischer Debate: The Bright Side

#### I.

Does Europe need a Constitution? Does it already have one, albeit one which does not generate the type of legitimacy that good European governance would require? What are the failures of the European construct that we have to address? How could the necessary changes be brought about?

Such questions nurture endless discussions among lawyers and political scientists all over Europe and beyond. To its surprise, this learned community hears about a talk given on 12 May 2000 at the Humboldt University in Berlin by Joschka Fischer. ‘Allow me ... to cast aside for the duration of this speech the mantle of German Foreign Minister .... Although I know it is not really possible to do so,’ Herr Fischer explained. Whether possible or not, one huge virtue was on display: that this was not a speech with electoral returns or the prospects of pre-election pep-talks in mind—a truly bright and a refreshing breath of fresh air in today’s politics. His talk became immediately accessible in three languages not only through the website of the Walter Hallstein Institute at the Humboldt University but also as a ‘Grundsatzrede’ on the website of the German Bundestag. A wide degree of public attention was hoped for and was, in fact, received. The German Foreign Minister had initiated an intensive public debate. The responses in Europe were heard primarily in the various political arenas of the Union’s Member States and were often enough articulated by citizen Fischer’s high ranking colleagues.

Public attention was not restricted to the political system and organised public opinion. Only rarely do politicians free themselves in public from the constraints of their roles of being either the specialist managing necessities or the generalist delivering uncontroversial messages. Our initiative was born out of academic curiosity for a *tertium*. We witnessed the emergence of a European-wide discussion on problems and prospects of the European polity inspired by an unconventional type of political act and wondered whether we could mirror this event: how does the academic world address the issues raised in the political system and what, indeed, do academics have to say when they themselves leave their own circles to raise their voices as citizens?

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Such an initiative can neither be representative or original<sup>1</sup> in any way nor can it articulate some form of *communis opinio*—academics, appropriately, are good at unveiling ever more problems but not, perhaps, at coming up with common answers. What we sought to bring about was a multi-disciplinary, multi-national, pluralist response which would document common concerns and the existence of a European public sphere—at least in the social sub-system we inhabit. With our initiative, we step outside the ordinary confines of the academic world in much the same way as Joschka Fischer operates outside the conventional borders of the political system. This is neither to suggest that both worlds could merge nor to establish a hierarchy among them. However, it nonetheless remains our ambition to enrich the public debate.

## II.

How might one read this collection of essays? We did not try to assign specific tasks to the individual contributors. Each and every one of them represents specific research priorities, long-term orientations and normative preferences. Their interdisciplinary and multi-national composition ensured a range of responses which, in some, would, to some degree, be complementary, in others controversial, but never ever simply redundant. We also did not bother too much with editing style: on the websites where these contributions were made accessible,<sup>2</sup> the voices one could read were authentic, having met only with the lightest of touches from the editor's pen. In these printed versions, the English of non-native writers has been edited, albeit not with the ambition of camouflaging the origin of texts.

Hence, it would be futile to try to organise their collective contents in line with some all-encompassing system. It may, however, be useful to sketch out briefly just three main common themes of this collective exercise. Such guidance may help readers to identify the contributions which are closest to their particular interest. They should, however, also be prepared to discover many more interesting comments which are not included in the following sketch.

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<sup>1</sup> Cf, 'The Forum' in *Integration* 3/00149-197 with contributions by Peter-Christian Müller-Graff, Heinrich Schneider, Beate Kohler-Koch.

<sup>2</sup> <http://www.law.harvard.edu/programs/JeanMonnet/papers/papers00.html>;  
<http://www.iue.it/RSC/Treaties.html>.

## ***Federation***

‘Less than a Federation. More than a Regime’:<sup>3</sup> this famous characterisation of the European project has proved to be of long-term validity. But this success stems from its very indeterminacy. When proclaiming ‘a very simple answer’ to the queries posed by this formula, namely ‘the transition from a union of states to full parliamentarisation as a European Federation,’ Joschka Fischer rejects what has so far been a very successful compromise formula. Charles Leben, the constitutionalist, cannot imagine what a ‘federation’ which is not a state, or, as Giuliano Amato puts it, not a Bundesrepublik, would look like, even though the European citizen, Leben, would apparently very much like to see it come into being; Klaus von Beyme, the political scientist, recalls the Lebenslüge of Germany’s federalism and Helen Wallace confirms this—not only does the term ‘federation’ irritate many Britons, as Joschka Fischer knows so well, ‘his focus on the finalité of the European Union also baffles’ most of them. Tanja Börzel and Thomas Risse have delivered a systematic treatment of the issue which juxtaposes the conventional legal reconstruction of the EU (with which they find Fischer still identifying himself) with the multi-level governance models circulating in the world of the political sciences: *tertium datur!*

## ***Eastern Enlargement***

Reservations about the ‘federation’ vision are particularly marked in the contributions by Iulia Motoc and Jan Zielonka. Both are afraid of the implications of such a move for the ‘standing’ of putative new members; the loss of their newly gained autonomy. The present institutional system cannot work with so many new member, Joschka Fischer argues. Deepening, however, will provoke the mistrust of the new Member States, von Beyme warns. And Jan Zielonka adds that enlargement is simply incompatible with Joschka Fischer’s finalité: to insist on the ‘adoption of an 80,000 pages long *acquis communautaire*’ cannot be the ‘Königsweg’ into a democratic future. The threat of a core Europe may, indeed, strengthen new alliances with British opponents of further integrationist moves. It is illuminating to observe that all the contributions are fighting with an apparent dilemma: the adherence to a formal structure which will be accompanied by the emergence of new non-formalised hierarchies on the one hand, and institutional changes which should focus on the efficacy of decision-making procedures in the future on the other. The quest is for a *tertium*, *i.e.*, an institutional reform within which the economic and social

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<sup>3</sup> W. Wallace (1983).



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discrepancies could be addressed and the acceptance of the Union by all its new and old citizens be ensured.

### ***How, then, does one get there?***

The title Johan Olsen has chosen for his contribution refers to the institutional framework outlined in Fischer's talk: 'a constitutional treaty centred around basic human and civil rights; shared sovereignty and a clear definition of competences between European and nation-state levels of governance; a division of powers among the European institutions, including full parliamentarisation and a European Parliament with two chambers, a European Government and, possibly, a directly elected president' entrusted with broad administrative powers. It is not just the individual elements of this building which meet with reservations, but the very idea of prescribing the ends of the integration process. All disciplines, including even the law, have come to understand integration more as a Hayekian discovery procedure than a pre-thought-out blueprint, and constitutionalisation more as a process than as an interpretative exercise. Constitutionalism beyond the state has become a theme even within nation-states with a strong 'Staats-tradition'. All this implies a search for legitimate governance structures which cannot simply be copies of the model of the democratic nation-state. Joschka Fischer, the citizen, may be less surprised than Joschka Fischer, the Foreign Minister, by the observation that so many among the contributors seem to be more radical than he is in their readiness to rethink Europe's institutional future.

There is a lot more to be found in the contributions—and, indeed, in Joschka Fischer's speech. This speech was politically successful in that it moved so many otherwise silent minds in the European public. It was also successful in strengthening the sensitivity of the academic world to a series of issues which deserve to be explored and debated further—in both worlds.

*Christian Joerges, Yves Mény & J.H.H. Weiler*

REDE VON JOSCHKA FISCHER

IN DER HUMBOLDT-UNIVERSITÄT IN BERLIN AM 12. MAI 2000

## **Vom Staatenverbund zur Föderation: Gedanken über die Finalität der europäischen Integration**

Fast auf den Tag vor 50 Jahren stellte Robert Schuman seine Vision einer „Europäischen Föderation“ zur Bewahrung des Friedens vor. Hiermit begann eine völlig neue Ära in der europäischen Geschichte. Die europäische Integration war die Antwort auf Jahrhunderte eines prekären Gleichgewichts der Mächte auf diesem Kontinent, das immer wieder in verheerende Hegemonialkriege umschlug, die in den beiden Weltkriegen zwischen 1914 und 1945 kulminierten. Der Kern des Europagedankens nach 1945 war und ist deshalb die Absage an das Prinzip der *balance of power*, des europäischen Gleichgewichtssystems und des Hegemonialstrebens einzelner Staaten, wie es nach dem Westfälischen Frieden von 1648 entstanden war, durch eine enge Verflechtung ihrer vitalen Interessen und die Übertragung nationalstaatlicher Souveränitätsrechte an supranationale europäische Institutionen.

Ein halbes Jahrhundert später ist Europa, der europäische Einigungsprozeß für alle beteiligten Staaten und Völker die wohl wichtigste politische Herausforderung, da sein Erfolg oder Scheitern oder auch nur die Stagnation dieses Einigungsprozesses für die Zukunft von uns allen, vor allem aber für die Zukunft der jungen Generation von überragender Bedeutung sein wird. Und eben dieser europäische Einigungsprozeß ist gegenwärtig bei vielen Menschen ins Gerede gekommen, gilt als eine bürokratische Veranstaltung einer seelen- und gesichtslosen Eurokratie in Brüssel und bestenfalls als langweilig, schlimmstenfalls aber als gefährlich.

Ich möchte mich gerade deshalb für die Gelegenheit bedanken, heute dazu öffentlich einige grundsätzlichere und konzeptionelle Überlegungen über die zukünftige Gestalt Europas entwickeln zu können. Gestatten Sie mir deshalb auch, für die Dauer dieser Rede, die beim öffentlichen Nachdenken bisweilen beanspruchende Rolle des deutschen Außenministers und Mitglieds der Bundesregierung hinter mir zu lassen, auch wenn ich weiß, daß dies nicht wirklich geht. Aber ich möchte heute eben nicht über die operativen Herausforderungen der Europapolitik in den nächsten Monaten zu Ihnen sprechen, nicht also über die nächste Regierungskonferenz, die Osterweiterung der EU und alle anderen wichtigen Fragen, die wir heute und morgen zu lösen haben, sondern vielmehr

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über die möglichen strategischen Perspektiven der europäischen Integration weit über das nächste Jahrzehnt und über die Regierungskonferenz hinaus.

Es geht also, wohlgemerkt, nicht um die Position der Bundesregierung, sondern um einen Beitrag zu einer öffentlich längst begonnen Diskussion um die „Finalität“, um die „Vollendung“ der europäischen Integration, und dies will ich eben als überzeugter Europäer und deutscher Parlamentarier tun. Um so mehr freue ich mich deshalb, daß beim letzten informellen Außenministertreffen der EU auf den Azoren, dank der Initiative der portugiesischen Präsidentschaft, exakt zu diesem Thema der Finalität der europäischen Integration eine lange, ausführliche und überaus produktive Diskussion stattgefunden hat, die sicher Konsequenzen zeitigen wird.

Man kann es gegenwärtig fast mit den Händen greifen, daß zehn Jahre nach dem Ende des Kalten Krieges und mitten im Beginn des Zeitalters der Globalisierung die europäischen Probleme und Herausforderungen sich zu einem Knoten geschürzt haben, der innerhalb der bestehenden Vorgaben nur noch sehr schwer aufzulösen sein wird: Die Einführung der gemeinsamen Währung, die beginnende Osterweiterung der EU, die Krise der letzten EU-Kommission, die geringe Akzeptanz von europäischem Parlament und europäischen Wahlen, die Kriege auf dem Balkan und die Entwicklung einer gemeinsamen Sicherheits- und Außenpolitik definieren nicht nur das Erreichte, sondern bestimmen auch die zu bewältigenden Herausforderungen.

*Quo vadis Europa?* fragt uns daher ein weiteres Mal die Geschichte unseres Kontinents. Und die Antwort der Europäer kann aus vielerlei Gründen, wenn sie es gut mit sich und ihren Kindern meinen, nur lauten: Vorwärts bis zur Vollendung der europäischen Integration. Für einen Rückschritt oder auch nur einen Stillstand und ein Verharren beim Erreichten würde Europa, würden alle an der EU beteiligten Mitgliedstaaten und auch alle diejenigen, die Mitglied werden wollen, würden vor allem also unsere Menschen, einen fatal hohen Preis zu entrichten haben. Und dies gilt ganz besonders für Deutschland und die Deutschen.

Was vor uns liegt, wird alles andere als einfach werden und unsere ganze Kraft erfordern, denn wir werden in der nächsten Dekade die Ost- und Südosterweiterung der EU zu wesentlichen Teilen zuwege bringen müssen, die letztlich zu einer faktischen Verdoppelung der Mitgliederzahl führen wird. Und gleichzeitig, um diese historische Herausforderung bewältigen und die neuen Mitgliedstaaten integrieren zu können, ohne dabei die Handlungsfähigkeit der EU substantiell infrage zu stellen, müssen wir den letzten Baustein in das Gebäude der europäischen Integration einfügen, nämlich die politische Integration.

Die Notwendigkeit, diese beiden Prozesse *parallel* zu organisieren, ist die wohl größte Herausforderung, vor der die Union seit ihrer Gründung jemals gestanden hat. Aber keine Generation kann sich ihre historischen Herausforderungen aussuchen, und so ist es auch diesmal. Nichts Geringeres als das Ende des Kalten Krieges und der erzwungenen Teilung Europas stellt die EU und damit auch uns vor diese Aufgabe, und deshalb bedarf es auch heute einer ähnlich visionären Kraft und pragmatischen Durchsetzungsfähigkeit, wie sie Jean Monnet und Robert Schuman nach dem Ende des Zweiten Weltkriegs bewiesen haben. Und wie damals, nach dem Ende dieses letzten großen europäischen Krieges, der wie fast immer auch ein deutsch-französischer Krieg gewesen war, wird es bei diesem letzten Bauabschnitt der Europäischen Union, nämlich ihrer Osterweiterung und der Vollendung der politischen Integration, ganz entscheidend auf Frankreich und Deutschland ankommen.

Meine Damen und Herren,

zwei historische Entscheidungen haben das Schicksal Europas zur Mitte des letzten Jahrhunderts grundsätzlich zum Besseren gewendet: Erstens, die Entscheidung der USA, in Europa zu bleiben. Und zweitens, das Setzen von Frankreich und Deutschland auf das Prinzip der Integration, beginnend mit der wirtschaftlichen Verflechtung.

Mit der Idee der *europäischen Integration* und mit ihrer Umsetzung entstand nicht nur eine völlig neue Ordnung in Europa, genauer: in Westeuropa, sondern die europäische Geschichte kehrte sich in ihrem Verlauf fundamental um. Vergleichen Sie einmal die europäische Geschichte der ersten Hälfte des 20. Jahrhunderts mit dessen zweiten fünf Jahrzehnten, und Sie werden sofort verstehen, was ich meine. Gerade die deutsche Perspektive ist dabei besonders lehrreich, denn sie macht klar, was unser Land der Idee der europäischen Integration und ihrer Umsetzung tatsächlich zu verdanken hat!

Dieses fast revolutionär zu nennende neue Prinzip des europäischen Staatensystems ging von Frankreich und seinen großen Staatsmännern Robert Schuman und Jean Monnet aus. Seine schrittweise Verwirklichung von der Gründung der Europäischen Gemeinschaft für Kohle und Stahl bis zur Schaffung des Binnenmarkts und der gemeinsamen Währung beruhte in allen Stadien seiner Entwicklung zentral auf der deutsch-französischen Interessenallianz. Diese war allerdings niemals exklusiv, sondern für andere europäische Staaten immer offen, und so sollte es bis zum Erreichen der Finalität auch bleiben.

Die europäische Integration hat sich als phänomenal erfolgreich erwiesen. Das Ganze hatte nur einen entscheidenden Mangel, der durch die Geschichte erzwungen war. Es war nicht das ganze Europa, sondern ausschließlich dessen

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freier Teil im Westen. Die Teilung Europas ging fünf Jahrzehnte mitten durch Deutschland und Berlin hindurch, und östlich von Mauer und Stacheldraht wartete ein unverzichtbarer Teil Europas, ohne den die europäische Integrationsidee niemals vollendet werden konnte, auf seine Chance zur Teilnahme am europäischen Einigungsprozeß. Diese kam dann mit dem Ende der europäischen und deutschen Teilung 1989/90.

Robert Schuman hat dies bereits 1963 mit äußerster Klarheit gesehen

Wir müssen das geeinte Europa nicht nur im Interesse der freien Völker errichten, sondern auch, um die Völker Osteuropas in diese Gemeinschaft aufnehmen zu können, wenn sie, von den Zwängen, unter denen sie leiden, befreit, um ihren Beitritt und unsere moralische Unterstützung nachsuchen werden. Wir schulden ihnen das Vorbild des einigen, brüderlichen Europa. Jeder Schritt, den wir auf diesem Wege zurücklegen, wird für sie eine neue Chance darstellen. Sie brauchen unsere Hilfe bei der Umstellung, die sie zu bewerkstelligen haben. Unsere Pflicht ist es, bereit zu sein.

Nach dem Zusammenbruch des Sowjetimperiums mußte sich die EU nach Osten öffnen, sonst hätte sich die Idee der europäischen Integration selbst ausgehöhlt und letztlich zerstört. Warum? Ein Blick nach dem ehemaligen Jugoslawien zeigt uns die Konsequenzen, auch wenn sie nicht immer und überall zu ähnlich extremen Entwicklungen geführt hätten. Eine auf Westeuropa beschränkte EU hätte es dauerhaft mit einem gespaltenen Staatensystem in Europa zu tun gehabt: in Westeuropa die Integration, in Osteuropa das alte Gleichgewichtssystem mit seiner anhaltend nationalen Orientierung, Koalitionszwängen, klassischer Interessenpolitik und der permanenten Gefahr nationalistischer Ideologien und Konfrontationen. Ein gespaltenes europäisches Staatensystem ohne überwölbende Ordnung würde Europa dauerhaft zu einem Kontinent der Unsicherheit machen, und auf mittlere Sicht würden sich diese traditionellen Konfliktlinien von Osteuropa auch wieder in die EU hinein übertragen. Gerade Deutschland wäre dabei der große Verlierer. Auch die geopolitischen Realitäten ließen nach 1989 keine ernsthafte Alternative zur Osterweiterung der europäischen Institutionen zu, und dies gilt erst recht im Zeitalter der Globalisierung.

Die EU hat als Antwort auf diesen wahrhaft historischen Einschnitt konsequent einen tiefgreifenden Umgestaltungsprozess eingeleitet:

- In Maastricht wurde von den drei wesentlichen Souveränitäten des modernen Nationalstaats—Währung, innere und äußere Sicherheit—erstmalig ein Kernbereich ausschließlich in die Verantwortung einer europäischen Institution übertragen. Die Einführung des Euro bedeutete nicht nur die Krönung der wirtschaftlichen Integration, sie war zugleich ein zutiefst politischer Akt, denn die Währung ist nicht nur eine ökonomische Größe, sondern sie sym-

bolisiert auch die Macht des Souveräns, der sie garantiert. Aus der Vergemeinschaftung von Wirtschaft und Währung gegenüber den noch fehlenden politischen und demokratischen Strukturen ist ein Spannungsfeld entstanden, das in der EU zu inneren Krisen führen kann, wenn wir nicht die Defizite im Bereich der politischen Integration produktiv aufheben und so den Prozess der Integration vollenden.

- Der Europäische Rat in Tampere markierte den Einstieg in ein neues weitreichendes Integrationsprojekt, den Aufbau eines gemeinsamen Raums des Rechts und der inneren Sicherheit. Damit rückt das Europa der Bürger in greifbare Nähe. Die Bedeutung dieses neuen Integrationsprojekts geht aber noch darüber hinaus: Gemeinsames Recht kann eine große integrative Kraft entfalten.
- Die europäischen Staaten haben, gerade unter dem Eindruck des Kosovo-Krieges, weitere Schritte zur Stärkung ihrer gemeinsamen außenpolitischen Handlungsfähigkeit ergriffen und sich in Köln und Helsinki auf ein neues Ziel verständigt: die Entwicklung einer gemeinsamen Sicherheits- und Verteidigungspolitik. Die Union hat damit—nach dem Euro—den nächsten Schritt getan. Denn wie sollte man auf Dauer begründen, daß Staaten, die sich durch die Währungsunion unauflösbar und in ihrer ökonomisch-politischen Existenz miteinander verbinden, sich nicht auch gemeinsam äußeren Bedrohungen stellen und ihre Sicherheit gemeinsam gewährleisten?
- Ebenfalls in Helsinki wurde ein konkreter Plan für die Erweiterung der EU vereinbart. Nach diesen Beschlüssen dürften die äußeren Grenzen der künftigen EU mehr oder weniger vorgezeichnet sein. Es ist absehbar, dass die Europäische Union am Ende des Erweiterungsprozesses 27, 30 oder noch mehr Mitglieder zählen wird, beinahe so viel wie die KSZE bei ihrer Gründung.

Wir stehen damit in Europa gegenwärtig vor der enorm schwierigen Aufgabe, zwei Großprojekte parallel zu organisieren:

1. Die schnellstmögliche Erweiterung. Diese wirft schwierige Anpassungsprobleme für Beitrittsländer wie für die EU selbst auf. Sie löst zudem bei unseren Bürgern Sorgen und Ängste aus: Geraten ihre Arbeitsplätze in Gefahr? Wird durch die Erweiterung Europa noch undurchsichtiger und unverständlicher für die Bürger? So ernsthaft wir uns mit solchen Fragen auseinandersetzen müssen, wir dürfen darüber nie die historische Dimension der Osterweiterung aus den Augen verlieren. Denn diese ist eine einmalige Chance, unseren über Jahrhunderte kriegsgeschüttelten Kontinent in Frieden, Sicherheit, Demokratie und Wohlstand zu vereinen.

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Die Erweiterung liegt gerade für Deutschland im obersten nationalen Interesse. Die in Deutschlands Dimension und Mittellage objektiv angelegten Risiken und Versuchungen werden durch die Erweiterung bei gleichzeitiger Vertiefung der EU dauerhaft überwunden werden können. Hinzu kommt: die Erweiterung—siehe die Süderweiterung der EU—ist ein gesamteuropäisches Wachstumsprogramm. Gerade die deutsche Wirtschaft wird von der Erweiterung einen hohen Gewinn für Unternehmen und Beschäftigung davontragen. Deutschland muß daher weiter Anwalt einer zügigen Osterweiterung bleiben. Zugleich muß die Erweiterung sorgfältig und nach Maßgabe des Beschlusses von Helsinki vollzogen werden.

2. Die Handlungsfähigkeit Europas. Die Institutionen der EU wurden für 6 Mitgliedstaaten geschaffen. Sie funktionieren mit Mühe noch zu 15. So wichtig der erste Reformschritt mit seiner verstärkten Mehrheitsentscheidung bei der vor uns liegenden Regierungskonferenz auch für den Beginn der Erweiterung ist, so wird er langfristig für die Erweiterung insgesamt allein nicht ausreichen. Die Gefahr besteht dann, dass eine Erweiterung auf 27-30 Mitglieder die Absorptionsfähigkeit der EU mit ihren alten Institutionen und Mechanismen überfordern wird, und dass es zu schweren Krisen kommen kann. Aber diese Gefahr spricht, wohlgemerkt, nicht gegen die schnellstmögliche Erweiterung, sondern vielmehr für eine entschlossene und angemessene Reform der Institutionen, damit die Handlungsfähigkeit auch unter den Bedingungen der Erweiterung erhalten bleibt. *Erosion oder Integration* lautet deshalb die Konsequenz aus der unabweisbaren Erweiterung der EU.

Meine Damen und Herren,

die Bewältigung dieser zwei Aufgaben steht im Zentrum der aktuellen Regierungskonferenz. Die EU hat sich verpflichtet, bis zum 1.1. 2003 aufnahmefähig zu sein. Nach dem Abschluss der Agenda 2000 geht es nun darum, die institutionellen Voraussetzungen für die nächste Erweiterungsrunde herzustellen. Die Lösung der drei Kernfragen—Zusammensetzung der Kommission, Stimmgewichtung im Rat und ganz besonders der Ausweitung von Mehrheitsentscheidungen—ist unverzichtbar für eine reibungslose Fortsetzung des Erweiterungsprozesses. Ihr kommt deshalb jetzt als nächster zu lösender praktischer Schritt unbedingte Priorität zu.

So zentral die Regierungskonferenz für die Zukunft der EU als nächster Schritt auch immer ist, so müssen wir angesichts der Lage Europas gleichwohl schon heute damit beginnen, uns über den Prozess der Erweiterung hinaus Gedanken zu machen, wie eine künftige „große“ EU einmal funktionieren kann, wie sie deshalb aussehen und funktionieren müßte. Und das will ich jetzt tun.



Gestatten Sie mir deshalb, meine Damen und Herren, dass ich jetzt „den Außenminister“ definitiv weit hinter mir lasse, um einige Überlegungen sowohl über das Wesen der sogenannten „Finalität Europas“ anzustellen als auch darüber, auf welchem Weg wir uns diesem Ziel annähern und es schliesslich erreichen können. Und auch allen Euroskeptikern diesseits und jenseits des Kanals sei empfohlen, jetzt nicht gleich wieder die dicksten Schlagzeilen zu produzieren, denn erstens handelt es sich um eine persönliche Zukunftsvision von der Lösung der europäischen Probleme. Und zweitens reden wir hier über einen langfristigen Zeitraum, weit jenseits der nächsten Regierungskonferenz. Niemand muß sich also vor diesen Thesen fürchten.

Die Erweiterung wird eine grundlegende Reform der europäischen Institutionen unverzichtbar machen. Wie stellt man sich eigentlich einen Europäischen Rat mit dreißig Staats- und Regierungschefs vor? Dreißig Präsidentschaften? Wie lange werden Ratssitzungen dann eigentlich dauern? Tage oder gar Wochen? Wie soll man in dem heutigen Institutionengefüge der EU zu Dreißig Interessen ausgleichen, Beschlüsse fassen und dann noch handeln? Wie will man verhindern, daß die EU damit endgültig intransparent, die Kompromisse immer unfaßlicher und merkwürdiger werden, und die Akzeptanz der EU bei den Unionsbürgern schließlich weit unter den Gefrierpunkt sinken wird?

Fragen über Fragen, auf die es allerdings eine ganz einfache Antwort gibt: *den Übergang vom Staatenverbund der Union hin zur vollen Parlamentarisierung in einer Europäischen Föderation, die Robert Schuman bereits vor 50 Jahren gefordert hat. Und d.h. nichts geringeres als ein europäisches Parlament und eine ebensolche Regierung, die tatsächlich die gesetzgebende und die exekutive Gewalt innerhalb der Föderation ausüben.* Diese Föderation wird sich auf einen *Verfassungsvertrag* zu gründen haben.

Mir ist wohl bewußt, welche Prozedur- und Substanzprobleme es bis zur Erreichung dieses Ziels zu überwinden gilt. Es ist aber für mich völlig klar, dass Europa seine ihm gemäße Rolle im wirtschaftlichen und politischen globalen Wettbewerb nur dann wird spielen können, wenn wir mutig vorangehen. Mit den Ängsten und Rezepten des 19. und 20. Jahrhunderts können die Probleme des 21. Jahrhunderts nicht gelöst werden.

Freilich erhebt sich gegen diese einfache Lösung sofort der Vorwurf der nicht vorhandenen Machbarkeit. Europa sei kein neuer Kontinent, sondern voll mit unterschiedlichen Völkern, Kulturen, Sprachen und Geschichten. Die Nationalstaaten seien nicht wegzudenkende Realitäten, und je mehr die Globalisierung und Europäisierung bürgerferne Superstrukturen und anonyme Akteure



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schaffen, umso mehr werden die Menschen an ihren Sicherheit und Geborgenheit vermittelnden Nationalstaaten festhalten.

Nun, alle diese Einwände teile ich, denn sie sind richtig. Deshalb wäre es ein nicht wieder gut zu machender Konstruktionsfehler, wenn man die Vollendung der politischen Integration gegen die vorhandenen nationalen Institutionen und Traditionen und nicht unter deren Einbeziehung versuchen würde. Ein solches Unternehmen müßte unter den historisch-kulturellen Bedingungen Europas scheitern. Nur wenn die europäische Integration die Nationalstaaten in eine solche Föderation mitnimmt, wenn deren Institutionen nicht entwertet oder gar verschwinden werden, wird ein solches Projekt trotz aller gewaltigen Schwierigkeiten machbar sein. Anders gesagt: die bisherige Vorstellung eines europäischen Bundesstaates, der als neuer Souverän die alten Nationalstaaten und ihre Demokratien ablöst, erweist sich als ein synthetisches Konstrukt jenseits der gewachsenen europäischen Realitäten. Die Vollendung der europäischen Integration läßt sich erfolgreich nur denken, wenn dies auf der Grundlage einer *Souveränitätsteilung von Europa und Nationalstaat* geschieht. Genau dieses Faktum aber steckt hinter dem Begriff der „Subsidiarität“, der gegenwärtig allenthalben diskutiert und von kaum jemandem verstanden wird.

Was hat man sich nun unter dem Begriff der „Souveränitätsteilung“ vorzustellen? Wie gesagt, Europa wird nicht in einem leeren politischen Raum entstehen, und ein weiteres Faktum unserer europäischen Realität sind deshalb die unterschiedlichen politischen Nationalkulturen und deren demokratische Öffentlichkeiten, getrennt zudem noch durch die allfälligen Sprachgrenzen. Ein europäisches Parlament muß deswegen immer ein Doppeltes repräsentieren: ein *Europa der Nationalstaaten* und ein *Europa der Bürger*. Dies wird sich nur machen lassen, wenn dieses europäische Parlament die unterschiedlichen nationalen politischen Eliten und dann auch die unterschiedlichen nationalen Öffentlichkeiten tatsächlich zusammenführt.

Dies läßt sich meines Erachtens erreichen, wenn dieses europäische Parlament über zwei Kammern verfügt, wobei eine Kammer durch gewählte Abgeordnete besetzt wird, die zugleich Mitglieder der Nationalparlamente sind. So wird es keinen Gegensatz zwischen nationalen Parlamenten und europäischem Parlament, zwischen Nationalstaat und Europa geben. Bei der zweiten Kammer wird man sich zwischen einem Senatsmodell mit direkt gewählten Senatoren der Mitgliedstaaten oder einer Staatenkammer analog unseres Bundesrates zu entscheiden haben. In den USA wählen alle Staaten zwei Senatoren, in unserem Bundesrat hingegen gibt es eine unterschiedliche Stimmenzahl.

Ebenso stellen sich für die europäische Exekutive, die europäische Regierung, zwei Optionen. Entweder entscheidet man sich für die Fortentwicklung des

Europäischen Rats zu einer europäischen Regierung, d.h. die europäische Regierung wird aus den nationalen Regierungen heraus gebildet, oder man geht, ausgehend von der heutigen Kommissionsstruktur, zur Direktwahl eines Präsidenten mit weitgehenden exekutiven Befugnissen über. Man kann sich hier aber auch verschiedene Zwischenformen dazu denken.

Nun wird es den Einwand geben, daß Europa ja bereits heute viel zu kompliziert und für die Unionsbürger viel zu undurchschaubar geworden sei, und nun wolle man es noch komplizierter machen. Aber genau das Gegenteil wird hier intendiert. *Die Souveränitätsteilung von Föderation und Nationalstaaten setzt einen Verfassungsvertrag voraus, der festlegt, was europäisch und was weiterhin national geregelt werden soll.* Die Vielzahl von Regelungen auf EU-Ebene sind mit dem Ergebnis der induktiven Vergemeinschaftung nach der Methode Monnet und Ausdruck zwischenstaatlicher Kompromisse im heutigen Staatenverbund EU. Die klare Zuständigkeitsregelung zwischen Föderation und Nationalstaaten in einem europäischen Verfassungsvertrag sollte die Kernsouveränitäten und nur das unbedingt notwendig europäisch zu Regelnde der Föderation übertragen, der Rest aber bliebe nationalstaatliche Regelungskompetenz. Dies wäre eine schlanke und zugleich handlungsfähige Europäische Föderation, voll souverän und doch auf selbstbewußten Nationalstaaten als Glieder dieser Föderation beruhend. Zudem wäre dies auch eine Föderation, die von den Bürgern durchschaut und verstanden würde, weil sie ihr Demokratiedefizit überwunden hätte.

Dies alles wird aber nicht die Abschaffung des Nationalstaates bedeuten. Denn auch für das finale Föderationssubjekt wird der Nationalstaat mit seinen kulturellen und demokratischen Traditionen unersetzlich sein, um eine von den Menschen in vollem Umfang akzeptierte Bürger- und Staatenunion zu legitimieren. Dies sage ich gerade mit Blick auf unsere Freunde in Großbritannien, denn ich weiß, daß der Begriff „Föderation“ für viele Briten ein Reizwort ist. Aber mir fällt bis heute kein anderer Begriff ein. Es soll hier niemand gereizt werden.

Auch in der europäischen Finalität werden wir also noch Briten und Deutsche, Franzosen und Polen sein. Die Nationalstaaten werden fortexistieren und auf europäischer Ebene eine wesentlich stärkere Rolle behalten als dies die Bundesländer in Deutschland tun. Und das Prinzip der Subsidiarität wird in einer solchen Föderation künftig Verfassungsrang haben.

Diese drei Reformen: die Lösung des Demokratieproblems sowie das Erfordernis einer grundlegenden Neuordnung der Kompetenzen sowohl horizontal, d.h. zwischen den europäischen Institutionen, als auch vertikal, also zwischen Europa, Nationalstaat und Regionen, wird nur durch eine

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*konstitutionelle Neugründung Europas* gelingen können, also durch die *Realisierung des Projekts einer europäischen Verfassung, deren Kern die Verankerung der Grund-, Menschen- und Bürgerrechte, einer gleichgewichtigen Gewaltenteilung zwischen den europäischen Institutionen und einer präzisen Abgrenzung zwischen der europäischen und der nationalstaatlichen Ebene sein muss. Die Hauptachse einer solchen europäischen Verfassung wird dabei das Verhältnis zwischen Föderation und Nationalstaat bilden.* Damit ich nicht mißverstanden werde: Dies hat mit Renationalisierung überhaupt nichts zu tun, im Gegenteil.

Meine Damen und Herren,

die Frage, die sich nun immer drängender stellt, ist folgende: *wird sich diese Vision einer Föderation nach der bisherigen Methode der Integration realisieren lassen oder muss diese Methode selbst, das zentrale Element des bisherigen Einigungsprozesses, in Frage gestellt werden?*

Bis in der Vergangenheit dominierte im wesentlichen die „Methode Monnet“ mit ihrem Vergemeinschaftungsansatz in europäischen Institutionen und Politiken den europäischen Einigungsprozess. Diese schrittweise Integration ohne Blaupause für den Endzustand war in den 50er Jahren für die wirtschaftliche Integration einer kleinen Ländergruppe konzipiert worden. So erfolgreich dieser Ansatz dort war, für die politische Integration und die Demokratisierung Europas hat er sich als nur bedingt geeignet erwiesen. Dort, wo ein Voranschreiten aller EU-Mitglieder nicht möglich war, gingen deshalb Teilgruppen in wechselnden Formationen voraus, wie in der Wirtschafts- und Währungsunion oder bei Schengen.

Liegt also in einer solchen Differenzierung, einer verstärkten Zusammenarbeit in Teilbereichen, die Antwort auf die doppelte Herausforderung von Erweiterung und Vertiefung? Gerade in einer erweiterten und zwangsläufig auch heterogeneren Union wird eine weitere Differenzierung unverzichtbar werden. Sie zu erleichtern, ist deshalb auch ein zentrales Ziel der Regierungskonferenz.

Allerdings wird eine immer stärkere Differenzierung auch neue Probleme aufwerfen: einen Verlust von europäischer Identität, an innerer Kohärenz sowie die Gefahr einer inneren Erosion der EU, wenn nämlich neben die Klammer der Integration immer grössere Bereiche intergouvernementaler Zusammenarbeit treten sollten. Schon heute ist eine wohl innerhalb ihrer eigenen Logik nicht mehr zu lösende Krise der „Methode Monnet“ nicht mehr zu übersehen.

Jacques Delors sowie Helmut Schmidt und Valéry Giscard d'Estaing haben deshalb in jüngster Zeit versucht, auf dieses Dilemma neue Antworten zu finden. Nach den Vorstellungen von Delors soll eine „Föderation der Nationalstaaten“,

bestehend aus den 6 Gründungsländern der Europäischen Gemeinschaft, einen „Vertrag im Vertrag“ schließen, mit dem Ziel einer tiefgreifenden Reform der europäischen Institutionen. In eine ähnliche Richtung gehen die Überlegungen von Schmidt und Giscard, die allerdings anstatt der 6 Gründungsmitglieder von den Euro-11 Staaten als Zentrum ausgehen. Bereits 1994 hatten Karl Lamers und Wolfgang Schäuble die Schaffung eines „Kerneuropa“ vorgeschlagen, das allerdings einen entscheidenden Geburtsfehler hatte, nämlich die Vorstellung eines exklusiven „Kerns“, der noch dazu das Gründungsland Italien ausschloß, anstatt eines *für alle offenen Integrationsmagneten*.

Wenn angesichts der unabwiesbaren Herausforderung der Osterweiterung die Alternative für die EU tatsächlich Erosion oder Integration heisst und wenn das Verharren in einem Staatenverbund Stillstand mit all seinen negativen Folgen bedeuten würde, dann wird, getrieben durch den Druck der Verhältnisse und der von ihnen ausgelösten Krisen, die EU innerhalb der nächsten Dekade irgendwann vor der Alternative stehen: Springt eine Mehrheit der Mitgliedstaaten in die volle Integration und einigt sich auf einen europäischen Verfassungsvertrag zur Gründung einer Europäischen Föderation? Oder, wenn dies nicht geschieht, wird eine kleinere Gruppe von Mitgliedstaaten als Avantgarde diesen Weg vorausgehen, d.h. ein Gravitationszentrum aus einigen Staaten bilden, die aus tiefer europäischer Überzeugung heraus bereit und in der Lage sind, mit der politischen Integration voranzuschreiten? Die Fragen würden dann nur noch heißen: Wann wird der richtige Zeitpunkt sein? Wer wird teilnehmen? Und wird sich dieses Gravitationszentrum innerhalb oder außerhalb der Verträge herausbilden? Eines jedenfalls ist dabei sicher: ohne engste deutsch-französische Zusammenarbeit wird auch künftig kein europäisches Projekt gelingen.

Angesichts dieser Lage könnte man sich also weit über das nächste Jahrzehnt hinaus die *weitere Entwicklung Europas in zwei oder drei Stufen* vorstellen:

*Zunächst dem Ausbau verstärkter Zusammenarbeit* zwischen denjenigen Staaten, die enger als andere kooperieren wollen, wie dies bereits auch in der Wirtschafts- und Währungsunion und bei Schengen der Fall ist. Auf vielen Gebieten können wir hiermit vorankommen: bei der Weiterentwicklung der Euro-11 zu einer wirtschaftspolitischen Union, beim Umweltschutz, der Verbrechensbekämpfung, der Entwicklung einer gemeinsamen Einwanderungs- und Asylpolitik und natürlich auch in der Außen- und Sicherheitspolitik. Sehr wichtig dabei ist, dass verstärkte Zusammenarbeit nicht als eine Abkehr von der Integration verstanden werden darf.

*Ein möglicher Zwischenschritt hin zur Vollendung der politischen Union könnte dann später die Bildung eines Gravitationszentrums sein.* Eine solche Staaten-

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gruppe würde einen neuen europäischen Grundvertrag schließen, den Nukleus einer Verfassung der Föderation. Und auf der Basis dieses Grundvertrages würde sie sich eigene Institutionen geben, eine Regierung, die innerhalb der EU in möglichst vielen Fragen für die Mitglieder der Gruppe mit einer Stimme sprechen sollte, ein starkes Parlament, einen direkt gewählten Präsidenten. Ein solches Gravitationszentrum müßte die Avantgarde, die Lokomotive für die Vollendung der politischen Integration sein und bereits alle Elemente der späteren Föderation umfassen.

Mir sind nun die institutionellen Probleme im Hinblick auf die jetzige EU durchaus bewußt, die ein solches Gravitationszentrum mit sich bringen würde. Deshalb würde es entscheidend darauf ankommen, sicherzustellen, daß das in der EU Erreichte nicht gefährdet, diese nicht gespalten und das die EU zusammenhaltende Band weder politisch noch rechtlich beschädigt werden darf. Es müßten Mechanismen entwickelt werden, die eine Mitarbeit des Gravitationszentrums in der größeren EU ohne Reibungsverluste erlauben.

Die Frage, welche Staaten sich an einem solchen Projekt beteiligen, die EU-Gründungs-, die Euro11-Mitglieder oder noch eine andere Gruppe, läßt sich heute unmöglich beantworten. Bei jeder Überlegung über die Option Gravitationszentrum muß eines klar sein: diese Avantgarde darf niemals exklusiv, sondern muß für alle Mitgliedstaaten und Beitrittskandidaten der EU offen sein, wenn diese zu einem bestimmten Zeitpunkt teilnehmen wollen. Für alle diejenigen, die teilnehmen wollen, aber dazu die Bedingungen nicht haben, muß es Heranführungsmöglichkeiten geben. *Transparenz* und eine *Mitwirkungsoption* für alle EU-Mitglieder und –kandidaten wären wesentliche Faktoren für die Akzeptanz und Realisierbarkeit des Projekts. Und dies muß gerade auch gegenüber den Beitrittsländern gelten. Denn es wäre historisch absurd und zutiefst töricht, wenn Europa just zu dem Zeitpunkt, wo es endlich wieder vereint wird, erneut gespalten würde.

Ein solcher *Gravitationskern* muß also ein *aktives Erweiterungsinteresse* haben und er muß Attraktivität für die anderen Mitglieder ausstrahlen. Folgt man dem Grundsatz von Hans Dietrich Genscher, daß kein Mitgliedstaat gezwungen werden kann, weiter zu gehen, als er es kann oder wünscht, aber daß derjenige, der nicht weitergehen möchte, auch nicht die Möglichkeit hat, die anderen daran zu hindern, dann wird sich die Gravitation innerhalb der Verträge herausbilden, ansonsten außerhalb.

*Der letzte Schritt wäre dann die Vollendung der Integration in einer Europäischen Föderation.* Damit wir uns nicht mißverstehen: von der verstärkten Zusammenarbeit führt kein Automatismus dorthin, egal ob als Gravitationszentrum oder gleich als Mehrheit der Unionsmitglieder. Die verstärkte

Zusammenarbeit wird zunächst vor allem nichts anderes als eine verstärkte Intergouvernementalisierung angesichts des Drucks der Fakten und der Schwäche der Methode Monnet bedeuten. Der Schritt von der verstärkten Zusammenarbeit hin zu einem Verfassungsvertrag—und genau dies wird die Voraussetzung der vollen Integration sein—bedarf dagegen eines bewußten politischen Neugründungsaktes Europas.

Dies, meine Damen und Herren, ist meine persönliche Zukunftsvision: Von der verstärkten Zusammenarbeit hin zu einem europäischen Verfassungsvertrag und die Vollendung von Robert Schumans großer Idee einer Europäischen Föderation. Dies könnte der Weg sein!



SPEECH BY JOSCHKA FISCHER

AT THE HUMBOLDT UNIVERSITY IN BERLIN, 12 MAY 2000

## **From Confederacy to Federation: Thoughts on the Finality of European Integration\***

Fifty years ago almost to the day, Robert Schuman presented his vision of a 'European Federation' for the preservation of peace. This heralded a completely new era in the history of Europe. European integration was the response to centuries of a precarious balance of powers on this continent which again and again resulted in terrible hegemonic wars culminating in the two World Wars between 1914 and 1945. The core of the concept of Europe after 1945 was, and still is, a rejection of the European balance-of-power principle and the hegemonic ambitions of individual states that had emerged following the Peace of Westphalia in 1648, a rejection which took the form of closer meshing of vital interests and the transfer of nation-state sovereign rights to supranational European institutions.

Fifty years on, Europe, the process of European integration, is probably the biggest political challenge facing the states and peoples involved, because its success or failure, indeed even just the stagnation of this process of integration, will be of crucial importance to the future of each and every one of us, but especially to the future of the young Generation. And it is this process of European integration that is now being called into question by many people; it is viewed as a bureaucratic affair run by a faceless, soulless Eurocracy in Brussels—at best boring, at worst dangerous.

Not least for this reason, I should like to thank you for the opportunity to mull over in public a few more fundamental and conceptional thoughts on the future shape of Europe. Allow me, if you will, to cast aside for the duration of this speech the mantle of German Foreign Minister and member of the Government—a mantle which is occasionally rather restricting when it comes to reflecting on things in public—although I know it is not really possible to do so. But what I want to talk to you about today is not the operative challenges facing European policy over the next few months, not the current intergovernmental conference, the EU's enlargement to the east or all those other important issues

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\* Translation of Advance Text



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we have to resolve today and tomorrow, but rather the possible strategic prospects for European integration far beyond the coming decade and the intergovernmental conference.

So let us be clear: this is not a declaration of the Federal Government's position, but a contribution to a discussion long begun in the public arena about the 'finality' of European integration, and I am making it simply as a staunch European and German parliamentarian. I am all the more pleased, therefore, that, on the initiative of the Portuguese presidency, the last informal EU Foreign Ministers' Meeting in the Azores held a long, detailed and extremely productive discussion on this very topic, the finality of European integration, a discussion that will surely have consequences.

Ten years after the end of the cold war and right at the start of the age of Globalisation, one can literally almost feel that the problems and challenges facing Europe have wound themselves into a knot which will be very hard to undo within the existing framework: the introduction of the single currency, the EU's incipient eastern enlargement, the crisis of the last EU Commission, the poor acceptance of the European Parliament and low turn-outs for European elections, the wars in the Balkans and the development of a Common Foreign and Security Policy not only define what has been achieved but also determine the challenges still to be overcome.

*Quo vadis Europa?* is the question posed once again by the history of our continent. And for many reasons, the answer Europeans will have to give, if they want to do well by themselves and their children, can only be this: onwards to the completion of European integration. A step backwards, even just stand still or contentment with what has been achieved, would demand a fatal price of all EU Member States and of all those who want to become Members; it would demand a fatal price above all of our people. This is particularly true for Germany and the Germans.

The task ahead of us will be anything but easy and will require all our strength; in the coming decade, we will have to enlarge the EU to the east and south-east, and this will, in the end, mean a doubling in the number of members. And at the same time, if we are to be able to meet this historic challenge and integrate the new Member States without substantially denting the EU's capacity for action, we must put into place the last brick in the building of European integration, namely political integration.

The need to organise these two processes in parallel is undoubtedly the biggest challenge the Union has faced since its creation. But no generation can choose the challenges it is tossed by history, and this is the case here too. Nothing less

than the end of the cold war and of the forced division of Europe is facing the EU and thus us with this task, and so today we need the same visionary energy and pragmatic ability to assert ourselves as was shown by Jean Monnet and Robert Schuman after the end of the Second World War. And like then, after the end of this last great European war, which was—as almost always—also a Franco-German war, this latest stage of European Union, namely eastern enlargement and the completion of political integration, will depend decisively on France and Germany.

Two historic decisions in the middle of last century fundamentally altered Europe's fate for the better: Firstly, the USA's decision to stay in Europe, and Secondly, France's and Germany's commitment to the principle of integration, beginning with economic links.

The idea of European integration and its implementation not only gave rise to an entirely new order in Europe—to be more exact, in Western Europe—but European history underwent a fundamental about-turn. Just compare the history of Europe in the first half of the 20th Century with that in the second half and you will immediately understand what I mean. Germany's perspective, in particular, teaches a host of lessons, because it makes clear what our country really owes to the concept and implementation of European integration.

This new principle of the European system of states, which could almost be called revolutionary, emanated from France and her two great statesmen Robert Schuman and Jean Monnet. Every stage of its gradual realisation, from the establishment of the European Coal and Steel Community to the creation of the single market and the introduction of the single currency, depended essentially on the alliance of Franco-German interests. This was never exclusive, however, but always open to other European states, and so it should remain until finality has been achieved.

European integration has proved phenomenally successful. The whole thing had just one decisive shortcoming, forced upon it by history: it was not the whole of Europe, but merely its free part in the West. For fifty years the division of Europe cut right through Germany and Berlin, and, on the eastern side of the Wall and barbed wire, an indispensable part of Europe, without which European integration could never be completed, waited for its chance to take part in the European unification process. That chance came with the end of the division of Europe and Germany in 1989/90.

Robert Schuman saw this quite clearly back in 1963:

We must build the united Europe not only in the interest of the free nations, but also in order to be able to admit the peoples of Eastern Europe into this community if, freed

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from the constraints under which they live, they want to join and seek our moral support. We owe them the example of a unified, fraternal Europe. Every step we take along this road will mean a new opportunity for them. They need our help with the transformation they have to achieve. It is our duty to be prepared.

Following the collapse of the Soviet empire, the EU had to open up to the east, otherwise the very idea of European integration would have undermined itself and eventually self-destructed. Why? A glance at the former Yugoslavia shows us the consequences, even if they would not always and everywhere have been so extreme. An EU restricted to Western Europe would forever have had to deal with a divided system in Europe: in Western Europe integration, in Eastern Europe the old system of balance with its continued national orientation, constraints of coalition, traditional interest-led politics and the permanent danger of nationalist ideologies and confrontations. A divided system of states in Europe without an overarching order would, in the long term, make Europe a continent of uncertainty, and, in the medium term, these traditional lines of conflict would shift from Eastern Europe into the EU again. If that happened, Germany, in particular, would be the big loser. The geo-political reality after 1989 left no serious alternative to the eastward enlargement of the European institutions, and this has never been truer than now, in the age of globalisation.

In response to this truly historic turnaround, the EU consistently embarked upon a far-reaching process of reform:

- In Maastricht, one of the three essential sovereign rights of the modern nation-state—currency, internal security and external security—was, for the first time, transferred to the sole responsibility of a European institution. The introduction of the euro was not only the crowning-point of economic integration, it was also a profoundly political act, because a currency is not just another economic factor but also symbolises the power of the sovereign who guarantees it. A tension has emerged between the communitarisation of economy and currency on the one hand, and the lack of political and democratic structures on the other, a tension which might lead to crises within the EU if we do not take productive steps to make good the short fall in political integration and democracy, thus completing the process of integration.
- The European Council in Tampere marked the beginning of a new far-reaching integration project, namely the development of a common area of justice and internal security, making the Europe of the citizens a tangible reality. But there is even more to this new integration project: common laws can be a highly integrative force.

- It was not least the war in Kosovo that prompted the European states to take further steps to strengthen their joint capacity for action on foreign policy, agreeing in Cologne and Helsinki on a new goal: the development of a Common Security and Defence Policy. With this, the Union has taken the next step following the euro. For how, in the long term, can it be justified that countries inextricably linked by monetary union and by economic and political realities do not also face up together to external threats and together maintain their security?
- Agreement was also reached in Helsinki on a concrete plan for the enlargement of the EU. With these agreements the external borders of the future EU are already emerging. It is foreseeable that the European Union will have twenty seven, thirty or even more members at the end of the enlargement process, almost as many as the CSCE at its inception.

Thus, we, in Europe, are currently facing the enormously difficult task of organising two major projects in parallel:

1. Enlargement as quickly as possible. This poses difficult problems of adaptation both for the acceding states and for the EU itself. It also triggers fear and anxiety in our citizens: are their jobs at risk? Will enlargement make Europe even less transparent and comprehensible for its citizens? As seriously as we must tackle these questions, we must never lose sight of the historic dimension of eastern enlargement. For this is a unique opportunity to unite our continent, wracked by war for centuries, in peace, security, democracy and prosperity.

Enlargement is a supreme national interest, especially for Germany. It will be possible to lastingly overcome the risks and temptations objectively inherent in Germany's dimensions and central situation through the enlargement and simultaneous deepening of the EU. Moreover, enlargement—consider the EU's enlargement to the south—is a pan-European programme for growth. Enlargement will bring tremendous benefits for German companies and for employment. Germany must, therefore, continue its advocacy of rapid eastern enlargement. At the same time, enlargement must be effected carefully and in accordance with the Helsinki decision.

2. Europe's capacity to act. The institutions of the EU were created for six Member States. They just about still function with fifteen. While the first step towards reform, to be taken at the upcoming intergovernmental conference and introducing increased majority voting, is important, it will not, in the long term, be sufficient for integration as a whole. The danger will then be that enlargement to include twenty seven or thirty members will hopelessly overload the EU's ability to absorb, with its old institutions and mechanisms, even with increased

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use of majority decisions, and that it could lead to severe crises. But this danger, it goes without saying, is no reason not to push on with enlargement as quickly as possible; rather it shows the need for decisive, appropriate, institutional reform so that the Union's capacity to act is maintained even after enlargement. The consequence of the irrefutable enlargement of the EU is, therefore, erosion or integration.

Fulfilling these two tasks is at the heart of the current intergovernmental conference. The EU has pledged to be able to admit new members by 1 January 2003. Following the conclusion of Agenda 2000, the aim now is to put in place the institutional preconditions for the next round of enlargement. Resolving the three key questions—the composition of the Commission, the weighting of votes in the Council, and particularly the extension of majority decisions—is indispensable for the smooth continuation of the process of enlargement. As the next practical step, these three questions now have absolute priority.

Crucial as the intergovernmental conference is as the next step for the future of the EU, we must, given Europe's situation, already begin to think beyond the enlargement process and consider how a future 'large' EU can function as it ought to function and what shape it must therefore take. And that's what I want to do now.

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Permit me therefore to remove my Foreign Minister's hat altogether in order to suggest a few ideas both on the nature of this so-called finality of Europe and on how we can approach and eventually achieve this goal. And all the Eurosceptics on this and the other side of the Channel would be well advised not to immediately produce the big headlines again, because firstly this is a personal vision of a solution to the European problems. And, secondly, we are talking here about the long term, far beyond the current intergovernmental conference. So, no one need be afraid of these ideas.

Enlargement will render imperative a fundamental reform of the European institutions. Just what would a European Council with thirty heads of state and government be like? Thirty presidencies? How long will Council meetings actually last? Days, maybe even weeks? How, with the system of institutions that exists today, are thirty states supposed to balance interests, take decisions and then actually act? How can one prevent the EU from becoming utterly intransparent, compromises from becoming stranger and more incomprehensible, and the citizens' acceptance of the EU from eventually hitting rock bottom?

Question upon question, but there is a very simple answer: the transition from a union of states to full parliamentarisation as a European Federation, something Robert Schuman demanded 50 years ago. And that means nothing less than a European Parliament and a European government which really do exercise legislative and executive power within the Federation. This Federation will have to be based on a constituent treaty.

I am well aware of the procedural and substantive problems that will have to be resolved before this goal can be attained. For me, however, it is entirely clear that Europe will only be able to play its due role in global economic and political competition if we move forward courageously. The problems of the 21st century cannot be solved with the fears and formulae of the 19th and 20th centuries.

Of course, this simple solution is immediately criticised as being utterly unworkable. Europe is not a new continent, so the criticism goes, but full of different peoples, cultures, languages and histories. The nation-states are realities that cannot simply be erased, and the more globalisation and Europeanisation create superstructures and anonymous actors remote from the citizens, the more the people will cling on to the nation-states that give them comfort and security.

Now I share all these objections, because they are correct. That is why it would be an irreparable mistake in the construction of Europe if one were to try to complete political integration against the existing national institutions and traditions rather than by involving them. Any such endeavour would be doomed to failure by the historical and cultural environment in Europe. Only if European integration takes the nation-states along with it into such a Federation, only if their institutions are not devalued or even made to disappear, will such a project be workable despite all the huge difficulties. In other words, the existing concept of a federal European state replacing the old nation-states and their democracies as the new sovereign power shows itself to be an artificial construct which ignores the established realities in Europe. The completion of European integration can only be successfully conceived if it is done on the basis of a division of sovereignty between Europe and the nation-state. Precisely this is the idea underlying the concept of ‘subsidiarity,’ a subject that is currently being discussed by everyone and understood by virtually no one.

So, what must one understand by the term ‘division of sovereignty’? As I said, Europe will not emerge in a political vacuum, and so a further fact in our European reality is, therefore, the different national political cultures and their democratic publics, separated in addition by linguistic boundaries. A European Parliament must, therefore, always represent two things: a Europe of the nation-

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states and a Europe of the citizens. This will only be possible if this European Parliament actually brings together the different national political elites and then also the different national publics.

In my opinion, this can be done if the European Parliament has two chambers. One will be for elected members who are also members of their national parliaments. Thus, there will be no clash between national parliaments and the European Parliament, between the nation-state and Europe. For the second Chamber, a decision will have to be made between the Senate model, with directly-elected senators from the Member States, and a chamber of states along the lines of Germany's Bundesrat. In the United States, every state elects two senators; in our Bundesrat, in contrast, there are different numbers of votes.

Similarly, there are two options for the European executive, or government. Either one can decide in favour of developing the European Council into a European government, *i.e.*, the European government is formed from the national governments, or—taking the existing Commission structure as a starting-point—one can opt for the direct election of a president with far-reaching executive powers. But there are also various other possibilities between these two poles.

Now objections will be raised that Europe is already much too complicated and much too intransparent for the citizen, and here we are wanting to make it even more complicated. But the intention is quite the opposite. The division of sovereignty between the Union and the nation-states requires a constituent treaty which lays down what is to be regulated at European level and what has still to be regulated at national level. The majority of regulations at EU level are, in part, the result of inductive communitarisation, as per the 'Monnet method,' and an expression of inter-state compromise within today's EU. There should be a clear definition of the competences of the Union and the nation-states respectively in a European constituent treaty, with core sovereignties and matters which absolutely have to be regulated at European level being the domain of the Federation, whereas everything else would remain the responsibility of the nation-states. This would be a lean European Federation, but one capable of action, fully sovereign, yet based on self-confident nation-states, and it would also be a Union which the citizens could understand, because it would have made good its shortfall on democracy.

However, all this will not mean the abolition of the nation-state. Because even for the finalised Federation, the nation-state, with its cultural and democratic traditions, will be irreplaceable in ensuring the legitimation of a union of citizens and states that is wholly accepted by the people. I say this not least with an eye to our friends in the United Kingdom, because I know that the term

‘federation’ irritates many Britons. But, to date, I have been unable to come up with another word. We do not wish to irritate anyone.

Even when European finality is attained, we will still be British or German, French or Polish. The nation-states will continue to exist and, at European level, they will retain a much larger role than the Länder have in Germany. And, in such a Federation, the principle of subsidiarity will be constitutionally enshrined.

These three reforms—the solution of the democracy problem and the need for fundamental reordering of competences both horizontally, *i.e.*, among the European institutions, and vertically, *i.e.*, between Europe, the nation-state and the regions—will only be able to succeed if Europe is established a new with a constitution. In other words, through the realisation of the project of a European constitution centred around basic, human and civil rights, an equal division of powers between the European institutions and a precise delineation between European and nation-state level. The main axis for such a European constitution will be the relationship between the Federation and the nation-state. Let me not be misunderstood: this has nothing whatsoever to do with a return to re-nationalisation, quite the contrary.

The question which is becoming more and more urgent today is this: can this vision of a Federation be achieved through the existing method of integration, or must this method itself, the central element of the integration process to date, be cast into doubt?

In the past, European integration was based on the ‘Monnet method’ with its communitarisation approach in European institutions and policy. This gradual process of integration, with no blueprint for the final state, was conceived in the 1950s for the economic integration of a small group of countries. Successful as it was in that scenario, this approach has proved to be of only limited use for the political integration and democratisation of Europe. Where it was not possible for all EU members to move ahead, smaller groups of countries of varying composition took the lead, as was the case with Economic and Monetary Union and with Schengen.

Does the answer to the twin challenge of enlargement and deepening, then lie in such a differentiation, an enhanced co-operation in some areas? Precisely in an enlarged and thus necessarily more heterogeneous Union, further differentiation will be inevitable. To facilitate this process is thus one of the priorities of the intergovernmental conference.

However, increasing differentiation will also entail new problems: a loss of European identity, of internal coherence, as well as the danger of an internal



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erosion of the EU, should ever larger areas of intergovernmental co-operation loosen the nexus of integration. Even today a crisis of the Monnet method can no longer be overlooked, a crisis that cannot be solved according to the method's own logic.

That is why Jacques Delors, Helmut Schmidt and Valéry Giscard d'Estaing have recently tried to find new answers to this dilemma. Delors' idea is that a 'federation of nation-states,' comprising the six founding states of the European Community, should conclude a 'treaty within the treaty' with a view to making far-reaching reforms in the European institutions. Schmidt and Giscard's ideas are in a similar vein, though they place the Euro-11 states at the centre, rather than just the six founding states. As early as 1994, Karl Lamers and Wolfgang Schäuble proposed the creation of a 'core Europe,' but it was still born, as it were, because it presupposed an exclusive, closed 'core,' even omitting the founding state Italy, rather than a magnet of integration open to all.

So, if the alternative for the EU in the face of the irrefutable challenge posed by eastern enlargement is indeed either erosion or integration, and if clinging to a federation of states would mean standstill with all its negative repercussions, then, under pressure from the conditions and the crises provoked by them, the EU will at some time within the next ten years, be confronted with this alternative: will a majority of Member States take the leap into full integration and agree on a European constitution? Or, if that does not happen, will a smaller group of Member States take this route as an avant-garde, *i.e.*, will a centre of gravity emerge comprising a few Member States which are staunchly committed to the European ideal and are in a position to push ahead with political integration? The question, then, would simply be: when will be the right time? Who will be involved? And will this centre of gravity emerge within or outside the framework provided by the treaties? One thing, at least, is certain: no European project will succeed in future either without the closest Franco-German co-operation.

Given this situation, one could imagine Europe's further development far beyond the coming decade in two or three stages:

First the expansion of reinforced co-operation between those states which want to co-operate more closely than others, as is already the case with Economic and Monetary Union and Schengen. We can make progress in this way in many areas: on the further development of Euro-11 to a politico-economic union, on environmental protection, the fight against crime, the development of common immigration and asylum policies and, of course, on the foreign and security policy. In this context, it is of paramount importance that closer co-operation should not be misunderstood as the end of integration.

One possible interim step on the road to completing political integration could then later be the formation of a centre of gravity. Such a group of states would conclude a new European framework treaty, the nucleus of a constitution of the Federation. On the basis of this treaty, the Federation would develop its own institutions, establish a government which within the EU should speak with one voice on behalf of the members of the group on as many issues as possible, a strong parliament and a directly elected president. Such a centre of gravity would have to be the *avant-garde*, the driving force for the completion of political integration and should, from the start, comprise all the elements of the future federation.

I am certainly aware of the institutional problems with regard to the current EU that such a centre of gravity would entail. That is why it would be critically important to ensure that the EU *acquis* is not jeopardised, that the union is not divided and the bonds holding it together are not damaged, either in political or in legal terms. Mechanisms would have to be developed which permit the members of the centre of gravity to co-operate smoothly with others in the larger EU.

The question of which countries will take part in such a project, the EU founding members, the Euro-11 members or another group, is impossible to answer today. One thing must be clear when considering the option of forming a centre of gravity: this *avant-garde* must never be exclusive but must be open to all Member States and candidate countries, should they desire to participate at a certain point in time. For those who wish to participate but do not fulfil the requirements, there must be a possibility to be drawn closer in. Transparency and the opportunity for all EU Member States to participate would be essential factors governing the acceptance and feasibility of the project. This must be true in particular with regard to the candidate countries. For it would be historically absurd and utterly stupid if Europe, at the very time when it is at long last reunited, were to be divided once again.

Such a centre of gravity must also have an active interest in enlargement and it must be attractive to the other members. If one follows Hans-Dietrich Genscher's tenet that no Member State can be forced to go further than it is able or willing to go, but that those who do not want to go any further cannot prevent others from doing so, then the centre of gravity will emerge within the treaties. Otherwise, it will emerge outside them.

The last step will then be completion of integration in a European Federation. Let us not misunderstand each other: closer co-operation does not automatically lead to full integration, either by the centre of gravity or straight away by the majority of members. Initially, enhanced co-operation means nothing more than

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increased intergovernmentalisation under pressure from the facts and the shortcomings of the ‘Monnet Method’. The steps towards a constituent treaty—and exactly that will be the precondition for full integration—require a deliberate political act to re-establish Europe.

This, ladies and gentlemen, is my personal vision for the future: from closer co-operation towards a European constituent treaty and the completion of Robert Schuman’s great idea of a European Federation. This could be the way ahead!

*12 May 2000*

DISCOURS PRONONCÉ PAR MONSIEUR JOSCHKA FISCHER  
À L'UNIVERSITÉ HUMBOLDT DE BERLIN, LE 12 MAI 2000

## **De la Confédération à la Fédération: réflexion sur la finalité de l'intégration européenne\***

Mesdames, Messieurs,

Il y a cinquante ans, presque jour pour jour, Robert Schuman exposait son idée d'une 'Fédération européenne' indispensable à la préservation de la paix, marquant ainsi l'avènement d'une toute nouvelle ère en Europe. L'intégration européenne était la réponse à des siècles d'équilibre précaire entre les puissances de notre continent qui basculait régulièrement dans des guerres d'hégémonie dévastatrices, dont les deux guerres mondiales menées entre 1914 et 1945 avaient sonné la funeste apogée. C'est pourquoi, à partir de 1945, la pensée européenne a toujours été et reste essentiellement fondée sur le refus du principe d'une balance des pouvoirs, d'un système d'équilibre européen et de la soif d'hégémonie de certains États issue de la Paix de Westphalie de 1648, refus s'opérant par le truchement d'une étroite imbrication des intérêts primaires de ces États et du transfert d'une partie de leurs droits de souveraineté nationaux à des institutions européennes supranationales.

Un demi-siècle plus tard, l'Europe, le processus d'unification européenne est pour tous les pays et les peuples qui y participent assurément le plus grand défi politique étant donné que sa réussite ou son échec, ou tout simplement la stagnation de ce processus seront déterminants pour notre avenir à tous, et en particulier pour la jeune génération. Or c'est précisément ce processus d'unification européenne qui fait aujourd'hui l'objet de bien des critiques, que l'on qualifie de manifestation bureaucratique d'une eurocratie bruxelloise sans âme ni visage, et que l'on considère au mieux comme ennuyeux, au pire comme périlleux.

Voilà pourquoi je me réjouis de cette occasion de développer en public une réflexion plus générale d'ordre conceptuel concernant la configuration de l'Europe de demain. Vous me permettrez aussi, pour le temps de ce discours, de me défaire de mon rôle—parfois un peu trop étroit pour une réflexion publique—de ministre allemand des Affaires étrangères et de membre du

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\* Traduction du texte distribué à l'avance.

gouvernement, même si je sais bien que ce n'est pas vraiment faisable. Aujourd'hui, je tiens à vous parler non pas des défis opérationnels que la politique européenne sera appelée à relever au cours des prochains mois, en d'autres termes non pas de la Conférence intergouvernementale, ni de l'élargissement de l'Union vers l'Est, ni encore de toutes les autres questions importantes qu'il nous faut résoudre à court terme, mais des perspectives stratégiques possibles de l'intégration européenne bien au-delà de la décennie prochaine et de la Conférence intergouvernementale.

Que ce soit bien clair, il ne s'agit donc pas pour moi de présenter la position du gouvernement fédéral, mais de concourir à une discussion qui a commencé depuis longtemps déjà au sein de l'opinion publique à propos de la 'finalité' de l'intégration européenne, de son 'parachèvement'; ce concours, je tiens justement à le fournir à titre d'Européen convaincu et de parlementaire allemand. Je suis d'autant plus satisfait qu'une longue discussion, approfondie et tout à fait productive, ait eu lieu, précisément sur ce thème de la finalité de l'intégration européenne, à l'initiative de la Présidence portugaise lors de la dernière réunion informelle des ministres des Affaires étrangères de l'Union européenne dans les Açores. Cette discussion ne manquera pas de produire ses effets.

Dix ans après la fin de la guerre froide et en pleine émergence de l'ère de la mondialisation, les problèmes et les défis européens sont à ce point imbriqués qu'ils forment un noeud presque palpable très difficile à dénouer dans les circonstances actuelles. En effet, que ce soit l'introduction de la monnaie commune, les débuts de l'élargissement vers l'Est, la crise de la dernière Commission européenne, ou bien le manque de soutien apporté au Parlement européen et aux élections européennes, les guerres dans les Balkans et le développement d'une politique étrangère et de sécurité commune, tous ces aspects ne définissent pas seulement les acquis réalisés, mais déterminent par ailleurs les défis qui demandent à être gérés.

*Quo vadis Europa?* Telle est donc la question que nous pose une fois de plus l'histoire de notre continent. Et là, pour bien des raisons différentes, il ne peut y avoir pour les Européens qu'une seule réponse s'ils songent à leur bien et à celui de leurs enfants: l'Europe doit aller de l'avant jusqu'à parfaire son intégration. Car tous les États membres de l'Union européenne et aussi tous ceux désireux d'en faire partie et en particulier nos populations devraient payer un prix fatal si l'Europe venait à reculer d'un pas, ou tout simplement à s'immobiliser ou à camper sur ses acquis. Cela vaut singulièrement pour l'Allemagne et pour les Allemands.

La tâche qui nous attend n'est pas simple du tout et nous devons user de toutes nos forces pour parvenir dans les dix prochaines années à mener à bien en grande partie l'élargissement de l'UE à l'Est et au Sud-Est, qui aboutira de facto à doubler le nombre des pays membres de l'Union européenne. Et pour gérer ce défi historique et intégrer les nouveaux États membres, sans pour autant remettre essentiellement en cause la capacité d'action de l'Union européenne, il nous faudra parallèlement apporter la dernière pierre à l'édifice de l'intégration européenne, à savoir l'intégration politique.

La nécessité d'organiser ces deux processus en parallèle représente sans conteste le plus grand défi auquel l'Union ait jamais dû faire face depuis sa fondation. Aucune génération, pourtant, ne peut choisir les défis que lui impose l'Histoire. Nous n'échappons pas à la règle. Ce n'est rien moins que la fin de la guerre froide et de la division forcée de l'Europe qui contraint l'Union européenne, et nous par la même occasion, à nous acquitter de cette tâche, et c'est pourquoi il nous faut faire preuve aujourd'hui d'une pareille force visionnaire et d'un pragmatisme aussi résolu que Jean Monnet et Robert Schuman au lendemain de la Seconde Guerre mondiale. Et tout comme jadis, à la fin de cette dernière grande guerre européenne qui—comme presque toutes les autres—avait été aussi une guerre franco-allemande, la France et l'Allemagne seront appelées à jouer un rôle absolument décisif dans cette dernière étape de la construction de l'Union européenne, à savoir son élargissement vers l'Est et le parachèvement de son intégration politique.

Mesdames, Messieurs,

Deux décisions de portée historique ont eu une influence positive décisive sur le destin de l'Europe au milieu du siècle dernier: premièrement, la décision des États-Unis de rester présents en Europe. Et deuxièmement, le fait que la France et l'Allemagne aient misé sur le principe de l'intégration, à commencer par l'imbrication économique.

Un ordre entièrement nouveau est né en Europe, ou plus précisément en Europe occidentale, avec l'idée de l'intégration européenne et sa mise en oeuvre; c'est le cours même de l'histoire européenne qui s'en est trouvé inversé. Si vous comparez l'histoire européenne de la première moitié du XXe siècle avec les cinquante dernières années, vous comprendrez tout de suite ce que je veux dire. La perspective allemande en particulier est très riche d'enseignements car elle illustre ce que notre pays doit vraiment à l'idée de l'intégration européenne et à sa mise en oeuvre.

C'est à la France et à ses grands hommes politiques, Robert Schuman et Jean Monnet, que l'on doit ce nouveau principe—presque révolutionnaire—

d'organisation politique des États européens. Sa réalisation progressive, à partir de la fondation de la Communauté européenne du charbon et de l'acier jusqu'à la création du marché intérieur et à la monnaie commune, a reposé à tous les stades de son développement essentiellement sur l'alliance d'intérêts franco-allemande. Jamais toutefois cette alliance n'a eu de caractère exclusif; elle a toujours été ouverte aux autres pays européens, et il devrait en être ainsi jusqu'à la réalisation de l'objectif final.

L'intégration européenne s'est avérée un succès phénoménal. Le tout n'était empreint que d'un déficit crucial, résultant de l'Histoire. Il ne s'agissait pas de l'Europe entière, mais uniquement de sa partie libre à l'Ouest. Pendant cinq décennies, la scission de l'Europe a partagé l'Allemagne et Berlin, laissant à l'est du Mur et des barbelés une partie indispensable de l'Europe—sans laquelle l'idée d'intégration européenne ne pouvait être menée à bien—attendre sa chance de participer au processus d'unification européenne. Cette chance, la fin de la division de l'Europe et de l'Allemagne en 1989/90 l'a fournie.

Robert Schuman s'en était rendu très clairement compte dès 1963 quand il a déclaré que nous devons faire l'Europe, non seulement dans l'intérêt des peuples libres, mais aussi pour pouvoir y accueillir les peuples de l'Est qui, délivrés des sujétions qu'ils ont subies jusqu'à présent, nous demanderont leur adhésion, et notre appui moral: que nous leur devons l'exemple d'une Europe unie et fraternelle; que chaque pas que nous faisons en ce sens constituera pour eux une chance nouvelle; qu'ils ont besoin de notre aide dans la restructuration qu'ils ont à accomplir et, pour finir, que c'est notre devoir d'être prêts.

Après l'effondrement de l'empire soviétique, l'Union européenne a dû s'ouvrir vers l'Est, sinon elle aurait couru le risque de voir l'idée d'intégration européenne se vider de tout sens et finir par s'autodétruire. Pourquoi? Il suffit de regarder ce qui se passe dans l'ex-Yougoslavie pour juger des conséquences, même si elles n'auraient pas forcément débouché partout sur des situations aussi extrêmes. Une Union européenne circonscrite à l'Europe occidentale aurait eu pour longtemps affaire à un système d'États européen divisé, caractérisé par l'intégration en Europe occidentale, et en Europe orientale par le vieux système d'équilibre aux pérennes orientations nationalistes, avec ses coalitions forcées, sa politique d'intérêts classique et le risque permanent d'idéologies et d'affrontements nationalistes. Or un système d'États européen divisé non doté d'une structure pour le chapeauter ferait durablement de l'Europe un continent d'insécurité dans lequel les lignes de conflit traditionnelles seraient appelées à moyen terme à se retransmettre de l'Europe orientale à l'Union européenne. L'Allemagne serait la première à en souffrir. Si les réalités géopolitiques ne laissaient pas non plus après 1989 d'alternative vraiment envisageable à

l'élargissement vers l'Est des institutions européennes, c'est encore plus vrai aujourd'hui, à l'ère de la mondialisation.

À cette césure de portée véritablement historique l'Union européenne a répondu avec détermination en lançant un processus de restructuration radicale:

- À Maastricht, l'un des trois domaines essentiels de souveraineté de l'État-nation moderne—monnaie, sécurité intérieure et sécurité extérieure—a été pour la première fois transféré sous la responsabilité exclusive d'une institution européenne. L'introduction de l'euro ne signifiait pas seulement le couronnement de l'intégration économique; c'était aussi un acte profondément politique puisque la monnaie n'est pas seulement une entité économique mais qu'elle symbolise par ailleurs le pouvoir du souverain qui la garantit. La communautarisation de l'économie et de la monnaie a créé un rapport antagoniste avec les structures politiques et démocratiques, qui restent à mettre en place, lequel est susceptible d'engendrer des crises intérieures dans l'Union européenne si nous ne remédions pas à temps de manière productive aux déficits dans le domaine de l'intégration politique et parachevons ainsi le processus d'intégration.
- Le Conseil européen de Tampere a marqué le lancement d'un nouveau projet d'intégration de grande portée, la mise en place d'un espace commun de droit et de sécurité intérieure. L'Europe des citoyens est ainsi à portée de main. L'importance de ce nouveau projet d'intégration va pourtant bien au-delà: le droit commun a un énorme pouvoir d'intégration.
- Sous l'effet de la guerre du Kosovo précisément, les pays d'Europe ont entrepris d'autres actions pour renforcer leur capacité d'action commune en matière de politique étrangère en convenant à Cologne et à Helsinki d'un nouveau grand objectif: l'élaboration d'une politique commune en matière de sécurité et de défense. L'Union a ainsi accompli, après l'euro, le pas suivant. Sinon comment aurait-on pu justifier à la longue que des États qui se sont irrévocablement associés au sein d'une union monétaire et qui ont lié leur destin économique et politique n'affrontent pas aussi ensemble des menaces extérieures et n'assurent pas conjointement leur sécurité?
- Toujours à Helsinki, il a été convenu d'un plan concret pour l'élargissement de l'Union européenne. Depuis ces décisions, les frontières extérieures de la future Union européenne peuvent être considérées comme plus ou moins définies. Il est prévisible que l'Union comptera 27, 30 ou encore davantage de membres à la fin du processus d'élargissement, à peu près autant donc que la CSCE à ses débuts.



De ce fait, nous nous trouvons actuellement confrontés en Europe à une tâche d'une difficulté énorme qui consiste à mener de front deux grands projets:

1. Un élargissement aussi rapide que possible. Cette question pose de difficiles problèmes d'adaptation aux pays candidats tout comme à l'Union. En outre, elle est source d'inquiétude et de crainte pour nos citoyens: Leurs emplois sont-ils en danger? L'élargissement signifiera-t-il pour les citoyens une Europe encore moins transparente et moins compréhensible? Aussi importante que puisse être la prise en compte de ces questions, il est essentiel que jamais nous ne perdions de vue la dimension historique de l'élargissement. Car c'est là une chance unique d'unir dans la paix, la sécurité, la démocratie et la prospérité notre continent secoué par les guerres durant des siècles.

L'élargissement revêt précisément pour l'Allemagne un caractère d'intérêt national suprême. L'élargissement et l'approfondissement parallèles de l'Union européenne permettront de surmonter de manière durable les risques et les tentatives objectivement liés à la taille et à la position centrale de l'Allemagne. Et puis, l'élargissement, comme on l'a vu pour le processus d'élargissement de l'UE vers le Sud, est un programme de croissance de l'Europe entière. Pour l'économie allemande notamment, l'élargissement constituera un grand bénéfice qui profitera aux entreprises et à l'emploi. L'Allemagne doit donc demeurer l'avocat d'un élargissement rapide vers l'Est. D'autre part, cet élargissement doit s'effectuer avec soin et dans le strict respect des critères de la décision d'Helsinki.

2. La capacité d'action européenne. Les institutions de l'Union européenne ont été créées pour six États membres. Elles ont bien du mal à fonctionner à 15. Aussi importante que soit, pour le début de l'élargissement, la première étape de la réforme visant l'extension du vote de la majorité qualifiée que nous nous proposons de franchir dans le cadre de l'actuelle Conférence intergouvernementale, elle ne suffira pas à elle seule pour l'élargissement dans son ensemble. On risque donc qu'un élargissement à 27 ou 30 États membres dépasse la capacité d'absorption de l'UE avec ses vieilles institutions et ses vieux mécanismes, et engendre des crises graves. Ce danger n'est pourtant pas un argument contre un élargissement rapide; c'est un argument en faveur d'une réforme résolue et appropriée des institutions, l'objectif étant de maintenir la capacité d'action de l'UE même dans le contexte de l'élargissement. C'est pourquoi la conséquence de l'élargissement incontournable de l'Union est soit l'érosion soit l'intégration.

Mesdames, Messieurs,

Ces deux tâches sont au centre de l'actuelle Conférence intergouvernementale. L'Union européenne s'est engagée à être prête à accueillir de nouveaux États membres à partir du 1er janvier 2003. Maintenant que l'Agenda 2000 a été adopté, il s'agit de poser le cadre institutionnel nécessaire au prochain cycle d'élargissement. Pour assurer le bon fonctionnement de la poursuite du processus d'élargissement, il est indispensable que soient réglées les trois grandes questions, à savoir la composition de la Commission, la pondération des voix au sein du Conseil et tout particulièrement l'extension du vote à la majorité qualifiée. C'est pourquoi ce prochain pas pratique dont l'accomplissement s'impose dans la logique du processus revêt une priorité absolue.

Aussi cruciale que soit la Conférence intergouvernementale comme étape prochaine sur la voie de l'Europe, nous devons, compte tenu de la situation en Europe, commencer dès aujourd'hui à nous préoccuper aussi de ce qui se passera après le processus d'élargissement, c'est-à-dire nous demander comment la future 'grande' Union européenne pourrait un jour fonctionner, et donc à quoi elle devrait ressembler et comment elle devrait opérer. C'est ce que je me propose de faire.

★ ★ ★

Permettez-moi donc, Mesdames et Messieurs, de laisser maintenant 'le ministre des Affaires étrangères' vraiment loin derrière moi pour m'adonner à quelques réflexions concernant aussi bien la nature de ce que nous appelons la 'finalité de l'Europe' que la façon dont nous pourrions nous rapprocher de cet objectif et finalement l'atteindre. Et à tous les eurosceptiques de part et d'autre de la Manche, il est recommandé de ne pas tirer tout de suite une fois encore les plus gros titres car, premièrement, il s'agit d'une vision personnelle future du règlement des problèmes européens. Et deuxièmement, nous parlons ici du long terme, bien au-delà de la Conférence intergouvernementale. Nul n'a donc besoin de redouter ces thèses.

L'élargissement rendra indispensable une réforme fondamentale des institutions européennes. Comment s'imaginer en effet un Conseil européen à trente chefs d'État et de gouvernement? Trente présidences? Combien de temps les réunions du Conseil dureront-elles dans ce cas? Des jours, voire des semaines entières? Comment parvenir à 30, dans le tissu actuel des institutions de l'Union européenne, à concilier des intérêts différents, à adopter des décisions et encore à agir? Comment veut-on éviter que l'Union ne perde définitivement toute transparence, que les compromis soient de plus en plus impalpables et étranges,

et que l'intérêt manifesté à l'égard de l'Union par ses citoyens ne finisse par tomber bien en dessous de zéro?

Autant de questions auxquelles toutefois il existe une réponse toute simple: le passage de la Confédération de l'Union à l'entière parlementarisation dans une Fédération européenne que demandait déjà Robert Schuman il y a cinquante ans. Et cela ne veut pas dire moins qu'un parlement européen et un gouvernement, européen lui aussi, qui exercent effectivement le pouvoir législatif et le pouvoir exécutif au sein de la Fédération. Cette Fédération devra se fonder sur un traité constitutionnel.

Je suis tout à fait conscient des problèmes de procédure et de substance qu'il faudra surmonter jusqu'à la réalisation de cet objectif. Mais il est aussi très clair pour moi que l'Europe ne pourra jouer le rôle qui lui revient dans la compétition économique et politique mondiale que si nous avançons avec courage. Les problèmes du XXI<sup>e</sup> siècle ne peuvent être résolus avec les peurs et les recettes des XIX<sup>e</sup> et XX<sup>e</sup> siècles.

Il est clair que l'on reprochera immédiatement à cette solution simple d'être impraticable; que l'Europe n'est pas un continent nouveau, mais un continent rempli de peuples différents et de cultures, de langues et d'histoires différentes; que les États-nations sont des réalités indispensables et que plus la mondialisation et l'europanisation créent de superstructures éloignées du citoyen et des acteurs anonymes, plus les êtres humains s'accrocheront à la sécurité et à l'abri moral que leur apportent les États-nations.

Toutes ces objections, je les partage car elles sont fondées. Ce serait donc commettre une erreur de construction irréparable que de tenter de parachever l'intégration politique à l'encontre des institutions et des traditions nationales existantes et non en cherchant à les associer au processus. Une telle entreprise serait appelée à échouer dans les conditions historiques et culturelles européennes. C'est uniquement si l'intégration européenne conserve les États-nations dans une telle Fédération, qu'elle ne dévalorise pas, voire ne fait pas disparaître complètement leurs institutions qu'un tel projet sera réalisable, en dépit des énormes difficultés qu'il présente. Autrement dit, la conception qui prévalait jusqu'à présent d'un État fédéral européen, qui remplacerait comme nouveau souverain les anciens États-nations et leurs démocraties, s'avère être une élucubration artificielle qui se situe en dehors des réalités européennes traditionnelles. Parachever l'intégration européenne n'est concevable que si ce processus s'effectue sur la base d'un partage de souveraineté entre l'Europe et l'État-nation. C'est précisément ce fait qui se dissimule derrière la notion de 'subsidiarité,' laquelle fait actuellement l'objet de discussions partout et que personne ou presque ne comprend vraiment.

Que peut bien signifier le ‘partage de souveraineté’? Comme je viens de le dire, l’Europe n’émergera pas dans un espace politique vide; de là découle un autre aspect de notre réalité européenne, à savoir les cultures politiques nationales différentes et leurs opinions publiques démocratiques, que séparent en outre des barrières linguistiques. Un parlement européen devra donc toujours représenter deux éléments: une Europe des États-nations et une Europe des citoyens. Or cela ne pourra se faire que si ce parlement européen rassemble les différentes elites politiques nationales et ensuite les différentes opinions publiques nationales.

C’est faisable, à mes yeux, à condition que ce parlement européen dispose de deux chambres, dont une serait composée de députés élus appartenant en même temps aux parlements nationaux. C’est là le moyen d’éviter tout antagonisme entre les parlements nationaux et le parlement européen, entre État-nation et Europe. En ce qui concerne l’autre chambre, il faudra choisir entre un modèle de sénat réunissant des sénateurs des États membres qui seront élus au suffrage direct et une chambre des États comparable à notre Bundesrat. Aux États-Unis, tous les États élisent deux sénateurs alors qu’au Bundesrat le nombre de voix varie.

De même, deux options se présentent pour l’exécutif européen, le gouvernement européen: soit nous décidons de développer le Conseil européen pour en faire un gouvernement européen, c’est-à-dire que le gouvernement européen sera constitué à partir des gouvernements nationaux, soit on passe, en se basant sur la structure actuelle de la Commission, à l’élection directe d’un président doté de vastes pouvoirs exécutifs. Il est toutefois possible d’envisager différentes autres formes intermédiaires.

D’aucuns avanceront que l’Europe est déjà beaucoup trop compliquée aujourd’hui, qu’elle manque par trop de transparence pour les citoyens de l’Union, et qu’un tel projet contribuerait à la compliquer encore. C’est tout à fait contraire au but recherché. Le partage de souveraineté entre la Fédération et les États-nations suppose comme préalable un traité constitutionnel consignait ce qui sera réglé au niveau européen et ce qui continuera de l’être à l’échelon national. La multitude de règlements du niveau communautaire résulte en partie de la communautarisation inductive selon la méthode Monnet et reflète les compromis inter-États dans l’actuelle confédération d’États que forme l’Union européenne. Une réglementation précise de la répartition des compétences entre la Fédération et les États-nations dans le cadre d’un traité constitutionnel devrait laisser à la Fédération les domaines de souveraineté essentiels et uniquement les questions demandant à être réglées impérativement au niveau européen, tandis que le reste demeurerait de la compétence des États-nations. Il en ressortirait une Fédération européenne élaguée et capable d’agir, pleinement souveraine quoique composée d’États-nations affirmés. En outre, une telle Fédération présenterait

aussi l'avantage d'être palpable et compréhensible pour ses citoyens parce qu'elle aurait surmonté son déficit démocratique.

Tout cela ne sonnera pas pour autant le glas de l'État-nation. Car pour le 'sujet' de cette Fédération finale, l'État-nation avec ses traditions culturelles et démocratiques demeurera irremplaçable, pour légitimer une union des citoyens et des États qui soit pleinement acceptée par les populations. Je dis cela en pensant en particulier à nos amis britanniques car je sais que la notion de 'fédération' les provoque. Je n'ai pourtant jusqu'à présent pas trouvé d'autre mot. L'idée n'est pas de provoquer qui que ce soit.

Même dans la finalité européenne, nous resterons donc britanniques et allemands, français et polonais. Les États-nations perdureront et ils conserveront au niveau européen un rôle bien plus important que celui qui revient aux Länder allemands. Et puis le principe de subsidiarité aura un rang constitutionnel dans cette union de demain.

Ces trois réformes, le règlement du problème de démocratie, la nécessité de redistribuer entièrement les compétences tant au niveau horizontal, c'est-à-dire entre les institutions européennes, qu'au niveau vertical, c'est-à-dire entre l'Europe, les États-nations et les régions, ne pourront être menées à bien qu'en refondant l'Europe au plan constitutionnel, ou en d'autres termes en réalisant le projet d'une constitution européenne qui devra essentiellement ancrer les droits fondamentaux et les droits de l'homme et du citoyen, de même qu'une séparation équilibrée des pouvoirs entre les institutions européennes et une délimitation précise des domaines régis par l'Europe ou par les États-nations. Les rapports entre la Fédération et l'État-nation constitueront le grand axe de cette constitution européenne. Pour être clair, je tiens à préciser que cela n'a rien à voir avec une renationalisation, au contraire!

Mesdames, Messieurs,

La question qui se pose maintenant avec une acuité croissante est la suivante: cette vision d'une Fédération d'États et de citoyens démocratique et unie au plan politique sera-t-elle réalisable selon la méthode de l'intégration appliquée jusqu'à présent, ou bien faut-il remettre en question cette méthode elle-même en tant qu'élément central de l'actuel processus d'unification?

Dans le passé, c'est essentiellement la 'méthode Monnet' qui dominait le processus d'intégration européenne avec son approche de la communautarisation des institutions et des politiques européennes. Cette intégration progressive dépourvue de modèle augurant du résultat final a été conçue dans les années 50 pour l'intégration économique d'un petit groupe de pays. Même si cette méthode s'est avérée efficace alors, elle a été seulement d'une utilité limitée pour

l'intégration politique et la démocratisation de l'Europe. Là où il n'était pas possible aux membres de l'Union européenne de progresser ensemble, des groupes formés différemment ont avancé, comme pour l'Union économique et monétaire ou pour Schengen.

Une telle différenciation, une coopération renforcée dans des secteurs partiels, est-elle donc la réponse au double défi de l'élargissement et de l'approfondissement? Précisément dans une Union élargie et par conséquent plus hétérogène, une différenciation plus poussée deviendra indispensable. L'un des objectifs centraux de la Conférence intergouvernementale est donc de la faciliter.

Néanmoins, une différenciation de plus en plus marquée posera aussi de nouveaux problèmes: une perte d'identité européenne et de cohérence interne ainsi que le risque d'une érosion interne de l'UE si des domaines de plus en plus vastes de la coopération intergouvernementale devaient venir s'ajouter au cadre de l'intégration. Dès aujourd'hui il n'est plus possible d'ignorer une crise de la 'méthode Monnet' qui ne peut plus être résolue dans les limites de sa propre logique.

C'est pourquoi Jacques Delors, tout comme Helmut Schmidt et Valéry Giscard d'Estaing ont tenté ces derniers temps de trouver de nouvelles idées pour sortir de ce dilemme. Selon Jacques Delors, une 'fédération des États-nations,' composée des six pays fondateurs de la Communauté européenne, doit conclure un 'traité dans le traité' voué à une réforme en profondeur des institutions européennes. Les réflexions d'Helmut Schmidt et de Valéry Giscard d'Estaing vont à peu près dans le même sens, même si elles ne proposent pas un noyau à 6 mais à 11, les onze pays de la zone euro. Dès 1994, Karl Lamers et Wolfgang Schäuble proposaient la création d'une 'noyau dur,' qui souffrait cependant dès le départ d'une malformation décisive puisqu'il s'agissait d'un 'noyau' exclusif et qui plus est excluant l'un des pays fondateurs, l'Italie, au lieu d'être un point d'attraction ouvert à tous.

Si face au défi incontournable de l'élargissement vers l'Est, l'alternative pour l'UE est donc soit l'érosion soit l'intégration, et si s'en tenir à une confédération d'États signifierait l'immobilisme avec tous les effets négatifs que cela comporte, l'Union européenne se trouvera confrontée à un moment ou à un autre dans les dix années à venir à un choix qui lui sera imposé par les circonstances et par les crises que ces circonstances auront déclenchées: ou bien la majorité des États membres tente le 'saut dans la pleine intégration' et se met d'accord sur un traité constitutionnel européen portant création d'une Fédération européenne ou bien, dans le cas contraire, un petit groupe d'États membres constituera une avant-garde, c'est-à-dire un 'centre de gravité' comprenant

plusieurs États prêts et capables, en Européens profondément convaincus, de progresser sur la voie de l'intégration politique. La seule question sera alors de savoir quand le moment sera venu, qui fera partie de cette avant-garde et si ce centre de gravité se formera au sein ou en dehors des traités. En tout cas, une chose est sûre: sans une très étroite coopération franco-allemande, aucun projet européen ne pourra pas non plus réussir à l'avenir.

Compte tenu de la situation, on pourrait donc imaginer bien au-delà de la décennie prochaine le développement futur de l'Europe en deux ou trois étapes:

Tout d'abord, le développement de la coopération renforcée entre les pays désireux de coopérer plus étroitement que d'autres, comme c'est d'ores et déjà le cas dans l'Union économique et monétaire et pour Schengen. Cet instrument nous permet d'avancer dans bien des domaines: le développement de la zone euro à onze vers une union politico-économique, la protection de l'environnement, la lutte contre la criminalité, le développement d'une politique commune en matière d'immigration et d'asile et bien sûr également en politique étrangère et de sécurité. Ce faisant, il est très important de ne pas concevoir la coopération renforcée comme un abandon de l'intégration.

La formation d'un centre de gravité pourrait constituer plus tard une étape intermédiaire sur la voie du parachèvement de l'intégration politique. Un tel groupe d'États conclurait un nouveau traité fondamental européen qui serait le noyau d'une constitution de la Fédération. Sur la base de ce traité fondamental, la Fédération se doterait de ses propres institutions, d'un gouvernement qui, au sein de l'UE, devrait parler d'une seule voix au nom des membres du groupe dans un nombre de questions aussi grand que possible, d'un parlement fort et d'un président directement élu. Un tel centre de gravité devrait être l'avant-garde, la locomotive du parachèvement de l'intégration politique et comprendre déjà tous les éléments de la future Fédération.

Je suis entièrement conscient des problèmes institutionnels qu'un tel centre de gravité poserait à l'UE actuelle. C'est pourquoi il serait décisif de veiller à ce que l'acquis de l'UE ne soit pas compromis, à ce que l'UE ne soit pas divisée et à ce que le lien qui retient l'UE ne soit pas endommagé ni au plan politique ni au plan juridique. Il faudra élaborer des mécanismes qui assure la coopération du centre de gravité dans une Union élargie sans pertes de friction.

Il est impossible de dire à l'heure actuelle quels seront les États qui participeront à un tel projet: les membres fondateurs de l'UE, les onze membres de la zone euro ou encore un autre groupe. Dans toute réflexion portant sur l'option du centre de gravité, une chose doit être bien claire: cette avant-garde ne devra jamais être exclusive, elle devra être ouverte à tous les États membres et à tous

les pays candidats de l'UE lorsqu'ils exprimeront à un moment donné le désir d'en faire partie. Et pour ceux qui voudront participer mais ne remplissent pas les conditions, il devra y avoir des possibilités de rapprochement. La transparence et une option de participation pour tous les membres de l'UE constitueraient des facteurs essentiels pour faire accepter et réaliser le projet. Cela doit aussi s'appliquer précisément à l'égard des pays candidats. Car il serait absurde d'un point de vue historique et absolument insensé que, juste au moment où elle est enfin réunie, l'Europe soit de nouveau divisée.

Un tel centre de gravité devra donc avoir un intérêt actif à s'élargir et il devra être attrayant pour les autres membres. Si l'on applique le principe de Hans-Dietrich Genscher qui veut qu'aucun État membre ne puisse être contraint d'aller plus loin qu'il ne peut et ne veut mais que celui qui ne veut pas continuer d'avancer ne puisse pas non plus empêcher les autres de le faire, ce centre de gravité se constituera au sein des traités, sinon en dehors.

La dernière étape serait alors la pleine intégration de la Fédération européenne. Pour éviter tout malentendu, je tiens à préciser que la coopération renforcée n'y mène pas automatiquement, que ce soit sous forme de centre de gravité ou directement comme majorité des membres de l'Union. La coopération renforcée ne signifiera tout d'abord rien d'autre qu'une intergouvernementalisation renforcée sous la contrainte des circonstances et en raison de la faiblesse de la méthode Monnet. Le pas qui va de la coopération renforcée à un traité constitutionnel—et c'est exactement cela qui sera le préalable à la pleine intégration—présuppose en revanche un acte de refondation politique délibéré de l'Europe.

Voilà, Mesdames et Messieurs, ma vision personnelle de l'avenir: de la coopération renforcée à un traité constitutionnel européen, et le parachèvement de la grande idée d'une Fédération européenne que nous devons à Robert Schuman. Cela pourrait être la bonne voie.

12 mai 2000





TANJA A. BÖRZEL AND THOMAS RISSE

## **Who is Afraid of a European Federation?**

### **How to Constitutionalise a Multi-Level Governance System**

#### **1. Introduction**

It is about time that someone started talking about the ‘finalité politique’ of European integration. As Joschka Fischer put it, the European Union (EU) faces the ‘parallel task’ of, on the one hand, enlargement towards up to 30 members over the next decades, given the invitation to the Balkan countries and to Turkey issued at the Helsinki European Council while, on the other hand and by sheer necessity, the EU will have to undergo deep institutional changes, *i.e.*, move further towards political integration, if its capacity for action is not to be seriously undermined through the enlargement process. How can one face this double challenge without thinking out loud about how the EU will look like at the end of this process? Thus, Fischer proposes a ‘European Federation’ composed of a ‘European Parliament and a European government which really do exercise legislative and executive power within the Federation.’ This European federation is to be based on a constitutional treaty which regulates, among others, the ‘division of sovereignty’ between the European institutions and the nation-states. Thus, he distances himself from the concept of a European super-state transcending and replacing the national democracies.

In the following, we comment on Fischer’s vision of the future European order. We applaud Fischer for striving to overcome the stylised dichotomy of the ‘Confederacy of European States’ (*Staatenbund*) and the ‘European Federal State’ (*Bundesstaat*), which has dominated the political debate about the ‘finalité politique’ of the European integration process from its very beginning and which is also reflected by the international reaction to Fischer’s speech. The question is not whether national sovereignty exclusively resides in the Member States or whether it is to be transferred to the European Union, but how to organise the division and sharing of sovereignty rights between the various levels of government. At the same time, Fischer’s suggestions for a European federation are still rather ambivalent in this respect. We argue that a further exploration of federalist concepts in a framework of multi-level governance helps us to escape such ambivalence because federalism provides principles for

the territorial organisation of political power. At the same time, the use of federal principles does not require the creation of a federal state.

Yet, if we compare the current structure of the EU to the concept of ‘federation’ as used in the literature on federalism, the EU looks like and behaves like a federation, except for two major features. First, the EU lacks ‘taxing and spending’ power. Second, the Member States continue to be masters of the constitutive treaties, at least formally speaking.

This essay proceeds in three steps. First, we demonstrate the inherent ambiguity of Fischer’s vision which is undecided between a system of divided, as compared to shared, sovereignty. Second, we claim that neither the modern European nation-states nor the current European order resemble a system in which governments exercise autonomous sovereignty over people and territory. Rather, both the European states and the European Union constitute structures of ‘multi-level governance’ in which power and action capacities are shared rather than divided. Third, we argue that the theoretical tradition of federalism provides constitutional structures which can be applied to systems of multi-level governance. But there are different federalist models to construct a future European order. We comment on the German and American models and discuss ways in which these can be applied to a European federation.

## **2. Between Divided and Shared Sovereignty: Fischer’s ‘European Federation’**

Fischer’s speech on the future European political order is ambiguous with regard to the division of formal sovereignty between the European level and that of the Member States. His subsequent comments have not clarified the matter further.<sup>1</sup> It is not surprising then that his ideas met with the usual criticism, from both those in favour and those rejecting the notion of a European federation (mis-) understood as a European supranational state. These interpretations partly follow from the ambiguities in the speech itself. On the one hand, Fischer defined the European federation as ‘nothing less than a European Parliament and a European government which really do exercise legislative and executive power within the Federation’ (p. 9). On the other hand, he talked about a ‘division of

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<sup>1</sup> See, for example, his discussion with Jean-Pierre Chevènement, *Die Zeit*, June 21, 2000, pp. 13-18, and his speech on 7 July 2000 at the European Parliament. On the latter, see ‘Fischer fordert Entscheidungen über die Zukunft der EU,’ *Süddeutsche Zeitung*, July 7 2000; ‘Fischer Proposes Directly Elected European President,’ *International Herald Tribune*, July 7, 2000.

sovereignty’ between Europe and the nation-states (p. 10) and of the need to take the nation-states along into such a federation (p. 9). In this context, he rejected the idea of a ‘European federal state’ (*europäischer Bundesstaat*)<sup>2</sup> ‘replacing the old nation-states and their democracies as the new sovereign power’ which he called an ‘artificial construct which ignores the established realities in Europe’ (p. 10). In this respect, the European constitutional treaty (*Verfassungsvertrag*) is, then, supposed to clarify the division of sovereignty between the European institutions and the nation-states, apart from containing a bill of rights. This can only mean that Fischer’s vision of a European federation is supposedly something less than a supranational state (which would have to be based on a real constitution, and not a constitutional ‘treaty’ which implies that treaty-making powers continue to reside with the nation-states), but more than the current mixture of supranational and intergovernmental institutions in the EU (‘real legislative and executive powers’).

To operationalise his ideas about the future European parliament and government, Fischer originally proposed a two-chamber parliament with the first chamber composed of elected members who are also representatives of their national parliaments. The second chamber should be modelled according to either the US Senate or the German *Bundesrat*. In the European context, the Senate model would imply a truly federal institution with directly elected senators from the nation-states, while the *Bundesrat* model would simply mean another intergovernmental body. In his speech at the European Parliament, he essentially opted for a modified US model: the first chamber of the EP would now be composed of directly elected members (a European ‘House of Representatives’), while the European ‘senators’ would be delegated from the parliaments of the Member States.<sup>3</sup>

As far as the European government is concerned, Fischer remained ambiguous: ‘Either one can decide in favour of developing the European Council into a European government, *i.e.*, the European government is formed from the national governments, or—taking the existing Commission structure as a starting point—one can opt for the direct election of a president with far-reaching executive powers’ (p. 10). In his Strasbourg speech, he opted for a

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<sup>2</sup> The English translation of Fischer’s speech is sometimes misleading. *Europäischer Bundesstaat* is translated as ‘federal European state,’ *Verfassungsvertrag* as ‘constituent treaty’ rather than ‘constitutional treaty’.

<sup>3</sup> See, ‘Fischer fordert Entscheidungen über die Zukunft der EU,’ *loc cit* n 1.

## Comments

directly elected European president with the broad support of the majority of Member States.<sup>4</sup>

While Fischer's Berlin speech remained undecided between a European order in which competences are shared between the EU and its Member States and one based on a clear separation of powers, his subsequent statements appear to lean further towards a model based on the strict division of sovereignty between the European level and that of the Member States. His vision for a future European parliament now foresees no representation of the Member State governments. His proposal of a strong and directly elected European president who forms a European government which is to be confirmed by the European parliament moves further in the direction of an autonomous European political order. By implication, the current institutions representing the interests of the Member State governments, the European Council and the Council of the European Union (the council of ministers), would have to be abolished. Yet, at the same time, Fischer argues that the future European government should have the broad support of the Member States, *i.e.*, of the national governments.

However, such a European federation looks pretty much like the United States of Europe, *i.e.*, a European federal state, which Fischer explicitly rejected. One difference remains, though: the European federation does not have a 'tax and spend' capacity independent from the nation-states (unless 'far-reaching executive powers' means just that; but Fischer does not speak about the right of the federation to generate its own revenue). Taxation and spending powers, however, are crucial to both the effectiveness and legitimacy of a political system. Giving the European Union real legislative and executive powers remains for the most part futile without providing it with the necessary financial resources to exercise these powers effectively. Moreover, the comprehensive redistribution of social welfare at European level would foster the integration of European societies and increase the legitimacy of European institutions.<sup>5</sup>

By emphasising the division, rather than the sharing, of sovereignty, Fischer still thinks in categories of the hierarchically structured nation-state with its exclusive authority over people and territory, including the legitimate monopoly over the use of (internal and external) force. No wonder then that it is difficult even to describe a future European order which is neither simply inter-governmental (*i.e.*, sovereignty ultimately resides with the nation-states even if they decide to pool it) nor supranational and, thus, creating a sovereign state above the nation-state. Fischer's notion of a 'European federation' opens up the

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<sup>4</sup> See, 'Fischer Proposes Directly Elected European President,' *loc cit* n 1.

<sup>5</sup> 'Federalize their wallets and their hearts and minds will follow,' (James Madison).

possibility of conceptualising a constitutional concept of a hierarchically structured nation-state which is beyond traditional concepts. Had he consequently used the language of federalism as a distinct political order of divided or shared sovereignty, he would have encountered fewer misunderstandings and could have been much more precise in his proposals.

### **3. The Modern Nation State and the European Union: Systems of Multi-Level Governance with Divided and Shared Sovereignty**

A language that takes a traditional concept of a nation-state as a legitimate and hierarchically organised authority over a people and a given territory with the monopoly over the use of force for granted, misses much of the current reality of modern European nation-states and of the European Union (EU) itself. At least, we need to distinguish between *formal* and *material* sovereignty, the latter being defined in degrees of the capacity for autonomous action. As to the former, sovereignty is already divided, as well as shared, to a large extent between EU authorities and the Member States. As to material sovereignty, neither the EU nor the modern welfare states enjoy the capacity for autonomous action of a 19<sup>th</sup> Century nation-state.

If we use state-centric concepts to describe the realities of modern welfare states, we encounter conceptual problems because such language implicitly maintains two distinctions which are increasingly problematic: first, the distinction between ‘state’ and ‘society,’ and, second, between the ‘domestic’ and the ‘international’ orders. As to the first distinction, it is increasingly difficult to describe the modern nation-state as one in which governing functions remain the exclusive property of state officials or *governments*. In comparative policy analysis, scholars increasingly talk about the ‘co-operative state,’ the ‘negotiating state,’ the ‘co-operative administration,’ or ‘policy networks’.<sup>6</sup> These and other terms imply the fact that governing functions are increasingly taken over by negotiating networks encompassing governments (national, sub-national, and local) as well as private actors (firms, interest groups, *etc.*) and representatives of civil society (such as non-governmental organisations [NGOs]). Modern welfare states look increasingly less like hierarchical structures of legitimate authority, and more like multi-level bargaining and negotiating networks in which public actors are not obsolete, but can only fulfil their functions by co-operating with private actors and/or groups. This is even true for the quintessential European nation-state, France. The authority of the French centralised state is balanced by dense formal and informal networks

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<sup>6</sup> See, for example, Benz *et al* (1992); Rüdiger (1995); Czada *et al* (1993); Börzel (1998).

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linking local, regional, and central-state authorities with private actors at the various levels of governance.

As to the second distinction between the ‘domestic’ and the ‘international’ realms, international relations scholars tend to emphasise that the traditional division between domestic and foreign affairs is obsolete in an age of globalisation and Europeanisation. While Joschka Fischer remains the German foreign minister, his colleagues in the finance and economics ministries are as much involved in external relations as he himself is. The distinction between the ‘domestic’ realm characterised by hierarchy and legitimate order, on the one hand, and the ‘international’ realm of anarchy in the absence of a world government, on the other, is less and less useful as an instrument to describe, let alone explain, the current international-domestic order. Moreover, authority in such ‘intermestic’ systems is increasingly organised along functional lines. The World Trade Organisation, for example, represents such a functional organisation regulating the international economic order.

As a result, international relations and comparative politics scholars tend to use the term ‘governance’ to describe the current reality of political life both inside and beyond the nation-states. It accounts for the finding that national states (governments) have lost their exclusive authority in the policy-making process, sharing it with international and supranational institutions on the one hand, and with private actors, such as multinational firms and representatives of civil society, on the other. The regulation authority of international institutions and accompanying networks may vary across issue-areas. Yet, material sovereignty no longer resides in the nation-state, but is divided and shared between multiple levels of governance.

The EU can then be described as a peculiar multi-level system of governance<sup>7</sup> which, first, not only encompasses national governments and supranational institutions such as the Commission, the European Parliament, the European Court of Justice, and the European Central Bank, but also transnational interest groups and other private actors in governance networks of varying density and scope. Second, the EU encompasses a variety of functional regimes with different scopes and depths as far as the nature of the regulations are concerned—from EMU to the Common Agricultural Policy to environmental regulations, and the Social Protocol. Third, the EU is multi-layered in the sense that supranational, national, and sub-national authorities interact regularly in these networks. Clearly, the various treaties constituting the European Union

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<sup>7</sup> See, for example, Marks *et al* (1996); Jachtenfuchs & Kohler-Koch (1996); Kohler-Koch & Eising (1999).

regulate the ultimate decision authority of the various layers. But what does it mean that the Commission has the right of initiative, if not one single initiative is taken behind closed doors in Brussels, but usually only after extensive consultations with state officials in the various Member States and with interest group representatives both in Brussels and in the national capitals? What does it mean that the European Council representing the Member States negotiates changes in the EU treaties when these changes have been prepared and talked about in intergovernmental conferences, which again include national and supranational actors and consult regularly with private actors and interest groups? In other words, how much do we analytically capture the EU's daily life if we focus exclusively on formal powers and legislative structures?

The conceptualisation of the EU as a multi-level structure of governance is widely accepted. The term has recently even entered the EU vocabulary through Commission President Romano Prodi. But how much mileage do we gain when talking about the future European political order? Does this language help us when moving from description and analysis to prescription and visions about the 'finalité politique' of the European order? First, we avoid the language of statehood when talking about the future of Europe and, thus, are no longer wedded to the false alternative of either a 'Europe of nation-states' or a European federal state. To the extent that Joschka Fischer also struggles to avoid this alternative, political scientists might then offer him different concepts to express his vision. Second, if we conceptualise both the EU and its Member States as multi-level structures of governance, our understanding of what constitutes a 'state' changes. It is no longer wedded to hierarchical structure of legitimate authority, but we can now speak more easily of 'divided sovereignty' as a central concept in Fischer's speech. Third, however, the notion of 'multi-level structure of governance' which focuses on the structure of material sovereignty or action capacity, does not easily translate into a constitutional language, which should delineate who is in charge of what and when, and thus, should define structures of formal sovereignty.

The constitutional language of federalism and of federalist orders allows the dividing and sharing of sovereignty in a multi-level system of governance to be discussed. Clearly, we are not referring to the notion of federalism as described in the '*Federalist Papers*' and which is usually associated with the creation of a European federal state, where sovereignty would be fully transferred to the European Union and the Member States would lose their state quality. Nor do we mean a federal union or a confederacy, in which sovereignty exclusively resides in the Member States and is only pooled at European level. Most versions of federalism are about divided and shared sovereignty. We will now discuss various federalist orders and how they can be used to construct a European federation.



#### 4. The European Union as an Emerging Federal System

Federalism fulfils two major functions:

- a) A vertical separation of power by a division of responsibilities between two levels of government. The component units as well as the federation are usually geographically defined, although ‘societal federalism’<sup>8</sup> considers non-territorial units as components of a federation.
- b) The integration of heterogeneous societies, while preserving their cultural and/or political autonomy (*et pluribus unum*).

Both functions imply that the component units and the federation have autonomous decision powers which they can exercise independently from each other. Thus, sovereignty is shared or divided, rather than exclusively located at one level. By no means do we suggest that the EU is, or should become, a federal state. But even without the legitimate monopoly of coercive force, the European Union has acquired some fundamental federal qualities. The EU possesses sovereignty rights in a wide variety of policy sectors reaching from exclusive jurisdiction in the area of Economic and Monetary Union to far-reaching regulatory competences in sectors such as transport, energy, environment, consumer protection, health and social security and, increasingly penetrating even the core of traditional state responsibilities such as internal security (Schengen, Europol) and, albeit to a lesser extent, foreign and security policy.<sup>9</sup> In most policy areas, Community law is not only superior to national law, it can also deploy direct-effect giving citizens the right to litigate against their states for violating their rights conferred to them by Community law. This is part of a second development, which has been addressed more recently. The European Union is transforming itself into a political community within a defined territory and with its own citizens, who are granted (some) fundamental rights by the European Treaties and the jurisdiction of the European Court of Justice. The European Community was conceptualised as a primarily functionally defined organisation of economic integration (*Zweckverband funktionaler Integration*)<sup>10</sup> without fixed territorial boundaries and no direct relationship between its institutions and the European citizens. With the Treaties

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<sup>8</sup> Hueglin (1991).

<sup>9</sup> von Bogdandy (1999).

<sup>10</sup> Ipsen (1972:196).

of Maastricht and Amsterdam, however, the Single Market has been embedded in a political union with emerging external boundaries<sup>11</sup> and a proper citizenship.

Not only has the EU developed into a political community with comprehensive regulatory powers and a proper mechanism of territorially defined exclusion and inclusion (Union citizenship). It shares most features of what the literature defines as a *federation*:<sup>12</sup>

- a) The EU is a system of governance which has at least two orders of government, each existing under its own right and exercises direct influence on the people.
- b) The European Treaties allocate jurisdiction and resources to these two main orders of government.
- c) There are provisions for ‘shared government’ in areas where the jurisdiction of the EU and the Member States overlap.
- d) Community law enjoys supremacy over national law, it is the law of the land (*Bundesrecht bricht Landesrecht*).
- e) European legislation is increasingly made by majority decision obliging individual Member States against their will.
- f) At the same time, the composition and procedures of the European institutions are based not solely on principles of majoritarian representation, but guarantee the representation of ‘minority’ views.
- g) The European Court of Justice serves as an umpire to adjudicate conflicts between the European institutions and the Member States.
- h) Finally, the EU has a directly elected parliament (since 1979).

The EU only lacks two significant features of a federation. First, the Member States remain the ‘masters’ of the treaties, *i.e.*, they have the exclusive power to amend or change the constitutive treaties of the EU. Second, the EU lacks a real ‘tax and spend’ capacity, in other words, there is no fiscal federalism. Otherwise, however, *the European Union today looks like a federal system, it works in a similar manner to a federal system, so why not call it an emerging federation?*

If we accept that the European Union has been developing into a federal system where formal and material sovereignty is divided and shared, federalism offers different alternatives to organise the distribution of power vertically, *i.e.*,

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<sup>11</sup> Article 11 of the European Union Treaty refers to the protection of the *integrity* of the Union and its *external boundaries*.

<sup>12</sup> Burgess (2000); Wheare (1963).

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between the European Union and the Member States, and horizontally, between the executive and legislature. In principle, we can distinguish two federal models, which differ according to the distribution of competences between the two levels (shared versus divided), the representation of the states at the federal level (strong versus weak), and the fiscal system (joint versus separate).

*Co-operative or intra-state federalism*, of which Germany is almost a prototype, is based on a functional division of labour between the different levels of government. While the federation makes the laws, the states are responsible for implementing them. The vast majority of competences are concurrent or shared. This functional division of labour requires a strong representation of the states at the federal level, not only to grant an efficient implementation of federal policies, but also to prevent the states from being reduced to mere administrative units. The reduced capacity for the self-determination of the states is compensated by their strong participation in federal decision-making through the second chamber of the national legislature. Major policy initiatives always require the consent of the Federation and the majority of the states. The chamber of territorial representation is organised according to the *Bundesrat* (Federal Council) principle: the states are represented by their governments in relation to their population, with smaller states usually enjoying over-representation. Representation is not only disproportionate but also indirect. The sharing of policy competences in terms of a functional distribution of labour is backed by a sharing of tax revenue in a joint tax system, which is usually complemented by financial equalisation. Federation and states share the most important taxes. The allocation of joint tax revenue also allows for a redistribution of financial resources between states with stronger and weaker spending power. The functional and fiscal interdependence of the two levels of government not only gives rise to a co-operative federalism, interlocking politics and joint decision-making, it also favours the emergence of a policy-making system in which policies are formulated and implemented by the administrations at both levels of government. Such executive federalism is counterbalanced by a strong and vertically integrated party system, which provides for an effective representation of non-territorial (functional) interests at federal level.

*Dual or inter-state federalism* to which the US most closely corresponds, emphasises the institutional autonomy of the different levels of government, aiming at a clear vertical separation of powers (checks and balances). Each level should have an autonomous sphere of responsibilities. Competences are allocated according to policy sectors rather than policy functions. For each sector, one of the two levels of government has both legislative and executive powers. As a consequence, the entire machinery of government tends to be duplicated because each level should manage its own affairs autonomously. The sectoral or dual allocation of policy competences is complemented by a rather weak

representation of the states at federal level. The second chamber of the federal legislature is usually organised according to the ‘Senate Principle’; the states are represented by an equal number of directly elected Senators, irrespective of their size and population. As a result, the Senate does not represent the interests of state executives, as the *Bundesrat* does, but the interests of the electorate or the parties within these states. The states articulate their interests through voluntary co-operation with the central state, usually in intergovernmental conferences. Consequently, there is no need for a strong, vertically integrated party system promoting functional interest representation in order to counterbalance executive dominance. The institutional autonomy of each level of government, in the final analysis, presupposes a fiscal system which grants the states sufficient resources to exercise their competences without the financial intervention of the central state. This should be ensured by a comprehensive fiscal autonomy of the states which allows them to levy their own taxes in order to have an independent source of revenue.

Which of the two models appears most appropriate for a European federation? Fischer’s own proposal, while most recently leaning toward the US model, remains, nevertheless, ambiguous as he has not made up his mind how best to preserve the strong role of the Member States in a European federation: either by granting them a strong representation at European level (German model) or by providing the Member States with a strong autonomous sphere of competences (US model). He cannot have it both ways. If Fischer wants strong representation of Member State interests at European level, he will have to opt for the German model—*i.e.*, the executives of the Member States must be represented (the *Bundesrat* model)—on the one hand, and sovereignty rights will have to be shared rather than divided, on the other. The Member States would have a veto on any major decision and would also be responsible for the implementation of European policies. The comprehensive legislative powers of the European federation, albeit shared with the Member States, would have to be matched by an *corresponding tax and spending capacity* at European level.

A ‘senate’ type concept whereby the members of the second chamber of a future European parliament are drawn from the national parliaments (Fischer’s speech in Strasbourg) provides only a weak representation of territorial interests at European level. As the US Senate provides ample evidence, the senators tend to represent functional and constituency interests rather than territorially defined concerns. It also follows that such a model has to be built on the division of sovereignty rather than on the concept of shared sovereignty, in order to avoid a far too centralised federal state. The EU would need to dispose of legislative and executive competences, which it could exercise *independently* of the Member State governments. Furthermore, independent legislative and executives responsibilities would have to be accompanied by a *minimum degree of taxation*

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*and spending autonomy* for the European government, if the European federation is not become a mere fig-leaf, veiling a return to the Europe of the nation-states.

Which model, therefore, is the most realistic for a European federation? First, given the current distribution of power, whereby the EU and the Member States *share* most of the policy competences, the German model of co-operative federalism appears to be most feasible. With the exception of monetary union, the EU cannot legislate without the consent of the Member States, even in the area of its exclusive competences such as foreign trade. There are hardly any areas in which the Member States completely ceded sovereignty to European level and do not directly participate in decision-making.

Second, the European Council and the Council of the European Union could be easily transformed into a *Bundesrat*-type second chamber of the European Parliament, while the Commission would become the European government (with or without a directly elected European president). One can still think about whether the members of the first parliamentary chamber should also be members of the Member State parliaments. Finally, the German and European federal systems share a consensus-oriented political culture which helps to prevent political stalemate and allows the smaller members to have a fair chance of being heard, even if their voting power is curbed, which seems to be unavoidable given the prospect of EU enlargement.

But the European Union lacks one important feature of the German federation, which is unlikely to be replicable at European level. German co-operative federalism corresponds to a clear political preference for equal living conditions enshrined in the German Constitution and widely shared by German society. Instead of preserving and accommodating socio-economic and cultural plurality, the post-war German federal system was to provide similar living conditions for all German citizens, irrespective of the state they lived in. Due to the largely divergent spending capacity of a big state like Bavaria compared to a small city state like Bremen, legislative and fiscal competences have been increasingly transferred to federal level. The German states were compensated by means of the strong participatory rights of the *Bundesrat* in federal decision-making. While a further transfer of policy competences to European level does not seem completely unrealistic, the real issue is the weakness of the 'taxation and spending' power of the European Union. Its redistributive capacity is currently limited to 1.27% of the GDP generated by all Member States, whereas the redistributive capacity of the individual Member States amounts to approximately 50% of their GDP. In Germany, the federation receives about 40% of the overall tax revenue. Thus, a comparable spending power for the European federation would correspond to a share of about 20% of the European

GDP. An almost twentyfold increase in the EU's spending power might strengthen the legitimacy and effectiveness of European governance, but it is inconceivable that the Member States would agree to such an enormous decline in their revenues.

The US model of dual federalism, in turn, would allow for a weaker European federation. It is grounded in a deep suspicion of a strong central state and, hence, resonates with the French and British distrust of what they perceive of as an emerging European federal state and with the corresponding claims for a strict application of the principle of subsidiarity. The restriction of European jurisdiction to a clearly defined area would also leave the Member States their autonomous taxation powers. A directly elected European president and a stronger European Parliament would significantly increase the legitimacy of the European federation. Finally, as state executive interests are less dominant at European level than in the German model, a vertically integrated party system, which is still missing in the EU, is of lesser importance. Yet, the introduction of the American model of federalism may be even more demanding than the German model.

First, divided sovereignty would require that most Europeanised legislation be dis-entangled in the areas for which the EU would have to hold exclusive competences as opposed to those in which the Member States are solely responsible. This is an almost impossible task given that the current EU is based on shared competences. It is also likely to meet with resistance from smaller Member States with low institutional and economic capacities. Second, the Member States would have to give up their strong representation at European level in order to grant the European federation independence in exercising its, by then, considerably curbed competences. The European Council and the Council of the European Union would be replaced by a senate representing the citizens rather than the governments of the individual Member States. The European Commission with a directly elected president would become a truly federal bureaucracy, which then, however, would have to be considerably strengthened (including field services in the Member States) in order to execute European policies effectively. Finally, given the strong, and with enlargement even increasing, socio-economic heterogeneity of the Member States, the European federation would need a minimum of redistributive capacity. The example of the American federation which started off with hardly any 'taxation and spending' capacity is rather instructive.

The European Union seems to be stuck between a rock and a hard place. None of the two federal models are without flaws. The introduction of either requires profound institutional reforms, which are far more demanding than a redistribution of voting powers in the Council or the reallocation of national

slots in the Commission, as are currently being considered in the Intergovernmental Conference. Yet, as Fischer correctly points out, such reforms are indispensable if European governance is supposed to remain effective in the light of enlargement.

## **5. Conclusions**

Our argument can be summarised in four points:

The current debate centring on whether or not the European Union should evolve into a federal system misses the mark. We have demonstrated that the EU already constitutes an *emerging federation*.

As far as *material* sovereignty or action capacities are concerned, the EU represents a multi-level system of governance with negotiating networks encompassing public and private actors spanning various sub-national, national, and supra-national levels. Federalism provides a constitutional language that conceptualises dividing and sharing *formal* sovereignty in such a multi-level system of governance.

The real issue, then, is whether the emerging European federation should be primarily based on a system of *shared* or *divided* sovereignty. We have discussed both concepts in reference to German co-operative federalism as compared to US dual federalism. The German model is based on a strong representation of the state executives at federal level and on shared competences which include a joint tax system. The US model divides competences between the two levels of governance and, thus, neither requires a strong representation of state executives at federal level nor a strong federal ‘taxation and spending’ capacity.

While the US model might appeal to those afraid of a strong European federal state, the emerging European federation has, so far, evolved along the lines of a shared, rather than a divided, sovereignty. ‘Americanising’ the EU essentially implies the abolition of the European Council and the Council of the European Union as the representation of Member State governments at European level. Otherwise, the European federation would degenerate into a mere confederation of states—a ‘*finalité politique*’ which Joschka Fischer certainly does not have in mind.

On balance, we would advocate a model of shared sovereignty for the emerging European federation, because it matches the multi-level governance structure of the current European order more closely. Such a model could incorporate elements of the US system, in particular, a directly elected president of the

European government which would enormously increase its legitimacy. However, and unlike the US system, the European parliament should provide for a second chamber with a strong representation of Member State governments. Such a system combines several advantages over a federal system with a strict separation of powers:

- a) It resonates with the current institutional design of the European Union which is fundamentally based on shared, rather than divided, competences as well as on a strong representation of the Member State governments at European level. The Council of the European Union, for example, could easily evolve into the second chamber of the European Parliament.
- b) Dis-entangling and dividing up the *formal* sovereignty between the EU level and the Member States fundamentally contradicts the multi-level governance character of the EU, where *material* sovereignty (or action capacities) are shared in networks across and between the various levels. It also contradicts fundamental features of the modern welfare state in Europe.
- c) A directly elected president of the European government would legitimate and partly counterbalance the dominance of executive interests in the European federation. The president could also generate the legitimacy required for an incremental increase in the ‘taxation and spending’ capacity of the European Union as a crucial feature which would distinguish a true federation from the current EU.

One problem remains: where does the democratic legitimacy of such a European federation come from, given the heterogeneity and plurality of European societies which are unlikely to evolve into the political and social solidarity usually identified with a nation-state? Although another paper would be necessary to tackle this problem, we submit that framing the issue in terms of the presence or absence of a European *demos* misses the point. Instead, the real problem is the lack of a strong European party system which integrates diverse ideological, social, and political interests along functional, rather than territorial, lines. The German party system, for example, counterbalances the territorially defined executive dominance of co-operative federalism. In the absence of a vertically integrated party system, we need to rely on the legitimacy-generating functions of governance networks of public-private partnerships. These transnational networks allow for the incorporation of diverse functional interests and may constitute spaces of public deliberation provided that membership and participation are open and inclusive, rather than closed and exclusive, and that decision-making processes are transparent and subject to public scrutiny.





KLAUS VON BEYME

## **Fischers Griff Nach Einer Europäischen Verfassung**

Ab Herbst 1988 wurde man von ausländischen Kollegen und Journalisten pausenlos mit der Frage drangsaliert, ob angesichts der Erosion der DDR die deutsche Einheit drohe. Ich bin dieser Frage stets mit einem Zitat von Joschka Fischer ausgewichen: „Schnauze halten“. Das burschikose Diktum bedeutete damals, dass Fischer offenbar nicht—wie die meisten seiner Partei—strikt gegen den Gedanken der Einheit war, dass er es aber für inopportun hielt, sich als Deutscher in dieser offenen Frage aus dem Fenster zu hängen. Heute, wo die Frage einer engeren Einheit Europas diskutiert wird, möchte man Fischer an seine einstige Zurückhaltung erinnern. Seine Lage hat sich gewandelt. Schon nach zwei Jahren in seinem Amt, wurde er im „Sommerloch“ der Medienthemen mit Gerüchten über seine Amtsmüdigkeit konfrontiert. Da war der Aufruf zum großen Verfassungssprung in Europa kein schlechter Schachzug, um seine volle Präsenz unter Beweis zu stellen.

Aber er ist immer noch Deutscher—und statt in der Opposition an sehr exponierter Stelle. Deutsche Rufer nach mehr europäischer Integration stehen unter dem Zwang, sich besonders verfassungspatriotisch gerieren zu müssen. Diese Konzentration auf die Verfassungsfrage wird ihnen aber kaum gedankt werden. Jeder Vorstoß in Richtung mehr europäische Einigung wird umgehend als verkappter deutscher Hegemonieanspruch verdächtigt. Der Verdacht verstärkt sich durch den Umstand, dass die alte Diskussion um ein Europa mehrerer Geschwindigkeiten in eine Debatte um den inneren Kreis der integrationswilligen Mächte überführt wird. Die Vertiefung der Einheit hat durch die simultane Verquickung mit der Osterweiterung der Union eine neue Dimension des Misstrauens gewonnen: die osteuropäische Warteschlange ist—vor allem wirtschaftlich—stärker mit Deutschland verbunden als mit irgendeinem anderen Land in Europa. Nostalgien nach der Entente des alten „cordon sanitaire“ der Zeit zwischen den Weltkriegen werden östlich der Oder und südlich des Erzgebirges zugunsten einer Führungsrolle Frankreich gelegentlich noch genährt. Aber das Echo von Präsident, Regierung und Medien in Frankreich auf Fischers Rede erlaubt Zweifel, ob Frankreich zu dieser Motorenrolle wirklich bereit ist.

Alle Analytiker sind sich einig, dass ein europäisches Staatsvolk auch durch eine Verfassung kaum entstehen dürfte. Die Betonung des Verfassungspatriotismus, die sich die Deutschen aufgrund ihrer Geschichte als Akt der „innerweltlichen

Askese“ zu Recht auferlegt haben, hat kein Pendant in den anderen europäischen Nationen ohne schlechtes historisches Gewissen. Aber auch sie fragen sich, was der europäische Bürger von einer verfassungsmäßig zementierten Einheit Europas zu erwarten hat und entdecken die Dreiteilung von T.H. Marshall in den „Rechtsbürger“, den politisch-demokratischen „citoyen“ und den „Sozialbürger“. Die Dimension des „kulturellen Bürgers“, die jener Dreiteilung hinzugefügt wurde, ist im europäischen Zusammenhang irrelevant.

Auf drei Gebieten nimmt sich die EU in ihren grundlegenden Dokumenten vor, die innere Integration der Bürger voranzutreiben:

- a) als Rechtsbürger,
- b) als politisch-demokratische Bürger,
- c) und als Sozialbürger.

Nur die kulturell-nationale Schiene steht der Gemeinschaft nicht zur Verfügung, um die emotionale Identifikation zu fördern. Das gilt selbst dann, wenn kein enger Hochkulturbegriff angelegt wird. Zur Kultur gehört notfalls der Fußball. Der Europacup zeigt jedoch harten Wettbewerb und keine übernationalen Allianzen. Leute, die vorgeben „null Bock auf Nation“ zu haben, werden hysterisch, wenn sich die gegnerische Mannschaft dem Strafraum der eigenen Nationalmannschaft nähert. Nach einer spöttischen Definition wird im Zeitalter des Fußballwahns die Nation durch die Existenz einer Nationalmannschaft definiert. Nach dieser Definition wäre Schottland eine Nation, Bayern nicht. Bayern hat dies kompensiert, als Bayern München sich vielfach wie die Nationalmannschaft aufführte, und diese gelegentlich auch überwiegend stellte. Die kulturelle Identifikation mit Europa bleibt auch bei Kosmopoliten vage. Denn ob das „Abendland“ oder ein „europäischer Humanismus“ beschworen wird—die Begriffe sind nicht geeignet die USA oder Neuseeland auszuschließen und drängen über die Grenzen Europas hinaus.

## **1. Die Europäisierung des Rechtsbürgers**

Ralf Dahrendorf (1990:823), ein unverdächtig binationaler Zeuge par excellence, gestand einmal, daß er „unrekonstruierter Kantianer“ bleibe, in der Annahme, daß Verfassungspatriotismus erst möglich werde, wenn eine Rechtseinheit gegeben sei. Diese wird vom Europäischen Gerichtshof mächtig befördert. Solange aber selbst das deutsche Bundesverfassungsgericht (BVerfGE Bd. 89) kräftig mauert, um weitere Erosionen der nationalen Kompetenzen zu verhindern, ist nicht einmal diese leichteste Form der Schaffung des einheitlichen Rechtsbürgers gesichert. In Dänemark—nicht berüchtigt für Nationalismus—wurde von der Regierung spontan klar gestellt: „Citizenship of

the Union is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and the Danish legal system. Citizenship of the Union in no way in itself gives a national of another Member State the right to obtain Danish Citizenship“. So sprach ein Land mit einer der liberalsten Einbürgerungspraktiken in der Union. Der Edinburgh-Gipfel versuchte abzuwiegel. „The provisions of Part Two of the Treaty ... do not in any way take the place of national citizenship“. Aber diese Definition ist nicht wasserdicht (Jesserum d’Olivera 1994:135), wie das Wahlrecht bei Gemeinderatswahlen und das Recht zu kandidieren nach Art. 8b1 zeigt. In europäischen Wahlen sollen die Nichtbürger von Mitgliedstaaten mit einheimischen Bürger gleichgestellt werden (Art. 8b2). Aber es ist kein Zufall, daß die notwendigen Durchführungsregeln nicht implementiert wurden.

Die Staatsbürgerschaftskonzeption der Akte von Maastricht ist klar nicht-ethnisch definiert. Aber eine *itio in partes* bei der Definition der Gewährung der Staatsbürgerschaft, wie sie selbst die Schweizer Kantone noch besitzen, würde archaische Relikte des *jus sanguinis* schützen, was nicht die Absicht der EU sein kann. Kritiker von außen haben immer wieder die „ontologische Konzeption der Staatsbürgerschaft“ in Deutschland kritisiert. Sie entstand nicht aus einem spezifischen Rassismus, sondern aus der Tatsache, daß sich das Territorium des Deutschen Reiches, des Deutschen Bundes und der deutschen Staaten nach 1945 permanent wandelte. Inklusion der ausgeschlossenen Deutschen war erforderlich. Erst 1990 waren die Bedingungen für die Beseitigung des Blutsprinzips voll gegeben. Die Regierung Schröder hat die notwendigen Schritte eingeleitet.

Bei den legalen Aspekten des Citizenship ist der Status der *Minderheiten* wichtig. Vielfach handelt es sich um Staatsbürger—umso mehr, wenn eine großzügige Staatsbürgerschaftspolitik getrieben wurde, wie in Frankreich. Die jakobinische Tradition der „*nation une et indivisible*“ vollzog die Integration über die Sprache. Lange schien Frankreich mit den Nordafrikanern keine Probleme zu haben. Viele konnten vorzüglich französisch. Dennoch ist ihre Häufung in den Vorstädten von Marseille bis Straßburg bei hoher Arbeitslosigkeit zum sozialen Problem geworden. Paradoxerweise war die Staatsbürgernation Frankreich intoleranter hinsichtlich der Kleiderordnung und den Symbolen des islamischen Fundamentalismus in der Schule als Deutschland.

Wie weit darf rechtlich gesehen die Toleranz gehen? Die politische Philosophie hat die Grenze dort gesetzt, wo schwere körperliche Schäden zugefügt werden: von Stammesnarben bis Frauenbeschneidung. Aber die Implementationsbereitschaft solcher Prinzipien, auf die sich die Gemeinschaft einigen könnte, ist höchst unterschiedlich in einzelnen Mitgliedstaaten entwickelt.

Der Schutz der EU-Bürger im Ausland ist relativ klar geregelt. Aber die Grundrechte im Inneren sind offen für Konflikte. Art. F 2 des „Unionsvertrags“ fordert die Respektierung der Grundrechte und fügt auch die gemeinsame Verfassungstraditionen der Mitgliedstaaten hinzu. Aber weite Bereiche der Grundrechte sind nicht gemeinsam, wie die Unterschiede bei der exzessiven Betonung der sozialen Grundrechte in Italien und die Enthaltbarkeit bei diesen im Grundgesetz zeigen. Deutsche Staatszielbestimmungen, obwohl nicht einklagbar, sind hingegen der angelsächsischen Tradition völlig fremd, die metaphysischen Deklarationen mißtraut. Menschenrechte sind universalistisch, daher genießen sie auch die Nichtmitglieder eines Mitgliedstaates, dennoch ist die Inklusion der *alien residents* höchst unterschiedlich in Europa geregelt (Wiener 1998).

Die fundamentalen Grundrechte werden im ganzen überall in der Union respektiert, auch wenn Amnesty International immer wieder einmal auch EU-Mitglieder an den Pranger stellt. Aber unterhalb dieser Grundrechtsebene gibt es Rechte wie die des Art. 8a mit „freier Residenz und Bewegungsmöglichkeit innerhalb des Territoriums der Mitgliedstaaten“ von denen nicht verschwiegen wird, daß sie mit nationalen Bestimmungen und Restriktionen in Konflikt stehen. Konditionale Grundrechte werden im Art. 48 vergeben, wie die „Bewegungsfreiheit der Arbeiter wenigstens am Ende einer Übergangsperiode“. Wieder sind die nationalen Dispositionen sehr unterschiedlich. Italien hat das Recht auf Arbeit als Kompromiß zwischen Christdemokraten und Kommunisten in seine Verfassung an prominenter Stelle untergebracht. Die Bundesrepublik hingegen hat sie für irreführend gehalten. Jeder weiß, daß Italien auch heute noch, wo Deutschland in zweistellige Zahlen bei der Arbeitslosigkeit geriet, über dem Unterbeschäftigungsniveau Italiens liegt. Als symbolische Politik und Merkposten werden solche Artikel gleichwohl verteidigt und wirken auf die Akzeptanz von Freizügigkeit des Faktors Arbeit zurück. Es zeigt sich an der laufenden Debatte um die Grundrechtscharta, daß Europa sich nur auf den harten Kern der Menschen- und Bürgerrechte einigen wird.

## **2. Die politisch-demokratische Integration**

Zwei Begriffe von politischer Citizenship konkurrierten in Europa:

a) Die *liberale Tradition*, die Partizipation individualistisch und instrumentalistisch interpretierte und vor allem den Rechtsstaatsgedanken betonte. Seit die neuen Demokratien im Osten vielfach als „defekte oder illiberale Demokratien“ endeten, die Partizipation in leidlich freien Wahlen erlaubten, aber den Rechtsstaat unterentwickelt ließen, gewinnt diese Konzeption wieder Oberwasser.

b) Die *aristotelische Konzeption der ethischen und kulturellen Gemeinschaft*—kulturell im Sinne der neueren Konzeption der politischen Kultur. Es wurden weniger die formalen Partizipationsrechte und die negativen Freiheitsrechte betont, als die „*moeurs politiques*“. Der Kommunitarismus hat an diese Konzeption mit einem holistischen Konzept von Citizenship wieder angeknüpft (Taylor 1989, Habermas 1992:640f.). Kommunitarier sind keine Ethno-Demos-Patrioten und könnten sich mit dem Verfassungspatriotismus à la Habermas anfreunden. Aber sie haben ihn von der Enge des Rechtsstaats befreit und mit einem neuen partizipatorischen Pathos verbunden. Konzeptionen der „*deliberativen Demokratie*“ oder der „*reflexiven Demokratie*“ wurden publizistisch wieder belebt. Es gibt keinen Grundkonflikt zwischen diesen Konzeptionen mehr, wie ihn am Anfang des Liberalismus Benjamin Constant gegen die antike Bürgerschaftskonzeption formulierte, die er für Gesinnungstyrannis hielt. Der Kommunitarismus ist nicht nur selbstreflexiv, sondern auch selbstbeschränkend in seinen intellektuellen Ansprüchen, wenn Walzer und andere liberal genug sind, zu betonen, daß der Kommunitarismus nur die Übertreibungen des Liberalismus korrigieren will und sich nicht als neue dogmatische Lehre versteht.

Eine neue Bewegung ist in die etablierten Institutionen der liberalen Demokratie gekommen. Jahrelang hat niemand mehr die Alternativen für die verfassungsmäßige Weiterentwicklung der EU diskutiert, wie sie einst Bowie und Friedrich (1964) in den „*Studies of Federalism*“ vornahm, die Präzidentalismus, Parlamentarismus und Schweizer Ratssystem im Hinblick auf einen europäischen Föderalismus testeten. Neuerdings (Kohler-Koch 1999:9) wird Friedrichs Präferenz für das Schweizer Ratssystem wieder aufgenommen. „Opas Politikwissenschaft“ des Altinstitutionalismus schien tot. Plötzlich kam der Paläoinstitutionalismus mit Ideen des „*constitutional engineering*“ (Sartori 1994) wieder in Mode. Noch einflußreicher war der aufgeklärte Neoinstitutionalismus, der sich mit Handlungsoptionen von Akteuren im Mehrebenensystem befaßte, und sich zunehmend mit *Rational Choice*-Ansätzen verband, etwa bei Scharpf (1994b).

Die *Praxis der Demokratien* hat sich in Europa vielfach angenähert. Der Unterschied zwischen semipräsidentiellen und rein parlamentarischen Systemen ist zweitrangig geworden, angesichts der Entwicklungen der Parteien und ihren Interaktionsgewohnheiten mit den Medien.

Die Natur der europäischen Citizenship, die *ex nihilo* geschaffen wurde (Jesserum d'Oliveira 1994) bleibt unklar—wie die staats- und völkerrechtliche Qualität des Gebildes, das sein Substrat darstellt. *Staatenverbund* ist der deutsche Formelkompromiß. Er hat den Nachteil, außer im Schwedischen (statsförbundet) nicht übersetzbar zu sein. Aus allen wichtigen Sprachen käme die Übersetzung als Föderation oder Konföderation zurück.

## *Kommentare*

Maastricht ist mehr als ein Vertrag und weniger als eine Verfassung. Einige sehen in diesem Vertrag eine Verfassung *in nuce*. Einige amerikanische Founding Fathers wollten ihre Verfassung „kurz und dunkel“. Neue Verfassungen, wie die süd- und osteuropäischen Verfassungen sind „lang und dunkel“ geworden, wenn etwa in Portugal die Dauer der Debatte einer Regierungserklärung geregelt wird, und die slowakische Verfassung damit beginnt, die Tradition des Großmährischen Reiches für sich in Anspruch zu nehmen.

Starbeispiel für die Tendenz zur Überlänge und Unklarheit ist das *Subsidiaritätsprinzip in Europa*. Es gelangte als Kompromißformel in die Verträge, weil vor allem Großbritannien keinen Anklang an föderales Vokabular duldete. Deutschland (neben Belgien) als einziger echter Bundesstaat unter den 12 Mitgliedern arbeitete unter dem Druck seiner Bundesländer mit an dieser Kompromißformel. Die führenden Unionsparteien hatten gegen den einst klerikalen Unterton der Formel seit „Quadrogesimo anno“ weniger einzuwenden. In der Diffusion von Sozialstaatsideen war das Konzept für den Grundkonsens zwischen Christ- und Sozialdemokraten längst seiner vatikanischen Konnotationen entkleidet worden. Aber klarer war es mit der Übertragung von funktionalen Zusammenhängen auf territoriale keineswegs geworden.

Zu seiner Realisierung bedarf das Subsidiaritätsprinzip der Spezifizierung zwischen dem Ganzen und den Gliedstaaten. Scharpf (1991:421) hat mit Recht von „der Lebenslüge des Föderalismus“ gesprochen. Bei verbalem Bekenntnis zu den größeren Residualkompetenzen der Gliedstaaten vollzog sich in allen Föderationen, außer der Schweiz, eine gewaltige Zentralisierung. Bei einer supranationalen Einheit, die als Wirtschaftseinheit ihre Karriere begann, ist dies a fortiori zu erwarten.

In einer Entschließung des Europäischen Parlaments zum Grundsatz der Subsidiarität vom November 1990 wurde bereits der Boden des Etikettenschwindels verlassen und klar konstatiert: „Die Föderalisierung der Ausübung dieser bereits auf Gemeinschaftsebene bestehenden Befugnisse wäre eine erste Antwort auf die Frage nach der Achtung des Grundsatzes der Subsidiarität, die somit eng mit der Beseitigung des Demokratiedefizits verbunden ist (EP-Doc. DE/RR/91692:6).

Stärker noch als das Föderalismusprinzip liegen Schranken gegen die Demokratisierung im Subsidiaritätsprinzip, das dem Ganzen nur in klar umrissenen Fällen einen legislatorischen Durchgriff auf alle Teile gestatten will. Sowie das Demokratiedefizit beschworen wird, kann man unter einem kaum kritisierbaren Etikett zentralisierende Tendenzen nur schwerlich aufhalten.

Es wäre jedoch ein Fehler, die Undeutlichkeit als Unvermögen der beteiligten Akteure zu brandmarken. Die Undeutlichkeit der Ziele hat im Vertrag von

Maastricht vielfach ihre Vorzüge offenbart, wie Elmar Brok (1992) für das Europäische Parlament überzeugend argumentierte. Das Subsidiaritätsprinzip läßt vieles offen für den Kampf der Interessen. In Deutschland wird das Defizit an der Durchsetzung der reinen Lehre der Marktwirtschaft ohne Subventionen beklagt, aber das Subsidiaritätsprinzip als Schranke des EU-Durchgriffs beschworen, sobald einheimische Werften oder Kohlengruben in die Gefahrenzone geraten. Als ein founding father die Devise „kurz und dunkel“ ausgab, lag eine ähnliche Sorge um die Undurchsetzbarkeit jeden Verfassungskompromisses zugrunde.

Die umstrittene Frage bleibt, ob die Vereinheitlichung der Rechtssysteme und der politischen Kulturen durch *eine Verfassung* gefördert werden kann. Die Antworten reichen von der Warnung vor überhöhten Erwartungen der Bürger, die eine Verfassung nach sich ziehen könnte (Grimm 1994:51) bis zur Betonung der Notwendigkeit einer Verfassung (Weidenfeld 1991), um die innere Einheit voranzutreiben. Für einige (Koch 1997) ist der Sprung in die „Revolution“ einer Verfassung der Ausweg aus der Langeweile. Euroskeptiker wie Kielmannsegg (1995:237) sehen noch wenig Chancen für eine europäische Demokratie ohne europäische Identität und Zivilgesellschaft, ohne wirklich europäische Parteien und Interessengruppen. Andere Betrachter legen sich nicht genau fest (Pies in: Streit/Voigt 1996) und halten sowohl die Entwicklung eines Vertrages als auch eine Verfassung für einen gangbaren Weg. *Funktionale* statt territoriale Repräsentation wird von einigen Experten (Kohler-Koch 1999:12) jedoch für die wahrscheinlichere Entwicklungslinie gehalten, um aus der Blockade zwischen demokratischem und föderalem Prinzip herauszutreten.

Der *Konstruktivismus* hat inzwischen die Theorie der Internationalen Politik erfaßt. Analysen der verfassungspolitischen Präferenzen der Mitgliedstaaten zeigten, daß nicht so sehr rationalistische Verfolgung von Machtinteressen, sondern institutionalisierte Wirklichkeitskonstruktionen die Verfassungsaußenpolitik in der EU prägen (Wagner 1999:435). Es ließen sich keine über Zeit stabile grundlegende Präferenzordnungen der Staaten nachweisen, wie sie die Neorealisten und Rational Choice-Theoretiker unterstellten. Wie zu erwarten war vor allem das Merkmal föderaler Staat/Einheitsstaat maßgeblich für die politische Kultur der Länder, in denen die Wirklichkeitskonstruktionen verankert sind. Ähnliches läßt sich auch für die Konzeption von Citizenship aufzeigen.

Die *Euroskepsis* erinnert in mancher Hinsicht an die Diskussionen des 19. Jahrhunderts für die Integration neuer Nationalstaaten.

a) Lorenz von Stein (1852:5) hielt Preußen einst *nicht reif für eine Verfassung*, weil es sozial zu heterogen war. Ähnliche Argumente tauchen hinsichtlich Europas auf. Aber Preußen sprach mit Ausnahme einiger östlicher Gebiete, die überwiegend zweisprachig waren, eine Sprache und ließ sich auf eine „erfundene



preußische Tradition“ bis zurück zum Ordensstaat lose ideologisch integrieren. Stein konnte noch hoffen, daß Preußens „*Verfassungsunfähigkeit*“ Deutschlands Verfassungsfähigkeit stärken werde. Die Verfassungsfähigkeit des ganzen Europa bis zum Bug oder gar zum Ural wird hingegen von niemandem als günstigere Voraussetzung für eine Verfassung angesehen als das „Klein-Europa“ von Maastricht.

b) *Föderalismus und Parlamentarismus galten als unvereinbar*—obwohl Saint-Simon schon 1814 die Gegenthese vertrat: eine europäische Föderation bedürfe zunächst der parlamentarischen Mehrheitsherrschaft. In der Paulskirche in Deutschland überwog die gegenteilige Ansicht vom Liberalen Welcker bis zum Konservativen Radowitz. Bismarck hat das Unvereinbarkeitstheorem trotz allgemeinem Wahlrecht gegen die Parlamentarisierung des Reiches nach 1871 ausgespielt. Konservative, wie Calhoun in Amerika oder Konstantin Frantz und Max von Seydel in Deutschland haben überwiegend die „*concurrent majorities*“ gegen die parlamentarische Mehrheitsherrschaft gesetzt. Die Unvereinbarkeitsthese wurde selbst dann noch vertreten, als Australien und Kanada längst das Gegenteil bewiesen hatte. Aber der Parlamentarismus der „Kolonien“ hatte keinen Bildungswert für die kontinentale Dogmatik und soweit man demokratischer Föderalist war, wurde eher das Schweizer Ratssystem oder das präsidentielle System der USA gefordert als ein parlamentarisches System.

Die neueren theoretischen Ansätze sehen ein „Paradox der Schwäche“ (Edgar Grande), das sowohl den Staat als auch die Gesellschaft schwächt. Der Staat verliert an Steuerungsfähigkeit, da Globalisierung und Regionalisierung den *bourgeois* über den staatlich beengt lebenden *citoyen* hinauswachsen lassen. Die Gesellschaft verliert ebenfalls, da der Staat durch die Mehrebenenverflechtung weniger kontrollierbar wird (Zürn 1996:34). Da im Sinne Hirschmans *voice* schwieriger wird, ist *exit* zu einer empfohlenen Option geworden. Entweder wird ein Pluralismusmodell empfohlen, das die Analogien zur Staatsformenlehre aufgibt oder es wird eine Flexibilisierung verlangt, die in einem System von Veto-rechten besteht (Abromeit 1998:89).

Zur Zeit steht nur die *Europäische Grundrechtcharta* auf dem Programm. Seit 1984 sind Initiativen des Europäischen Parlaments in diese Richtung verzögert worden. Nun wird die Charta bis Ende 2000 erhofft. Die Auffassungen variieren von einer Kopie der Europäischen Menschenrechtskonvention bis zu einem neuen Grundrechtskatalog mit vielen sozialen Grundrechten. Problem wird die Frage bleiben, ob die Mitgliedstaaten zur Einhaltung dieser Rechte mit Sanktionen gezwungen werden können und wie weit das Klagerecht gegen Grundrechtsverstöße beim Europäischen Gerichtshof ausgebaut werden soll, ohne welche die Charta zur *symbolischen Politik* degradiert würde. Teile der Hessischen Verfassung sind immer wieder für nicht grundgesetzkonform angesehen worden, den-

noch wurde auf Hessen kein Druck zur Amendierung ausgeübt. In Rußland enthalten 20 von 21 Republik-Verfassungen Klauseln, die unvereinbar mit der Föderationsverfassung sind. Die Union kann nicht einmal schwerwiegendere Verletzungen der Bundestreue sanktionieren—außer in Tschetschenien, wo es um förmliche Sezession geht. Europa wird es nicht besser gehen!

### 3. Die Integration der Sozialbürger

Die Lektüre des Maastrichtvertrages hinterläßt den Eindruck, es handele sich um die Schaffung eines neuen Wohlfahrtsstaates. Art. 123 konstituierte einen Sozialfonds. Die deutsche Obsession mit „gleichen“—und seit der Vereinigung nur noch „gleichwertigen“—Lebensverhältnissen ging in den Art. 117 ein, wo von der „*Harmonisierung des Lebensstandards*“ die Rede ist. Es ist wahrscheinlich, daß egalitäre Traditionen in Europa niemals dauerhaft so große Differenzen in den sozialen Transfers zulassen, wie sie in den USA bestehen.

Die EU wurde in den siebziger Jahren als „Supermarkt“ von links kritisiert. Die wirklichen Fusionen kamen erst in den neunziger Jahren und sie waren eher schwächer als die Zusammenschlüsse, die über Europa hinaus reichten. Eine einheitliche Lohnpolitik erwarten die Experten nicht (Joerges 1991:283) von der Maastricht-Runde. Die ersten Protestaktionen in romanischen Ländern zeigten, daß viele Verschlechterungen gern der Euro-Bank und indirekt der Bundesbank angelastet werden.

Eine positive *Verflechtung der Souveränität*, bei der die europäische Ebene weite Materien der Sozialpolitik regeln kann, ist als kontinuierlicher Prozeß bisher nicht in Sicht. Wellen des nationalen Rufes nach mehr Souveränität für die nationalen Entscheidungsträger sind wahrscheinlich. Die französischen Initiativen der Arbeitslosenverbände sind vermutlich nur die Vorschau auf populistische Tendenzen zur Resouveränisierung im Bereich der Wohlfahrtspolitik. Die Europaliteratur ist sich über die Szenarien für die zukünftige Entwicklung uneins. Paradoxerweise sind die eher „linken“ Autoren, wie Leibfried und Offe, an mehr europäischer Integrationspolitik im sozialen Bereich interessiert. Das wird verständlich, wenn man bedenkt, daß sie der EU eher eine parteieneutrale Innovationspolitik ohne zahlreiche Rücksichten auf national gewachsene Strukturen zutrauen als dem Nationalstaat. Eine Studie kommt im Gegensatz zu zahlreichen bisherigen Meinungen zu dem Schluß, daß Parteipolitik in der Willensbildung der Kommission eine ganz untergeordnete Rolle spielt (Morgan & Tame 1996; Landfried 2001). Die *Autoren des Mainstreams* auf der anderen Seite sind eher der Ansicht, daß der Kernbereich der distributiven Sozialpolitik, Erziehung und Kultur eine nationalstaatliche Domäne bleiben wird. „Verfassungspatriotisch“ eingestellte Autoren (Nassehi &

## *Kommentare*

Schroer 1999:111) sind mit Recht der Meinung, daß nur durch Ausbau der Wohlfahrtspolitik eine De-Ethnisierung Europas dauerhaft zu bewerkstelligen ist. Welches Szenario sich in Zukunft auch als das wahrscheinlichere erweist, es besteht schon jetzt kein Zweifel, daß Prozesse oberhalb und unterhalb nationaler Systeme den Entscheidungsspielraum nationaler Parlamente einengen. Umstritten sind nur die Sektoren und die Geschwindigkeit, in der diese Prozesse ablaufen:

- a) In einem Prozeß der *Regionalisierung* versuchen regionale Versammlungen sich auf Kosten der nationalen Parlamente über die Regionalpolitik der EU zu stärken.
- b) In einem Prozeß der *Europäisierung* werden immer mehr Materien, die den nationalen Parlamenten vorbehalten schienen, von Europa her geregelt. Dieser Prozeß wird durch die Rechtsprechung des Europäischen Gerichtshofes und die schleichende Vereinheitlichung der Rechtssysteme unmerklich aber wirksam befördert.
- c) In einem Prozeß der *Globalisierung* bleibt der nationalen Ebene nur der Trost, daß weltweite Organisationen, wie die World Trade Organisation oder die GATT der EU heimzuzahlen beginnen, was diese den nationalen Entscheidungsgremien angetan haben, weil zunehmend auch der Handlungsspielraum der Europaorganisationen von der globalen Ebene eingeengt wird, wenn auch bisher stark sektoral begrenzt.

Der Konflikt um das Ausmaß, indem die sozialpolitische Kompetenz den nationalen Parlamenten entzogen wird, kann nur durch Unterklassifikationen geschlichtet werden. Die einen weisen auf die Wirkungen der Vereinheitlichung der Betriebsverfassungen und der Mitbestimmungsregelungen hin. Andere grenzen die bloß „sozialregulativen“ Maßnahmen von den *distributiven und redistributiven Maßnahmen* ab. Erstere sind durch die Einheitliche Europäische Akte mit Art. 100a und 118a zweifellos stärker europäisiert worden. Zu den sozialregulativen Bereichen kann auch der Umweltschutz im Titel VII gerechnet werden, der europäisierte, wo die alte EG sich auf bloße Förderung der intergouvernementalen Kooperation beschränkte. Die Einbeziehung der Arbeitsumwelt, der Gesundheit, des Verbraucher- und Umweltschutzes entzieht den nationalen Parlamenten wichtige Materien (Majone 1996).

Dennoch sprechen gewichtige Gründe für die Annahme, daß der Kernbereich des Wohlfahrtsstaats noch lange national reguliert werden wird. Das Vorbild von echten Föderationen mit weitreichender Kompetenz der Mitgliedstaaten, die keine „unitarischen Bundesstaaten“ wurden, wie Deutschland oder Österreich, zeigte am Modell Amerika, daß die Beharrungsfähigkeit regionaler Differenzen groß ist. Noch 1990 zahlte Kalifornien an Wohlfahrtsempfänger sechsmal mehr als das arme Alabama. Wenn es alten Nationalstaaten nicht gelang, den Wohl-

fahrtsstaat auf Staatenebene zu homogenisieren, so ist es unwahrscheinlich, daß die EU darin erfolgreicher sein kann. Sie hat nur 4 Prozent der Ausgaben aller nationalen Regierungen und weniger als 1,3% des Bruttosozialproduktes der EU zur Verfügung. Angesichts der budgetären Restriktionen ist es unwahrscheinlich, daß die Nationalstaaten die Knappheit an Mitteln für die Verteilungspolitik wirklich ändern wollen. Die Erfolge einer Form von Umverteilungspolitik—als Regionalpolitik—gelten bisher nicht so beeindruckend, daß sie eine Sogwirkung auf die Wohlfahrtspolitik im allgemeinen ausüben könnten. Neben der Sicherheits- und Verteidigungspolitik wird daher die Sozialpolitik vermutlich weiterhin ein Pfeiler der Entscheidungskompetenz nationaler Parlamente bleiben.

Der Ausbau der Sozialbürgerschaft wird auf die Dauer vermutlich die schärfsten Konflikte auslösen, da die EU zur Zeit eher auf dem Markt als auf die nationalen staatlichen Institutionen vertraut (Jachtenfuchs & Kohler-Koch 1996a:29). Die Nationalstaaten werden dadurch gezwungen, sich in Materien einzumischen, die sie lieber ungeregelt gelassen hätten. Umgekehrt wird die positive Integration durch Initiativen aus Brüssel, die hinter der nationalen Gesetzgebungsinitiative stehen, vorangetrieben und vielfach als Fremdbestimmung empfunden. Das kommt im Sozialbereich nach deutscher Zählung noch unter 10% vor; während in der Landwirtschaft schon 42% hinter deutschen Initiativen im Bundestag standen und im Post- und Fernmeldewesen bereits 100% Euro-Initiativen (Töller 1995:47).

## Fazit

Die Konzeptionen des *Staatsbürgerrechts* nähern sich in Europa an. Die Formen der Ausübung staatsbürgerlicher Partizipation sind noch sehr verschieden, bilden aber kein Hindernis für die Integration. Die *Kulturbürger* bleiben national, die *Rechtsbürger* haben die weitestgehendste Angleichung erreicht, ein Prozeß, der durch den Europäischen Gerichtshof befördert wird. Aber selbst wenn dieser zu große Schritte wagt, zeigen sich Rückschläge der Verhärtung bei den nationalen Politikern und sogar bei den nationalen Verfassungsgerichten, wie die deutsche Maastricht-Entscheidung gezeigt hat. Die *Sozialbürger* schließlich bleiben mangels Umverteilungsmasse der Union auf nationale Sozialpolitik angewiesen. Nur im sozialregulatorischen Bereich schreitet die Integration rasch fort.

Eine Symmetrie der vier Citizenships ist auf europäischer Ebene in absehbarer Zeit nicht zu erwarten. Auch einzelne Nationalstaaten haben lange gebraucht, um dieses Symmetrie der Legitimation des Gemeinwesens und seiner Citizenship zu erreichen. Es ist unwahrscheinlich, daß durch spektakuläre Arbeit

## *Kommentare*

an einer europäischen Verfassung diese Integration aller vier Citizenships beschleunigt werden kann. Es sind eher neue überflüssige Konflikte zu erwarten. Die Fixierung auf eine Verfassung erscheint im internationalen Vergleich ohnehin als eine ziemlich deutsche Diskussion. Die Charta der Grundrechte wird vermutlich kommen. Den organisatorischen Teil einer Verfassung können Dokumente nach Art eines Organisationsstatus bewältigen. Die dritte französische Republik mag da Vorbild sein: „rien ne dure que le provisoire“ wurde für die drei Gesetze geprägt, die seit 1875 als Ersatz für eine einheitliche Verfassung dienen mußten, weil die beiden Lager sich nicht auf einen Text hätten einigen können. Ohne die Niederlage von 1940 bestünde die Regelung von 1875 vielleicht noch heute. Großbritannien kommt noch heute ohne einen einheitlichen Verfassungstext aus. Polen hat bis 1997 mit der „kleinen Verfassung“ leben können. Ungarn hat die Ausarbeitung einer endgültigen Verfassung noch vor sich. Warum sollte Europa weiter vorpreschen als es einige Nationalstaaten getan haben?

Es mehren sich die Stimmen derer, die eine Nichtratifizierung der Europäischen Verfassung für ein größeres Übel halten als den Verzicht auf die Ausübung des europäischen *pouvoir constituant* (Di Fabio, F.A.Z. 30.6.2000:6). Auch die Befürworter einer europäischen Verfassung verlangen keinen „verfassungspolitischen Urknall“ mehr (Europa Kommission 2000:30). Selbst ein Europäisches Verfassungssystem müsste die Verfolgung nationaler Interessen „ohne Majorisierungsdruck“ zulassen (Lepsius 2000:304) und die ist durch eine Zweiteilung der Verträge (Dehaene Gruppe) und durch die Tolerierung des „*système inédit*“ rudimentärer Grundlagenverträge, die erst langfristig in Richtung einer einheitlichen Verfassung drängen, leichter zu erreichen.

In Zeiten der Prosperität wird vieles toleriert und mangels Transparenz von den Bürgern der Mitgliedstaaten ignoriert. Alle Integrationsschritte—vor allem aber im sozialen Bereich, wo die Kostenlawine zu Umverteilungsgelüsten gegenüber den finanziellen Lasten führen—sollten auch unter dem Aspekt des Schutzes gegen Rechtsextremismus und militanten Populismus gesehen werden. Das Haider-Syndrom ist kein Phänomen eines Kleinstaats. Selbst das Nichtmitglied Schweiz ist von dem Bazillus erfaßt worden und vom Glistrupismus bis zur AN und der Lega in Italien liegt politischer Sprengstoff in den nationalen Parteiensystemen, der zum Rückschlag für allzu rasche Integrationsschritte werden kann.

KLAUS VON BEYME\*

## Fischer's Move Towards a European Constitution

From August 1988 onward, we were harassed non-stop by foreign colleagues and journalists with the question of whether the erosion of the GDR brought the threat of German unity. I always dodged this question with a quotation from Joschka Fischer: 'Shut your trap'. This boisterous utterance then meant that Fischer was evidently not—like the bulk of his party—strictly against the idea of unity, but that he felt it inappropriate for himself as a German to fly any kites on this open question. Today, with the question of closer unity of Europe being discussed, one might like to remind Fischer of his one-time reticence. His position has shifted. Even after only two years in office, he was confronted, during the media's 'silly season,' with rumours how tired he was of it. So, the call for the great constitutional leap forward in Europe was not a bad chess move in order to give proof of his full presence.

Yet, he is still a German—and, instead of being in opposition, in a very exposed position. Germans who call for more European integration are under the compulsion to handle themselves with special constitutional patriotism. This concentration on the constitutional question is not, however, anything they are likely to be thanked for. Every advance in the direction of more European unification is immediately suspected of being a disguised German hegemony claim. Suspicion is strengthened by the fact that the old debate on a multi-speed Europe is being converted into one about the inner circle of powers ready for integration. The deepening of unity has, from its simultaneous amalgamation with the Union's Eastern enlargement, taken on a new dimension of mistrust: the Eastern European queue is tied more to Germany—particularly in economic terms—than to any other country in Europe. Nostalgias for the *entente* of the old 'cordon sanitaire' times between the wars are occasionally still cherished east of the Oder and south of the Ore Mountains, in favour of a leadership role for France. But the response by the president, government and media in France to Fischer's speech allows doubt as to whether France is truly ready for this leading role.

All analysts agree that a European state-bearing people can hardly be brought into being even by a constitution. The stress on constitutional patriotism that

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\* Translated by Iain L. Fraser.

## Comments

Germans have rightly imposed on themselves because of their history, as an act of ‘inward asceticism,’ has no counterpart in the other European nations which lack bad historical consciences. But they, too, ask themselves what the European citizen can expect from a constitutionally cemented unity of Europe, on discovering T.H. Marshall’s threefold division into ‘legal citizens,’ politically democratic ‘citoyens’ and ‘social citizens’. The dimension of the ‘cultural citizen’ which was subsequently added to this threefold division is irrelevant in the European context.

There are three areas where, in its fundamental documents, the EU undertakes to push forward the internal integration of citizens:

- a) as legal citizens,
- b) as politically democratic citizens,
- c) as social citizens.

It is only the culturally national line that is not available to the Community for the promotion of emotional identification. This is true even without narrowing the concept to high culture. Culture necessarily includes football. But the European Cup is marked by fierce competition and a distinct absence of supranational alliances. People who claim not to give a damn for nationalism wax hysterical when the opponents come close to their own national team’s penalty area. In this age of football, one whimsical definition defines the nation by the very existence of a national team. On this definition, Scotland is a nation and Bavaria not. Bavaria has compensated by having Bayern München often act like the national team, often also providing the bulk of it. Cultural identification with Europe remains vague even among cosmopolitans. For whether the references are to the ‘West’ or to ‘European humanism,’ the concepts are unsuitable for ruling out the US or New Zealand, and press beyond Europe’s frontiers.

### **1. The Europeanisation of the Legal Citizen**

Ralf Dahrendorf (1990:823), a bi-national witness *par excellence* and above all suspicion, once confessed that he remained an ‘unreconstructed Kantian’ in the assumption that constitutional patriotism becomes possible only where there is a legal unity. This is vigorously promoted by the European Court of Justice. But as long as even the German Federal Constitutional Court (BverfGE Bd. 89) beavers away to prevent further erosions of national powers, not even this mildest form of the creation of a unitary legal citizen is assured. In Denmark—not notorious for nationalism—the government spontaneously clarified: ‘Citizenship of the Union is a political and legal concept which is entirely

different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and the Danish legal system. In no way does the Citizenship of the Union in itself give a national of another Member State the right to obtain Danish Citizenship.’ This is a country with one of the most liberal naturalisation practices in the Union. The Edinburgh Summit attempted appeasement: ‘The provisions of Part Two of the Treaty ... do not in any way take the place of national citizenship.’ But this definition is not watertight (Jessurun d’Oliveira 1994:135) as the right to vote in local elections and the right to stand pursuant to Article 8b(1) shows. In European elections, non-citizens from other Member States are to be equated with national citizens (Article 8b(2)). But it is no coincidence that the necessary implementing rules have not been adopted.

The citizenship conception of the Maastricht Treaty is clearly non-ethnically defined. But an *itio in partes* in the definition of granting of citizenship, such as even the Swiss Cantons still have, would protect archaic relicts of *jus sanguinis*. However, this cannot be the EU’s intention. Outside commentators have continually criticised the ‘ontological conception of citizenship’ in Germany. This emerged not from any specific racism but from the fact that the territory of the German Reich, the German Federation and the German states after 1945, constantly shifted. Inclusion of the excluded Germans was necessary. Not till 1990 were the conditions for removing the *jus sanguinis* principle fully present. The Schröder government has begun the necessary steps.

Among legal aspects of citizenship, the status of *minorities* is important. These are often citizens—especially where a generous citizenship policy was pursued, as in France. The Jacobin tradition of the ‘*nation une et indivisible*’ brought about integration through language. For a long time, France seemed not to have any problems with the North Africans. Many could speak excellent French. Nonetheless, their accumulation in the suburbs, from Marseilles to Strasbourg, along with high unemployment, has become a social problem. Paradoxically, the citizens’ nation of France was more intolerant towards the dress code and principles of Islamic fundamentalism in schools than was Germany.

Legally considered, how far may tolerance go? Political philosophy has set the boundary where severe bodily damage is caused—from tribal scars to female circumcision. But the willingness to implement such principles as the Community could agree to is very differently developed in individual Member States.

Protection of EU citizens abroad is fairly clearly regulated. But fundamental rights within the country are open to dispute. Article F2 of the ‘Union Treaty’ calls for respect for fundamental rights, also adding the common constitutional



traditions of Member States. But broad areas of fundamental rights are not common, as the differences in the excessive stress on fundamental social rights in Italy and the reticence about them in Germany's constitution show. The basic policy clauses in Germany's constitution, though not justiciable, are, in contrast, totally foreign to the English-speaking tradition, which mistrusts metaphysical declarations. Human rights are universal and therefore also enjoyed by non-citizens of a Member State, yet the inclusion of alien residents is regulated extremely diversely within Europe (Wiener 1998).

The basic fundamental rights are, on the whole, respected everywhere in the Union, even if Amnesty International every now and again puts EU Members, too, on the pillory. But below this level of fundamental rights there are rights such as those of Article 8a, with 'freedom of residence and movement within the territory of the Member States,' where it cannot be concealed that they conflict with national provisions and restrictions. Conditional fundamental rights are conferred in Article 48, such as the 'freedom of movement of workers, at least at the end of a transitional period.' Again, national provisions are very diverse. Italy has brought the right to work into its constitution at a prominent position, in a compromise between Christian Democrats and Communists. In contrast, the Federal Republic regarded it as misleading. Everyone knows that, even today, with German unemployment running into double-figures, Italy still has more unemployment than Germany. Yet, such articles are nonetheless defended as symbolic policies and guideposts, and have repercussions on the acceptance of the freedom of movement for the labour production factor. It can be seen from the ongoing debate about the fundamental rights charter that Europe can unite only around the hard core of human and civil rights.

## **2. Politically Democratic Integration**

Two concepts of political citizenship are competing in Europe:

a) The liberal tradition, interpreting participation in an individualistic and instrumentalist manner, and above all stressing the idea of the rule of law. Since the new democracies in the East often ended up as 'defective or illiberal democracies,' allowing participation in more or less free elections but leaving the rule of law underdeveloped, this conception is gaining the upper hand again.

b) The Aristotelian conception of ethical and cultural community—cultural in the sense of the more recent conception of political culture. It is not so much the formal participatory rights and negative freedoms that are stressed, as '*moeurs politiques*'. Communitarianism has again linked up with this conception through a holistic concept of citizenship (Taylor 1989, Habermas 1992:640 *et seq.*).

Communitarians are not *ethno-demos* patriots, and might hobnob with constitutional patriotism *à la* Habermas. But they have freed it from the narrowness of the state based on rule of law, and combined it with new participatory feeling. Conceptions of ‘deliberative democracy’ or ‘reflexive democracy’ are being revived in the press. There is no longer any basic conflict between these conceptions, as Benjamin Constant framed it at the outset of liberalism against the ancient concept of citizenship, which he regarded as ideological tyranny. Communitarianism is not only self-reflective but also self-limiting in its intellectual claims, if Walzer and others are liberal enough to stress that communitarianism seeks only to correct the exaggerations of liberalism and does not see itself as a new dogmatic doctrine.

New movement has come into the established institutions of liberal democracy. For years, no-one still discussed the alternatives for the constitutional further development of the EU, as Bowie and Friedrich (1964) had undertaken in ‘Studies of Federalism,’ testing presidentialism, parliamentarianism and the Swiss council system with an eye to a European Federalism. Recently, (Kohler-Koch 1999:9), Friedrich’s preference for the Swiss Council system has been taken up again. ‘Grandpa’s political science,’ the old institutionalism, seemed dead. Then, all of a sudden, paleo-institutionalism came back into fashion with ideas of ‘constitutional engineering’ (Sartori 1994). Still more influential was enlightened neo-institutionalism, concerned with actors’ options for action in multi-level systems, and increasingly associated with rational-choice approaches, *e.g.*, in Scharpf (1994b).

The practice of democracies has, in many ways, come closer together in Europe. The difference between a semi-presidential and a purely parliamentary system has become secondary, given the developments in parties and their habits of interacting with the media.

The nature of the European citizenship that was created *ex nihilo* (Jessurun d’Oliveira 1994) remains unclear—as does the quality, in constitutional and international law, of the formation that constitutes its substrate. *Staatenverbund* is the German compromise formula. It has the drawback of being practically untranslatable, except into Swedish (*statsförbundet*). In all the major languages, the most readily accepted translation would be federation or confederation.

Maastricht is more than a treaty and less than a constitution. Some see this treaty as a constitution in embryo. Some American founding fathers wanted their constitution to be ‘short and dark’. New constitutions like the Southern and Eastern European ones have become ‘long and dark,’ with, in Portugal for instance, the length of the debate on a government policy statement being

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regulated, and the Slovakian constitution commencing by laying claim to the tradition of the Great Moravian Empire.

The star example for the tendency to be overlong and unclear is the subsidiarity principle in Europe. It got into the treaties as a compromise formula, as Britain, in particular, would tolerate no echo of federal vocabulary. Germany (along with Belgium), as the only real federal state among the twelve Members, collaborated on this compromise formula, under pressure from the federal Länder. The leading union parties had less to object to in the once clerical undertones of the formula after the '*Quadragesimo anno*' encyclical. The spread of social-state ideas had long removed the Vatican connotations from the concept of the basic consensus between Christian Democrats and Social Democrats. But it had not, by any means, been made clearer by the transfer from functional contexts to territorial ones.

In order to be realised, the subsidiarity principle required specification between the whole and the Member States. Scharpf (1991:421) has rightly spoken of the 'life-lie of federalism'. For all the verbal acknowledgement of the greater residual powers of Member States, in all federations with the exception of Switzerland, enormous centralisation came about. With a supranational entity that began its career as an economic entity, this is *a fortiori* to be expected.

A European Parliament resolution on the subsidiarity principle of November 1990 had already abandoned the ground of fraudulent labelling and clearly stated: 'Federalisation of the exercise of these powers already existing at Community level would be an initial answer to the question of complying with the subsidiarity principle, which is accordingly closely connected with removing the democratic deficit' (EP-Doc. DE/RR/91692: 6).

Even more than in the federalism principle, boundaries on democratisation are present in the subsidiarity principle, which seeks to permit legislative power over all the parts for the whole only in clearly specified cases. As long as the democratic deficit is invoked, an impossible to criticise label makes it difficult to check centralising tendencies.

Yet, it would be an error to brand this ambiguity as the inability of the actors involved. Unclearly of objectives in the Maastricht Treaty has often revealed its advantages, as Elmar Brok (1992) convincingly argued for in the European Parliament. The subsidiarity principle leaves much open to conflicts of interest. In Germany, the deficit in implementing the pure theory of the market economy without subsidies is complained of, but the subsidiarity principle is invoked as a limit on EU powers as soon as domestic shipyards or coalmines come into the danger zone. When one of the founding fathers proclaimed the slogan 'short and

dark,' he was expressing similar concern at the unenforceability of any constitutional compromise that underlay it.

The controversial question remains as to whether unification of the legal systems and the political cultures can be promoted by a constitution. Answers range from a warning against the excessive expectations on the part of the citizens that a constitution might bring with it (Grimm 1994:51) to the stress on the need for a constitution (Weidenfeld 1991) in order to push forward internal unity. For some (Koch 1997), the leap into the 'revolution' of a constitution is a way out of boredom. Eurosceptics like Kielmansegg (1995:237) still see few chances for a European democracy without a European identity and civil society, and without genuinely European parties and interest groups. Other observers do not pin themselves down precisely (Pies in: Streit & Voigt 1996) and regard both the development of a treaty and a constitution as roads that can be taken. Functional, instead of territorial, representation is, however, regarded by some experts (Kohler-Koch 1999:12) as the likelier line of development in order to overcome the blockage between the democratic and the federal principle.

Constructivism has since taken over the theory of international politics. Analyses of the constitutional-policy preferences of the Member States have shown that it is not so much a rationalist pursuit of power interests as institutionalised constructions of reality that mark constitutional foreign policy in the EU (Wagner 1999:435). No long-term order in the basic preference of the states can be shown, such as those assumed by the neo-realists and the rational-choice theoreticians. As was to be expected, it was, first and foremost, the feature of federal state versus unitary state that was decisive for the political culture of the countries where the reality constructions are rooted. Much the same can also be shown for the conception of citizenship.

In many respects, Euroscepticism recalls the Nineteenth-Century discussions about the integration of new nation-states.

a) Lorenz von Stein (1852:5) once considered Prussia not to be ripe for a constitution, because it was socially too heterogeneous. Similar arguments appear in relation to Europe. But with the exception of a few Eastern districts that were predominantly bilingual, Prussia spoke a single language and could be loosely integrated ideologically on the basis of an 'invented Prussian tradition' running back to the Teutonic Order. Stein was still able to hope that the 'constitutional incapacity' of Prussia would strengthen the constitutional capacity of Germany. The constitutional capacity of the whole of Europe, up to the Bug or even to the Urals, is, by contrast, regarded by no one as being a more favourable precondition for a constitution than the 'mini-Europe' of Maastricht.

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b) Federalism and parliamentarianism were regarded as incompatible—though Saint-Simon had already put the counter-thesis in 1814: that a European federation would first require parliamentary majority rule. In St. Paul's in Frankfurt in 1848, the opposite view prevailed, from the liberal Welcker through to the conservative Radowitz. Despite universal suffrage, Bismarck played off the incompatibility theorem against the parliamentarisation of the Reich after 1871. Conservatives, like Calhoun in America or Konstantin Frantz and Max von Seydel in Germany, overwhelmingly set 'concurrent majorities' against parliamentary majority rule. The incompatibility thesis was still being defended even when Australia and Canada had long proved the contrary. But the parliamentarianism of the 'colonies' had no educational value for continental dogmatics, and, where there were democratic federalists, they tended more to call for the Swiss council system or the US presidential system than for a parliamentary one.

The more recent theoretical approaches see a 'paradox of weakness' (Edgar Grande), weakening both the state and society. The state loses control capacity, since globalisation and regionalisation allow the *bourgeois* to grow beyond the *citoyen* living within the confines of a state. Society also loses, since multi-level interpenetration makes the state becomes less controllable (Zürn 1996:34). Since, in Hirschman's terms, voice becomes harder, exit has become a recommended option. Either a pluralism model which drops the analogies with the theory of forms of government is recommended, or flexibilisation, consisting in a system of veto rights, is demanded (Abromeit 1998:89).

At the moment, it is only the European Charter of Fundamental Rights that is on the programme. Since 1984, European Parliament initiatives in this direction have been delayed. Now, the Charter is hoped for by the end of 2000. Views range from a copy of the European Human Rights Convention up to a new fundamental-rights catalogue with many social fundamental rights. One problem that remains will be the question of whether Member States can be compelled to comply with these rights by sanctions, and how far the right of action against fundamental-rights infringements should be extended before the European Court of Justice, for without it, the Charter would deteriorate into symbolic politics. Parts of the Hessian constitution have repeatedly been found to be incompatible with the constitution, yet no pressure has been put on Hesse to amend them. In Russia, the constitutions of twenty out of twenty-one republics contain clauses that are incompatible with the constitution of the Federation. The Union cannot even apply sanctions against severe infringements of federal comity—except in Chechnya, where the issue is formal secession. Things will not go any better for Europe!

### **3. The Integration of Social Citizens**

A reading of the Maastricht Treaty leaves us with the impression that what is being created is a new welfare state. Article 123 set up a Social Fund. The German obsession with 'equal': now only 'equal-value' since unification included living conditions within Article 117, which talks about 'harmonising standards of living.' It is likely that egalitarian traditions in Europe will never lastingly permit such big differences in social status as exist in the US.

In the seventies, the Left criticised the EU for being a 'supermarket'. The real attempts at fusion did not come until the nineties, and tended to be weaker than the ones extending beyond Europe. A uniform wage policy is not expected from the Maastricht round by the experts (Joerges 1991:283). The first protest actions in Latin countries show that many deteriorations in social conditions are readily laid at the door of the Eurobank, and, indirectly, the Bundesbank.

Positive integration of sovereignties, with the European level being able to regulate broad areas of social policy, is not yet in sight as a continuing process. Waves of national calls for more sovereignty for national decision-makers are likely. The French initiatives by associations of the unemployed are probably only the forerunners of populist tendencies towards re-sovereignisation in the area of welfare policy. The literature on Europe does not comprise agreed-on scenarios for future development. Paradoxically, it tends to be more the 'left' authors, like Leibfried and Offe, who are interested in a policy of more European integration in the social sector. This becomes understandable if one bears in mind that, for party-neutral innovative policies without too much consideration of structures that have grown up nationally, they have more trust in the EU than in the nation-state. One study, in contrast with many opinions to date, arrives at the conclusion that party politics plays a very sub-ordinate part in the Commission's decision-making (Morgan & Tame 1996; Landfried 2001). The mainstream authors on the other side tend more to take the view that the core area of distributive social policy, education and culture will remain a nation-state domain. Authors tending towards attitudes of 'constitutional patriotism' (Nassehi & Schroer 1999:111) rightly take the view that only an extension of welfare policy can lastingly bring about a de-ethnicisation of Europe. Whichever scenario proves the likelier in the future, there is, even now, no doubt that processes above and below the national systems are cramping the national parliaments' space for decision-making. What is controversial is the actual sectors in which the following processes will take place, and how fast they will go:

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- a) A process of *regionalisation*, whereby regional assemblies are seeking to strengthen themselves through the EU regional policy, at the expense of national parliaments.
- b) A process of *Europeanisation*, where increasingly more areas which seemed to have been reserved to the national parliaments are being regulated from Europe. This process is being imperceptibly, but effectively, promoted by European Court of Justice case law and the creeping unification of legal systems.
- c) A process of *globalisation*, where the national level is left only with the consolation that world-wide organisations such as the World Trade Organisation or GATT are beginning to pay the EU back for what it has done to national decision-making bodies, since the room for manoeuvre of even the European organisations is increasingly being hemmed in by the global level, albeit, to date at least, in a highly sectorally-limited fashion to date.

As the social policy competence is taken away from national parliaments, the conflict over its extent can only be settled through sub-classifications. Some point to the effects of unification of corporate-governance and of worker-participation regulations. Others demarcate the merely ‘social regulatory’ measures from the distributive and redistributive measures. The former have undoubtedly been more strongly Europeanised, through Articles 100a and 118a in the Single European Act. The social regulatory areas also include environment protection in Title VII, which Europeanised where the old EC confined itself to merely promoting intergovernmental co-operation. Including the work environment, health, and consumer and environment protection meant that major areas were taken away from national parliaments (Majone 1996).

Yet, there are important reasons in favour of the assumption that the core area of the welfare state will still be nationally regulated for a long time. The model of genuine federations, which continue to endow the individual states with far-reaching competences and have not become ‘unitary federal states’ in the manner of Germany or Austria, demonstrates—especially when exemplified by reference to the US—that the capacity for regional differences to persist is high. In 1990, California was still paying welfare recipients six times as much as poor Alabama. If the old nation-states did not manage to homogenise the welfare state at state level, then it is unlikely that the EU can be more successful here. It has only 4% of the expenditure of all the national governments, and less than 1.3% of the EU gross social product available to it. In view of the budget restrictions, it is unlikely that the nation-states really should want to do anything about the shortage of means for redistributive policies. The successes of individual forms of redistributive policy—such as regional policy—are not so nearly so impressive as to exercise a pulling effect on welfare policy in general.

Thus, alongside security and defence policy, social policy will presumably continue to remain a pillar of the decision-making competence of national parliaments.

The extension of social citizenship will, in the long term, be likely to set off the sharpest conflicts, since the EU has, to date, relied more on the market than on national state institutions (Jachtenfuchs & Kohler-Koch 1996a:29). The nation-states are thereby compelled to dabble in areas that they would have preferred to have left unregulated. Conversely, positive integration is being pushed forward through initiatives from Brussels that lie behind the national legislative initiatives and are often perceived as outside control. According to German estimates, this influence still amounts to less than 10% in the social sphere; whereas, in agriculture, initiatives from Brussels lie behind 42% of German legislative acts in the Bundestag, and already lie behind 100% of legislative acts in the area of Posts and Telecommunications. (Töller 1995:47).

## Summary

Conceptions of citizenship are coming closer together in Europe. The forms of exercise of participation by citizens are still very different, but do not constitute a hindrance to integration. The cultural citizens remain national, and the legal citizens have achieved the furthest-reaching harmonisation, a process encouraged by the European Court of Justice. But even if the latter ventures to take steps which are too large, reactions can be seen in the rigidification among national politicians and even national constitutional courts, as the German Maastricht decision showed. The social citizens, in the end, remain dependent on national social policy, due to the lack of redistributive volume on the part of the EU. It is only in the social regulatory area that integration is advancing speedily.

Symmetry of the four citizenships at European level cannot be expected in the foreseeable future. Some nation-states have also taken long to reach this symmetry of legitimation of the community and its citizenship. It is improbable that spectacular work on a European constitution can accelerate this integration of all four citizenships. Instead, new superfluous conflicts are to be expected. In any case, the fixation on a constitution seems, in an international comparison, to be a fairly German debate. The Charter of Fundamental Rights will presumably arrive. The organisational part of a constitution can be coped with by documents similar to the statutes of an organisation. The French Third Republic may serve as an example: *'rien ne dure que le provisoire'* was coined for the three Acts which, after 1875, had to stand in for a unitary constitution because the two camps would not have been able to agree on a text. Without the 1940 defeat, the



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1875 arrangements might still exist today. Britain is still able to do without a unitary constitutional text today. Poland was able to live with the ‘mini-constitution’ till 1997. Hungary still has the drawing up of a definitive constitution before it. Why should Europe hasten on further than some nation-states have done?

Voices that see non-ratification of the European Constitution as a greater evil than the waiving exercise of the European *pouvoir constituant* are multiplying (Di Fabio, *Frankfurter Allgemeine Zeitung*, 30.6.2000:6). Even the advocates of a European Constitution are no longer calling for a ‘constitutional big bang’ (Europa-Kommission 2000:30). Even a European constitutional system would have to admit the pursuit of national interests ‘without pressure from majority votes’ (Lepsius 2000:304), and this would be easier to achieve by dividing the treaties in two (Dehaene Group) and tolerating the ‘*système inédit*’ of rudimentary basic treaties that will, but only in the long run, press in the direction of a unitary constitution.

In times of prosperity much is tolerated, and ignored, because of a lack of transparency, by the citizens of the Member States. All the steps towards integration—especially in the social sphere, where the cost overhangs lead to redistribution desires in relation to the financial burdens—should also be seen from the viewpoint of protection against right-wing extremism and militant populism. The Haider syndrome is not some sort of small-state phenomenon. Even the non-member Switzerland has caught the *bacillus*, and from Glistrup’s followers in Denmark up to the *Allianza Nazionale* and the *Lega* in Italy there are political explosives around in the national party systems that could rebound against any overly hasty steps to integration.

CHARLES LEBEN

## **Fédération d'Etats-nations ou Etat fédéral?**

Il est rare que la réflexion propre d'un homme politique majeur se dégage des problèmes immédiats et pressants de sa charge pour porter sur des problèmes de fond dont la résolution ne peut être immédiate. Quand tel est le cas, l'analyse dénote alors la capacité à penser à long terme, c'est-à-dire à avoir une vraie vision d'avenir. C'est précisément ce qui fait tout l'intérêt du discours prononcé par le ministre des affaires étrangères allemand, Joschka Fischer, devant l'Université Humboldt de Berlin, le 12 mai 2000.

Nous ne souhaitons pas ici reprendre tous les éléments de cette analyse très riche mais nous fixer uniquement sur les problèmes de théorie de l'Etat qui sont au cœur de la réflexion de J. Fischer. Et de la même façon que celui-ci se place délibérément dans le long terme, qu'il prend le soin de souligner qu'il ne s'agit que de réflexions personnelles et que « nul n'a [...] besoin de redouter ces thèses » (p.6 du texte français), nous nous livrerons à une réflexion théorique « au-delà de la Conférence intergouvernementale » comme il le précise encore.

Si on veut résumer la question que le ministre des affaires étrangères d'Allemagne se pose et pose à ses partenaires de l'Union, on pourrait dire la chose suivante: comment rendre les institutions communautaires, plus simples plus transparentes, plus efficaces, plus démocratiques, plus accueillantes pour les candidats, plus efficaces à 30 qu'à 15, tout en permettant de progresser sur la voie de l'intégration et en conservant intacts les Etats-nations? Il y a là un problème qui n'est pas loin de ressembler à celui de la quadrature du cercle.

Pour J. Fischer, la solution est relativement simple: il s'agit de passer du stade actuel de l'Union qu'il analyse, très justement (nous le verrons) comme celui d'une Confédération, à un stade supérieur qu'il dénomme Fédération et dont il nous faudra examiner les caractéristiques. Cependant, avant de le faire, il serait bon de préciser quelle est la source de la majeure partie des dysfonctionnements de la Communauté (ou de l'Union).

## **1. Les raisons des dysfonctionnements de l'Europe communautaire**

Ces raisons, nous semble-t-il, résident dans la double logique qui, dès l'origine, commande le fonctionnement des trois Communautés. D'une part, ces Communautés, fondées chacune par un traité constituent des organisations internationales au sens classique du terme en droit international public. La logique qui préside à une telle organisation est la logique intergouvernementale ou mieux, interétatique. Cela signifie que ce sont les Etats souverains qui sont les maîtres du jeu et qu'il n'y a pas de sens à parler de démocratie au sein de telles institutions car la seule légitimité qui compte est celle des Etats et de leur égalité souveraine.

Cependant, et en même temps que cette logique, une autre est en œuvre dans les Communautés qui est une logique d'intégration ou, si l'on veut une logique supranationale. Celle-ci s'exprime i) dans l'institution de la Commission, ii) dans la possibilité donnée à l'autorité communautaire (Commission et Conseil) de créer du droit dérivé qui peut avoir, lorsqu'il s'agit du règlement, un effet direct total, iii) dans la création d'une Cour de justice qui par sa jurisprudence a élargi la possibilité pour tout le droit dérivé à avoir un effet direct tout en affirmant la primauté du droit communautaire sur tout le droit national. A cela il faut encore ajouter l'existence d'un parlement, élu au suffrage universel direct, et dont les pouvoirs ont été accrus par les différents traités qui sont venus réviser les traités originels.

Il en est résulté, au fur et à mesure de l'évolution de la construction communautaire, une grande confusion quant à la détermination du détenteur du Pouvoir ultime dans la Communauté: le Conseil i.e. l'organe étatique? Ou la Commission, organe supranational? Voire le Parlement européen? Ou la Cour de justice elle-même?. Une autre confusion n'a cessé de planer sur la répartition des compétences entre les Etats et la Communauté, répartition nulle part définie clairement et laissée au travail jurisprudentiel de la C.J.C.E. c'est-à-dire d'un organe voué en fait à défendre le caractère supranational de la Communauté.

D'où les reproches d'opacité des décisions et de déficit démocratique adressés aux institutions, pour ne prendre que ces reproches là. On remarquera, à ce stade, que le reproche portant sur le déficit démocratique, implique que l'on considère la Communauté (et au-delà l'Union), comme autre chose qu'une simple organisation internationale. On n'a jamais reproché aux Nations Unies, par exemple, de souffrir d'un déficit démocratique. On a pu leur reprocher la composition obsolète, selon certains, du Conseil de sécurité mais de critiques quant à la démocratie, la séparation des pouvoirs, l'Etat de droit, à notre

connaissance, point. C'est que l'O.N.U. fonctionne selon la logique de l'organisation internationale, i.e. selon la logique inter-étatique.

Mais si, en revanche, on parle pour l'Union de déficit démocratique, c'est nécessairement par rapport aux citoyens de l'Union. Cela suppose que le fondement ultime de la légitimité de l'institution dont on parle est le peuple, le peuple de l'Union, le peuple qui, dans la théorie démocratique est le souverain, qui décide soit par lui-même soit par ses représentants et qui contrôle l'Exécutif. Mais la suprématie de la logique démocratique sur la logique interétatique n'est pas organisée par les traités qui, au moins dans leur rédaction initiale, donnent la suprématie à l'organe, le Conseil, qui représente la logique interétatique. Et plus la construction communautaire avance, c'est-à-dire, plus les éléments d'intégration progressent, plus la distorsion entre les deux logiques s'accroît au point de devenir insupportable. C'est ce que J. Fischer voit bien lorsqu'il constate que:

La communautarisation de l'économie et de la monnaie a créé un rapport antagoniste avec les structures politiques et démocratiques, qui restent à mettre en place...(p.4)

La solution simple (au plan logique mais non point au plan politique) à ces problèmes serait de constituer un Etat fédéral permettant de dépasser l'antagonisme de ces deux logiques et de mettre en place les institutions démocratiques et de l'Etat de droit: Parlement doté de vrais pouvoirs législatifs, un Exécutif responsable, des institutions judiciaires indépendantes et impartiales le tout reposant sur une constitution comprenant une charte des droits de l'homme. Mais c'est précisément cette solution simple que le ministre allemand s'interdit d'invoquer car il sait que sa seule mention rencontrerait auprès de certains des Etats de l'Union une hostilité telle qu'elle ne permettrait pratiquement pas la discussion.

C'est pourquoi il imagine une autre solution qu'il appelle la Fédération et non l'Etat fédéral (*Föderation* et non *Bundesstaat*). En quoi consiste cette solution, est-elle théoriquement fondée et pratiquement réalisable, c'est ce que nous allons essayer d'examiner maintenant.

## **2. Fédération et théorie constitutionnelle de l'Etat**

S'agissant de l'étude des regroupements d'Etats, et l'Union européenne constitue bien un tel regroupement, la théorie constitutionnelle classique ne connaît que deux figures possibles: la Confédération d'Etats et l'Etat fédéral. Peut-il exister un troisième genre, Fédération mais non pas Etat fédéral comme semble le suggérer le discours de J. Fischer?

## 2.1. Confédération d'Etats et Etat fédéral

Dès la fin du XIX<sup>ème</sup> siècle les constitutionnalistes allemands (Laband et Jellineck) tous comme les français, à partir de la thèse de L. Le Fur qui inspirera les réflexions d' Esmein, d'Hauriou, de Duguit et de Carré de Malberg, vont formuler une distinction juridique claire quant à la distinction entre deux grandes formules de regroupement d'Etats: les confédérations et les fédérations.<sup>1</sup> La Confédération d'Etats, ne constitue pas un nouvel Etat mais seulement une association d'Etats souverains (*Staatenbund*) alors que l'Etat fédéral (*Bundesstaat*) est comme son nom l'indique à la fois *Staat* et *Bund*, Etat et fédération. Comme l'écrit L. Le Fur: « L'Etat fédéral, à raison de sa qualité d'Etat, possède la souveraineté » (p.590) alors que « la Confédération d'Etats n'est qu'une association d'Etats souverains [et] ne possède pas elle-même la souveraineté ni par conséquent le caractère d' Etat. » (p.498)

Au XX<sup>ème</sup> siècle Hans Kelsen, tout en inscrivant sa théorie du fédéralisme dans le cadre d'une théorie plus générale de la centralisation et de la décentralisation des ordres juridiques<sup>2</sup>, confirme la distinction entre la Confédération d'Etats qui est un regroupement d'Etats qui n'est pas lui-même un Etat mais une « union d'Etats purement internationale [...] à l'image de la Société des nations », et l'Etat fédéral qui est, comme son nom l'indique, un Etat au sens du droit international. Les membres de la fédération sont, tout au contraire, des collectivités qui ne sont plus des Etats au sens du droit international. En effet, leur fondement se trouve dans la constitution de l'Etat fédéral et non plus directement dans l'ordre juridique international.<sup>3</sup> C'est donc bien à juste titre que J. Fischer qualifie l'Union actuelle de confédération. Mais qu'entend-il exactement par Fédération?

## 2.2. La Fédération (J. Fischer) ou Fédération des Etats-nations (J. Delors)

On dispose d'un témoignage sur le fait que le choix de l' expression « Fédération » a posé problème au ministre des affaires étrangères d'Allemagne. Dans le face à face Chevènement-Fischer reproduit dans le *Monde* du 21 juin 2000 (p.15-17), le ministre français de l'intérieur ayant déclaré à propos de

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<sup>1</sup> V. L. Le Fur, *Etat fédéral et confédération d'Etats*, Paris, thèse 1896, reprise 2000 avec un avant-propos de Charles Leben (le Fur 2000); pour une revue de la doctrine allemande sur la question (Beaud 1999).

<sup>2</sup> Pour une tentative d'analyse de la Communauté européenne dans le cadre conceptuel kelsénien, Leben (1991).

<sup>3</sup> H.Kelsen, *Théorie générale du droit et de l'Etat*, (1997:367).

l'Union européenne qu': « [e]lle n'est ni une fédération ni une confédération. Elle est quelque chose qui n'a jamais été décrit nulle part et qui ne ressemble même pas au Saint empire romain germanique », J. Fischer précise: « Nous avons cherché un mot allemand neutre, en lieu et place de fédération. Traduit en français ou en anglais, c'est toujours fédération; aussi nous nous sommes résignés. Nous devons accepter le fait que fédération est le mot qui convient le mieux. »<sup>4</sup>

Et l'on voit bien pourquoi le mot fédération gênait le ministre allemand: dans la langue commune, tout comme dans la langue des constitutionnalistes, « fédération » évoque immédiatement « Etat fédéral » et c'est ce qu'il s'agit d'éviter même au prix d'un vocabulaire polémique qui est absent du reste de son discours devant l'Université Humboldt. C'est ainsi qu'il déclare:

C'est uniquement si l'intégration européenne conserve les Etats-nations dans une telle Fédération, qu'elle ne dévalorise pas, voire ne fait pas disparaître complètement, leurs institutions qu'un tel projet sera réalisable en dépit des énormes difficultés qu'il présente. Autrement dit, la conception qui prévalait jusqu'à présent d'un Etat fédéral européen, qui remplacerait comme nouveau souverain les anciens Etats-nations et leurs démocraties, s'avère être une *élucubration artificielle* qui se situe en dehors des réalités européennes traditionnelles. (p.7, c'est nous qui soulignons).

C'est qu'à première vue, la solution proposée par J. Fischer aux problèmes de la Communauté ressemble furieusement à un Etat fédéral. Ainsi, toujours à la même p.7 il écrit qu'à tous les problèmes de l'élargissement de l'Union:

il existe une réponse toute simple, le passage de la Confédération de l'Union à l'entière parlementarisation dans une Fédération européenne [...]. Et cela ne veut pas dire moins qu'un parlement européen et un gouvernement européen lui aussi, qui exercent effectivement le pouvoir législatif et le pouvoir exécutif au sein de la fédération. Cette Fédération devra se fonder sur un traité constitutionnel.

Si on ajoute que ce parlement européen comportera deux chambres, l'une pour représenter l'Europe des Etats-nations (un « sénat » sur le modèle américain ou allemand, p.8) un gouvernement européen, pouvant être constitué à partir des gouvernements nationaux (p.8) ou bien procédant de l'élection d'un président au suffrage universel indirect et « dotés de vastes pouvoirs exécutifs », distinct de la Commission qui deviendrait un simple organe administratif<sup>5</sup>, on peut

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<sup>4</sup> *Le Monde* 21 juin 2000, p.17, 6ème colonne. Sur la comparaison, pour le moins curieuse, entre l'Union et le Saint empire romain germanique, V. p.16, 1ère colonne.

<sup>5</sup> C'est cette solution qui a sa préférence, V. sa déclaration devant la commission des affaires const. du Parlement européen, le *Monde* du 8/7/00 et *International Herald Tribune* du 7/7/00. Mais l'idée est rejetée par le chancelier Schröder qui la qualifie de « parfaite illusion », le *Monde* du 18/7/00, p.3.

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légitimement se poser la question de ce qui séparerait vraiment cette Fédération qu'il qualifie avec Jacques Delors de « Fédération d'Etats-nations » (p.10) d'un Etat fédéral classique.

Et ceci, est politiquement capital puisque son collègue français H. Vedrine, dans sa « Réponse à Joschka Fischer » publié par le *Monde* du 11-12 juin 2000, met les points sur les i en écrivant:

La nœud de la réflexion, ce sont les concepts de fédération et de fédération d'Etats-nations. S'agit-il au bout du compte d'une seule et même chose, le fédéralisme classique? Dans ce cas nous allons vers un blocage.

Tout dépend donc, dans le modèle constitutionnel présenté par le ministre allemand, de la survie des Etats-nations qui ne disparaissent pas, comme dans l'Etat fédéral, ou plutôt, si l'on reprend ce qui pourrait être une imprudence de plume, ne disparaissent pas « complètement » (V. citation supra). Une chose est d'affirmer la coexistence de la Fédération et des Etats-nations, autre chose est d'en présenter un tableau convaincant. Or, nous avons vu que dans cette Fédération il y aura un Parlement européen, constitué de deux chambres, et doté du pouvoir législatif, un gouvernement européen (peut-être sous la houlette d'un Président de l'Union), pour agir en tant qu'Exécutif et il y aura aussi un « traité constitutionnel consignant ce qui sera réglé au niveau européen et ce qui continuera à l'être à l'échelon nationale » (p.8).

Ainsi, au lieu de ce que le ministre appelle correctement une « communautarisation inductive », on aura « une réglementation précise de la répartition des compétences entre la Fédération et les Etats-nations dans le cadre d'un traité constitutionnel [qui] devrait laisser à la Fédération les domaines de souveraineté essentiels et uniquement les questions demandant à être réglées impérativement au niveau européen, tandis que tout le reste [le moins essentiel, ne l'oublions pas] demeurerait de la compétence des Etats-nations » (p.8).

Pour savoir à quoi ressemblerait cette « Fédération finale » (p.9) on peut encore se reporter à la description que donne J. Fischer de la Fédération qui pourrait être constituée entre les Etats appartenant au « centre de gravité » et décidés d'aller de l'avant sans attendre que tous les Etats de l'Union soient prêts à en faire autant. Et voici comment le ministre voit l'action des Etats appartenant à ce centre de gravité:

Un tel groupe d'Etats conclurait un nouveau traité fondamental européen qui serait le noyau d'une constitution de la Fédération. Sur la base de ce traité fondamental, la Fédération se doterait de ses propres institutions, d'un gouvernement qui, au sein de l'UE, devrait parler d'une seule voix au nom des membres du groupe dans un nombre de questions aussi grand que possible, d'un parlement fort et d'un président directement élu. Un tel centre de gravité devrait-être l'avant garde, la locomotive du parachèvement

de l'intégration politique et comprendre déjà tous les éléments de la future Fédération.  
(p.11).

Sans nous attarder sur la faisabilité d'une telle Fédération au sein de l'Union, on remarquera que l'aspect « militant » de cette Fédération qu'on pourrait appeler « intérieure » *et qui ne serait toujours pas, en principe, un Etat fédéral*, est malgré tout difficile à concilier avec un modèle constitutionnel dans lequel les Etats-nations conservent leurs souveraineté: la Fédération parle d'une seule voix, dans un nombre de questions aussi grand que possible, elle dispose d'un parlement fort et d'un président directement élu.

Or cette Fédération intérieure préfigure la Fédération européenne dernière étape de l'intégration européenne (p.12). Peut-on se satisfaire, dans ces conditions, de l'affirmation que

[t]out cela ne sonnera pas pour autant le glas de l'Etat nation. Car pour le "sujet" de cette Fédération finale, l'Etat-nation avec ses traditions culturelles et démocratiques demeurera irremplaçable, pour légitimer une union des citoyens et des Etats qui soit pleinement accepté par les populations. (p.8-9).

Ou encore:

[p]arachever l'intégration européenne n'est concevable que si ce processus s'effectue sur la base d'un partage de souveraineté entre l'Europe et l'Etat-nation [...] Que peut bien signifier le "partage de souveraineté"? Comme je viens de le dire, l'Europe n'émergera pas dans un espace politique vide ; de là découle un autre aspect de notre réalité européenne, à savoir les cultures politiques nationales différentes et leurs opinions publiques démocratiques, que séparent en outre des barrières linguistiques. (p.7-8).

### **3. Souveraineté et Etats-nations**

Il nous semble que l'une des difficultés qui s'attache à la discussion actuelle est la confusion entre une notion juridique, celle de la souveraineté et une notion historique, politique, voire même philosophique qui est celle de l'Etat-nation.

#### ***3.1. La souveraineté***

On ne peut entrer ici dans les discussions complexes sur la notion de souveraineté. On se contentera de quelques remarques. Parmi les diverses acceptions que peut revêtir cette notion on en retiendra deux. S'agissant d'un Etat, et dans la sphère du droit international public, on appelle souverain un Etat qui n'est pas sous la dépendance juridique d'un autre Etat ou pour le dire comme Kelsen, un Etat qui trouve son fondement directement dans l'ordre juridique



international et non dans la constitution d'un autre Etat.<sup>6</sup> C'est pourquoi les Etats membres d'une fédération ne sont pas souverains au sens du droit international alors que ceux qui font partie d'une Confédération le sont.

Dans l'ordre juridique interne, on appelle souverain l'être réel ou fictif qui possède la *summa potestas*, et dont dépend toute la légalité/légitimité de cet ordre. C'est ainsi qu'on dira que dans tel Etat c'est le peuple ou la nation qui sont le souverain.

Si l'on en revient au droit international, le problème que posent les regroupements d'Etat est celui des « limitations » ou des « transferts » de « souveraineté » ou de « compétences » que la plupart des constitutions autorisent au bénéfice de ce qu'on peut appeler d'un terme général, les organisations internationales. C'est ainsi qu'en France, le Conseil constitutionnel après avoir distingué les « limitations » de souveraineté (permises) des « transferts » de souveraineté (inconstitutionnelles et demandant éventuellement une révision de la Constitution), utilise actuellement la notion de traités (ou dispositions de traités) portant atteinte ou non « aux conditions essentielles de l'exercice de la souveraineté nationale ».<sup>7</sup>

On remarquera cependant que jusqu'à présent, chaque fois que le Conseil a rencontré de telles dispositions, dans les traités de Maastricht et d'Amsterdam par exemple, il s'en est suivi non pas le refus par la France de ratifier ces traités mais la révision de la constitution française. Il faut en tirer la conclusion que ces dispositions tout en portant atteinte « aux conditions essentielles de l'exercice de la souveraineté nationale » ne le faisait pas à un degré tel que les autorités françaises aient vraiment craint pour la souveraineté de la France.

On imagine pourtant bien qu'un Etat qui transférerait toutes ses compétences à une organisation internationale (un regroupement d'Etats) perdrait sa souveraineté au regard du droit international. Où se trouve donc le point de rupture? La réponse de la doctrine internationale classique est que le transfert par un Etat de ses compétences en matière de conduite des relations extérieures et en matière de défense nationale entraîne la disparition de la souveraineté au sens du droit international.<sup>8</sup> A cela certains ajoutent également, mais à tort selon nous, le transfert des compétences monétaires ».<sup>9</sup>

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<sup>6</sup> H.Kelsen, (1997:365-372).

<sup>7</sup> O.Beaud, (1993:1052 *et seq*).

<sup>8</sup> Le point est bien vu par le président J. Chirac dans son discours devant le Bundestag du 27 juin 2000 : « Ni vous ni nous n'envisageons la création d'un super Etat européen qui se

On notera que dans son discours, J. Fischer, pour mettre en valeur la « césure de portée véritablement historique » opérée par l'Union européenne, note que « [à] Maastricht, l'un des trois domaines essentiels de la souveraineté de l'Etat-nation moderne—monnaie, sécurité intérieure et sécurité extérieure- a été pour la première fois transférée sous la responsabilité exclusive d'une institution européenne » (p.4). Cela ne correspond pas tout à fait aux critères que nous avons énoncés mais cela s'en rapproche. Cependant tant que les Etats restent maîtres, en dernier ressort, de leur politique de défense et de leur politique extérieure, ce qui est toujours le cas dans l'Union actuelle, ils conservent leur souveraineté. Si dans ces domaines les Etats transféraient véritablement leurs compétences, i.e. leur droit de décider, en dernière instance et pour eux-mêmes de leur politique, alors il y aurait perte de la souveraineté.

De même, si la Fédération devait se doter d'un Parlement possédant de vrais pouvoirs législatifs, dans des domaines conséquents et sans tutelle ni du « gouvernement » de la Fédération ni des parlements nationaux, cela marquerait sans doute la création d'un Etat fédéral. Notons que c'est sur ce sujet que les propositions de J. Fischer apparaissent non seulement les plus faibles mais aussi les plus inconséquentes. Tout à sa volonté de « vendre » l'idée de Fédération laissant leur souveraineté aux Etats-nations, il propose pour la chambre représentant les citoyens de l'Union une bien curieuse solution. Cette chambre écrit-il (p.8) « serait composée de députés élus appartenant en même temps aux parlements nations » ce qui permettrait « d'éviter tout antagonisme entre les parlements nationaux et le parlement européen. »

Mais qu'est-ce à dire? Les parlementaires européens devraient-ils être l'image fidèle des divisions partisans des parlements nationaux? Devraient-ils être élus par ceux-ci selon le système représentatif de façon à reconstituer, au niveau du Parlement européen des sortes de petits parlements français, allemands, anglais etc? Devraient-ils démissionner en cas de nouvelles élections nationales ou de changements de majorité nationale? Seraient-ils prisonniers d'un mandat impératif et pourraient-ils être rappelés par les parlements nationaux si d'aventure ils exprimaient par leur vote des convictions différentes de celles leurs mandants? Voilà une étrange façon de faire avancer la cause de la construction européenne.

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substituerait à nos Etats-nations et marquerait la fin de leur existence comme *acteurs de la vie internationale* ». (le Monde du 28 juin 2000, p.16).

<sup>9</sup> Ch.Leben (1991:69-72). Il existe depuis longtemps une union économique et monétaire entre la Belgique et le Luxembourg sans que cette union ait eu pour conséquence la fin de la souveraineté de chacun de ces Etats.

Un dernier mot encore sur l'idée de « constitution européenne » idée récurrente, reprise par le président Jacques Chirac dans son discours devant le Bundestag le 27 juin 2000.<sup>10</sup> Nous ne voulons pas discuter ici du fait de savoir si une telle « constitution » est oui ou non souhaitable pour permettre une répartition des compétences plus claires et plus simples, une meilleure participation des citoyens et un accroissement de la démocratie au sein de l'Union. Nous voudrions simplement rappeler que le mot « constitution » ne renvoie par lui-même à aucune structure institutionnelle. C'est ainsi que le traité créant certaines organisations internationales est dénommé « constitution ». C'est le cas, par exemple, du traité créateur de l'Organisation internationale du travail (« la constitution de l'O.I.T. »).

Il est vrai cependant que la pyramide normative d'un Etat est couronnée par ce qu'on appelle d'ordinaire, une constitution. Dans le cas d'un Etat fédéral, cette constitution peut trouver son origine dans un ou plusieurs traités. Dans ce cas, la constitution de la fédération est l'objet du traité par lequel des Etats jusqu'alors indépendants s'unissent pour créer un nouvel Etat fédéral. Le traité d'union politique conclu par les deux Etats allemands le 31 août 1990 pour leur réunification, est un exemple récent d'une telle hypothèse.<sup>11</sup> Dans quelle condition le passage de l'acte international à l'acte de droit interne se produit-il?

Ch. Eisenmann l'a clairement expliqué. La transformation s'opère « dès lors que le traité prévoit que ses clauses sur l'organisation de la collectivité qu'il crée pourront être révisées selon une procédure de législation interne, de révision constitutionnelle, c'est-à-dire selon une règle de majorité et non plus d'unanimité. » Dans ce cas en effet, les clauses sur l'organisation de la collectivité regroupée, « bien qu'elles aient été originellement règles de droit international », se transforment en règles de droit étatique du fait du mode de leur modification ultérieure. Le mode d'établissement historique dans le passé ne compte plus: le traité [devient] constitution. »<sup>12</sup>

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<sup>10</sup> Texte reproduit par le *Monde* du 28 juin, p.16-17. V. aussi la proposition commune de Daniel Cohn-Bendit et François Bayrou présentée le 13 juin à Strasbourg, le *Monde* du 14 juin 2000.

<sup>11</sup> V.M. Fromont (1991) et les autres articles de ce numéro de la *Rev. fr. de dr. const.* consacré au thème « réunification de l'Allemagne et Constitution ».

<sup>12</sup> Ch.Eisenmann (1982). V. aussi Le Fur (2000:540-589), pour les discussions sur ce problème dans les doctrines française et allemande à la fin du XIXème siècle.

### 3.2. Etats-nations

Si l'on examine maintenant le concept d'Etat-nation dont personne ne veut « sonner le glas », il y a, nous semble-t-il une ambiguïté qui brouille les discussions. Il faut remarquer que l'expression Etat-nation n'apparaît pratiquement pas, sauf erreur de notre part, dans les ouvrages et traités de théorie de l'Etat ou de droit constitutionnel, du moins dans ceux que nous avons pu consulter. On le chercherait en vain, par exemple, dans la *Théorie pure de l'Etat* ou dans la *Théorie générale du droit et de l'Etat* de Kelsen. On trouve dans ces ouvrages de longues études sur les Etats fédéraux, les Etats unitaires, les Etats décentralisés ou centralisés mais rien sur les Etats-nations. Dans la *Contribution à la théorie générale de l'Etat*, Carré de Malberg consacre des développements à l'idée de l'union de l'Etat et de la nation. Par là il veut repousser les thèses qui soutiennent que la nation est le sujet originaire de la souveraineté, qu'elle a donné naissance à l'Etat auquel elle est antérieure. Pour l'éminent constitutionnaliste, au contraire « l'Etat n'est pas un sujet juridique se dressant en face de la nation et s'opposant à elle: mais dès qu'il est admis que les pouvoirs de nature étatique appartiennent à la nation, il faut admettre aussi qu'il y a identité entre la nation et l'Etat, en ce sens que celui-ci ne peut-être que la personnification de celle-là. »<sup>13</sup>

Mais nous ne croyons pas que c'est à cette discussion, tournant autour de la conception très spécifique de la souveraineté nationale chez les constitutionnalistes français, que pensent les défenseurs de l'idée de l'Etat-nation. Il s'agit plutôt pour ceux-ci de défendre la pérennité d'une collectivité fondée dans et par l'histoire et qui exprime un héritage culturel, religieux, linguistique, politique et en fin de compte un « vouloir vivre ensemble » (Renan) d'une qualité toute spéciale.

Ce vouloir vivre ensemble doit-il nécessairement impliquer que la collectivité dans lequel s'exprime la nation soit un Etat souverain au sens du droit international?<sup>14</sup> C'est ce que pensent indubitablement les « souverainistes » au

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<sup>13</sup> V.Carré de Malberg, *Contribution à la théorie de l'Etat*, Paris, Sirey, 1920, reprise 1969 (de Malberg 1969:12-13).

<sup>14</sup> C'est là l'idée défendue par le président J. Chirac dans son discours devant le Bundestag : « Nos nations sont la source de nos identités et de notre enracinement. La diversité de leurs traditions politiques, culturelles et linguistiques est une des forces de l'Union. Pour les temps qui viennent, les nations resteront les premières références de nos peuples. Envisager leur extinction serait [...] absurde... » (le *Monde* du 2 juin 2000). Mais qui dit que l'instauration d'un Etat fédéral entraînerait l'extinction des identités nationales? Ce que l'on voit dans des Etats fédéraux (Etats-Unis, Allemagne, Suisse) avec des Etats

point que lors des débats sur la ratification du traité de Maastricht, on a entendu des hommes politiques déclarer que même un référendum très largement majoritaire ne pourrait pas faire disparaître la France souveraine, car celle-ci n'appartient pas à une génération. Chacune l'a reçue de ses pères et à le devoir de la transmettre toujours aussi souveraine à ses enfants.

Il y a là une opinion politique tout à fait respectable mais qui n'implique pas, à notre sens, que l'héritage culturel, religieux, linguistique, politique et ce « vouloir vivre ensemble » d'une qualité toute spéciale doive nécessairement s'exprimer au sein d'un Etat souverain plutôt qu'au sein d'un Etat fédéré au sein d'un Etat fédéral plus large. Est-il imaginable que le « génie » français, italien, anglais, allemand etc. ne puisse s'exprimer dans un Etat fédéré? Nos nations ne sont-elles pas suffisamment anciennes pour autoriser cette hypothèse? De sorte que lorsque J. Fischer souligne que dans la Fédération (européenne) finale, « l'Etat-nation avec ses traditions culturelles et démocratiques demeurera irremplaçable pour légitimer une union des citoyens et des Etats qui soit pleinement acceptée par les populations » (p.9), cela ne signifie pas, à nos yeux, que tout cela n'est possible que si les Etats-nations conservent leur souveraineté au sens du droit international car, dans ce cas, nous ne voyons toujours pas comment on peut concilier la Fédération européenne et les Etats-nations (sous-entendu, Etats toujours souverains).

#### **4. La Fédération européenne et la quadrature du cercle**

On en revient alors à notre question de départ: comment rendre les institutions communautaires, plus simples plus transparentes, plus efficaces, plus démocratiques, plus accueillantes pour les candidats, plus efficaces à 30 qu'à 15, tout en permettant de progresser sur la voie de l'intégration et en conservant intacts les Etats-nations? Une doctrine récente, s'inspirant des idées de Carl Schmitt sur le « pacte fédératif » et représentée de façon talentueuse en France par le Pr Olivier Beaud, pense pouvoir concilier des éléments dont on pourrait croire qu'ils sont inconciliables. C'est ainsi qu'Olivier Beaud écrit:<sup>15</sup>

Le propre de cette théorie du pacte fédératif tient à ce que la création de la Fédération ne fait pas disparaître le caractère d'unité politique aux Etats-membres qui l'ont conclu. Autrement dit, il n'y a pas fusion des unités politiques constituantes dans un ensemble

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fédérés à la personnalité moins ancienne et moins riche que celle des nations de l'Union, ne conduit pas nécessairement à cette conclusion.

<sup>15</sup> O.Beaud (1993:269). Et V. Carl Schmitt, *Théorie de la constitution*, («Théorie constitutionnelle de la Fédération»), (1989:507-540). Il serait intéressant de savoir dans quelle mesure J. Fischer (ou ses conseillers) sont influencées par ces idées schmittiennes.

plus vaste, c'est-à-dire pas d'absorption des Etats dans la Fédération. De ce point de vue, cette théorie de la Fédération se démarque du droit commun de la personnalité morale ; en droit privé, la personne collective créée fait écran entre ses fondateurs et ses organes et l'on pourrait dire que ceux-ci se substituent à ceux-là. Au contraire, dans cette conception de droit public de la fédération, les auteurs du pacte, les sujets du pouvoir constituant, continuent à exister.

On voit bien l'intérêt politique d'une telle construction qui ferait s'évanouir, comme par enchantement, toutes les contradictions sur lesquelles les analystes de l'Union européenne buttent: beaucoup plus qu'une organisation internationale, c'est-à-dire une Confédération (avec qui elle partage la création par un traité et le maintien de la souveraineté des Etats membres), moins qu'un Etat fédéral (mais pour combien de temps si des compétences sans cesse plus nombreuses lui sont transférées?) l'Union baptisée Fédération, au sens de Carl Schmitt, pourrait à la fois être aussi puissante et efficace qu'un Etat fédéral tout en maintenant strictement la personnalité et la souveraineté de ses constituants.

Nous avouons être sceptique sur un tel dépassement hégélien des contraires et sur l'apparition d'une synthèse nouvelle. Nous ne voyons pas comment, dans la théorie de l'Etat, on pourrait glisser un «nouvel animal» comportant tous les avantages juridiques et politiques de l'Etat fédéral tout en conservant la souveraineté pleine des « Etats-nations ». Mais nous comprenons très bien que les hommes politiques, soit par croyance sincère soit par calcul, essaient d'acclimater l'idée qu'un tel résultat pourrait être atteint. Si la construction communautaire, si l'Europe, est à ce prix, personnellement, nous l'acquiesçons volontiers. Et après tout, nous nous sentons trop incertain dans nos analyses « académiques » pour exclure absolument que la synthèse nouvelle défendue par la doctrine que nous venons de résumer soit totalement exclue.

Cependant, et malgré tout, nous tenons à la vieille idée spinoziste que l'essence du cercle est irrémédiablement différente de celle du carré et *tertium non datur*.



CHARLES LEBEN\*

## **A Federation of Nation States or a Federal State?**

It is rare for a major politician's thoughts to turn away from the immediate and pressing problems of his position in order to consider basic problems whose solutions cannot be immediate. When it does happen, the analysis brings out the capacity for long-term thinking, that is, the capacity to have a genuine vision of the future. This is just what makes the speech given by German Foreign Minister Joschka Fischer at the Humboldt University in Berlin, on 12 May 2000, so interesting.

We do not wish to pick up all the elements of this very rich analysis here, but to focus solely on the problems in the theory of the state that are at the core of Joschka Fischer's thinking. And just as he deliberately expresses himself in the long term, taking care to stress that these are only personal thoughts and that 'no-one need be afraid of these ideas' (p. 8 of the English version), we shall devote ourselves to theoretical thinking 'beyond the Intergovernmental Conference,' as he, once again, specifies.

Wishing to summarise the question that the German Foreign Minister asks both himself and his Union partners, one might put it like this: how can the Community institutions be made simpler, more transparent, more effective, more democratic, more welcoming to candidates, more effective with thirty countries, rather than fifteen, while enabling progress along the path of integration and maintaining the nation-states intact? This is a problem that looks rather like squaring the circle.

For Joschka Fischer, the solution is fairly simple: to move from the present state of the Union, which he, as we shall see, very rightly analyses as that of a confederation, to a higher stage which he calls a federation, whose features we shall have to examine. However, before doing so, it would be a good idea to clarify the source of the bulk of the Community's (or the Union's) dysfunctions.

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\* Translated by Iain L. Fraser.



## 1. The Reasons for Community Europe's Dysfunctions

These reasons, we feel, lie in the twofold logic which presided over the functioning of the three Communities from the outset. On the one hand, these Communities, each founded by a treaty, constitute international organisations in the classical sense of the term in public international law. The logic governing such organisations is an intergovernmental, or better-stated, inter-state, logic. It means that it is the sovereign states that are the masters of the game and that there is no point in talking about democracy without such institutions, since the only legitimacy that counts is that of the states and their sovereign equality.

Yet, simultaneously parallel to this logic, there is another one at work in the Communities: a logic of integration, or, if you wish, a supranational logic. This is expressed in 1) the institution of the Commission, 2) the possibility given to the Community authorities (Commission and Council) to create derived law that may, in the case of the Regulation, have full direct effect, 3) the creation of a Court of Justice, which, through its case law, has extended the possibility for all of the derived law to have direct effect, by asserting the primacy of Community law over the whole of national law. To this should be added the existence of a parliament elected by direct universal suffrage, whose powers have been enhanced by the various treaties that have come along to revise the original ones.

The result, as the Community construction has evolved, has been great confusion about determining who holds ultimate power in the Community: the Council, *i.e.*, the state organ; the Commission, the supranational organ; the European Parliament; or the Court of Justice itself? The breakdown of powers between the states and the Community is another area of confusion that has ever been present as it has never been clearly defined but simply left up to the case law of the ECJ, namely a body that has actually been given the mission of defending the Community's supranational character.

Hence the accusations of opacity of decisions and of democratic deficit made to the institutions, to mention only these reproaches. It will, at this point, be noted that the reproach related to the democratic deficit implies that the Community (and beyond it, the Union) is regarded as something different from a mere international organisation. The United Nations, for instance, have never been reproached with suffering from a democratic deficit. They may have been accused of the obsolete composition, in some eyes, of the Security Council, but never, to our knowledge, have they been subject to criticisms about democracy, the separation of powers, or the rule of law. The UN functions on the logic of an international organisation, *viz.*, the inter-state logic.

But if, by contrast, democratic deficit is talked of in the case of the Union, it is necessarily in relation to Union citizens. It supposes that the ultimate basis of the legitimacy of the institution being talked of is the people, the people of the Union, the people who are, in democratic theory, sovereign, taking decisions either by themselves or through their representatives, and controlling the executive. But the supremacy of the democratic logic over the inter-state logic is not organised by the treaties, which, at least in their initial version, give supremacy to the body, the Council, which represents the inter-state logic. And the more the Community construction advances, in other words, the more the elements of integration progress, the more the distortion between the two logics accumulates, to the point of becoming insupportable. This is what Joschka Fischer clearly sees when he says that:

A tension has emerged between the communitarisation of economy and currency on the one hand, and the lack of political and democratic structures on the other ... (p. 6).

The simple solution—in logical terms, although by no means in political terms—to these problems would be to set up a federal state, which would allow the antagonism between these two logics to be transcended, and to set up the democratic institutions and a state based on rule of law: a parliament endowed with genuine legislative powers, a responsible executive, independent and impartial judicial institutions, with everything being based on a constitution which includes a human rights charter. But it is just this simple solution that the German minister refrains from invoking, since he knows that merely mentioning it would raise such hostility among some EU states as practically to prohibit debate.

That is why he imagines another solution, which he calls a federation rather than a federal state (*Föderation*, not *Bundesstaat*). What this solution consists of and whether it is theoretically well-founded and practically achievable is what we shall now attempt to consider.

## **2. Federation and the Constitutional Theory of the State**

When studying groupings of states, and the European Union is undoubtedly a grouping, classical constitutional theory knows only two possible types: the confederation of states and the federal state. Can there be a third type, a federation but not a federal state, as Joschka Fischer's speech seems to suggest?

## **2.1. Confederation of States and Federal State**

As from the end of the Nineteenth Century, German (Laband and Jellinek) and French constitutionalists, starting from L. Le Fur's theories that inspired the ideas of Esmein, Hauriou, Duguit and Carré de Malberg, formulated a clear legal distinction between two great formulas for groupings of states: confederations and federations.<sup>1</sup> The confederation of states does not constitute a new state but just an association of sovereign states (*Staatenbund*), while the federal state (*Bundesstaat*) is, as its name indicates, both *Staat* and *Bund*, state and federation. As L. Le Fur writes:

The federal state, in virtue of being a state, has sovereignty' (p. 590), whereas 'the confederation of states is only an association of sovereign states [and] does not itself possess sovereignty, nor, consequently, the character of a state. (p. 498)

In the Twentieth Century, Hans Kelsen, while incorporating his theory of federalism into a more general theory of the centralisation and decentralisation of legal orders,<sup>2</sup> confirms the distinction between the federation of states, which is a grouping of states, not itself a state, but a 'purely international union of states ... on the model of the League of Nations,' and the federal state which is, as its name indicates, a state within the meaning of international law. The members of the federation are, in contrast, collectivities that are no longer states within the meaning of international law. This is because their foundation is to be found in the constitution of the federal state, and not directly in the international legal order.<sup>3</sup> Consequently, Joschka Fischer is quite right to call the present Union a confederation. But what exactly does he mean by a federation?

## **2.2. The Federation (J. Fischer) or Federation of Nation States (J. Delors)**

There is evidence of the fact that the choice of the term 'federation' raised a problem for the German Foreign Minister. In the Chevènement-Fischer dialogue that appeared in *Le Monde* on 21 June 2000 (p. 15-17), the French Minister of the Interior said, in connection with the European Union, that 'It is neither a federation nor a confederation. It is something that has never been described

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<sup>1</sup> See, L. Le Fur, *Etat fédéral et confédération d'Etats*, Paris, Thesis 1896, reprinted, 2000, with a foreword by Charles Leben (Le Fur 2000); for a survey of German scholarship on the question, see, Beaud (1999).

<sup>2</sup> For a tentative analysis of the European Community in the context of Kelsen's theory, see, Leben (1991)

<sup>3</sup> H. Kelsen, *Théorie générale du droit et de l'Etat*, French translation of 1997, (Kelsen 1997:367).

anywhere, and does not even resemble the Holy Roman Empire of the German Nation.’ Joschka Fischer clarifies as follows: ‘We sought a neutral word in German instead of, and in place of, federation. Translated into French or English, it still remains federation; so we resigned ourselves. We have to accept the fact that federation is the word that best suits.’<sup>4</sup>

It is easy to see why the word federation embarrassed the German Minister: in ordinary language, just as in the language of constitutionalists, ‘federation’ immediately evokes the ‘federal state,’ and this is what has to be avoided, even at the cost of a polemical vocabulary which is absent from the rest of his speech at the Humboldt University. Thus, he says:

Only if European integration takes the nation-states along with it into such a Federation, only if their institutions are not devalued or even made to disappear, will such a project, in spite of all the difficulties, be workable. In other words, the existing concept of a federal European state replacing the old nation-states and their democracies as the new sovereign power reveals itself to be an *artificial construct* which ignores the established realities in Europe. (p. 9-10, our emphasis).

But, at first sight, the solution Fischer offers to the Community’s problem looks enormously like a federal state. Thus, again on page 9, he writes that for all the problems of enlargement of the Union:

There is a very simple answer: the transition from a Union of states to full parliamentarisation as a European Federation .... And this means nothing less than a European Parliament and a European government which really do exercise legislative and executive power within the federation. This federation will have to be based on a constituent treaty.

If it is added that this European Parliament is to have two chambers, one to represent the Europe of nation-states (a ‘senate’ on the American or German model, p. 10), with a European government able to be formed from the national governments (p. 10) or else opting for the direct election of a president with ‘far-reaching executive powers,’ distinct from the Commission, which would become a mere administrative body,<sup>5</sup> one may legitimately ask what would really separate this federation, which, like Jacques Delors, he calls a ‘federation of nation-states’ (p. 13), from a classical federal state.

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<sup>4</sup> *Le Monde* 21 June 2000, p. 17, 6th column. On the comparison, curious if nothing else, between the Union and the Holy Roman Empire of the German Nation, see p. 16, 1st column.

<sup>5</sup> This is the solution he prefers: see his declaration before the European Parliament’s Committee on Constitutional Affairs, *Le Monde* on 8 July 2000 and *International Herald Tribune* on 7 July 2000. But the idea has been rejected by Chancellor Schröder, who calls it a ‘perfect illusion,’ in *Le Monde* on 18 July 2000, p. 3.

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This point is a capital one politically, as his French colleague H. Vedrine showed in his ‘reply to Joschka Fischer’ published in *Le Monde* on 11-12 June 2000, by dotting the i’s as follows:

The core of the ideas is the concept of federation and of federation of nation-states. Does this, at the end of the day, amount to one and the same thing, classical federalism? In that case, we are moving towards an impasse.

Everything in the constitutional model presented by the German minister, thus depends on the survival of the nation-states. They would not disappear as in a federal state, or rather, taking up what might be a slip of the pen, not disappear ‘*complètement*’.<sup>6</sup> It is one thing to affirm the co-existence of the federation and the nation-states, but quite another to present a convincing picture of it. But we have seen that, in this federation, there is to be a European Parliament made up of two chambers and endowed with legislative powers, a European government (perhaps under the *aegis* of a President of the Union) to act as an executive, and also a ‘constituent treaty which lays down what is to be regulated at European level and what has still to be regulated at national level’ (p. 11).

But instead of what the Minister rightly calls ‘inductive communitarisation,’ there will be ‘a clear definition of the competences of the Union and the nation-states respectively in a European constituent treaty, with core sovereignties and matters which absolutely have to be regulated at European level being the domain of the federation, whereas everything else—the least essential bits, let us not forget—would remain the responsibility of the nation-states’ (p. 11).

To know what this ‘finalised federation’ (p. 11) might look like, one can again go to the description Fischer gives of the federation that might be set up among the Member States belonging to the ‘centre of gravity’ that are resolved to go forward without waiting for all EU states to be ready to do so. Here is how the Minister sees the action of the states belonging to the centre of gravity:

Such a group of states would conclude a new European framework treaty, the nucleus of the constitution of a federation. On the basis of this treaty, the Federation would develop its own institutions, establish a government which within the EU should speak with one voice on behalf of the members of the group on as many issues as possible, a strong parliament and a directly elected president. Such a centre of gravity would have to be the *avant-garde*, the driving force for the completion of political integration, and should, from the start, comprise all the elements of the future Federation. (p. 14).

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<sup>6</sup> Translator’s note: see quotation above—in the French version; neither the English nor the German original contain this adverb.

Without dwelling on the feasibility of this sort of federation within the Union, one should note that the ‘militant’ aspect of this federation, that might be called ‘interior’ *and would still, in principle, fail to be a federal state*, is, after all, hard to reconcile with a constitutional model in which the nation-states conserve their sovereignties: the federation speaks with a single voice on as large a number of questions as possible, and has a strong parliament and a directly elected president.

But this interior federation foreshadows the European Federation which is the last stage of European integration (p. 15). Can one, in these circumstances, be satisfied with the assertion that:

... All this will not mean the abolition of the nation-state. Because even for the finalised Federation, the nation-state, with its cultural and democratic traditions, will be irreplaceable in ensuring the legitimation of a union of citizens and states that is wholly accepted by the people’ (p. 11).

Or again:

The completion of European integration can only be successfully conceived if it is done on the basis of a division of sovereignty between Europe and the nation-state. So what must one understand by the term ‘division of sovereignty’? As I said, Europe will not emerge in a political vacuum, and so a further fact in our European reality is, therefore, the different national political cultures and their democratic publics, additionally separated by linguistic boundaries (p. 10).

### **3. Sovereignty and Nation States**

It seems to us that one of the difficulties attaching to the current debate is the confusion between a legal notion, that of sovereignty, and a historical, political or even philosophical notion, that of the nation-state.

#### **3.1. Sovereignty**

As we cannot go into the complex discussions about the notion of sovereignty here, we shall content ourselves with a few remarks. Among the various ideas that this notion can cover, we shall take two. Regarding a state, in the sphere of public international law, we call sovereign a state that is not legally dependent upon another state, or as Kelsen says, a state that has its foundation directly in the international legal order and not in the constitution of another state.<sup>7</sup> This is

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<sup>7</sup> See, Kelsen, *Théorie générale du droit et de l’Etat*, (Kelsen 1997:365-372).

## Comments

why the Member States of a federation are not sovereign within the meaning of international law, while those that are part of a confederation are.

In the domestic legal system, we call sovereign the real or fictitious entity that possesses the *summa potestas* on which the whole legality/legitimacy of the order depends. Thus, we say that, in such a state, it is the people or the nation that are sovereign.

Coming back to international law, the problem raised by groupings of states is that of either ‘limitations’ or ‘transfers’ of ‘sovereignty’ or ‘powers’ that most constitutions authorise in favour of what may generally be termed as international organisations. Thus, in France, the Constitutional Council, after distinguishing ‘limitations’ of sovereignty (permitted) from ‘transfers’ of sovereignty (unconstitutional, and possibly requiring amendment of the constitution), currently uses the notion of treaties (or treaty provisions) on the basis of whether they infringe ‘the essential conditions for the exercise of national sovereignty,’ or not.<sup>8</sup>

It will, however, be noted that, to date, whenever the Council has encountered such provisions, in the Maastricht and Amsterdam treaties for instance, what has followed is not a refusal by France to ratify the treaties, but a revision of the French constitution. The conclusion must be drawn that these provisions, while infringing ‘the essential conditions for exercising national sovereignty,’ did not do so to such a degree that the French authorities genuinely feared for France’s sovereignty.

One can, however, well imagine a state which transfers all its powers to an international organisation (a grouping of states) losing its sovereignty in the eyes of international law. Where, then, is the breaking point? The reply of classical international theory is that the transfer of the powers to conduct external relations and national defence by a state bring a disappearance of sovereignty within the meaning of international law.<sup>9</sup> To this, some would add, though in our view wrongly, the transfer of monetary powers.<sup>10</sup>

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<sup>8</sup> Beaud (1993:1052 *et seq.*)

<sup>9</sup> The point was quite well seen by President Jacques Chirac in his speech to the Bundestag on 27 June 2000: ‘Neither you nor we are envisaging the creation of a European super-state that would replace our nation-states and mark the end of their existence as *actors in international life*’ (*Le Monde*, 28 June 2000, p. 16).

<sup>10</sup> Leben (1991:69-72). For a long time, there has been economic and monetary union between Belgium and Luxembourg without the consequence of ending the sovereignty of either state.

It will be noted that in order to highlight the ‘truly historic turnaround’ made by the European Union, Joschka Fischer notes in his speech that, ‘In Maastricht, one of the three essential sovereign rights of the modern nation-state—currency, internal security and external security—was, for the first time, transferred to the sole responsibility of a European institution’ (p. 5). This does not entirely fit the criteria we have set forth, but comes close. Yet, as long as the Member States ultimately remain masters of their defence and foreign policies, which is still the case in the present Union, they retain their sovereignty. If the states were truly to transfer their powers in these areas, *i.e.*, their right to decide their policy in the last instance by themselves, then, there would be loss of sovereignty.

Likewise, were the federation to endow itself with a parliament that possessed true legislative powers in major areas but without supervision of either the ‘government’ of the federation or the national parliaments, this would undoubtedly mark the creation of a federal state. Let us note that it is on this point that Fischer’s proposals appear not just weakest, but also least consistent. For all his desire to ‘sell’ the idea of a federation which leaves the nation-states with their sovereignty, he proposes a most peculiar solution for the chamber representing the European Union’s citizens. This chamber, he writes (p. 10) would be ‘for elected members who are also members of their national parliaments,’ which would avoid any ‘clash between national parliaments and the European Parliament.’

But what does this mean? Would the European parliamentarians be the faithful image of the party divisions of national parliaments? Ought they to be elected by them on the representative system, so as to reconstitute a sort of French, German, British, *etc.*, mini-parliament at the level of the European Parliament? Ought they to resign in the event of new national elections or changes in their national majority? Would they be prisoners of a binding mandate, and could they be recalled by the national parliaments were they perchance to express through their vote convictions that differed from those of their constituents? This is a strange way of advancing the cause of European integration.

One last word on the idea of a ‘European Constitution,’ a recurrent idea taken up again by President Jacques Chirac in his speech to the Bundestag on 27 June 2000.<sup>11</sup> We do not wish to discuss whether or not such a ‘constitution’ is desirable in order to enable clearer and simpler distribution of powers, better participation by citizens and an enhancement of democracy within the Union

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<sup>11</sup> Printed in *Le Monde* of 28 June, p. 16-17. See also the joint proposal by Daniel Cohn-Bendit and François Bayrou presented on 13 June in Strasbourg, *Le Monde* of 14 June 2000.



here. We should merely like to recall that the word ‘constitution’ does not in itself refer to any institutional structure. Thus, the treaties setting up certain international organisations are called ‘constitutions’. This is, for instance, the case for the treaty setting up the International Labour Organisation (‘the Constitution of the ILO’).

It is, nonetheless, true that the normative pyramid of a state is crowned by what is ordinarily called a constitution. In the case of a federal state, this constitution may find its origin in one or more treaties. In this case, the constitution of the federation is the object of the treaty whereby the hitherto independent states combine to create a new federal state. The treaty of political union concluded by the two German States on 31 August 1990 for their reunification is a recent example of such a case.<sup>12</sup> In what circumstances does the transition from an international act to one of domestic law come about?

Charles Eisenmann has explained this clearly. The transformation happens ‘because the treaty provides that its clauses on the organisation of the collectivity that it sets up can be amended by a procedure of domestic legislation, of constitutional revision, *i.e.*, by a majority, no longer unanimity, rule.’ For, in this case, the clauses on the organisation of the group collectivity, ‘though originally rules of international law’ become transformed into rules of state law because of the way that they may be amended. The way they were historically established no longer counts: the treaty [becomes] a constitution.<sup>13</sup>

### **3.2. Nation States**

If we now come to look at the concept of the nation-state, which nobody wants to ‘abolish,’ there is, we feel, ambiguity that confuses the discussion. It should be noted that the term nation-state hardly appears, if we are not wrong, in works and treatises of theory of the state or of constitutional law, at least those we have been able to consult. It can be sought in vain, for instance, in Kelsen’s *Pure Theory of the State* or *General Theory of Law and State*. These works contain long studies on federal states, unitary states, decentralised or centralised states, but nothing about nation-states. In his *Contribution to the General Theory of the State*, Carré de Malberg devotes his consideration to the idea of the union of state and nation. He wishes, thereby, to reject the positions that the nation is the

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<sup>12</sup> See, Fromont (1991), and the other articles in this issue of the *Revue Française de droit Constitutionnel* on the theme of ‘Germany’s reunification and constitution’.

<sup>13</sup> See, Eisenmann (1982:429) and Le Fur (2000:540-589), for the debates on this question in French and German legal theory at the end of the nineteenth century.

original subject of sovereignty, and that it gave rise to the state, to which it is prior. For this eminent constitutionalist, instead: ‘The state is not a legal subject that arises in the face of the nation and opposes it: as long as it is accepted that the powers of a state nature belong to the nation, it must also be admitted that there is an identity between the nation and the state, in the sense that the latter can be only the personification of the former.’<sup>14</sup>

But we do not believe that it is this debate, which turns around a very specific conception of national sovereignty among French constitutionalists, that the defenders of the idea of the nation-state are thinking of. They are seeking more to defend the durability of a collectivity founded in, and by, history that expresses a cultural *cum* religious, linguistic and political heritage, and, ultimately, a ‘will to live together’ (Renan) of a very special quality.

Need this will to live together necessarily imply that the collectivity through which the nation is expressed be a sovereign state within the meaning of international law?<sup>15</sup> This is undoubtedly what the ‘sovereignists’ think, to the point that, during the debates on the ratification of the Maastricht Treaty, one could hear politicians declare that even a large majority in a referendum could not make sovereign France disappear, since it does not belong to a single generation. Each has received it from its forebears and has the duty to pass it on, still just as sovereign, to its children.

This is an entirely respectable political opinion which does not, in our view, imply that the cultural, religious, linguistic, and political heritage, coupled with the very special quality of the ‘will to live together,’ necessarily have to be expressed through a sovereign state rather than through a federated state within a larger federal state. Is it conceivable that the French, Italian, British, German, Irish, *etc.*, ‘genius’ would be unable to express itself in a federated state? Are our nations not sufficiently ancient to justify this hypothesis? Thus, when Joschka Fischer stresses that, in the final (European) federation, ‘the nation-state, with its cultural and democratic traditions, will be irreplaceable in

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<sup>14</sup> See, Carré de Malberg. *Contribution à la théorie de l’Etat*, Paris, Sirey, 1920, reprinted in 1969 (de Malberg 1969:12-13).

<sup>15</sup> This is the idea defended by President Jacques Chirac in his speech to the Bundestag: ‘Our nations are the source of our identities and our roots. The diversity of their political, cultural and linguistic traditions is one of the strengths of the Union. For times to come, the nations will remain the foremost reference for our peoples. Contemplating their extinction would be ... absurd ... (*Le Monde* of 21 June 2000). But who says the creation of a federal state entails the extinction of national identities? What we see in federal states (US, Germany, Switzerland), whose federated states have less ancient and less rich personalities than the Union’s nations, does not necessarily lead to this conclusion.’

ensuring the legitimation of a union of citizens and states that is wholly accepted by the people' (p. 11), this does not, to our mind, mean that all this is possible only if the nation-states retain their sovereignty within the meaning of international law, as, in that case, we do not see how the European federation and the nation-states (still meaning sovereign states) can be reconciled.

#### **4. The European Federation: Squaring the Circle**

So, we come back to our original question: how can the Community institutions be made simpler, more transparent, more effective, more democratic, more welcoming to candidates, and more effective with thirty rather than fifteen countries, while continuing to permit progress along the path of integration and maintaining the nation-states intact? Some recent scholarship, inspired by Carl Schmitt's ideas on the 'federative pact' and brilliantly represented in France by Professor Olivier Beaud, thinks these seemingly irreconcilable elements can be reconciled. Thus, Olivier Beaud writes:<sup>16</sup>

The special feature of this theory of the federative pact is that creation of the federation does not make the nature of the Member States that have concluded it as political unit(s) disappear. In other words, there is no merger of the political units constituting a larger whole, *i.e.*, no absorption of the Member States into the federation. From this viewpoint, this theory of the federation differs from the ordinary law of moral personality; in private law, the created collective person makes a screen between its founders and its bodies, and one might say that the latter replace the former. In contrast, in this public-law conception of the federation, the authors of the pact, the subjects of constituent power, continue to exist.

One can readily see the political relevance of such a construction, which might, as if by magic, immediately dispel all the contradictions that analysts of the European Union stumble over: much more than an international organisation, *i.e.*, a confederation (with which it shares its creation through a treaty and maintenance of Member States' sovereignties) even though it be less than a federal state (but for how long if increasingly numerous powers are transferred to it?), the Union baptised a federation in Carl Schmitt's sense, might simultaneously be as powerful and effective as a federal state while strictly maintaining the personality and sovereignty of its constituent parts.

We confess that we are very sceptical as to this sort of Hegelian transcendence of opposites and the emergence of a new synthesis. We do not see how a 'new

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<sup>16</sup> Beaud (1993:269). See, also, Carl Schmitt, 'Constitutional Theory of the Federation,' French translation of 1989, (Schmitt 1989:507-540). It would be interesting to know how far Joschka Fischer (or his advisors) have been influenced by these ideas of Schmitt's.

animal' involving all the legal and political advantages of the federal state can be slipped into the theory of the state while still conserving the full sovereignty of the 'nation-states'. But we can very well understand politicians seeking, whether from sincere belief or from calculation, to acclimatise the idea that this sort of result could be reached. If the Community construction, if Europe, has this price, we personally are willing to pay it. And, after all, we feel too uncertain in our 'academic' analyses to be able to rule out absolutely the new synthesis defended by the scholarship we have just summarised.

Nonetheless, despite everything, we hold to Spinoza's old idea that the essence of the circle is irremediably different from the square's, and that *tertium non datur*.



GIULIANO AMATO

## Un cœur fort pour l'Europe\*

Jacques Le Goff, célèbre historien français, a écrit une fois: 'l'Europe a un nom depuis 25 siècles, mais elle en est encore au stade de projet'. Et c'est à ce stade—non pas d'un seul mais de nombreux projets—qu'elle restera probablement encore longtemps, car c'est ainsi que procède l'action créatrice de la politique, au sens élevé du terme, à laquelle nous devons les passages décisifs de la construction européenne. Mais il faut justement avoir des projets et des visions stratégiques, aujourd'hui particulièrement, du fait que l'Europe paraît s'égarer au milieu des incertitudes sur le cours de l'Euro, de la perspective d'un très grand élargissement de ses frontières et des premiers signes d'une crise de confiance de la part de ses citoyens.

Le discours du ministre des Affaires étrangères allemand Fischer, vendredi dernier à l'université Humboldt, a eu, de ce point de vue, un mérite fondamental: le débat sur l'avenir de l'Europe et l'organisation de l'Union 'élargie' a finalement retenu l'attention des médias et de l'opinion publique. Il n'est plus limité aux sièges académiques et aux think tanks, ni circonscrit aux bureaux des diplomates qui, depuis maintenant plusieurs semaines, négocient la révision du Traité d'Amsterdam. Et c'est un bien que les citoyens européens, le demos auquel doit se référer tout dirigeant responsable, soient informés et impliqués dans une confrontation publique plus vaste que la 'finalité politique' de l'Union, au-delà des réformes, encore qu'essentielles, des mécanismes décisionnels actuellement en discussion à la Conférence intergouvernementale

### 1.

Avant Fischer déjà, Jacques Delors—en relançant sa proposition de faire de l'Europe une 'Fédération d'Etats-nations' guidée par une avant-garde regroupée autour des six pays fondateurs de la Communauté—puis Valéry Giscard d'Estaing et Helmut Schmidt—avec leur idée de remettre en marche le processus d'intégration à partir des 'euro-européens'—avaient essayé d'ouvrir le débat sur le '*Quo Vadis Europe?*' Et c'est le point d'où est également parti Fischer avec un discours qui a été, de plusieurs côtés, vu comme une relance en

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\* Traduit de l'italien par Madeleine Carbonnier Santoro.

grand style des principes inspirateurs de la tradition fédéraliste: tradition noble qui, en Allemagne—comme en Italie—a eu un enracinement solide et durable dans les elites publiques et parmi les citoyens, abstraction faite de leurs respectives préférences politiques et appartenances de parti. En fait, au-delà des mots utilisés, les propositions qu'a illustrées Fischer (ne serait-ce qu'à titre personnel) visent à actualiser les vieilles idées-force du fédéralisme européen à la lumière des changements qui sont intervenus à la fin du XX<sup>e</sup> siècle et, surtout, de la perspective de l'élargissement. Je voudrais à ce propos rappeler ce qu'Altiero Spinelli lui-même, un des pères fondateurs et des figures-clef de cette tradition, a dit vers la fin de sa prestigieuse parabole personnelle: 'L'architecture européenne que nous avons mis sur pied' soutenait Spinelli à la veille de l'Acte Unique, 'a été le produit de la tension entre la vision radicale des fédéralistes et l'approche pragmatique des hommes d'Etat. Sans cette tension, on n'aurait rien obtenu: la vision des fédéralistes serait restée une utopie et le pragmatisme essentiellement conservateur des hommes d'Etat n'aurait mené nulle part'.

Bref, c'est dans ce mix entre positions idéales et leur agencement en décisions compatibles et institutions fonctionnelles que réside le véritable 'moteur' du processus d'intégration—processus qui, à l'instar de l'analyse freudienne, est probablement interminable. Il n'a pas de point d'abordage préétabli et partagé; il ne procède pas de façon linéaire; il n'est pas auto-référentiel mais interagit avec l'environnement intérieur et extérieur pour des accomodements, des rétroactions et de nouveaux inputs.

C'est pour cette raison, je crois, que le véritable problème n'est pas d'accélérer en direction d'un débouché 'fédéral' plus ou moins préfixé: débouché souhaité par certains mais craint par d'autres et qui, au fond, consisterait à transférer au niveau européen—de l'Union européenne—des compétences et des attributions des Etats nationaux. Par contre, paradoxalement, les années au cours desquelles la Communauté s'est le plus accrue et développée ont justement été celles où les Etats nationaux ont été les plus forts, grâce à l'expansion de la main publique et à la création de l'Etat-providence. Aujourd'hui, en revanche, les Etats nationaux tendent plutôt à se retirer de l'économie et de la société elle-même, à exercer un rôle régulateur plutôt qu'interventionniste: il est par conséquent difficile de penser récupérer au niveau supranational ce pouvoir de 'commande' désormais perdu, alors qu'aujourd'hui les marchés ne coïncident plus avec les Etats et que les 'réseaux' mondiaux déterminent non seulement la new economy mais le spectre tout entier de nos relations publiques et personnelles.

D'ailleurs, même Fischer ne se pose pas cet objectif. Il est vrai qu'il tend un peu à voir l'Europe du futur comme une grande Bundesrepublik, avec les mêmes niveaux de gouvernance et de 'division de souveraineté' que le système allemand; mais il ne lui échappe pas que les traditions civiques, même celles des Quinze

membres actuels, sont trop différentes les unes des autres pour pouvoir être ramenées à un seul modèle, valable pour toutes.

L'Union, au fond, reste une joint venture hardie entre partenaires: une Union qui procède par avancements et adaptations successifs, en combinant intégration et coopération, structures communes et compromis intergouvernementaux classiques, standards à atteindre et actions de contrôle réciproque. Les décisions sont de plus en plus 'bruxellisées' mais les opinions publiques sont encore essentiellement nationales, alors que certains des thèmes qui les mobilisent (les droits de l'homme, par exemple) ne sont pas spécifiquement européens, mais plutôt universels. Bref, plus que par 'division de souveraineté', l'Union procède par 'souverainetés partagées': où la 'souveraineté' n'est pas une quantité fixe et indivisible mais fonction d'une affaire complexe et changeante, où intégration et coopération ne sont pas des jeux anodins entre les Etats et les institutions, mais déplacent le siège et, surtout, modifient la nature des pouvoirs publics. Tout ceci pour dire que les domaines de légitimité politique, d'identité culturelle et d'intégration économique seront inévitablement multiples, même au sein de chacun des pays membres: compétences et pouvoirs seront répartis et en partie dispersés à plusieurs niveaux—vers le bas et vers le haut—avec des solutions tour à tour différentes.

C'est dans ce contexte, celui de la construction d'un système de gouvernement à niveaux multiples (comme les techniciens le disent en jargon) qu'il faut absolument sauvegarder la préoccupation centrale et originelle du fédéralisme, à savoir celle d'indiquer aux citoyens et aux elites du continent—pour utiliser une expression chère à Jacques Delors qui, de cette tradition, est l'interprète le plus créatif—les 'coûts de la non-Europe': les conséquences potentiellement destructrices d'un réflexe de défense et d'un repli conservateur face aux défis de l'époque. En ce sens, les rappels de Delors lui-même, de Giscard et de Schmidt—tous elder statesmen dont la compétence et la conviction européiste sont hors de doute—visent à projeter les négociations d'aujourd'hui dans une vision moins contingente, et conditionnée, des choix à accomplir. Et les sollicitations de Fischer, qui fait, lui, partie des 'hommes d'Etat' en service actif, sont incontestablement utiles à la recherche d'un équilibre entre visions stratégiques et solutions possibles: en vue d'une Europe qui aura essentiellement besoin d'un coeur central pour ne pas aller à l'aveuglette au-devant d'un élargissement qui, autrement, pourrait la ramener à la dimension d'espace économique.



## 2.

Les trois principales questions à l'ordre du jour de la Conférence intergouvernementale sont, par exemple, apparemment techniques; mais, inscrites justement dans une perspective stratégique, elles ont un impact tout autre que secondaire sur la manière dont l'Union pourra fonctionner dans les prochaines années. La composition de l'exécutif communautaire, le 'poids' décisionnel de chaque pays et les domaines où il faudra passer du vote unanime à celui à majorité qualifiée sont des éléments-clef pour définir l'équilibre entre démocratie et efficience, représentativité et efficacité dans l'UE 'élargie'. Il est toutefois évident qu'affrontés dans des négociations limitées à ces seuls points, ils risquent d'exacerber les différences qui ont déjà empêché une entente à Amsterdam et d'accroître la méfiance réciproque entre les partenaires. Par contre, inscrits dans une perspective à plus grande portée, ils peuvent indiquer une voie d'issue aux difficultés qui affligent entre autres déjà l'Union à Quinze. En d'autres termes, de nouvelles règles démocratiques sont indispensables pour faire fonctionner les institutions d'aujourd'hui, et plus encore celles de demain. Les pays qui veulent l'élargissement doivent se rendre compte qu'il n'y aura pas d'élargissement sans quelques renoncements, en termes d'attributs de pouvoir formels de la part de chacun et de tous, qu'il s'agisse d'un deuxième commissaire, de quelques sièges à Strasbourg, de votes 'pondérés' au Conseil ou de politiques sur lesquelles exercer un veto. A leur tour, les pays qui veulent entrer dans l'Union, et qui aujourd'hui considèrent avec grande méfiance les négociations institutionnelles, doivent se rendre compte que sans structures décisionnelles et administratives plus souples ils n'entreront pas de si tôt ou pourront tirer moins de bénéfices de leur entrée. Tout ceci est sans doute vrai pour la dimension strictement communautaire de l'intégration, autrement dit pour le marché unique, l'union monétaire et les politiques communes gérées par la Commission.

Et les pays qui veulent un véritable 'approfondissement'? C'est là, à cette jointure délicate, que viennent se souder—ou se heurter—les visions des uns et les impératifs immédiats des autres. Il est hors de doute que les six pays fondateurs de la Communauté ont le droit/devoir de relancer la discussion et l'initiative sur la 'finalité politique' de l'Union. Et il est hors de doute que l'Europe par le passé a eu, et combien, une sorte 'd'avant-garde', ou de 'moteur': c'était l'axe franco-allemand, ou plutôt Paris-Bonn, autour et à côté duquel l'Italie, et les pays du Bénélux, ont exercé une importante fonction de socialisation et de médiation. Par la suite, d'autres pays—en commençant par l'Espagne et Portugal—se sont associés à ce groupe 'leader' de l'intégration, même si le lancement de l'Union monétaire a temporairement créé des tensions en son sein.

Aujourd'hui, toutefois, la situation apparaît changée. La relance en cours de l'entente franco-allemande, sans et contre laquelle il est impossible de faire procéder l'intégration, est sans aucun doute souhaitable, et je dirais même indispensable; en même temps l'Union actuelle et, plus encore celle future, ont besoin d'un 'centre de gravité' (qui est plus qu'un axe mais aussi plus qu'un 'noyau dur') plus large et mieux organisé. Plus large tant en ce qui concerne sa composition et sa portée, et mieux organisé en fait de système: avec les accords de Schengen et la création de l'espace commun de liberté et de justice, et surtout avec le renforcement de la politique étrangère et de sécurité commune (PESC), l'Union a en effet considérablement 'élargi' ses domaines d'activité et ses ambitions d'intervention. Mais les pays les plus intéressés à coopérer et à s'intégrer dans ces nouvelles politiques (y compris la nouvelle dimension de défense) ne sont pas toujours et nécessairement les mêmes, encore qu'il y ait, par exemple, de nombreuses analogies entre les adhérents à l'euro, à Schengen et à l'UEO/OTAN. La principale différence, bien qu'elle ne soit pas la seule, est représentée par la Grande Bretagne qui, sur initiative de Blair, s'est depuis un peu plus d'un an mise à la tête de l'effort européen pour arriver à une 'capacité autonome' de gestion européenne des crises, y compris militaire—mais est en-dehors de l'euro, comme de Schengen.

Une des grandes interrogations de l'UE d'aujourd'hui est justement 'Quo Vadis Britannia?': en effet, sans la Grande Bretagne, l'éventuel 'centre de gravité' serait peut-être plus compact, mais aussi plus faible politiquement, financièrement et militairement, et plus pauvre culturellement. Par ailleurs, le 'centre de gravité' dont nous parlons devrait, pour être crédible et efficace, être fondamentalement homogène et relativement uniforme, autrement dit associer plus ou moins les mêmes pays dans toutes les politiques principales.

### 3.

Pour ouvrir la voie à une perspective de ce genre, et pour en revenir au point de départ—c'est-à-dire comment souder la réflexion stratégique au technicisme des négociations diplomatiques en cours—il est essentiel que la Conférence intergouvernementale affronte avec courage une révision des dispositions sur la flexibilité, ou plutôt sur les coopérations 'renforcées'. Celles actuellement en vigueur, péniblement négociées à Amsterdam, sont peu utilisables parce qu'en garantissant tous, elles finissent justement par ne garantir personne et par encourager les coopérations en-dehors des traités et des institutions communes. Néanmoins, paradoxalement, les coopérations renforcées ne sont pas aussi importantes pour le 'pilier' communautaire pour lequel elles avaient été conçues en un premier moment: au fond, si nous élargissons le recours au vote à majorité qualifiée, le marché unique imaginé il y a cinquante ans par Jean Monnet et

Robert Schuman et les politiques et institutions communes qui l'accompagnent seront vraiment complétés pour pouvoir être bientôt étendus aux pays candidats. Les coopérations renforcées sont en revanche cruciales dans les nouveaux 'chantiers' du processus d'intégration—justice, immigration, sécurité et défense—où l'acquis est encore entièrement à construire et où, comme il y a vingt ou trente ans pour la Communauté, un certain niveau d'homogénéité et de convergence initial est fondamental. S'il était plus facile—en ce qui concerne l'éventuel 'centre de gravité' déjà évoqué—d'amorcer une coopération renforcée en utilisant éventuellement les institutions ainsi que le budget UE, cela constituerait un stimulant important pour l'approfondissement de l'intégration dans une Europe de plus en plus grande et diversifiée. Cela multiplierait entre autre l'effet 'magnétique' du 'centre de gravité': les partenaires non intéressés initialement à la coopération renforcée, ou non qualifiés, se verraient bientôt incités à adhérer pour ne pas rester exclus de ses bénéfices prévisibles (fonctionnels et politiques). Au fond, c'est ce qui s'est passé—mutatis mutandis—tant avec l'Union monétaire qu'avec Schengen qui ont fini par incorporer plus de pays qu'il n'avait été initialement prévu ou imaginé.

Bref, la grande Europe élargie a besoin d'un coeur vital: comme outil d'intégration et non de division; et comme outil ouvert aux pays intéressés à y entrer, tel qu'il en était avec la Communauté des dernières décennies.

Il s'agirait en quelque sorte d'un retour au futur, nourri de visions mais aussi d'expérience concrète—d'une nouvelle étape dans l'interminable chemin de l'Europe.

GIULIANO AMATO

## **A Strong Heart for Europe\***

Jacques Le Goff, the well-known French historian, once wrote: ‘Europe has had a name for 25 centuries, but it is still at the project stage.’ And it is likely to remain at this stage—of not just one project but many—for a long time to come, since this is the way the creative action of politics, at the high level to which we owe the decisive moves in European integration, functions. But it is certainly projects and strategic visions that are needed, especially today, when Europe seems to be floundering in the midst of the uncertainties about the euro exchange rate, the prospect of a major enlargement of its frontiers, and the initial signs of a crisis of confidence among its citizens.

The speech by German Foreign Minister Joschka Fischer at the Humboldt University last Friday had one essential merit from this viewpoint: the debate on Europe’s future and the organisation of the ‘enlarged’ Union has at long last attracted the attention of the media and public opinion. It is no longer confined to academic venues and think-tanks, nor circumscribed to the offices of the diplomats who have been negotiating the revision of the Amsterdam Treaty for several weeks now. And it is a good thing that European citizens, the *demos* to which any responsible leader has to refer, are informed and involved in a broader public confrontation than the Union’s ‘political objective’, over and above the reforms, essential as they are, to the decision-making machinery currently under discussion at the Inter-Governmental Conference.

### **1.**

But even before Fischer, Jacques Delors, in relaunching his proposal to make Europe a ‘Federation of nation-states’ led by a vanguard grouped around the six founding Community countries—and subsequently Valéry Giscard d’Estaing and Helmut Schmidt with their idea of setting the integration process going again, starting with the ‘Euro-Europeans’—had already attempted to open the debate on ‘*Quo vadis, Europa?*’ This is the point that Fischer, too, starts from, with a speech seen in several quarters as a relaunch, in grand style, of the guiding principles of the federalist tradition: a noble tradition, which in

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\* Translated by Iain L. Fraser

## Comments

Germany—as in Italy—has become solidly and lastingly rooted in both public elites and among the citizens, irrespective of their various political preferences and party affiliations. In fact, over and above the words used, the proposals that Fischer set forth (if only on a personal basis) are aimed at updating the old life-giving ideas of European federalism in the light of the changes that have come at the end of the Twentieth Century, and especially of the prospect of enlargement. I should like to recall in this connection what Altiero Spinelli himself, one of the founding fathers and key figures of that tradition, said towards the end of his own prestigious career: ‘The European architecture we set up,’ he said on the eve of the Single Act, ‘was the product of the tension between the radical vision of the federalists and the pragmatic approach of the statesmen. Without that tension, nothing would have been attained: the federalists’ vision would have remained a utopia, and the essentially conservative pragmatism of the statesmen would have led nowhere.’

In short, it is in this mixture of ideal positions and their implementation through compatible decisions and functional institutions that the true ‘engine’ of the integration process lies—a process which, like Freudian analysis, is probably endless. There is no pre-established, shared access point; it does not proceed linearly; it is not self-referential, but interacts with the internal and external environment for compromises, feedback and new inputs.

This, I believe, is the reason why the real problem is not to accelerate in the direction of some more-or-less preset ‘federal’ objective, desired by some but feared by others, which would, at bottom, consist in transferring to European level—European Union level—some powers and attributes of the nation-states. On the contrary, and paradoxically, the years when the Community most grew and developed were the very ones when the nation-states were strongest, thanks to expansion of the public sector and the creation of the welfare state. Today, in contrast, the nation-states are increasingly tending to withdraw from the economy and from society itself, and to play a regulatory, rather than interventionist, role: it is consequently hard to conceive of regaining this now lost power of ‘command’ at supranational level, as markets no longer coincide with states, and world-wide ‘networks’ are determining not just the new economy but also the entire spectrum of our public and personal relations.

In any case, even Fischer does not set himself this objective. It is true that he somewhat tends to see the future Europe as a *Bundesrepublik* writ large, with the same levels of governance and ‘division of sovereignty’ as the German system; but he does not overlook the fact that the civic traditions even of the fifteen current members are too different from each other to be brought under a single, ‘one size fits all’, model.

The Union, at bottom, remains a bold joint-venture among partners: it proceeds by successive advances and adjustments, combining integration and co-operation, joint-structures and classic intergovernmental compromises, standards to be reached and mutual control actions. Decisions are increasingly 'Brussellised', but public opinion is still essentially national, while some of the themes that mobilise it (human rights, for instance) are not specifically European, but rather universal. In short, more than by 'division of sovereignty' the Union proceeds by 'shared sovereignties'; where the 'sovereignty' is not a fixed, indivisible quantity, but a function of a complex, changing process where integration and co-operation are not anodyne games among states and institutions, but shift the locus, and especially change the nature, of government. What all this means is that the areas of political legitimacy, cultural identity and economic integration are inevitably manifold even within each Member State: competences and powers will be distributed and in part dispersed to various levels—upwards and downwards—with solutions that differ case by case.

It is in this context of the construction of a multi-level system of government (as the technical jargon calls it) that we absolutely have to safeguard the central, original concern of federalism, namely to indicate to the continent's citizens and elites what Jacques Delors, the most creative interpreter of this tradition, liked to call the 'costs of non-Europe': the potentially destructive consequences of a defensive reflex and a conservative fall-back, in the face of the challenges of the age. In this sense, the reminders from Delors himself, d'Estaing and Schmidt—all elder Statesmen whose competence and European convictions are beyond doubt—are aimed at projecting today's negotiations onto a less contingent and conditioned vision of the choices to be made. And the appeals from Fischer, himself one of the 'statesmen' in active service, are indubitably useful in the search for a balance between strategic visions and possible solutions: in the light of a Europe that will essentially need a central core in order not to stumble blindly in the face of an enlargement that might otherwise reduce it to a mere economic area.

## 2.

The three main points on the agenda for the Intergovernmental Conference, for instance, appear technical: but, seen properly from a strategic perspective, they have an anything but secondary impact on the way the Union can function in coming years. The composition of the Community executive, the weight in decisions of each country and the areas where there has to be a move from unanimous to qualified-majority voting are the key features for defining the balance between democracy and efficiency, representativeness and effectiveness, in the 'enlarged' EU. It is, however, clear that, if tackled in

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negotiations that are confined to these points alone, they risk exacerbating the differences that already prevented agreement at Amsterdam, and risk an increase in the mutual mistrust among the partners. If, however, they are instead set within a perspective with greater scope, they might point a way out of the difficulties that afflict, *inter alia*, even the fifteen-member Union. In other words, new democratic rules are essential in order to make the institutions of today, and still more importantly those of tomorrow, work. The countries wanting enlargement must be aware that there will not be any enlargement without some renunciation in terms of formal attributes of power by each and all, be it a second Commissioner, some seats at Strasbourg, 'weighted' votes on the Council, or policies subject to the veto. For their part, the countries wishing to enter the Union, who are today watching the institutional negotiations with great mistrust, have to realise that, without more flexible decisional and administrative structures, they will not be joining so early, or might derive less benefit from joining. All this is undoubtedly true for the strictly Community aspect of integration, in other words, for the Single Market, monetary union and the common policies managed by the Commission.

And the countries wanting real 'deepening'? It is here at this delicate juncture that the visions of some and the immediate imperatives of others will join—or clash. It is beyond doubt that the six founding Members of the Community have the right and the duty to relaunch the debate and the initiative on the Union's 'political objective'. And it is beyond doubt that in the past Europe has had, and how, a sort of 'vanguard', or 'engine', namely the Franco-German or, rather, Paris-Bonn axis, round and alongside which Italy and the Benelux countries have played an important socialising and mediating part. Subsequently, other countries—starting with Spain and Portugal—joined this 'leadership' group for integration, even if the start of monetary union had temporarily created tensions within it.

Today, though, the position looks different. The relaunch of the Franco-German *entente* under way, without which or against which integration cannot advance, is beyond all doubt desirable and, I would even say, essential; at the same time, the present Union, and still more importantly the future one, needs a 'centre of gravity' (something more than an axis, but also more than a 'hard core') that is broader and better organised. It must be broader in both composition and scope, and better organised as a system: for the Schengen agreements and the creation of the common space in justice and home affairs, and especially the strengthening of common foreign and security policy (CFSP) have considerably 'enlarged' the Union's areas of activity and ambitions for intervention. But the countries most interested in co-operating and integrating into these new policies (including the new defence dimension) are not always and necessarily the same, even though there are, for instance, many similarities among euro, Schengen and

WEU/NATO Members. The chief difference, though not the only one, concerns Britain, which, on Blair's initiative, has, for over a year, headed the European effort to arrive at an autonomous European crisis-management capacity, in military terms, too—and yet remains outside the Euro and outside Schengen.

One of the EU's great questions today is, rightly, '*Quo vadis, Britannia?*': for without Britain, the possible 'centre of gravity' might perhaps be more compact, but it would also be politically, financially and militarily weaker, and culturally poorer. Moreover, the 'centre of gravity' that we have mentioned would, in order to be credible and effective, have to be basically homogeneous and relatively uniform, in other words, it would have to bring together more or less the same countries in all the main policies.

### 3.

To open the road to a prospect of this kind, and to come back to the starting point—namely, how to combine strategic thinking with the technical aspects of the ongoing diplomatic negotiations—it is essential for the Intergovernmental Conference to tackle the revision of the provisions on flexibility, or, in other words, on 'enhanced' co-operation, boldly. The provisions painfully negotiated at Amsterdam, that are in force at present, are not very usable, since by guaranteeing everyone, they end up not guaranteeing anyone, and encourage co-operation *outside* the treaties and the common institutions. Nonetheless, paradoxically, the strengthened types of co-operation are not so important for the Community 'pillar' that they were initially designed for: at bottom, if we extend recourse to qualified-majority voting, the Single Market conceived fifty years ago by Jean Monnet and Robert Schuman and the common policies and institutions that accompany it will be truly completed, so as to be able to be extended to the candidate countries soon. Enhanced co-operation is, however, crucial in the new 'building sites' of the integration process—justice, immigration, security and defence—where the *acquis* still remains to be created, and where, as with the Community twenty or thirty years ago, a certain initial level of homogeneity and convergence is essential. If it were easier—in relation to the possible 'centre of gravity' already mentioned—to embark on enhanced co-operation, perhaps by using the institutions and the budget of the EU, that would constitute a major stimulus to 'deepen' integration in an increasingly larger, more diversified, Europe. This would, among other things, multiply the 'magnet' effect of the 'centre of gravity': partners not initially interested, or not qualified, in enhanced co-operation would soon see themselves encouraged to join in order not to remain excluded from the foreseeable benefits (both functionally and politically). Basically, this is what happened—*mutatis*



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*mutandis*—with both the monetary union and Schengen, which ended up incorporating more countries than was initially planned or imagined.

In short, the great enlarged Europe needs a vital core: as an instrument for integration, not division; and it needs it as an instrument that is open to countries interested in joining, as has been the case with the Community in recent decades.

This would, in some sense, mean going back to the future: enriched with visions, but also with concrete experience—a new stage in Europe's never-ending course.

## **Another View of the Democratic Deficit: No Taxation without Representation**

For a while, it seemed that European integration was on the peaceful track of routine. The agreement reached at the Amsterdam summit in 1996 was sufficient to postpone big thinking.<sup>1</sup> It is true that a certain sense of constitutional crisis was in the air during the last months of Jacques Santer's presidency of the Commission, but no major theoretical debate surrounded its demise or the election of Mr Prodi as a new, reformed head of the college of commissioners.<sup>2</sup> However, the last two months have brought big ideas back to the European public. A wave of speeches and statements by key politicians has fostered a wide debate on where Europe should be heading in the coming years. The three boldest ones may have been Joschka Fisher's at Humboldt University,<sup>3</sup> Jacques Chirac's before the German Parliament<sup>4</sup> and Carlo Azeglio Ciampi's on the occasion of receiving an honorary degree from Lipsia University.<sup>5</sup>

This might mark a new stage in the debate, but, to a certain extent, it was bound to happen once we take into account the following two processes. On the one hand, the Union is committed to enlarge its membership. A number of candidate members have started negotiations, and some more are on the waiting list. This has encouraged fundamental thinking on the institutional structure of the Union. It is widely agreed that it is simply not possible to adapt the existing one to a constituency of twenty-five or thirty members. On the other hand, the number of

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<sup>1</sup> A very helpful outline is contained in Renaud Dehousse, *European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?* (Dehousse 1998). It is also available at [http://www.iue.it/RSC/WP-Texts/98\\_11.html](http://www.iue.it/RSC/WP-Texts/98_11.html).

<sup>2</sup> See, Chiti (1999).

<sup>3</sup> *From Confederacy to Federation. Thoughts on the finality of European Integration.* Speech by Joschka Fischer at the Humboldt University in Berlin, 12 May 2000 (in this Volume).

<sup>4</sup> *Our Europe.* Speech by M. Jacques Chirac, President of the Republic of France, to the Bundestag. English version, available at <http://www.presidence-europe.fr/pfur/page-dossier6.htm/dossier=00383&nav=6&lang=5&rubrique=-1&page=1>.

<sup>5</sup> Discorso del Presidente della Repubblica Carlo Azeglio Ciampi in occasione del conferimento della laurea *Honoris Causa* dell' Università di Lipsia. July 6<sup>th</sup>, 2000. Available at <http://www.quirinale.it/Discorsi/Discorsi.asp?=12587> (only in Italian).

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issues dealt with at European level is on the increase, despite subsidiarity. This is partly the direct result of the new pillars added at Maastricht, but it is also a consequence of the superior problem-solving capacities of a supra-national institution. The problem here is that the Europeanisation of policies tends to take place in a blurred way, exponentially increasing the degree of complexity of the institutional structure.

It is in such a context that we can make full sense of the three aforementioned discourses. The finalité of the Union comes quite naturally when one has to consider fundamental reform. The three interventions can be seen as an attempt to provide the political vision that should underlie the detailed plans of reform. References to a European constitution, to enhanced co-operation and federalism might look too vague, but should really be considered as fundamental principles already settled at the beginning of the debate. At any rate, it does not seem too risky to assume that Pandora's box lies open and will not easily close again, if only because of the timing of the *ad-hoc* convention conveyed to draft a Charter of Fundamental Rights for the Union. The convention has already produced a final text<sup>6</sup> and will release its final report in September. Despite the need for such an exercise,<sup>7</sup> it is quite clear that the standing and status of rights is a major constitutional issue. It does not take much imagination to see this as a potential first step towards a constitutional moment for the Union.<sup>8</sup>

In this note, the focus is on Fischer's speech. His arguments are the most challenging. Not only does he have a *certain idée de l'Europe*, but he also has a quite detailed blueprint of how representation and decision-making processes should be changed. His is a committed federal proposal, and one might even say that it has a Habermasian flavour.<sup>9</sup> My intention is to provide some normative arguments for what seems to me to be the implicit premise of Fischer's speech. Namely, that there is no necessary tension between European integration and democracy (which does not mean that there is necessarily harmony). I basically do two things. First, I try to analyse what the democratic deficit is really about. Instead of invoking it rhetorically, we should analyse it with the help of a sound conception of democracy. If we do so, we see that not only Europe, but also nation-states and unregulated markets have to deal with serious democratic deficits. Second, I try to show that the processes of European integration verify

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<sup>6</sup> Final draft (28.07.200): see, <http://db.consilium.eu.int/dfddocs/EN/0422en.pdf>.

<sup>7</sup> See, Weiler (2000).

<sup>8</sup> Applying Ackerman's apt terminology: see, *We the People* (Ackerman 1998) and 'The Rise of World Constitutionalism' (Ackerman 1997).

<sup>9</sup> Which is not surprising given his reading diet. This is hinted at in an interview to *EL PAÍS*, 7 July 2000.

this abstract normative argument. I consider in some detail one specific policy area, namely personal taxation. It seems to me that there is enough evidence to conclude that Member States have paid a high price to keep their formal sovereignty on this matter. They seem to have lost most of their factual sovereignty. This should be enough to conclude that Fischer's basic insight is right. We can have more of Europe, more of nation-states and more of democracy, provided we use our institutional imagination.

## 1. Fischer's Argument

Fischer makes a plea for a federal conception of Europe. The general premise is that Europe has already transcended the international, or intergovernmental, stage of integration, and that it increasingly resembles a federation. The *Rubicon* of European integration was passed with Monetary Integration (he refers to the famous third stage, during which national currencies were to be replaced by the euro). This quite neo-functionalist idea seems to be shared by many publicists in France.<sup>10</sup> It is worth quoting Fischer's statement: 'Tension has emerged between the communitarisation of economies and currencies on the one hand, and the lack of political and democratic structures on the other.'<sup>11</sup>

This reality of an increasingly integrated Europe is yet to be translated into adequate mechanisms of citizen representation and of decision-making. This *décalage* makes it necessary to move forward to explicit political integration, namely, to a European federation. The slow process of integration, based on the idea that one small step now will allow several small steps later on, is no longer useful. Gradual integration without worrying about the picture of the polity that is being forged (the so-called Monnet method) is precisely at the root of present troubles. This implies two things at the very least. First, direct mechanisms of representation of citizens. This requires the familiar transformation of the European Parliament into something closer to a fully-blown legislative organ, and further from the less usual claim of the direct election by the people of the

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<sup>10</sup> One can just recall the catchy formulation of former President D'Estaing: 'We wanted the European Central Bank to be an independent body, not an orphan.' See his speech before the French National Assembly on 9 May 2000.

<sup>11</sup> This is completely in line with the feeling of both Chirac and Ciampi. It must be said that it was 'in the air' during the 9 May 2000 session at the French National Assembly, where a very interesting debate on the priorities of the French Presidency took place.

head of the European executive.<sup>12</sup> Second, a complete overhaul of the decision-making process. We need a new (and proper) constitution, with full-blooded legislative and executive powers. It has just been said that he puts forward a new model of Parliament (with two chambers, one for direct citizens representation, the other for regional representation) and a new model of the Commission, as a real executive, with its head receiving a direct mandate from the people.

## 2. Reactions to Fischer's Discourse

Fischer seems to have intended his discourse to foster debate. He was cautious not to offend the sensibilities of anybody. He insisted that this was not an official piece, so he took his ministerial hat off. He softened his language with several discharge notices. However, his invocation of the European F-word (for *federation*) has been more effective in awakening fears of a European Leviathan than in offering a clear picture of the decision-making structure that he favours.<sup>13</sup>

It is too soon to offer a detailed analysis of criticisms. However, it is not too risky to suppose that frontal attacks will be based on the argument that a federal Europe, with mechanisms for the direct political representation of citizens and both renovated breadth and scope for federal decision-making processes, is unlikely to reduce the European Union's legitimacy deficit. This is so because it is the pooling of competences by a supranational institution *that is perceived to be the problem*. It is precisely this that is argued to be what is actually *perverting* national democracies. Under such premises, a European federation (somehow by definition) cannot be sufficiently democratic.

This is, of course, the language of Euroscepticism, a short word for anything opposing further political integration. This usually comes in two main variants.

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<sup>12</sup> Fischer refined his views on 6 July 2000 before the Constitutional Committee of the European Parliament. For the full published text of this refinement, refer to <http://www.db.eurparl.eu.int/ep/owa/pcalag.oj?ipid=0&imm=7874&ilg=EN&iorig=committes>.

<sup>13</sup> See, *The Times*, 13 May 2000: 'German threat to isolate Britain'. The correspondents report that 'Paris and Berlin are determined to counter what they see as an Anglo-Saxon plot to turn the EU into little more than a free-trade area' and that Francis Maude, the Conservative shadow-Foreign Secretary argued that Fischer had 'spectacularly blown the lid of Europe's super-state agenda.' It is interesting to have a look at the two letters to the editor in *The Times*, 17 May 2000, under the headline: 'European 'superpower' plan eclipses Euro debate'. One of the readers, Sir Roy Denman, argues that '[the UK] will not be prepared to join a federation for a generation. This is the length of time during which we shall simply be a sidekick to a new European superpower under Franco-German leadership.'

Firstly, we find those who conceive of the Union as mainly an economic affair. Integration would mainly be about deregulating cross-border economic activities. The key words here are competition and mutual recognition of standards. This can be based on a general political stance (neo-liberalism, ordoliberalism) or on a particular view of the distribution of competences between the Union and the Member States (this seems to be the case of ‘third way’ social-democrats like Tony Blair). Secondly, there are those who deny that a federal Union can be a working polity, to the extent that it cannot forge one of the basic resources for stability, namely, the loyalty of citizens. The argument goes that politics requires a sort of pre-political solidarity, and this is based on common culture. Because the latter is absent within Europe, the Union should be a mere association of states, based on the intergovernmental model of international organisations. The key words here are loyalty, solidarity and *demos*. The Union as a federation would be a recipe for tyranny.<sup>14</sup>

Even though we are still waiting for direct responses to Fischer’s speech, one cannot fail to notice that it has had an immediate impact on the discourse of national and supranational officials. It is interesting to see how the basic premise of the Green politician’s argument is directly rebutted, namely, that monetary integration needs to be complemented by further political integration. This has been left painfully clear in two statements within weeks of the speech given in Berlin by Gordon Brown, the UK Chancellor of the Exchequer,<sup>15</sup> and the flamboyant Fritz Bolkestein, Commissioner in charge of the Internal Market and Taxation (portfolio).<sup>16</sup> It is worth noticing that both of them advanced a view of the Union based on economic competition,<sup>17</sup> and strongly disregarded any

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<sup>14</sup> It is worth considering the extent to which the two variants have deeper intellectual connections. After all, neo-liberal arguments against redistribution postulate charity as an alternative means to guarantee that people are not exposed to extreme economic deprivation. The obligation of charity is then located in the members of close-knit communities, sharing culture, language and so on.

<sup>15</sup> A lecture delivered 13 July 2000 to the Royal Economic Society. Available in electronic form at [http://www.hm-treasury.gov.uk/press/2000/p90\\_00.html/](http://www.hm-treasury.gov.uk/press/2000/p90_00.html/).

<sup>16</sup> Speech given 27 June 2000 to Conservative MEPs participating in the IGC. See, for details: [http://europa.eu.int/comm/internal\\_market/en/speeches/spch243.htm](http://europa.eu.int/comm/internal_market/en/speeches/spch243.htm).

<sup>17</sup> Bolkestein was assertive. He said: ‘I am not about to harmonise taxes. *I would rather have fiscal competition*. Instead, we try to simplify as much as possible by recognising the validity of each other’s rules. We call this the mutual recognition of standards. Where necessary, we replace fifteen different sets of rules by just one. Thus, the goods, services, labour and capital can now freely flow across borders.’

further integration towards some supra-static form.<sup>18</sup> This makes it clear that we are in the middle of a debate about the soul of European integration.

### **3. What to do with Fischer's Discourse? A new look at the Democratic Deficit**

My point is the following. On the one hand, no democrat can be happy with the present shape of the Union political system. The democratic deficit, notwithstanding Scharpf,<sup>19</sup> is a serious concern. There are serious legitimacy problems to be faced. On the other hand, and as things stand, the implicit premise of Fischer (moving towards a European federation will increase legitimacy) seems to me *plausible*. The reader will be immediately shocked by the contradictory character of these two statements. How is it possible to increase legitimacy by strengthening an institutional structure that displays many democratic flaws? The key to this puzzle is that we need to distinguish between the different kinds of democratic deficit that are at stake here. The paradox dissolves once we give second thoughts to the conception and dimensions of democracy.

In the next section, I claim that political legitimacy is not to be equated with a concrete method of aggregating preferences, but with a complex conception of democracy.<sup>20</sup> This has at least four dimensions: procedure, substance, implementation and scope. The democratic deficit of European institutions is related to the first three dimensions, while the democratic deficit of non-Europe is related to the fourth, namely, to scope. The Union is needed because it makes decisions that are democratic in terms of scope. Going back to the traditional nation-state is no solution to the deficit. At the same time, we can gain a clear picture of what is wrong at European level, and, consequently, we can put forward proposals to reduce the real dimensions of the democratic deficit. And it is this, as a matter of fact, that seems to be what Fischer is saying.

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<sup>18</sup> Brown was quite straight, and indirectly referred to Fischer's speech as 'an old claim'. Here is the relevant passage: 'We are challenging the old claim made by some that tax harmonisation and a federal super-state run by the European Commission are the next stage after Monetary Union. We are putting the case for tax competition and against tax harmonisation, for the mutual recognition of nationally determined standards, and calling for timetables that would open up the single market in aviation, telecommunications, utilities, energy and financial services.'

<sup>19</sup> Fritz Scharpf argues that the democratic deficit has been more an academic, than a political, concern up to quite recently. See, *Governing Europe* (Scharpf 1999).

<sup>20</sup> For the complex conception of democracy, see, Menéndez (2000:68 *et seq*).

#### 4. The Democratic Deficit Unbound

Politics is basically about deciding common action norms. Once we recognise that we are not alone in the world, and that our actions have severe consequences upon others, we realise the existence of what have been called *the circumstances of politics*. The only way to claim our own autonomy while respecting that of others is by means of agreeing on sets of norms to deal with conflicts, and, hopefully, behaviour that is co-ordinated in ways that improve the lot of every one of us. Democracy is the yardstick that allows us to determine whether political decisions are legitimate and, consequently, to assess whether there is a good case for us complying with them even if we do not agree with their content. This is essential for the regular functioning of political communities. But what does democracy entail? It has become quite intuitive to associate it with majority rule, but if we pause for thought, we would depart from such a conclusion quite quickly. Respect for fundamental rights and a fair application of the law is also clearly associated with our concept of democracy, and this involves an appeal to substantive values (respect for the life of the person, for his or her autonomy and dignity) and criteria governing the actual implementation of the laws, either by courts or by public administration.<sup>21</sup> It is in this sense that we can claim that democracy is basically about procedure (about how we decide which laws should govern us), but that it is also about substance and guaranteed implementation.

If this is granted, a democratic polity becomes one in which citizens freely decide about common norms which give institutional expression to a set of democratic values, and which are implemented in ways that ensure their respect. Democratic politics is the epitome of freedom. However, freedom is one thing and unbounded free will is another. We are *free* to argue and vote for a given set of common norms, but we are not *free* either to decide whether we have certain issues on the agenda or to decide which individuals will also be part of the community. The *circumstances of politics* (the commonality of interest in avoiding conflict and defining schemes of co-operation) are the ones that define the constituency. If this is so, this adds a fourth dimension to democracy, namely, *scope*. The political constituency called to decide a certain matter should be one *of those that is affected in a relevant way by the outcome of the decision*. This works both ways. In the same way that it would be undemocratic for the national parliament to decide the amount of funds to be devoted to

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<sup>21</sup> It needs to be said that all this is dealt with in the draft charter of the fundamental rights of the European Union.



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gardening by a given city council, it would be undemocratic for the local city council to set the rates of the income tax at national level.

All this has relevant implications for the European integration process. Different processes have led us to increasingly share interests across European countries. One could argue that the process of market integration ensuing the Rome Treaty of 1956 is itself to be blamed for this, but it is also the case that this was perceived to be the reaction to previous developments which took place much earlier.<sup>22</sup> Be this how it may, we have reached a point at which we share many interests, just as we already share a good deal of common action norms, as the thick repertoires of Community law prove. This creates a good *prima facie* case for arguing that the only way to deal democratically with a good number of issues is at European level (some issues might even require us to move to the global level). Against the arguments of Eurosceptics, it is *democracy itself* (the dimension of its scope) which calls for supranationalism.

Although it was stated at the beginning, it is probably worth repeating now that this does not mean that the European Union is a perfectly legitimate polity and that we should bow to any argument for deeper integration. European institutions are still inadequate in what concerns the other three dimensions of democracy. Political participation is weak, the *acquis communautaire* needs to be expanded in order to give a more balanced protection to basic fundamental rights, and access to Courts is imbalanced in favour of certain sectoral interests.<sup>23</sup> My reasoning only clarifies that the way out of the democratic deficit is neither deep deregulation nor a return to the 'classical' nation-state. In both cases, we will end up with a serious democratic deficit, due to the mismatch between the level at which decisions should be adopted and the one at which they are actually adopted. Consequently, we will probably end up with far from efficient arrangements. The experience with rigid neo-liberal macro-economic policies must have taught us the extent to which the market depends on fundamentals that it cannot provide by itself. A good deal of the pressures to Europeanise certain fields or policies derives from the incapacity of nation-states to deal with global problems unilaterally (although they might try to adapt and do their best, and some do this clearly better than others).<sup>24</sup>

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<sup>22</sup> Alan Milward's, *The European Rescue of the Nation State*, (Milward 1992), remains the unavoidable reference.

<sup>23</sup> Harding (1992).

<sup>24</sup> Scharpf (1999).

## 5. A Closer Look at Taxation?

This rather abstract normative argument can be rendered more concrete by considering specific policy areas. In this section, I propose to review the process of the Europeanisation of taxes. Taxation is continuously said to be a core competence of the nation-states. The third stage of Monetary Union has augmented the stakes. It is now frequent to hear that tax policy is the last trench of the nation-states, deprived as they are of monetary pulleys and levers. It is rather curious that Joschka Fischer does not even consider this (although there is a direct reference to the Europeanisation of monetary policy, there is no reference whatsoever to public finance in the speech). My claim is that the present state of play in the Europeanisation of tax matters makes it clear that Fischer's basic intuition is right. Namely, that furthering political integration within the European Union is not against democracy, but could allow us to improve democracy. This is so because Member States have less room for political manoeuvre in relation to the taxes which have not been Europeanised than they have regarding the taxes for which a common normative framework has been established.

The usual argument that taxes have not been harmonised at European level is more accurately reformulated as the premise that there has been no positive harmonisation of personal taxes, what are usually referred to as *direct* taxes. The first flaw in the usual rhetoric about taxation is that it neglects that some taxes are already Europeanised. This is true of customs duties, and, to a good extent, also applies to Value Added Tax and to excise duties (although to a lesser extent). The actual failure of the European political process is correctly circumscribed to personal taxes. Despite the fact that ambitious plans for comprehensive tax harmonisation have been on the agenda since the very beginning of the Communities<sup>25</sup> (the need for some harmonisation of corporate taxation having already been discussed in the very early stages of the ESC), not much has been achieved on tax figures burdening capital or corporate income.<sup>26</sup> The relevant thing is that the formal preservation of national sovereignty has come hand in hand with the progressive erosion of the *de facto* sovereignty of the nation-states.<sup>27</sup> This is to be explained by two parallel processes, namely, the de-regulation of cross-border capital flows (quickly implemented after the

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<sup>25</sup> See the comprehensive Neumark report. It can be found in *The EEC Reports on Tax Harmonisation* (Amsterdam: International Bureau of Fiscal Documentation, 1963).

<sup>26</sup> See, Farmer & Lyal (1993); Martín Jiménez (1999).

<sup>27</sup> See, Avi Yonah (forthcoming).

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demise of the Breton Woods international financial architecture)<sup>28</sup> and the implementation of the merely *negative* aspects of the free movement of capital within the Community.<sup>29</sup> It does not take much ingenuity to see that, under such circumstances, all states have tended to reduce the tax burden over capital income and shift it to labour income. It is difficult not to see that this reflects a loss of factual sovereignty. Nation states have an increasingly narrow margin for manoeuvre in the design of their tax systems. Most of the discussions surrounding the major tax reforms that have taken place since the eighties have focused on the consequences that the reform would have on the international competitiveness of the country in question. If one needs further evidence, one can consider the evolution of some technical aspects of corporate tax, which are directly related to cross-border activities. It is difficult to argue that there is much democratic support for the reforms of the tax treatment of capital gains or of the taxation of savings, which tend to go almost unnoticed by the public, despite their major distributive effects. Tax reforms of such elements of the tax mix are normally undertaken citing the argument that ‘whether you like it or not, there is no alternative.’

It is paradoxical to see that the same nation-states have much more room for political decision concerning taxes which have been Europeanised. This is the case with the Value Added Tax, for example. A set of European directives constitute the basic normative framework for national laws defining the Value Added Tax. Member States have to design their taxes according to the tax base definition established at European level. However, this allows them to have room to fix the basic rates of VAT, and they can also apply preferential rates to certain products or activities. This ensures a smooth working of the tax, and allows sufficient room to make politically significant and transparent decisions. Reducing or increasing the basic VAT rate is a politically relevant decision, and

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<sup>28</sup> See, among others, Taeko (1993:184 *et seq*).

<sup>29</sup> See Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty. See Official Journal L 178, 08/07/88, pp. 5-18. Of course it is difficult to determine the relationship between different causal agents. The two ones to which I make reference seem to be the remotest causes of many other relevant developments, but this might be inaccurate. For example, one could consider that a major cause of the erosion of national control over the economy is the volatility of capital markets. My assumption is that *short-termism* in economic decision-making has been rendered possible by the previous deregulation of capital markets. And that it has been aggravated by the specific way in which freedom movement of capitals was implemented in the Union.

different governments have opted for different solutions in line with the national political preferences.<sup>30</sup>

This all boils down to evidence that democracy is also a matter of scope. To the extent that the interests of the citizens of many different states are at stake, it is clear that national decision-making is bound to be either undemocratic or plainly ineffective, and, thus, against the real preferences of citizens. This makes it clear that, for a common action norm in this respect, we will need to have resort to the supranational level. But, in a way, this is part of the traditional liberal motto, *no taxation without representation*. Not only does it require voting rights within the polity to be extended, it also requires matters to be decided in institutional frameworks where all those affected can be represented. In personal tax matters, this implies a common normative framework decided at European level. Only in this way can Member States regain actual political sovereignty.<sup>31</sup> Clearly, this does not make such a level of governance immediately democratic, as this will depend on procedure, substance and implementation.

## 6. So, What can Fischer Teach us?

As stated, I have made two points in order to defend Fischer's vision. First, that any fruitful analysis of the democratic deficit should start by analysing the concept of democracy itself. By doing so, we realise that European integration helps to increase the legitimacy of the scope dimension of democracy. This does not hide the fact that there are other dimensions of democracy in which much needs to be done. The Union as a polity still needs to find better ways of increasing political participation; it has an insufficient commitment towards certain substantive values and it provides individuals with insufficient access to

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<sup>30</sup> For example, the basic VAT rate went down 1 point in France in April 2000. See, WorldWide Tax News (International Bureau of Fiscal Documentation), document TNS-51 (2000).

<sup>31</sup> A further question is why such normative framework must be a *fully supranational* one, and not one established through *classic* international law. Fully tackling this issue will triple the size of this note, but it can be said that the functional argument (member states can no longer act unilaterally and be factually sovereign) can be complemented by normative arguments of different kinds in favour of decision-making at European level. One could be that a purely intergovernmental solution would not be sufficiently sensitive to the strength (in number and in reasons) of transnational coalitions in support of certain measures. As things stand, one member state (even of the size of Luxembourg) can veto any proposed arrangement, without any need to invoke the reasons, acceptable to others, for adopting such a stance. It is puzzling to hear that an institutional arrangement that makes that possible is the *essence* of democracy.

judicial protection. But this cannot be solved by a move towards a non-Europe or a conception of the Union as a free trade area. Second, that a careful analysis of the process (or lack of) of tax harmonisation confirms the previous analysis. The mixed record of tax harmonisation shows that the lack of a supranational framework for *personal taxes* has led to a considerable narrowing of the tax policy options open to national political processes. The only way of rescuing national sovereignty is by means of increasing supranational arrangements.

It seems to me that this provides a bit more solid ground for the general insight of Fischer. In such a light, one should construct him as making a modest plea for constitution-making.

After all, he is openly arguing for a federal Europe. The problem with federalism is that it means very different things to different people, and it is not always the case that everybody is eager to learn what others mean by it. According to classical constitutional thinking, what is at stake here is where sovereignty rests, or—amounting to the same thing—who has the last word, the power of last resort (in legal jargon, the *competence-competence*). States can establish different frameworks of co-operation. In a confederation, states retain their original sovereignty, while delegating a limited number of powers to the new central power, which is a mere creature of the states. In a federation, sovereignty moves to the centre, and states have their powers enshrined and limited in the federal constitution. Eurosceptics very much share this view; consequently, they see Fischer's plea for a federation of states as a recipe for depriving member states of sovereignty. However, one could doubt whether this mode of conceptualising sovereignty makes sense any longer. For one, Neil MacCormick has shown how the present structure of European law cannot be explained with such conceptual tools. The Union makes it clear that we have gone beyond sovereignty. The relationship between European and national law cannot be said to be one based on the unconditional supremacy of any of the systems over the other. We have a plurality of overlapping legal systems, and a pluralistic relationship between them.<sup>32</sup> The last word does not belong to the European or the national legal system, but to the *dialogue* that exists between the two. Under such an understanding, federalism is not a formula to determine where the power of last resort rests, but to describe the foundations of the Union. Structures of international law are exclusively based on the commonality of interests and the functional need of finding common action norms. They resemble a *modus vivendi*, in which parties tolerate each other. A Federal Europe is based on something else. Common action norms deal with areas in which we need to solve conflicts and achieve co-operation, but they are also

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<sup>32</sup> See, Neil D. MacCormick (1999).

inspired by *common values*. The right model is that of the overlapping consensus, of a normative consensus on which the whole integration process seems to be founded.<sup>33</sup>

Such a conception of federalism makes it clear why Fischer has felt in need of reopening the debate on the finalité of the Union. We could interpret him as saying that citizens should realise that the Union is already based in an overlapping consensus that transcends a mere *modus vivendi*. In this sense, and to use Ackerman's terminology once again, Europe is not facing a radical new constitutional beginning in which it has to redefine its identity. It is just entering a constitutional moment, in which important reforms will be adopted.

This implies, among other things, reconsidering the division of competences between the Union and member states, but this is not necessarily a recipe for a super-state (actually, it could be just the opposite). However, it seems to me that Fischer might be too optimistic. It is not realistic to expect that we could make a one-page list to sort all things out. Anybody familiar with policy processes at the European and at the national level within federations knows that things are far more complex. As regards tax matters, the efforts to establish an Anti-Fraud office (surprisingly baptised as OLAF in the Euro-jargon) show that different schemes of cooperation are needed, no matter who is mainly responsible for doing what.<sup>34</sup> But nothing prevents making things as clear as possible, even if complexity is to be accepted as the price for sophisticated governance.

## 7. Conclusion

This means that we are only at the beginning of the real debate. The European Union is already a full-blown polity with a constitution.<sup>35</sup> There are good *democratic* reasons for this to be so. If we are really committed to democracy, we should endorse the move from a messy and undefined constitution towards a drafted charter that has benefited from extended deliberation.<sup>36</sup> This will allow us to start tackling the real democratic deficit at European level. We need to

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<sup>33</sup> See, Massimo La Torre (1999:188).

<sup>34</sup> See, the First report on the operational activities of OLAF, Brussels, 23 May 2000. Available at [http://europa.eu.int/comm/anti\\_fraud/documents/rapport\\_en.pdf](http://europa.eu.int/comm/anti_fraud/documents/rapport_en.pdf).

<sup>35</sup> See, MacCormick (1999).

<sup>36</sup> A similar idea can be found in Jean-Claude Piris, '*Does the European Union have a Constitution? Does it need one?*' (Piris 2000). Philippe C. Schmitter puts forward an interesting proposal for a constitution-making process in his recent *Comme democratizzare l'Unione Europea e perché* (Schmitter 2000:145-55).

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have a clear set of procedures, substantive values and criteria for the implementation of this. But this requires us to move forward, not backwards, in the process of European integration. Thus, Fischer's vision is basically correct. We can have both more of Europe and more of nation-states, but only if we dare to become the *pouvoir constituant*.

HELEN WALLACE

## **Possible Futures for the European Union: A British Reaction\***

In his speech in Berlin in May 2000, Joschka Fischer commented that he had ‘an eye on our friends in the United Kingdom, because I know that the term ‘federation’ irritates many Britons’. He might have added that his focus on the finalité of the European Union (EU) also baffles most Britons. This short essay tries to set the new debate that Fischer provoked on possible futures for the EU in the context of developing thinking in the UK about European policy. In particular, it looks at two related issues: the discussion about the ultimate shape of European integration, and the debate within the Intergovernmental Conference (IGC) 2000 on proposals for ‘closer co-operation’. Both issues have to be seen against the back-drop of the continuing enlargement of the EU.

The British come to this with two contradictory starting points, and with a still tense debate in domestic politics on core issues of European integration. The two contradictory starting points are: first, a pragmatic (and quite commonsensical) notion that European ventures should match horses to courses; and, second, a fear of exclusion from the inner circle of the European governments which count.

On the one hand, it has been a consistent thread of British policy to encourage co-operation in Europe by and with the countries that were relevant to any given task. Thus, in particular, the British have consistently been key players in European defence co-operation since the Second World War, actively and extensively engaged in the NATO alliance and in other circles of defence collaboration, including willingly engaged-in active military deployment. In a plethora of other settings, successive British governments have been engaged in co-operation when this made sense in pragmatic terms or in terms of critical British interests, and—crucially—when it was judged that co-operation with other European partners would lead to value-added outcomes in terms of public policy.

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The British Labour Government’s policy on the longer term development of the EU was set by Prime Minister Blair on 6 October 2000. This speech was deliberately delivered in Warsaw to signal the strategic emphasis on enlargement. This new statement of British policy was intended as a major contribution to the debate launched by Joschka Fischer.



On the other hand, British governments have been repeatedly concerned that other European governments would run ahead with co-operative and integrationist adventures that would leave the UK on the margins. Their fears have repeatedly been well-founded. On many issues and at many moments over the past fifty years or so, the British have discovered that, whatever the British reservations might be, others have been willing to proceed with intensified integration. The net result of these two starting points is that on the courses where the British horse was able to run, the British have been important players, while on other courses there has been no British runner—economic and monetary union (EMU) is the obvious case in point.

## **1. Domestic Politics**

Many of the reasons for this contradiction lie deep in British politics. ‘Europe’ has been a contested domain for British politicians as both process and substance. To summarise very briefly, typically governments in office have sought to develop a more engaged European policy, while the alternating lead party of opposition has found ‘Europe’ a persuasive and useful subject on to which to differentiate itself from the governing party. There has been a damaging cycle of acrimony, which, hardly surprisingly, has been reflected in ambivalent public opinion on European issues and an image of Britain as an unpredictable partner.

We might note here, since it is relevant to new suggestions being currently mooted for institutional reform, that the EU institutional process leaves little scope for out-of-office politicians from the Member States to be either informed about or involved in the development of EU policies. Opposition politicians have the freedom of ignorance from which to launch their criticisms of the EU and ‘Brussels’. The particularly adversarial character of the British political process reinforces this.

British reservations about engagement in the EU and its further development have related to both substance and process. Differences on substance have, over time, become increasingly less pronounced, which, in part, explains why British governments have, as they became more informed and more involved, engaged in the development of many EU policy regimes with more and more enthusiasm. Indeed, on a number of critically important EU issues British governments have been not only ‘regime-takers’, but have also sought to be ‘regime-makers’. The British government at that time was among the earliest and keenest advocates of the single European market, just as the current government is of the ‘new European economy’ paradigm outlined in the strategy agreed at the Lisbon European Council of March 2000. British governments have been keen

participants in the development of European foreign policy co-operation (remember the London Report of 1981), and have latterly become one of the prime movers in the push towards increasing European defence autonomy. And there are other examples.

The image of the UK is, however, much coloured (both at home and abroad) by the focus on the issues on which the British remain disengaged—the EMU is the obvious current case in point. Hence, the assumption can easily—but perhaps wrongly—be made that British governments are likely to be followers rather than leaders on new integration issues.

Also relevant to the current debate is precisely Joschka Fischer's observation that the British find federalism an indigestible concept. It would, indeed, have been helpful for the British domestic debate if he and his advisers had succeeded in finding an alternative label for his recent propositions. In Britain, a country with a very different experience of state-building from that of Germany, many feel that federalism is perceived (however wrongly) as a mode of organising power hierarchically and top-down. The British experience is one of organic evolution in the relationships between the different levels and locations of governance. It is, thus, also one in which constitutional behaviour has been defined by evolving practice and acts of parliament, rather than by formal constitutional documents.

However, two new points are relevant here. One is that the current government, at least, is more inclined than its predecessors to accept that federalism is a normal, if sometimes puzzling, part of the rhetoric and discourse of many continental European politicians. Thus, there were no anguished rebuttals of Joschka Fischer's proposals. The other point is that the organisation of the UK as a polity is undergoing fundamental change, with the implementation of forms of devolution in Scotland, Wales and, perhaps, Northern Ireland. Thus, British politicians are being forced to think differently—and in more explicitly constitutional terms—about the ways in which policy powers are assigned to different levels of government—and also about the ways in which political responsibilities are, as a consequence, diffused between different political office-holders. In August 2000, for example, the UK government was able to maintain a grateful silence while the new Scottish executive grappled with an extraordinary catalogue of errors in administering final school examinations.

It follows from these new developments that the British government is able to contemplate the revived EU discussion about the assignment of powers to different levels of government (EU, Member State, sub-state) with fresher eyes. In contrast to the defensive British positions on subsidiarity of a decade ago, the current British government can now engage much more constructively with their

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EU partners on this subject. Thus, we might expect to see more nuanced British contributions on the cases for and against codifying the assignment of policy powers. Some in Britain will be in favour of lists in order to achieve a kind of clarity, while others will continue to argue for the merits of a more organic approach.

We might also note here that the British discussion on the proposed EU Charter of Fundamental Rights has precisely this quality. Voices (from) close to the government which are resistant to an over-codified, or overly binding, EU Charter are making their arguments not out of fundamental opposition to continental constitutionalism, but rather on the basis of how they think a Charter might work in practice.

What, then, can we conclude from this overview of British domestic politics? First, there continues to be a troublesome contrast of perspectives about the future development of the EU between governing and opposition politicians. Second, on the substance of further EU integration, we can expect the British government to contribute ideas and proposals for closer integration in some policy areas, whatever the continuing nervousness about the EMU. Third, on the forms and methods of integration, the British now have more open minds, although with a continuing instinct to prefer organic development to 'constitution-led' blueprints.

## **2. Future Goals of Integration**

It is as much the talk of the finalité of the EU as that of a European federation that disturbs British politicians. The notion that, on some distant horizon, an 'end-state' of perfect integration exists simply carries little cogency in the British discussion. It seems too abstract, too speculative, and, hence, not a productive area of debate. This reluctance to engage with a debate that is much more popular in continental Europe is, of course, partly a result of the difficult history of British policy towards the EU. However, it also crucially reflects deep patterns of British political culture. Ask a British politician what they think the finalité of the devolution process now under way within the UK is and they will be similarly puzzled and reluctant to answer, unless they come from one of the parties seeking outright independence for Scotland or (less commonly) Wales. The more usual answer is 'let's see how things develop.'

It is increasingly recognised among British policy-makers that this 'wait-and-see' attitude is a disadvantage in European circles, since it is so quickly elided with a preference for disengagement. Hence, one can now hear voices calling for the British to enter this EU debate more energetically and positively. Evolving

British policy is, however, likely to be strongly influenced by an organic approach to institutional reforms and by a preference for substance to determine form. Thus, the British are still more inclined to focus on the questions of ‘what is the EU really for?’ or ‘where does EU solidarity really help us towards better policy outcomes?’

On these more substantive questions current British thinking has become rather strongly supportive of EU policy extension in a significant number of significant policy domains. These can be grouped under a number of headings.

*a) Market regulation and ‘flanking policies’.* The British government is likely to hold to the single market as a cornerstone of the EU edifice, for both the current and the future enlarged membership. It will be reluctant to envisage any weakening of the single market (*i.e.*, no support here for ‘closer co-operation’), but, where possible, it will tend to favour regulation with a lighter touch. British policy-makers tend to take a ‘narrowish’ view of the flanking policies that are a necessary corollary of the single market. Hence, the British preference in this area is likely to favour consolidation.

*b) The ‘new European economy’.* There is likely to be strong British support for a vigorous development of the Lisbon strategy. Indeed, one can already observe a sense of ownership of this new strategy on the part of the British policy-makers involved—here, indeed, they believe themselves to be in the vanguard (*sic.*) of a new development in the EU, one which can be described as marking ‘a new paradigm’ in EU policy-making around the ‘benchmarking’ and ‘best practice’ approaches. The British also believe that this offers a more promising approach to the European ‘social’ agenda. What the Lisbon strategy will add up to in practice is another matter—views on this are divided across the EU. But three particular points about it should be noted. First, it is explicitly permissive in encouraging national or local experimentation rather than imposing a single blueprint. Second, it is an elastic formula which could rather easily admit candidate countries into the circle of comparisons sooner rather than later. Third, it depends on an institutional mode of ‘seminar-style’ governance, rather than on explicit decision-rules or assignments of policy competences.

*c) EMU.* For the moment, this remains the Achilles’ heel of the current government’s European policy. Although most members of the Cabinet favour entry into the single currency regime, subject to various conditions, politically the government remains reluctant to put the issue to the electorate. As long as this remains so, there is not much scope for British speculation about how to reinforce EMU, a key subject for many of those who are fearful about how to maintain the momentum of integration in EMU countries.

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*d) Foreign and defence policy.* In contrast, in this policy field, the British are among the strongest and most engaged advocates of developing a ‘grown-up’ collective policy. The sense of ownership is very strong, and there is a formidable list of specific goals to be achieved, as indicated by the Helsinki European Council of December 1999. The worry on the British side is about which of the other EU members—or candidates—will, in practice, be able to deliver the commitments required of them (troops, equipment, and resources) for the Helsinki goals to be achieved. Moreover, there is British concern about how easy it will prove in practice to deploy the intended European autonomous capability in specific situations. In this field, the concern is much less with institutional procedures than with hard evidence of commitments, although the British are more willing than many other EU governments to acknowledge that they are already accustomed to a form of ‘supranationalism’ (herewithin the NATO context).

*e) Justice and home affairs.* This is an area of EU policy which reveals a sea-change in British involvement. For various reasons, the British Conservative government got into tangle over JHA. On the one hand, there was strong resistance to some of the ‘rules-led’ efforts at policy integration, especially as regards the operation of border controls. On the other hand, for functional reasons, British policy-makers and agencies were keenly interested in practical co-operation. When the JHA issues were being discussed in the Amsterdam IGC, a then very new and still nervous British Labour government took what it believed to be the prudent—and available—opt-out *via* the special protocol on Schengen. Earlier this year, this opt-out was almost entirely reversed, as the British were admitted to most of the Schengen regime (after some difficulties with the Spanish arising from a bi-lateral dispute over Gibraltar). Thus, British energies have been released to join actively in the development of JHA, including in areas where the British can lay some claim to having benchmarks worth emulating by other EU partners. There is likely to be strong British support for a further intensification of collective EU measures, for example, to handle the problems of transnational crime, a subject repeatedly cited as a priority for further integration by EU maximalists.

*f) Other policy areas.* On other issues, the British are likely to take a ‘case-by-case’ approach. On environmental policy, for example, the current government is open to an intensification of EU measures and targets, where the EU level seems appropriate, *i.e.*, subject to subsidiarity criteria. In many of the other additional policy areas currently being cited as ones for EU action—the mixed bag of education, culture, tourism, public health and so forth, British thinking is likely to be subsidiarity defined. Thus, few of these areas are likely to emerge as strongly favoured by the British for EU regime-building.

*g) The EU budget.* As Börzel and Risse point out, a ‘real’ federation usually has a ‘real’ budget. Given the history of British controversy over the Community budget, this is not an obvious object of British enthusiasm. If, however, one thinks about an EU budget oriented at supporting collective EU responsibilities, then an area in which there would be a strong case for an expanded EU financial role is in relation to external responsibilities. This is a subject that has had less attention than it deserves, and one in which the British might consider more engagement. However, this would be thinkable only if, and when, the EU institutions can radically improve their poor record of programme management.

All in all, therefore, the current British government is much more open than its predecessors to the vigorous development of the EU and, in particular, to strengthening EU policy regimes in important areas. These include several articulated as targets by those who seek to reinvigorate the momentum of integration in the current debate. Foreign, security and defence policy is of special importance because the British are necessary partners in this domain. The development of JHA is becoming another such priority area for the British, a policy area which some British policy-makers liken in scale and scope to the 1992 project. As for the core issues of economic integration, the British are firmly engaged in the consolidation of the single market and in the search for European responses to the new economy. The EMU is a singular exception. Beyond these core issues the British tend to be less persuaded of the case for intensified policy integration.

The British have become more relaxed on many of the issues of institutional and constitutional debate in the EU. Indeed, some thought is being given to specific ideas for institutional enhancement. The British are, in principle, keen supporters of non-treaty reform, a task which, as far as the Commission is concerned, has fallen to Neil Kinnock to pursue. In terms of the proposals made by Joschka Fischer and others, however, the British might wonder whether the constitutional blueprint approach is the most appropriate one (for taking forward the big policy issues currently on the EU agenda). It is not obvious that grand designs make for best institutional practice across the particular core policy areas that seem to be in most urgent need of development. On the contrary, there may be a case for constructive experimentation with different features across the three domains of economic integration, foreign and defence policy, and JHA. Similarly, given the scale of the endeavour required in each of these areas, now might not be the best moment to include other policy areas for the sake of it, especially since these might well provoke resistance from more locally rooted politicians across the Member States.

But does the prospect of further enlargement make such an approach seem complacent, or too dismissive of the alleged dysfunctions in the current EU of

Fifteen? The EMU is, in a sense, well protected by the Maastricht rules of eligibility for inclusion in the single currency regime, and we already have working experience of late-comers undergoing technical appraisal and peer review. As commented above, the Lisbon strategy is more open to wide and diverse participation than orthodox EU policies and thus does not seem to pose great problems. As for foreign and defence policy, given that there are EU candidate countries which are already full members of NATO, while some EU members are not, the bigger problem seems instead to be about how to manage the relationship between NATO and the EU. Meanwhile, as a number of commentators and practitioners are beginning to observe, and as was cogently argued by the EUI group chaired by Giuliano Amato, the JHA field is one in which bridges urgently need to be built to associate candidate countries with the regime being developed by the EU. Policy reinforcement may be less vulnerable to enlargement than is often argued, and a constitution-driven reform process may bring disappointing rewards in terms of policy reinforcement.

The underlying issue facing the EU is whether or not organic development, often marked by ambiguities and lack of clarity, is preferable to a tidier constitutional design which would sort out the ambiguities and assert a political finalité, but leave less room for policy experimentation.

### **3. Closer Co-operation**

For the British, ‘closer co-operation’ or ‘flexibility’—the confusions of language do not aid clear discussion—has, in the past, been seen as a ‘poisoned chalice’. On the one hand, it might provide the elasticity of engagement which British politicians have often demanded and continue to practise as regards the EMU. On the other hand, it appears to give other governments the opportunity and the legitimacy to disregard objections from reluctant governments, even when the objections may be based on political or economic substance. Indeed, the now much criticised provisions in the Treaty of Amsterdam to permit closer co-operation were, in essence, designed to address the then British problem of strident exceptionalism. Moreover, in the British case, any mention of flexibility seems to give grounds to opposition politicians to advocate the self-exclusion of Britain from inconvenient or unpopular EU commitments.

The more that British policy approaches something like the mainstream of EU policy development, the less likely it will be that the British will welcome proposals to loosen the conditions under which closer co-operation could be made to operate. Indeed, one might observe that it is precisely because Britain has become so much more willing to participate in EU policy development that the Amsterdam provisions have not needed to be brought into play. If, after all,

the British are spearheading a move towards establishing a form of European defence autonomy, why fall back on arguments about closer co-operation being a necessary tool? A similar point can be made as regards the development of JHA, given that the British have signed up to so much of the Schengen Agreement. One might also comment that those who bemoan the failure to operate the Amsterdam provisions are short of hard examples of missed opportunities to deploy them. Maybe the provisions should be understood as an insurance policy, which events did not make it necessary to activate.

But if not Britain, then maybe other awkward partners, and especially among the candidate countries? Maybe yes, maybe no—we are here in the realm of assertion rather than evidence. Clearly, new members may not be quickly able to be full participants in all EU policy regimes. The record suggests that political exceptionalism is a harder problem to resolve than economic lack of readiness, where precedents seem to show that a combination of hard work by the adjusting new members and sensible elasticity on the part of the EU can overcome a great many of the difficulties. Political exceptionalism of the kind that beset France in the mid-1960s or Britain during the 1980s is harder to legislate against.

If not an insurance policy, then perhaps a management tool? It is commonly argued that it is the sheer weight of the increasing numbers of Member States that makes the case for having an inner group of governments as a kind of executive board for the collectivity of the EU. Again, at first sight, this is a persuasive argument, in that a proliferation of heterogeneous members may well militate against effective management of the EU. But then the question is whether that which is needed is an inner group of countries or—for certain purposes—some tasks to be carried out by fewer than the full membership *on behalf of* the total membership. Here, the European Central Bank sets an interesting precedent with its board of six rotating members. There is certainly room for brainstorming and experimentation along these lines.

A different version of this argument is that—depending on the policy area—some Member States have more to bring to regime-development than others. This would lead to an approach based on the relevance and degree of the engagement of particular Member States. There is already a core single currency group, which, so the approach goes, ought to be given the opportunity to take the regime further. Indeed, the EMU provides the most convincing case for this kind of approach.

Foreign, security and defence policy appears to be a similar case, and, indeed, the experiences of the Contact Groups for Bosnia and Kosovo seem to bear this out. Some of the current discussion seems to be driven by the fact that the



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Contact Groups were established informally outside the EU structures, and, of course, included non-EU governments. We should also note that, in this field, smaller groups of relevant EU Member States may also emerge more organically or as a function of geography and degree of stake-holding in any given context. What seems harder to argue convincingly is that there could be a permanent inner circle of EU governments in this field, or that it would be effective to legislate against the adhocery of circumstance, which is more likely to generate self-constituted coalitions of the willing (as in the Albanian case). In this field, the British are likely to be practitioners of forms of closer co-operation, but reluctant to predefine the relevant memberships.

There is also an undeveloped discussion of a variety of other policy subjects on which closer co-operation might be extended. The examples of policies quoted are quite puzzling—environment, education, culture and so forth—subjects where there is already scope for smaller circles of countries to co-operate more closely. Many of these cross the boundaries of the EU—the Nordic Council, the Rhine Commission and so forth. On the face of it, it is not evident why all of these local bi-lateralisms and multi-lateralisms need to be drawn within the EU architecture.

It is quite a different argument to propose the creation of a permanent inner group, with both its own institutional underpinnings and a hierarchically superior role in relation to the rest of the extended EU family. Versions of this proposal generally define the inner group as naturally comprising the original founder six members of the European Community. They also most frequently emanate from French or German advocates, usually with the added component of a privileged Franco-German relationship nested within the vanguard group. Hardly surprisingly, proposals with these contours find little support from the British, partly because they seem to be an effort to turn the political clock backwards not forwards, and partly because they neglect the contributions that other governments, such as the British, bring to important policy areas such as foreign, security and defence policy. Nor are such proposals welcome to those other governments of countries that have, although later recruits to the EU, become keen integrationists. The notion of a viable permanent inner directorate stems from an odd mixture of nostalgia for apparent past intimacy and nervousness about the dilution of the integration model through serial enlargement.

Hence, on these issues, we should expect British policy to resist formal procedures to facilitate closer co-operation, especially any which would elevate the founder members to a privileged status *vis-à-vis* other Member States. On the other hand, following the ‘horses for courses’ argument, the British may well be at ease with the emergence of special circles of the more involved or the

especially relevant or the really serious in particular policy areas. Here, as on the question about the finalité of the EU process, the British contributions are likely to be driven by their underlying preference for organic evolution. Whether or not this can be articulated as a convincing strategy to reassure the doubters and the nervous, especially in the face of enlargement, remains to be seen. The organic view is much harder to express in ringing phrases than the constitutional blueprint view.

#### **4. In Conclusion**

British policy has changed a great deal in ways that bring it much more into the EU mainstream on the substance of EU policy development. It accepts policy integration in areas widely identified as those that federalists have long advocated as the high ground of integration. Hence, there ought to be more opportunities for this to generate a more willing engagement in the debate about the longer term evolution of the EU. The constraints of domestic politics and the continuing self-exclusion from the EMU leave the British with a larger handicap than many other EU governments. The inwardness of the British media accentuate this.

Yet, there are also lessons to be learned from British experience in the context of further enlargement. National political cultures do not easily yield to the pressures of ‘Europeanisation’, and the EU project has to live with this. The debate about possible futures for the EU has to work with the grain of the real politics of the different Member States. Keeping awkward or reluctant countries outside an EU regime seems attractive, but can be counterproductive. The EMU may be the exception rather than the rule here, in that a way was found—of a quasi-objective character—to separate out the willing and able from the unwilling or unable. In many other policy areas, the inclusion of more members has, by and large, added strength to the EU regime. The numbers of countries involved may be less relevant than whether or not there is a set of congruent policy preferences, a factor that seems to have been critical in launching the new defence initiative. Thus, nervousness about the increased size of the membership of the EU may exaggerate the risks. It would be a pity if this nervousness led to too much discussion of countermeasures rather than greater efforts to ‘mainstream’ as many European countries as possible. Moreover, there are grounds for encouragement from the diversity of modes of integration currently being developed to generate new joint-policy ventures in difficult and sensitive areas of policy.



JAN ZIELONKA

## **Enlargement and the Finality of European Integration**

The major reason behind Joschka Fischer's argument for deepening European integration is the forthcoming eastward enlargement of the European Union. As he puts it:

In the coming decade, we will have to enlarge the EU to the east and south-east, and this will, in the end, mean [a] doubling in the number of members. And at the same time, if we are to be able to meet this historic challenge and integrate the new Member States without substantially denting the EU's capacity for action, we must lay the last brick in the building of European integration, namely political integration.

According to Fischer, the outcome of the integration process will be a European federation, preceded by the formation of a 'centre of gravity' within the Union; an 'avant-garde, the driving force for the completion of political integration.'

Fischer's vision has been met with a great dose of scepticism, if not open hostility, among officials of the Eastern European applicant states. Some of them are worried that any ambitious reform project might further delay their entrance to the Union.<sup>1</sup> Others fear erosion of the national sovereignty that they fought so hard to regain in their struggles against Soviet domination.<sup>2</sup> Others again fear that far reaching reforms might arrive before they are in a position to shape them as full EU members.<sup>3</sup> These are all important concerns that are being ignored by Western commentators debating the future of European integration in a most self-centred manner.

Candidates from Eastern Europe have no interest in paralysing European institutions. Like Fischer, they want the Union to work efficiently after their

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<sup>1</sup> See, for example, the Report of the meeting of the parliaments of the Member States and applicant countries of 17<sup>th</sup> June, 2000, that is readily available on the Internet at: <http://www.europarl.eu.int/dg3/sdp/backg/en/b000717.htm>.

<sup>2</sup> See, a commentary of Poland's Foreign Minister, Bronislaw Geremek quoted by PAP (Polska Agencja Prasowa), that is available, in electronic form, at the following address: <http://euro.pap.com.pl/cgi-bin/europap.pl?grupa=1&ID=81>.

<sup>3</sup> See, an interview with the Hungarian Prime Minister, Victor Orbán, for the Austrian newspaper *Standard*, June 18, 2000.

accession.<sup>4</sup> However, as I will argue in this paper, enlargement and Fischer's vision are basically incompatible, despite all the assurances and qualifications spelled out by Fischer himself. I will try to show that a political federation within an enlarged Union is no longer possible, while the creation of a core group is set to undo the basic rationale for enlargement. Enlargement will greatly enhance the diversity within the Union and result in an ever greater disjunction between the EU's geographic and functional boundaries. The Union will increasingly act in overlapping circles and along a variable geometry resembling a neo-medieval empire more than a post-Westphalian federal state.<sup>5</sup> If this is unavoidable, the Union should try to find ways of making the emerging neo-medieval empire work better, rather than attempting to re-construct a neo-Westphalian state writ large. A neo-medieval empire does not need to be seen as a recipe for chaos and paralysis. Effective governance is today about recognising complexity, flexibility and dispersion. However, the increased diversity and multiplicity of governing arrangements might also have negative side effects, especially in terms of democracy and cultural identity. The Union should try to find ways of coping with various negative aspects of the new diversified Europe while utilising positive aspects for the benefit of the *entire* continent.

## 1. The Logic of Core and Periphery

Fischer realises that a European federation cannot spontaneously emerge overnight. It needs to be pushed forward by a few determined states; 'a centre of gravity', as he put it. Fischer does not use the terms such as 'hard core' or 'a two-speed' Europe that produced hefty debates and conflicts in the past. However, most commentators notice that a difference between a core group and a centre of gravity is only rhetorical. As M. Hubert Védérine, French Minister of Foreign Affairs, put it in his open letter to Fischer:<sup>6</sup>

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<sup>4</sup> As the Polish government stated unequivocally: 'It is Poland's intention to join an effective EU with all the consequences involved.' See, *Intergovernmental Conference 2000: the Polish Position*, Warsaw, 12 June 2000, which is available on the Internet at: <http://www.msz.gov.pl/english/unia/IGC.htm>.

<sup>5</sup> The term neo-medieval empire was first been used in Ole Waeber's, 'Imperial Metaphores: Emerging European Analogies to Pre-Nation State Imperial Systems, (Waeber 1997:61)

<sup>6</sup> 'Future of Europe,' a Letter from M. Hubert Védérine, Minister of Foreign Affairs, to Joschka Fischer, Minister of Foreign Affairs of the Federal Republic of Germany, Paris, 8 June 2000, an English translation provided by the French Embassy in the UK (internet source: <http://194.216.217.67//db.phtml?id=4116>). The French President, Jacques Chirac in his speech at the German Bundestag also avoided the controversial term 'core group,' and instead used the term, '*groupe pionnier*.'

Over the past few weeks several present or former European political leaders proposed that the countries determined to make a big leap forward into political integration should create a 'hard core' or a 'vanguard' together. This is tantamount to accepting the idea, that was challenged vehemently for a long time, of a two-speed Europe. This is the line you adopted, after Jacques Delors and others, by suggesting the creation, in stages, of a centre of gravity that would one day become the core of a future federation.

The discussion about the pros and cons of an avant-garde core is usually conducted from a Western European perspective. However, the picture is much clearer from an Eastern European perspective, leaving little room for any debate. The idea of a European hard core is viewed as an East European nightmare because it condemns the post-communist states to an inferior peripheral status.

The concept of 'core' goes hand-in-hand with the concept of 'periphery'. They are like two sides of a coin that cannot be separated. Those countries that form the core are on one side of the coin, while those unwilling or unable to join the core are on the other side. Clearly, the contrast between the core and the periphery does not need to be great; but if there is little difference between the core and the periphery, why does one need a core in the first place? Fischer insists that he intends to overcome the division of Europe, but the creation of a core group cannot but create a division between the 'ins' and 'outs'. This has been well grasped by Robin Cook, the British Foreign Minister:<sup>7</sup>

We want those countries [*i.e.*, applicant countries from Eastern Europe] to be joining as full members of a Europe of equals, not finding that some other countries have moved on to an inner chamber from which they are excluded.

Great Britain fears a core group for different reasons to those which are arousing fear among the applicant states from Eastern Europe.<sup>8</sup> The latter might be willing to join the core group, but may be unable to do so for many years to come; Great Britain might be able, but is unwilling, to join the core group. For Great Britain, access to the integrated system of decision-making is at stake; for Eastern Europeans, the ability to catch up with the centre of prosperity and effective government is at stake. Before the fall of communism, the threat of a core group was often used to prod hesitant integrationists into more co-operative attitudes with regard to agendas set in Paris, Bonn and Brussels. Today, however, the threat of a core group has an entirely different meaning and

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<sup>7</sup> Robin Cook in an interview for *The Times*, 29 June 2000.

<sup>8</sup> For a detailed analysis of the British position, see Helen Wallace's contribution to this volume.

implications. It is largely about perpetuating the division of Europe between an affluent and stable core, and an impoverished and unstable periphery.<sup>9</sup>

Recent proposals suggesting some kind of a core group in the Union resemble similar efforts aimed at Eastern European exclusion put forward a decade ago. On the eve of the European transformation, some Western politicians hoped that integration within the EU could continue unabated among only the most developed European states for a long time. Eastern Europeans have been offered alternative forms of pan-European co-operation, such the Organisation for Security and Co-operation in Europe, or a European Confederation project launched by the French President, François Mitterand. When it proved impossible to arrest the process of the eastward enlargement, the idea of a core Europe became an alternative strategy to keep the less developed Eastern European countries outside the frame of advanced integration. Fischer's promise that each member of the Union will be welcome to join the core group is not very credible. If everybody can join the core group, there is no reason for having it. The whole point of a core group is to impose even stricter criteria for admission than is presently the case in order to join the existing European Union framework. Needless to say, the post-communist countries already have enough problems in trying to meet the latter criteria for admission.

In short, creation of a core group would undo the greatest benefit of the enlargement project; namely, allowing the less advanced countries of Eastern Europe to join the most advanced countries of Western Europe on equal terms. Joining the Union, but not its newly created core, might well have a positive symbolic meaning for those who have made little progress in meeting the Copenhagen criteria for admission. However, those who champion the meeting of these criteria as a precondition for admission will surely feel demotivated, if not cheated, when told that the centre of gravity, prosperity and peace has moved further away from them. If Fischer truly believes that enlargement is not only unavoidable, but also beneficial for the Union, he should recognise all these negative implications of a core group. He cannot have it both ways, because enlargement and the creation of a core group are largely in conflict.

Supporters of a core group, Fischer presumably among them, believe that it is better to dilute the meaning of enlargement rather than to dilute the meaning of European integration. They argue that paralysing the EU's institutions through a fully fledged enlargement is in nobody's interest, and not least in the interests of Eastern European nations dependent on Western help. Can the Union avoid a

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<sup>9</sup> This has been well argued in Jonathan Story's 'The Idea of the Core: The Dialectics of History and Space,' (Story 1997).

major restructuring if it is going to have about 30 very divergent Member States? The solution is a European federation gradually developed by a small group of the most developed and determined countries. Is such reasoning correct? The answer might be either normative or empirical. The former would say what the Union should do, while the latter would try to indicate what the Union is able to do under the current circumstances. As I find it futile to debate on whether a certain model is desirable before knowing whether it is possible, I will leave the normative approach to one side.

One question is whether the creation of a core group is possible, and another is whether the creation of a European federation is possible. I will try to answer the latter question because, for Fischer, a core is not an end in itself, but a means of building a federal European state. Without this ambition, the creation of a core makes little sense. However, the answer to the first question is not predetermined either. There is much evidence to suggest that efforts to create a core group would meet fierce resistance from the current Member States likely to find themselves outside the core. There is also evidence to suggest that a core, when created, would not be likely to work. This is the argument outlined by the Czech President, Václav Havel, in his speech to the European Parliament:<sup>10</sup>

The idea that there could forever be two Europes—a democratic, stable and prosperous Europe engaged in integration, and a less democratic, less stable and less prosperous Europe—is, in my opinion, totally mistaken. It resembles a belief that one half of a room could be heated and the other half kept unheated at the same time. There is only one Europe, despite its diversity, and any weightier occurrence anywhere in this area will have consequences and repercussions throughout the rest of the continent.

Fischer apparently agrees with Havel's general evaluation of the situation in the present-day Europe, and yet he suggests building a European federation by a newly created avant-garde group of only few EU Member States.<sup>11</sup> Let us

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<sup>10</sup> Václav Havel, 'Overcoming the Division of Europe,' A speech given to the European Parliament on 15th June 2000, which is available, in electronic form, on the Internet at: [http://www.TheEPC.be/Challenge\\_Europe/text/122.asp?ID=12](http://www.TheEPC.be/Challenge_Europe/text/122.asp?ID=12).

<sup>11</sup> As Fischer put it: 'Following the collapse of the Soviet empire, the EU had to open up to the east, otherwise, the very idea of European integration would have undermined itself and eventually self-destructed. Why? A glance at the former Yugoslavia shows us the consequences, even if they would not always and everywhere have been so extreme. An EU restricted to Western Europe would forever have had to deal with a divided system in Europe: in Western Europe integration, in Eastern Europe the old system of balance with its continued national orientation, constraints of coalition, traditional interest-led politics and the permanent danger of nationalist ideologies and confrontations. A divided system of states in Europe without an overarching order would, in the long term, make Europe a



examine whether such a federation is a viable project in the post-modern and post-Soviet European setting.

## **2. Neo-Westphalian State vs. Neo-Medieval Empire**

Fischer assumes that exclusion of Eastern European nations from more advanced forms of integration is only a temporary phenomenon. In due course, they are also likely to join the European federation. My argument is that a level of diversity in a broader pan-European setting prevents the creation of such a federation, thus exclusion would need to have a more permanent character. However, I will go a step further and argue that Fischer's vision of a European federation is not even possible in a narrower setting confined to only the Western part of the continent. This is partly due to the persisting divergence among the EU's existing Member States, and partly due to the forces of interdependence and globalisation currently at work in Europe and elsewhere.

Fischer's term 'European federation' has alarmed most Euro-sceptics. But the key element of Fischer's vision is not so much a European federation, but a (federal) European state. As Tanja A. Börzel and Thomas Risse show in another contribution to this volume, there are already plenty of federal elements within the current Union despite the strong positions of individual Member-States. The point is, therefore, not whether the Union will transform itself from a confederation into a federation, but whether it will become a federal state. At present, the Union is anything but a state: it has no proper government, no fixed territory, no army or police, no constitution, nor even a normal legal status. And the federalist argument is that integration should produce most, if not all, of these characteristics. In short, the final state of integration would be the creation of a post-Westphalian type of state with clear borders, hierarchical governing structures and a distinct cultural identity. A contrast to this Westphalian model is provided by a neo-medieval model in which the borders are soft and never fixed, authority is dispersed, and multiple cultural identities co-exist. Table 1 illustrates these two possible extreme outcomes of the current political, economic and cultural developments in Europe. Of course, abstract models cannot but oversimplify complex processes and structures.<sup>12</sup> But if the current trend suggests that there is a neo-imperial empire rather than a post-Westphalian

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continent of uncertainty, and, in the medium term, these traditional lines of conflict would shift from Eastern Europe into the EU again.'

<sup>12</sup> For more about the use of models in analysing the future of European integration, see, Munch (1996) or Caparoso (1996).

federation in the making, then it is difficult to reverse this trend by a simple act of institutional engineering.

**Table 1: Two Contrasting Models of a Future EU**

Westphalian super-state	Neo-medieval empire
Hard & fixed external border lines	Soft border zones in flux
Relatively high socio-economic homogeneity	Socio-economic discrepancies persist without consistent patterns
A pan-European cultural identity prevails	Multiple cultural identities coexist
Overlap between legal, administrative, economic & military regimes	Disassociation between authoritative allocations, functional competencies and territorial constituencies
A clear hierarchical structure with one centre of authority	Interpenetration of various types of political units and loyalties
Distinction between EU members & non-members is sharp & it is most crucial	Distinction between the European centre and periphery is most crucial, but blurred
Redistribution centrally regulated within a closed EU system	Redistribution based on different types of solidarity between various transnational networks
One single type of citizenship	Diversified types of citizenship with different sets of rights and duties
A single European Army and Police force	Multiplicity of various overlapping military and police institutions
Absolute sovereignty regained	Divided sovereignty along different functional and territorial lines

The key variable in determining the future course of developments is the degree of convergence and divergence in Europe. A neo-Westphalian European state could only work in a relatively homogenous environment. Free trade zones can, admittedly, operate in a vastly diversified setting. However, this does not equally apply to more ambitious projects of political, economic and military integration. Common laws and administrative regulations cannot cope well with a highly diversified environment, and consequently various complicating opt-

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outs and multi-speed arrangements are required. A degree of common values and habits is also needed for a system to function efficiently and legitimately. The existence of largely incompatible members multiplies the EU's internal boundaries, however informal, and creates incentives for some smaller groups of countries to 'go it alone'.<sup>13</sup>

From a broader historical perspective, Western Europe certainly shares some important common cultural, economic, and political characteristics with Eastern Europe. However, crossing the East-West divide during the Cold War was like entering a totally alien, if not hostile, empire with different laws and a different economy, education, ideology and culture. Bridging this gap is seen as crucial for the EU's enlargement policy to succeed. Without closing this gap, the creation of a Westphalian type of state is virtually impossible. The EU accession strategy is based on a strict conditionality principle. Applicant states are confronted with an ever-growing list of conditions that would make them compatible with the current members and fit them into the existing system, and the Union does its best to help the applicant countries to meet these conditions by providing financial help and human expertise.<sup>14</sup> However, the process of adjustments cannot but take many decades. Economic discrepancies between the Eastern and the Western parts of Europe are great. Although some applicant states from Eastern Europe are currently enjoying much higher rates of economic growth than are the existing EU members, catching up with the affluent West will take at least 15 or 20 years, even according to the most optimistic scenarios.<sup>15</sup> The adoption of an 80,000 pages long *acquis communautaire* should also be counted in decades not years, especially if we expect Eastern European countries to adopt not only the letter but also the spirit of Western European laws and regulations.

Moreover, the progress of adjustment is doomed to be unequal for different countries and in different functional fields. This will create a very complex map of divergence and convergence that defines geography, history and existing cultural patterns.

Finally, the Europeanisation of post-communist countries will go hand in hand with Americanisation and globalisation. In other words, some of these countries

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<sup>13</sup> For an analysis of the problem of managing diversity in the European Community in the early 1980s, see, Wallace & Ridley (1985).

<sup>14</sup> The 1997 EU's document entitled *Agenda 2000* envisaged an 'enlargement package' of assistance to the applicant Member States of no less than ECU 75 billion: see, <http://europa.eu.int/comm/agenda2000/rapid/9716fr.htm>.

<sup>15</sup> See, for example, Vaughan-Whitehead (2000).

might, in due course, come to resemble less and less a ‘European model’ in a given functional field. In the field of social policy, for instance, countries like Hungary have already adopted a system that more resembles the United States of America than Germany or Sweden. The US also has much more influence in shaping the police and military forces in these countries.

Divergence is also significant among current EU Member States, and this possibly explains why the federal project has not ‘got off the ground’ before now.<sup>16</sup> In many respects, Great Britain also resembles America more than Germany or France. Average support for democracy in Finland is much lower than in any other EU Member State (and lower than in some applicant states), while in Spain the average rejection of violence as a political instrument is strikingly below the EU average.<sup>17</sup> Austria’s GDP per capita is more than double that of Portugal: \$25,666 compared to \$10,167 (figures for 1997). Slovenia’s GDP per capita (\$9,039) is nearly as high as that of Portugal. In fact, the lines of divergence in various functional fields of the economy, law, and culture do not correspond with the Cold War divide between the East and West. These lines run across the continent in chaotic zigzags and create a very complex picture indeed.

But what about a Westphalian state confined only to a hard core of the most developed and compatible countries? If one looks at the historical process of state formation, success has largely been determined by the degree to which states were able to assure overlap between administrative borders, military frontiers, cultural traits and market fringes.<sup>18</sup> As Stefano Bartolini put it:<sup>19</sup>

Nation states of the European type are characterised by boundaries which are simultaneously military, economic, cultural and functional. By crossing the boundary of the state, one passes, at the same time, into the *imperium* of alternative extractive agencies, into a different economic market, into a different community and into a different set of functional regimes such as educational systems, welfare state, legal jurisdiction, and so forth. This (territorial) coincidence of different type boundaries has been their distinctive trait—which distinguishes them from earlier or different forms of *politische Verbände*—and their legitimacy principle.

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<sup>16</sup> As Fritz Scharpf points out, (Scharpf 1994), the current EU lacks three of the crucial attributes which confer a degree of policy-making autonomy on federal states: relatively homogeneous political culture and public opinion, political parties operational at both levels of governance and a high degree of economic and cultural homogeneity.

<sup>17</sup> For detailed data, Fusch & Klingemann (forthcoming).

<sup>18</sup> See, Rokkan *et al* (1987:17-18); Kratochwil (1986:25-52).

<sup>19</sup> Stefano Bartolini, ‘Exit options, boundary building, political restructuring,’ paper presented at the Departmental Seminar, European University Institute, Florence, October 28, 1997, p. 27 (unpublished).

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If the core group of the EU is serious about constructing a Westphalian type of state, it will also need to provide an overlap between different the types of borders, frontiers, fringes and triads. However, this will not be easy to accomplish. The Union currently acts in concentric circles and variable geometric patterns due to various opt-outs negotiated by individual Member States in the areas of foreign, monetary or social policy. At the same time, its laws and regulations are increasingly being applied beyond the EU's borders, particularly in Eastern European applicant states. The Union also lacks a strong and coherent sense of cultural identity, let alone a European *demos*. In short, there is a significant disjunction between the Union's functional and territorial boundaries, and it would be difficult to overcome this disjunction by the creation of a core group. In fact, the creation of a core group is likely to complicate, rather than simplify, relations between individual EU's Member States because an additional set of co-operative frameworks would be added to the existing ones.

Moreover, and probably more crucially, globalisation has eroded the capacity of any integrated political unit to maintain a discrete political, cultural, or economic space within its administrative boundary. Economic sovereignty, in particular, has been eroded by massive international labour and capital flows that constrain individual abilities of governments to defend the economic interests of their units. Territorial defence along border lines has been made largely obsolete by modern weapons technology. Migration and other forms of cross-border movements are on the rise, despite all the efforts of border guards and surveillance technology to seal the frontiers. Normative models and cultural habits are spreading via satellite television and the internet in a largely uncontrolled manner. Both the Union and its Member States are losing control over the legal and administrative regimes within their respective borders because they are increasingly being defined by supranational bodies such as the WTO.

In short, the instruments of a Westphalian type of state are no longer available to contemporary territorial units. It is no longer possible to control trans-border flows, suppress multiple cultural identities or defend particular lines of demarcation. It is difficult to regain an absolute form of sovereignty even among a largely compatible set of states. A core group would find it difficult to build up a Westphalian type of federation in a post-modern environment of cascading interdependence and globalisation.

### **3. Conclusions: Crafting European Integration**

The argument thus far suggests that a neo-medieval empire rather than a neo-Westphalian state is in the making. This is bad news for supporters of a

European federal state, but it is not necessarily bad news for supporters of European integration. There is no reason to assume that building a neo-Westphalian state is the only solution for the enhancement of European integration. In particular, there is no need to demonise diversity, overlapping authorities and multiple identities. Divergence is a normal state of affairs. Some would even argue that divergence is ‘pluralism’ by another name, and that it is Europe’s greatest historical and cultural treasure. Divergence is also a prerequisite of modernity (or, if one prefers, ‘post-modernity’), in the sense that only highly diversified and pluralistic societies acting in a complex web of institutional arrangements are able to succeed in conditions of modern competition. As Philippe Schmitter argues, effective governance requires ‘growing dissociation between authoritative allocations, territorial constituencies and functional competencies.’<sup>20</sup> It requires an opening of the way for institutional diversity, ‘for a multitude of relatively independent European arrangements with distinct statuses, functions, resources that operate under different decision rules.’<sup>21</sup> A particular form of territoriality—‘disjoint, fixed, and mutually exclusive,’ to use John Gerard Ruggie’s words—is no longer the basis of political life, and the Union is, in fact, very good at ‘unbundling territoriality.’<sup>22</sup> The Union is transforming politics and government at both European and national levels into ‘a system of multi-level, non-hierarchical, deliberative and apolitical governance.’<sup>23</sup>

All this does not necessarily mean that we are condemned to neo-medievalism. Nor does it mean that there is nothing wrong with the rise of a neo-medieval empire in Europe. Consider, for instance, two basic prerequisites of political legitimacy: democracy and cultural identity. Democracy can hardly work in a complicated, if not impenetrable, system of multi-layered and multi-speed arrangements run by an ever-changing group of unidentified and unaccountable people. Similarly, affection and identity can hardly develop in a complex system of open-ended arrangements with fluid membership, variable purposes, and a net of cross-cutting functional frames of co-operation. Cultural identity and democracy require transparency, simplicity and a sense of belonging to a defined community, and these are difficult to acquire in a highly diversified and open-ended environment.

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<sup>20</sup> Schmitter (1996b:132).

<sup>21</sup> Schmitter (1996b:127).

<sup>22</sup> Ruggie (1993).

<sup>23</sup> Hix (1998:54).

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We should, therefore, work hard to mitigate the negative effects of neo-medievalism.<sup>24</sup> In fact, some of Fischer's suggestions could well be employed for this end. For instance, it would be good to clarify, possibly in the form of a treaty, what is to be regulated at European level and what is to be regulated at national level. It would also be good to codify a catalogue of basic human and civil, and possibly also social, rights of Europe's citizens. It would, furthermore, be good to clarify which applicant countries are going to join the Union, why and when. Such steps would inject a degree of order and predictability into a highly diversified, and sometimes chaotic, European setting. Such steps could also enhance the Union's legitimacy. The ambiguity of successive European arrangements prevents any democratic controls and makes it difficult for Europe's citizens to identify with them. However, efforts to create a core group of countries trying to construct a federal European state should be discouraged. In the long term, these efforts are probably doomed to failure, and, in the short term, they are doomed to produce artificial divisions and conflicts.

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<sup>24</sup> I suggested some specific ways of handling the issue of democracy and cultural identity in a complex and highly diversified European setting of today in *Explaining Euro-paralysis* (Zielonka 1998:82-85 and 152-156).

JOHAN P. OLSEN

**How, then, does one get there?**

## **An Institutional Response to Herr Fischer's Vision of a European Federation**

### **1. European Federation: Vision or Utopia?**

Ordinary language makes a distinction between the utopian dreamer and the visionary political leader. The utopian offers an ideal system of governance and community. Yet, he presents no clear ideas about how and under what conditions the polity can be moved towards the ideal. Or, if he does, the ideas, together with the prescribed institutional arrangement, are generally viewed as impractical or impossible fantasies. The visionary leader has a better understanding of the relationship between human action, institutions and the flow of history. The prescribed political order can be imagined to work in practice, and there is enough understanding and control of institutional dynamics to move the polity in a consistent and desired direction.

The scholarly literature, however, suggests that the distinction is less clear than is assumed in everyday language. There is no general theory of institutional dynamics that explains how and when institutions of governance change, and what implications follow from institutional change. Nor is there agreement on the role of deliberate intervention and governance in processes of comprehensive institutional change. Scholarly assessments of the possibility of transformative leadership through institutional change seem to depend on both the time frame and the theoretical perspective employed.

In the following, these ideas are developed in the context of Joschka Fischer's scheme for a new European political order, as expressed in his speech at the Humboldt University.<sup>1</sup> Here, the existing order based on intergovernmental cooperation and a union of states (Confederacy, Staatenverbund) is to be replaced

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<sup>1</sup> Speech by Joschka Fischer at the Humboldt University in Berlin, 12 May 2000 (reproduced in this Volume) The German title was: 'Vom Staatenverbund zur Föderation: Gedanken über die Finalität der europäischen Integration'. When quotation marks or quotation font are used without any other references, the text refers to the speech. Thanks to Jeff Checkel and Martha Snodgrass for help and advice.



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by a European Federation. The key characteristics of the Federation will be a constitutional treaty centred around basic human and civil rights; shared sovereignty and a clear definition of competences between European and nation-state levels of governance; a division of powers among the European institutions, including full parliamentarisation and a European parliament with two chambers, a European government and, possibly, a directly elected president ‘with far-reaching executive powers.’

The scheme was presenting an end-state, the *finalité*, and ‘the last brick in the building of European integration.’ Comprehensive institutional reform was seen as necessary in order to maintain the Union’s capacity to act effectively in the face of the coming enlargement and increasing heterogeneity. The reform was also supposed to improve transparency and democratic control, and to achieve a better balance between economic and political integration and power. The perceived alternatives were further integration, or stagnation and even erosion of the EU.

The aim of this paper is *not* to discuss the suggested scheme in great detail, or to make a normative assessment of the desirability of a European federation. Instead, the focus is on understanding what kind of processes might produce radical institutional transformation of the kind suggested by Fischer. The basic questions are well known: what are the processes through which political orders are established, maintained, changed and abandoned? In what ways, and under what conditions, is it possible to initiate and carry out deliberate comprehensive changes in the political order? In particular, when is it possible to create a discontinuity in the political organisation of societies characterised by considerable political, socio-economic and cultural diversity, or in international political orders?

The paper contrasts three theoretical perspectives on institutional dynamics, giving political leadership quite different roles. The *first* portrays leaders as impotent pawns—the victims of the functional imperatives of environmental change or internal processes beyond their control. The *second* portrays leaders as omnipotent political engineers, solving problems and resolving conflicts on the basis of stable preferences and powers. The *third*, an institutional perspective, portrays leaders as institutional gardeners. They are neither impotent nor omnipotent and, if patient, they may give some direction to institutional developments.

An institutional perspective emphasises the role of institutions, their origins, history, internal structures and dynamics, in the understanding of human action. Institutions are rules and practices embedded in structures of meaning and resources. Changes in a political order involve not only the reorganisation and

reallocation of resources, but also the reconceptualisation and change in expectations, preferences, aspirations, mentalities and identities.<sup>2</sup> Yet, institutions are seen as being relatively robust against environmental changes and deliberate reforms.<sup>3</sup>

The rest of the paper is divided into five parts. *First*, Fischer's view of the change process is briefly presented. *Second*, the three theoretical perspectives, describing political reformers as pawns, engineers and gardeners, are developed in more detail. *Third*, these perspectives are then used to discuss Fischer's plan as utopian or visionary. *Fourth*, some non-heroic options for transformative political leadership are suggested, and *fifth*, the uncertain borders between utopian dreams and visionary leadership are revisited.

## **2. The Reorganisation of Power in Europe: Business as Usual will not do**

To implement a federation, Europe has to 'move forward courageously.' *Business as usual* will not do. Full political integration cannot be achieved through the Monnet method of integration, an incremental process with no blueprint of the final state. This method worked well with few Member States and a focus on economic integration. It is of 'limited use for the political integration and democratisation of Europe.' According to Fischer, the method is in a crisis that cannot be solved according to the method's own logic.<sup>4</sup>

Fischer is well aware that his plan for reorganising power in Europe is will be contested. Implementing the reforms involves huge challenges, procedural as well as substantive, and some will view the plan as utterly unworkable. Fischer is also aware that he is up against strong institutional traditions. The European political order has, for a long time, been constituted on the principles of state sovereignty and national self-determination. Europe, as he says, is a continent 'full of different peoples, cultures, languages and histories.' The region is torn between competing visions of possible political communities and forms of

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<sup>2</sup> Fischer does not present his ideas on the desired changes in financial arrangements, and this aspect is, therefore, left out in my response, too. Naturally, this does not imply that the financial and *reallocation* aspects are not highly significant for the institutional future of Europe.

<sup>3</sup> March & Olsen (1983,1989,1995,1998); Olsen (1992,1996,1997,1998); Brunsson & Olsen (1993); March (1999).

<sup>4</sup> As emphasized by Wallace, the EU uses a variety of methods of policy-making, H. Wallace (2000).

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governance. There is deep divergence of opinion over the proper role of the European Union *vis-à-vis* the nation-state and the proper role of politics *vis-à-vis* the economy and society. Currently, many call the integration project into question, finding it irrelevant or even dangerous.

So, the balancing of unity and diversity is problematic. Moving towards a federation may drive European states apart, rather than closer together. There may be a loss of European identity and internal coherence. Yet, the EU *acquis* should not be jeopardised, the Union not divided, and the bonds holding the EU together should not be damaged. To whit:

It would be historically absurd and utterly stupid if Europe, at the very time when it is at long last reunited, were to be divided once again.

Fischer's answer is a stepwise political development. *First*, co-operation would be enhanced between those willing and able to co-operate more closely, as in the Economic and Monetary Union and Schengen. *Second*, a centre of gravity would be established, around a European framework treaty—the core of the federation's 'constitution'. On this basis, the federation would develop its own institutions and establish a government through which the EU could speak with one voice on as many issues as possible. Furthermore, there would be a strong parliament and a directly elected president. An avant-garde of member states would, from the start, comprise all the elements of the future federation. *Third*, there would be a completion of the political integration into a European federation.

The unanswered questions, in Fischer's view, are: within the next decade, will a majority of the Member States take the leap into full integration and agree on a European constitution? If this does not happen, will an avant-garde emerge? When will this happen? Who will be involved? Will the core emerge within, or outside, the framework provided by the treaties?

The completion of European integration will depend upon the alliance between France and Germany, in Fischer's view. No country will be forced to participate at a level of integration that it does not want to. Yet, the reluctant countries will not be allowed to prevent others from further integration outside the treaties. The hope is that the avant-garde will work as 'a magnet of integration open to all,' like the EC and the EU have done historically. To make the federal scheme workable, the states, with their national institutions, traditions and identities, have to be involved in the process of change. The nation-states 'will retain a much larger role than the Länder have in Germany.' Furthermore, sub-national

units, such as the German Länder, will not accept their competencies being weakened as a result of further political integration in Europe.<sup>5</sup>

### 3. Political Pawns, Engineers and Gardeners

The dynamics of European integration reactivate unresolved questions that have been worked on by practitioners and theoreticians for centuries. What are the 'driving forces' that form and change political orders? What is the role of human intention, reflection and choice in the development of political institutions and good government? In institutional matters, do we know how to reform? How, and under what conditions, can political actors rise above, and get beyond, existing institutional structures?<sup>6</sup>

Students of institutional dynamics have given very different answers to these questions. In particular, they have disagreed about political agency, the relative importance of environmental imperatives and intrinsic dynamics which go beyond the comprehension and control of political actors, and historical processes of gradually evolving systems of meaning and incremental change. Thus, different perspectives will suggest different answers to what kind of processes are likely to produce radical change, of the kind suggested by Fischer, in the European polity.

*Pawns, organic development and imperative processes.* Political actors are sometimes portrayed as largely impotent pawns. They are captives of imperative (technological, economic, demographic *etc.*) processes in their environments, or of intrinsic institutional dynamics beyond their comprehension and control. They may codify, through formal reorganisation, change that has already happened, but they are unable to structure future institutional developments deliberately. The key processes of change are external competitive selection or internal organic processes of institutional birth, growth, stagnation and death. In the first case, only comparatively efficient institutions and political orders survive. The others lose support and disappear. In the second case, all institutions have their heydays. Then, they wither and die, irrespective of whatever reform plans political leaders present (Kimberly & Miles 1980, Olsen 1992).

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<sup>5</sup> *Agence Europe* No 7726 Saturday 27 May 2000: 'German Länder repeat to Prodi that ratification of revised treaty will be difficult if their powers are not preserved'.

<sup>6</sup> Hamilton, Jay & Madison (1787, 1964:1); Mill (1861, 1962:1); March & Olsen (1989,1995,1998); Olsen (1997); Brunsson & Olsen (1993); Sartori (1997:xi).

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*Engineers, design and institutional choice.* In contrast, the concept of governance is about how differently, over any given period of time, our social and political life, can be purposefully shaped (Dunn 1990:161). An institutional reform policy is about explicitly changing social and political life through new institutional arrangements. A constitutional reform policy is about changing the basic institutions and principles of governance in order to change the identity and character of the polity.

Portraying political leaders as institutional engineers, and institutions as malleable, is consistent with a democratic ethos of governance. Democracies are supposed to be able to design and choose institutions in order to improve the welfare of citizens. The key questions involved in explaining institutional dynamics, then, are: who are the significant actors? what do they want an institutional arrangement to accomplish? what do they believe different arrangements will accomplish? what resources can they mobilise?

Under special circumstances, ‘We the people’ can form a constitutional convention and deliberately rearrange the whole political order (Ackerman 1991). Under normal conditions, political intention, will and power secure rational adaptation of institutions that are not working well. Institutional dynamics become a question of bargaining and building that win coalitions among competing interests. In a short-term perspective, however, constitutive institutions and rules limit the legitimate space of institutional design—what can be changed, how fast, and in what ways. Heterogeneous societies, in particular, demand strongly qualified majorities to change the power of different branches and levels of government or the relative power of public authorities and citizens (Weaver & Rockman 1993:464).

To understand the dynamics of European integration, however, we have to go beyond institutional change as a simple reflection of differences in the comparative functional efficiency of alternative forms. In other words, we have to question the idea that political institutions normally adapt fairly quickly to changes in external conditions and human purposes through processes of competitive selection and rational adaptation.<sup>7</sup>

The pawn and engineering perspectives lead to different assessments of reform plans. Consider, for instance, the constitution-writing aspect. In a period of flux,

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<sup>7</sup> March & Olsen (1989), North (1990). Brennan and Buchanan also criticise the ‘hidden hand’ assumption in economic theory: ... ‘great damage has been and is being done by modern economists who argue, indirectly, that basic institutional change will somehow spontaneously evolve in the direction of structural efficacy,’ (Brennan & Buchanan 1985:149).

uncertainty and ambiguity, an engineering approach suggests that the time is ripe for deliberate intervention, to give more structure to current developments. The pawn perspective suggests the opposite. A period of flux, uncertainty and ambiguity is definitely not the right moment for codification and constitution writing. Both perspectives, however, suppose that the comparative efficiency of forms of governance and organisation is the key factor that determines their chances of survival.

*Gardeners, incremental reforms and meanders.* Studies of comprehensive institutional reform in large-scale, complex and dynamic systems with unresolved conflict suggest that reorganisation of the polity with a single scheme is unlikely to be politically digestible. Change is not well understood and controlled, and actual reforms are usually incremental rather than comprehensive. Governance is less a matter of engineering than of gardening.<sup>8</sup> Existing institutional configurations are usually the result of long historical processes, involving conflicts, victories, defeats and compromises, as well as processes of interpretation, learning and habituation.<sup>9</sup> It is difficult to subject institutional evolution to tight control, and history becomes a meander (March 1994).

In this perspective, reforms are influenced by environments and political actors. Yet, institutions do not adapt instantaneously or efficiently to minor changes in will, power, or circumstances. Institutions cannot be changed into any arbitrary form and comprehensive reform requires strong organisational capabilities to stabilise attention, mobilise resources and cope with resistance (March & Olsen 1983,1989). Change does not start with clear problem definitions and objectives, which lead to tailor-made institutional designs, as suggested by instrumental-functional approaches. Often, change takes the form of deliberation and ‘sounding out’ processes, involving the use of ambiguity, ‘soft laws’ and tacit agreements (Blichner & Sangolt 1994, Sverdrup 1999).<sup>10</sup>

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<sup>8</sup> Szanton (1981:24). See, also, March & Olsen (1983:287,1989,1995); Olsen (1996); Benz & Goetz (1996), Knill (1999).

<sup>9</sup> This is certainly true for state and nation building processes in Europe (Eisenstadt and Rokkan 1973), (Rokkan 1975,1999), and also for the development within the EU (Pierson 1996:126-7).

<sup>10</sup> Sounding out, in contrast to Habermasian force-free deliberation, involves the systematic use of ambiguity. It is important for each participant to avoid taking an early stand. While the participants will try to reveal the trend in their beliefs and preferences, and attempt to move the final outcome toward a desired end result, they will avoid very accurate indications of beliefs and preferences. They will always retain some degree of counter-argument and contradiction in their statements. The process is time consuming. The

#### 4. Utopia? Vision?

The idea of functional competitive selection is consistent with the traditional functional-utilitarian justification of the European Union. The *raison d'être* of the Union is its presumed superiority in problem-solving and conflict resolution, compared to other forms, and, in particular, the functional utility of the nation-state. Likewise, increasing international interdependence and globalisation is seen to require further European integration.

In the current situation, however, there is no guarantee that the characteristics of the objective environment, through processes of competition and selection, will, by functional necessity, dictate specific forms of organisation and governance. Moreover, it is not at all obvious that such processes will drive out existing institutional arrangements and replace them with Fischer's vision of a European federation. Instead, a common economic-technological deterministic perspective sees political leadership as irrelevant and portrays attempts at European integration towards a state-like polity as 'ironic' and 'tragic'. This is because such efforts work against the overwhelming forces of a global borderless economy of competitive markets (Ohmae 1995:38).

More trust has been invested in the idea that the European Union already has intrinsic dynamics of integration. For instance, The Treaty of Rome (1957) asserted a determination 'to lay the foundations of an ever closer union among the peoples of Europe.' The Maastricht Treaty (1992) was presented as 'a new stage in the process of creating an ever closer union among the peoples of Europe.' Now, the Preamble of the Draft Charter of Fundamental Rights of the European Union claims that 'the peoples of Europe have established an ever closer union between them.' Existing internal dynamics are seen to lead inevitably to a closer union, even without any deliberate political act.<sup>11</sup>

Fischer, however, is *not* a utopian in the sense that he expects an external or internal 'hidden hand' to produce a European federation. Quite the opposite, he sees the internal dynamics of the EU, as well as global changes, as demanding political leadership. The steps towards a constituent treaty, a precondition for full integration, 'require a deliberate political act to re-establish Europe.'

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outcome is the result of more and more participants accepting a certain alternative as the best solution, while other alternatives 'fade away' (Olsen 1972:273). The behaviour is purposeful, but it is reflecting what in a culture is defined as appropriate behaviour and process, not strategic calculation.

<sup>11</sup> Draft Charter of Fundamental Rights of the European Union, Brussels, 28 July 2000, Charter 4422/00 (fundamental.rights@consilium.eu.int).

Institutional reforms are supposed to help the EU both to cope with enlargement and increasing internal complexity, and to make Europe's voice better heard throughout the world.

Nor is Fischer a utopian in the sense that he expects his reform plans to be accepted by all significant actors. Traditionally, institutional reforms in the EU have been presented as Pareto improvements, in other words, changes where some gain and no one loses. This image has become problematic as European integration has become more politicised. And as could be expected, the Fischer plan has been received with scepticism, and even hostility, by many actors.

For instance, it has been argued that from an Eastern European point of view, the Fischer plan is incompatible with enlargement, because it will doom the Eastern members to be second class members, permanently excluded from the core.<sup>12</sup> For a British opponent, the reform plan looks like 'a Franco-German plot to destabilise the Union.' The French and the Germans are seen as wanting a directorate of larger Member States, at the expense of the Treaty-based inter-institutional system.<sup>13</sup> Creating a secretariat for an avant-garde outside the EU institutions obtains little support from Commission President Romano Prodi.<sup>14</sup> The Commission is also faced with the dilemma of whether to work for further integration with a pioneer group led by some major powers, or to protect the coherence of the EU and the position of the smaller Member States.

Several small states have been concerned that the reforms will change the balance of power in favour of the larger countries. However, the issue is hardly one of whether some actors will have more power than others. They already do. Independent of the current legal forms in the EU, a basic reality from the European balance-of-power era is still alive. Co-operation within the EU has been based on a tacit understanding that some countries are more equal than others.<sup>15</sup> The issue is, rather, how much the balance of power will change and whether it is possible to find a legitimate pathway towards a European federation.

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<sup>12</sup> See, Zielonka, in this Volume.

<sup>13</sup> British Liberal Democate Andrew Duff, *Agence Europe* No 7723, Wednesday 24 May 2000.

<sup>14</sup> *Agence Europe* No 7759 Saturday 15 July 2000 p. 5.

<sup>15</sup> For instance, Luxembourg's Prime Minister Jean-Claude Juncker has argued that 'larger European states have always preserved their special influence ... . Nothing will change that. The voice of the French President in the European Council counts more than my own. He knows it, I know it and accept it and there is no need to formalise this in the treaty' (Speech at the Swedish Institute for International Affairs, June 7 2000, *Agence Europe* No 7735, 10 June 2000).



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Finally, the plan has not received overwhelming support even in Germany. Fischer presented his speech as his personal views. While realising that it would not really be possible to do so, he explicitly tried to divest himself of the hat and mantle of the German foreign minister. However, Chancellor Gerhard Schröder has characterised the idea of a European president as ‘a perfect illusion’, presented by ‘one of the leaders of the Green Party seeking an identity.’<sup>16</sup> European Commissioner Günther Verheugen—a German national—has argued (in the *Süddeutsche Zeitung*) against the idea of a core and warned against the EU becoming a superstate like the USA.

What, then, are the possibilities for institutional engineering? The ideas of federalism and a dynamic core are hardly new in the European context, but, so far, they have received modest support. During both the Amsterdam process and the current IGC, it has been difficult to get agreement on comprehensive institutional reforms. Is the Fischer plan, in the face of the hostility, scepticism or apathy doomed to be utopian?

A power struggle over reforms, given the traditional consensus norms in the EU and the current preferences, world-views and powers of the various actors, is likely to threaten the EU itself, or to change the Union in fundamental ways. This is so even if Fischer’s view is triumphant in the end. Most likely, the plan will remain a Utopia and a source of disappointment and frustration—unless there are significant changes in key concepts and vocabularies, preferences and world-views.

Such changes are, however, not impossible to achieve for patient institutional gardeners. Political leaders are neither omnipotent, nor impotent. From an institutional perspective, democratic institutions and identities cannot be engineered and re-engineered overnight. There are limitations of transformative leadership through institutional design, and, in order to avoid the utopian trap, reformers have to go beyond ordinary processes of coercion, exchange, bargaining, negotiation and coalition building. Seen as a contribution to a future debate—a broad, democratic, constitutional debate on the preferred political order, something that has been missing in the EU so far—Fischer’s speech may come closer to a vision than a utopia.

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<sup>16</sup> Interview with *Le Figaro* (*Agence Europe*, No 7761 Wednesday 19 July 2000 p. 6).

## 5. Options for Institutional Gardeners

Fischer argues that ‘common laws can be a highly integrative force.’ The current IGC, consistent with the legal tradition of the EU, also focuses on formal-legal aspects such as the composition of the Commission, the weighting of votes in the Council and the extension of majority voting. In contrast, from an institutional perspective, comprehensive change in a political order involves not only affecting human conduct and formal-legal institutions, but also affecting peoples’ inner state of mind, their moral and intellectual qualities, their identities and their sense of belonging (Mill 1861, 1962:32).

An institutional/gardening perspective reveals doubts that democratic reformers can be successful independent of the properties of the population. In other words, it doubts whether it is possible to develop democratic institutions without democrats, or a European federation without Europeans, so that the legitimacy of institutional arrangements is based solely on a continuous proof of their functional efficiency (Olsen 1997:222). Political gardening requires knowledge of the mechanisms through which different institutions and processes of opinion—and formation of will—may influence the mentality and identity of individuals and collectivities. On the *one hand*, such changes can be the result of a political community making decisions and debating the challenges and opportunities they face, and the principles, rules and procedures by which they want to live. On the *other*, changes can be traced back to processes of socialisation in educational institutions, both universities and mass schooling (Soysal & Strang 1989, March & Olsen 2000).

From this perspective, political leadership includes affecting how Europeans come to think about what constitutes unity or disunity, as well as the reasons for establishing and changing political borders, common purposes and projects, institutions and forms of governance. The EU also has numerous arenas for interaction, argumentation, problem solving and conflict resolution, and the gaining of experience through interaction may create habits of working together, friendship, group loyalties and knowledge about others. These may create convergence, mutual confidence and positive trust spirals. However, they may also create awareness of differences and produce conflicts and confrontations (March & Olsen 1998). Political gardeners can use such arenas to push the system in a consistent direction. They may stabilise attention, develop a shared vocabulary, shared interpretations of experience, criteria of assessment and aspiration levels, and may also improve institutional adaptability.

*Stabilise attention.* Fischer has focused attention on major institutional reform, but he also emphasises the importance of different time scales. His own time horizon is ‘far beyond the coming decade and the intergovernmental

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conference.’ From this time perspective, there are many possible future distractions. Comprehensive change in institutions and identities may take decades or generations, and because large scale reforms are weakly institutionalised, they usually attract a variety of issues, often loosely coupled to the reform itself.

As argued by March and Olsen in a study of comprehensive administrative reforms in the United States, ‘[A]lthough it is hard to predict what specific crisis, scandal, or war will divert presidents from the reorganisation arena, it is easy to predict that something will’ (March & Olsen 1983:286). The result is that reformers are frequently distracted and disappointed. However, persistence may pay off. Sometimes, short-run failures turn into long-run successes, as old plans are reactivated under new and more favourable circumstances (March & Olsen 1983:287).

A possible *first* lesson, therefore, is that the realisation of a large-scale vision of reform requires an ability to stabilise and institutionalise attention and resources around comprehensive reforms, so that incremental steps can be tied together into a long-term consistent plan.<sup>17</sup>

*Develop a shared vocabulary.* Fischer is well aware that some words have to be used with caution. For instance, the term ‘federation’ irritates many Britons. He does not want to irritate anyone, yet, he has not been able to come up with another word. Simultaneously, he feels a need to avoid the misunderstanding that he is really suggesting a ‘re-nationalisation’. Likewise, he wants to avoid scaring anyone: ‘Let us not misunderstand each other: closer co-operation does not automatically lead to full integration.’

These expectations have turned out to be realistic. The reform proposal has come to mean different things to different actors. Consider, for instance, the idea of ‘a federation of nation-states’ with a sharing of sovereignty, and clear demarcation of powers between levels of governance. In Britain federalism *is*, in spite of Fischer’s caution, associated with a hierarchy between levels of government.<sup>18</sup> For others, ‘division of sovereignty’ means that Fischer ‘distances himself from the concept of a European super-state transcending and replacing

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<sup>17</sup> The argument is relevant in the EU-context because, on the one hand, outcomes are rarely entirely anticipated by those who strike strategic bargains (W. Wallace 2000). On the other, the short-term preoccupation of institutional designers has led them to make decisions that have undermined their long-term control (Pierson 1996:156).

<sup>18</sup> See, H. Wallace, in this Volume.

the national democracies.’<sup>19</sup> More generally, ‘federalism’, ‘constitution’, ‘democracy’, ‘sovereignty’, ‘enhanced co-operation’, ‘Europe’, *etc.*, are words without a shared meaning across EU Member States, a fact that makes fruitful deliberation less likely.

A possible *second* lesson, therefore, is that implementation of a reform vision will depend as much on leadership through reconceptualisation, as through reorganisation. Success will be facilitated by the development of a shared vocabulary and concepts, or, at least, a repertoire of such vocabularies and concepts, so that actors can ‘translate’ between different interpretations of key concepts.

*Develop shared interpretations of experience.* In fairly stable periods, institutions provide languages, concepts and repertoires of legitimate accounts. They help participants to make sense of an ambiguous, uncertain and changing world, and present rules of appropriate, or exemplary, behaviour (March and Olsen 1989, 1995, Powell & DiMaggio 1991: 15). In periods of transformation, the organising power of institutionalised concepts, schemas and scripts is weakened. There are competing institutions and interpretations. Questions are raised as to why the code of conduct, as well as the forms of organisation and governance, are different in one country, or in one context, from another (Elias 1982).

Major reform projects provide an opportunity for developing shared interpretations, affirming legitimate values and institutions, and changing the climate of opinion. A *public* discourse about the adequacy, or inadequacy, of existing institutional arrangements can be a process of civic education through which European citizens develop an understanding of what constitutes a good society and system of governance, *i.e.*, the legitimate constitutional principles of authority, power and accountability, and the normative-ethical basis, and value commitments and beliefs, of the polity (March & Olsen 1983, Olsen 1992:259).

A possible *third* lesson, in this perspective, is that an important aspect of political leadership, and a way to avoid the utopian trap, is to provide adequate accounts of the past and visions of the future. Clearly, agreement is by no means guaranteed. Struggles over belief-systems and causal models may be as fierce as conflicts over normative criteria.

*Develop shared criteria of assessment.* The prospects of avoiding the utopian trap will also depend on what reformers aspire to achieve through constitutional reforms. A political institution can be assessed instrumentally on the basis of its

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<sup>19</sup> See, Börzel & Risse in this Volume, at 45.

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contribution to substantive (policy) results. Alternatively, a structural arrangement can be evaluated deontologically, *i.e.*, on the basis of specific properties of the institution itself. The test, then, is not an issue of precise calculation of the effectiveness and efficiency of alternative designs for policy outcomes in specific situations. Instead, it is a question of whether the institution is seen as the appropriate means to cope with certain classes of tasks and situations within a culture (Olsen 1997). The issue is whether institutional practices and rules are consistent with basic principles of reason and morality in a culture—possibly involving general conceptions of good and evil, just and unjust, right and wrong, legal and illegal, and true and false—so that it becomes a duty for citizens to follow its rules and prescriptions. For instance, support for representative institutions is a commitment to a long-term institutional arrangement, not to a specific outcome (Pitkin 1972:234). Likewise, the rule of law, the prohibition of retroactive laws and recruitment based on merit, exemplify legitimising principles that are not linked to the immediate substantive outcome of specific decisions. Such principles and institutions structure and discipline-policy making processes. They encourage some types of behaviour and inhibit others. Yet, they do not determine precise policy outcomes.

Fischer's proposal has elements of a deontological approach, for instance, through its emphasis on democracy and transparency. It aims more to develop basic principles for a workable system more than to achieve an immediate policy outcome. In comparison, the British tradition has been described as instrumental. Political institutions, and reform plans, are primarily assessed as instruments to achieve policy outcomes. There is a preference for substance to determine form, and a standard question is, will this reform lead to better policy outcomes? In the context of the EU, this leads to a preference for pragmatic, case-by-case co-operation, and to local experimentation rather than a single blueprint.<sup>20</sup>

A possible *fourth* lesson is that visionary leaders should clarify whether reforms aim to change the basic principles and rules of the organisation of political power, thus providing a framework for policy processes, or to achieve specific policy outcomes. It is the latter approach that is probably more likely to generate frustration.

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<sup>20</sup> See, H.Wallace in this Volume. The differences should not be exaggerated. During the Thatcher-period, reforms were, to a considerable extent, driven by principles and ideology, without clear evidence about exact policy impacts (Hood 1996).

*Clarify aspirations.* Political leaders also have different aspirations when it comes to which kind of relationships should bind the people in Europe together, and, as a consequence, what kind of polity the EU should become. Aspirations have also changed over time. The revolt against the Maastricht Treaty created a perceived need for ‘heightening the sense of belonging to the Union and enhancing its legitimacy’ (Commission 1995:7). Furthermore, debates over the Rights Charter and the Austrian crisis have reactivated a debate over the cultural identity of the EU.

The general issue is how flexible political identities are, and through what processes they are created, maintained and changed? Within the EU, there is an awareness that building trust and cohesion among European peoples and governments will take time (Commission 1992:8). In the short run, identities are unlikely to change in the absence of dramatic external shocks which create one of the ‘great mentality-shaping controversies’ (Habermas 1988:12). In the face of cultural heterogeneity, it is also questionable whether a shared programme of civic education is possible in the short run. What should be the content and who should be in charge of developing the programme? What institutions are needed in order to develop a feeling of a democratic, European identity? Given that identities change only slowly, the leadership challenge is to influence perceptions of the desirability and capability of multiple identities, and with it the perceived compatibility among competing identities among Europeans.

A possible *fifth* lesson is that visionary leaders need to clarify the assumptions made about the role of shared identities and a sense of belonging—that which they assume binds people in Europe together and keeps them apart. Likewise, they need to clarify their assumptions about how fast, and through what mechanisms, identities may change. A Europe constituted *solely* as a market community of exchange and as a functional-utilitarian unit, may not provide an adequate foundation for further integration. In contrast, a Europe constituted as a cultural community based on shared values is likely to be beyond reach in the near future. In comparison, plans for further integration based on Europe as a legal community of shared rights and duties, and a political community based on shared institutions of governance, are less likely to be utopian dreams (Olsen 1998).

*Improve institutional adaptability.* Visionary leaders in the EU have to ‘take the law seriously’ (Joerges 1996), yet, they have to avoid becoming overly legalistic and formalistic. The problem of non-effective constitutions and institutions is well known. Constitutions can be written and re-written and organisational charts can be drawn and re-drawn. However, such changes may have a modest impact on the ‘living institutions’ of a society (Olsen 1996, Laffan 1999). Formal treaties and constitutional provisions alone cannot explain the Union’s

dynamics (Dehousse & Majone 1994:92). Change has often been both incremental and part of the daily practice of governance and adjudication, later codified in treaty form by intergovernmental conferences (Jachtenfuchs & Kohler-Koch 1996a, Kohler-Koch & Eising 1999).

The distribution of formal-legal authority is only a limited part of the distribution of power resources. Thus, visionary leaders have to make realistic assessments concerning what modifications of practices can be achieved through changes in formal-legal institutional arrangements. They have to consider both to what degree and under what circumstances institutions can be deliberately restructured, and what the likely effects of changing formal organisational charts and rules are in a world where many resources other than formal-legal authority count (Olsen 1996:238).

Likewise, avoiding the utopian trap may depend on the leaders' understanding of what makes some institutions able to learn and adapt continuously, while inertia in other institutions creates large gaps between existing structures and underlying realities. Experiential learning has been suggested as the basis of governing the future polity (Deutsch 1981:338). Success may, however, depend on insight into the many ways in which such processes are less than perfect,<sup>21</sup> and how the imperfections of mundane processes of learning and incremental adaptations allow for comprehensive institutional reform. In general, the more inefficient ordinary processes of adaptation are, the more likely that an institution or a regime may collapse like a house of cards and be replaced by a new one (Olsen 1992:256, 1997:209).

A possible *sixth* lesson for visionary leaders, then, is that they have to take an interest in the dynamics of 'living' institutions and not only formal-legal arrangements. A precondition for willed radical reforms may be a better understanding of why ordinary processes of learning and adaptation sometimes succeed and sometimes fail.

## **6. Governing Through Institutional Change**

European co-operation has already produced a dense institutional order—a quasi-federal polity and a system of governance based on constitution-like treaties (Stone Sweet & Sandholtz 1998:1).<sup>22</sup> Yet, many recent integration initiatives have been initiated outside the EU institutions, and the European

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<sup>21</sup> Levitt & March (1988); March (1991,1994,1999), Levinthal & March (1993).

<sup>22</sup> See, Börzel & Risse, in this Volume.

polity is still in flux. The EU is an unsettled political order in terms of geographical reach, functional scope and institutional balance. The Union simultaneously faces questions such as: who is going to belong to the political community and where should its external borders be drawn? What should the shared agenda, purposes and projects be? How are collective issues to be dealt with, and in terms of which common institutions and principles? How are such choices to be justified and legitimised?

Reorganising political power in Europe involves a delicate re-balancing between levels of governance and institutions. The EU has gone through a variety of stages (Schuppert 1995), but the preconditions for a European federation are not well understood. The long-term history of government may also indicate that there is no such thing as an end-state, but a succession of forms of government instead (Finer 1997). Fischer's speech can be seen as an attempt to provide leadership and a vision of a new political order in Europe in a period of uncertainty and ambiguity. He proposes further political integration, but he is also setting a limit for integration, short of a United States of Europe. Will, then, the majority of the Member States make the leap into full integration? Will an avant-garde emerge? Will the core emerge within or outside the framework provided by the treaties? Will there be destructive conflicts over further integration?

The main argument of this paper is that what looks utopian for political pawns and engineers, may be a little less so for patient political gardeners. In particular, patient gardeners may turn utopias into visions, and give a consistent and desired direction to European developments if they understand the dynamics of political institutions and identities well. In other words, the abilities of institutions to adapt spontaneously to major changes in their environments, the abilities of environments to eliminate non-adaptive institutions, and the latitude of purposeful institutional reform.

One key aspect to understand comprehensive institutional change is to develop a better comprehension of how existing institutional characteristics and histories affect institutional change. This includes developing better insight into the institutional preconditions for creating both legitimacy and deserved support through public debates about political institutions and the organisation of governance.





IULIA MOTOC

## **Europe and its Teleology: Is there a Central-Eastern Vision?**

### **1. Introduction**

Can we simply forget Fischer? Let us imagine that Fischer is an actor on a stage: why has his performance given rise to such agitation and debate amongst his audience? Let us attempt to put forward a hypothesis to explain this phenomenon: with his speech on ideals, Fischer has addressed an audience that has, admittedly, been forgetful of its ideals, but has nevertheless maintained them deep within their hearts. A second hypothesis, in contrast, would centre around the notion of confession: the actor has ceased to play his part and has, instead, endeavoured to comment on the play by substituting his own speech for the written text. A third hypothesis is inspired by the not so distant experiences within Central and Eastern Europe. Plays were successful during communist times if they could be interpreted in different manners and hinted at what many believed, but few dared to express.

As in any balanced ‘cause-effect’ relationship, all of the causal hypotheses listed above may engender equally valid explanations. However, were the third explanation to be proven sound, it would imply that the EU is in the middle of what we might, in Foucauldian language, term as a crisis in the relationship between ‘truth’ and ‘power’.

Having already experienced a loss in legitimacy and a democratic deficit from the early 1990s onwards, the European Union is now faced with a massive enlargement into the East, and into post-Communist Europe. This challenge is only superficially touched upon within European discourse, including the discourse of European authorities, national authorities and civil society. Since the optimism created with regard to the EU’s future does not appear to have been accompanied by concrete solutions, the distrust of Europeans has grown and the deficit in substantive legitimacy has become even more considerable. The ‘power’ appears to have established a ‘truth’ which has become less and less convincing to ‘the people’.

In this context, what was required within the European public space was a *démarche* that would newly call into question what appeared to be the EU’s

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conception of itself. Or, to put it another way, an intellectual discourse. This circumstance may also account for the fact that Fischer's critical—even dramatically-flavoured—descriptive review of present day Europe is mixed up with a wide, diverse, and consequently contradictory, assortment of normative prescriptions for the reform of Europe.

When describing both the present situation and the future of integration, Fischer substitutes the confident tone that is typical of European public discourse, with one that reflects a current concern—albeit one that is difficult to admit to. However, the normative elements within his speech are combined with too many of the ideas that have already been aired on the possible future shape of Europe. The outcome is that the puzzle of ideas offered by Fischer as an alternative for the future of the EU is only superficially consistent and is, therefore, vulnerable to criticism, especially academic criticism, as is demonstrated by the debate that this contribution forms a part of. It is possible, however, that the overview of the many ideas and concepts belonging to the European public domain was nevertheless necessary, precisely in order to stir up a debate.

Whilst he refers to the Founding Fathers from the very outset of his speech, Fischer's statement does not seem to be typical of a 'Founding Father', and instead reflects the views of a 'hero of open society.' Certainly, the host of disappointments that stem from the inconsistency of the speech are joined by a substantive discontent that is related to the inconsistency of the European public space. Fischer is perfectly aware that his mantle as the German Foreign Minister cannot really be cast aside, and that a speech given by him will not pass unheeded.

If we accept this interpretation, we can view Fischer's undertaking as a success, since it succeeded in launching the debate. This success should nevertheless be balanced against the fact that it would seem to be more useful to examine the reactions to Fischer's speech than the speech itself. These include the reactions to the Eastward enlargement of the EU, a process that—although seemingly imminent—had remained somewhat confined within the realm of 'taboo subjects'.

If we are asked to read Fischer's discourse, we can find a lot of positive remarks about Central and Eastern Europe's concern regarding European integration. Referring to the eidetic realm, he assesses the 'historical challenge' of the enlargement process and relies on the legacy of Jean Monnet's ideal of Europe. Faithful to his eclectic approach, Fischer also raises geopolitical justifications for enlargement, which appear to justify an enlargement 'as soon as [is] possible.' By contrast, if we examine Central-Eastern European hermeneutics regarding Fischer discourse, we can learn that he is delving deeply into fallacy

and working against Central-Eastern European interests: postponing the enlargement, with recourse to unclear federalist ideas, and by maintaining a hard-core exclusive European Union.

What is the meaning of this paradox? Does a more general framework exist, with reference to which we might understand some of the important contradictions that arise in relation to a European finality, which is firmly confined within an East-West format? Are there simply different views on the enlargement process, or do these different views reflect some deeply-rooted dissimilarities that are destined to remain with us for some time?

It is not our intention to reproduce the Central-Eastern European reactions to Fischer's speech here. We shall try to respond to Joschka Fischer's discourse by considering certain of its themes, which might help to clarify the paradox revealed above. First, we shall examine the 'sense' of Europe and the 'ideal' of reunification. Further, we shall briefly discuss the question of the hard-core federation and some of the strategic proposals made for the purposes of legitimising enlargement.

## **2. To be a European: Natural Right and History**

The prospect of enlargement has, of itself, caused a great increase in the number of references to 'Europe' and its fate. This is apparent within Fischer's rhetoric of '*Quo vadis Europa*'. This discourse has similarly caused a great swelling in the ranks of those concerned with the 'historical' side of the enlargement story: rather than using the terms 'historical chance' or 'historical necessity', Fischer opts for the phrase 'historical challenge'. Having thus joined the ranks of the 'anxious historicists', Fischer nonetheless proceeds in the same manner as other commentators and does not question the 'historicity' of enlargement. He does, however, distance himself from this prosaic landscape by quoting the Jean Monnet foundational ideal relating to Eastern Europe.

Why question the ideals of enlargement? One must begin by asserting the importance of the philosophical realm for the process of European integration. But, as a matter of course in a political discourse like Fischer's, ideals serve only as political instruments with legitimisation functions. The analysis of the ideals seems telling to us, simply because it was supposed to be the main tool for the legitimisation of Eastward Enlargement. But it was not. The Fischer's debate is only the most recent piece of evidence for this.

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B.Renaud expressed the philosophical dimension of the next European Enlargement in a thought provoking way:<sup>1</sup>

In what could be seen as a surprising rupture, the process of Central and East European accession to the EU brings us back to the essence of European spiritual identity, all the way towards the European soul.

In the terms of political philosophy, the European soul may be equated with the European *telos*. This *telos* is, in essence, not simply a matter of the best form of government, but is also related to the individual, whose ‘natural’ rights are inextricably bound up with the notion of justice. Every doctrine of natural right asserts that principles of justice and ‘the truth’ should be accessible to the individual. At the same time, each standpoint has its own account of the nature of truth and justice, and any attempt to compare them, or to find a neutral principal, would be utopian. Accordingly, following this argument, the natural right to be a European could be a mere tautology.

The political modernity of the Eighteenth Century caused this natural right, and with it the European *telos*, to disappear. As demonstrated by Leo Strauss, the dissolution of this natural right was the result of a confrontation with historicism—the belief that all human values are historical-qualified and are relatives—and of the battle with positivism; *i.e.*, the conventional understanding of the truth, given by a external law.

Nonetheless, a certain nostalgia for this human and political *telos* and for the establishment of a perfect relationship between natural right and justice remained a constant within the history of political ideas, albeit often with an anti-modern and an anti-liberal political focus. For example, the attempt to reconstruct and reinterpret the moral code of pre-modern societies was a common feature of Central-European political ideas during communism.

Although very different in their political attitudes, the Czech, Jan Patočka and the Romanian, Constantin Noica, leading philosophical figures within their own countries, took the question of the soul as their core philosophical concern. Both entertained reservations about integral humanism, and were obsessed with the potential for the spiritual reinvention of Europe, which they considered might be a possible solution for the crisis of modernity.

The legacy of this line of thinking is present in Vaclav Havel’s essays and speeches. Havel’s discourse is not only striking, it is also unique within modern Europe. He is, as a simple matter of fact, the only political leader for whom the

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<sup>1</sup> B.Renaud (2000:297).

discourse on European values does not possess an explicit instrumental connotation which is further related to specific interests and/or practical purposes, be they merely for purposes of legitimisation or mobilisation.<sup>2</sup> Furthermore, Havel's thought fills the gap between the Husserlian vision of Europe as a solution to the modernity crisis and the post communist Europe of democratic return, and space of responsibility. Clearly, however, all the references to the idea of Europe failed to attain their goal. The section of Fischer's speech that deals with ideals seems to have been ignored by both 'West' and 'East' Europeans.

Why is it that today, when Europe is teetering on the brink of attaining its *telos* through enlargement, there is such a significant amount of indifference towards Europe, and even occasional outright hostility? One possible explanation might be the very major difference between the Europe of 2000 and the Europe of 1951; the former has attained the goals of the latter, having grown into what J.H.H. Weiler has termed a '*fin de siecle Europe*'.<sup>3</sup> Accordingly, and set against this background, were Europe to come at all close to finding its soul or *telos*, the latter would nonetheless seem to be so remote from the ideas and values found within the current, shared, public political culture that it would no longer—and justifiably so—have an audience. To employ other words: in a world that is void of ideals—arguably the situation existing within the EU—latent ideals, such as enlargement, are incapable of commanding any enthusiasm.

Yet another hypothesis is that the European *telos* suffers—as it has done so from the very creation of the EU—from the fragility of idealism within political modernity. Today, the European *telos* has a very particular and historically-qualified meaning and is also subject to a transformation process initiated by the positive law that governs European integration. As is the case with any modern polity, the EU also experiences epochs when idealism takes over from realism. Undoubtedly, ideals must be instrumentalised and transformed into interests and practices before they can be mobilised.

What, then, of idealism under conditions of political modernity? In order to be operationalised, ideals must be accompanied by a common understanding of values, a favourable form of positive law and, on the procedural side, by political forces and elites capable of converting them into reality. Let us consider the enlargement process with regard to these three conditions.

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<sup>2</sup> See, for example, V. Havel (1998).

<sup>3</sup> J.H.H. Weiler (1999:238-263).

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First, the act of understanding the common European values that were supposed, automatically, to lead to the enthusiastic sharing of a future common destiny for East and West is not as simple a matter as current European discourse might suggest. It is an elementary observation that the East refers to common values more often than the West does so. At the same time, however, the notion of a European identity, which is even now being asserted in the East, is more in the nature of a 'claim', rather than something that could be taken for granted.

Equally, however, the West's discovery of the East during the past decade has also raised certain question marks about the concept of common identity. Some commentators argue that the cultural differences that have given rise to such question marks are simply a temporary consequence of Communism. Others maintain that such differences have their roots in a distant historical past which was characterised by separateness, rather than commonality. According to this view, Western European integration was possible only because Western Europe was separated from Eastern Europe.<sup>4</sup>

Second, important challenges to European integration of Eastern states stem from the incorporation of European law. What can be taken as a fact, however, is that the process of accession to an international organisation, like the EU, is based on certain positive substantial and procedural rules. States were thus required to meet the criteria laid down in Copenhagen. If they failed to do so, they could not participate in the process of European integration.

Third, the conversion of the ideal of the reunified Europe into reality, which has been the core of the European agenda since 1990, has failed. Naturally, enthusiasm for the reunification of Europe was greater during the period that followed the fall of the Berlin Wall than it is today. However, the reaction of the EU was, even then, a cautious one, which probably explains Lord Dahrendorf's statement that he was ashamed that the European Union did not approve the accession of the East European countries immediately after their had cast their democratic choice.<sup>5</sup> One might say that this was a moment of idealism, which favoured enlargement, that was nevertheless lost.

Fischer quoted the Jean Monnet foundational ideal relating to European reunification. One could make guesses about the predictive capabilities of the Founding Father, but it seems to us that the argument of Monnet extends beyond the somewhat simple ideal of reunification. First, Monnet invited Europeans to build 'a fraternal Europe'; a Europe which would be able to offer 'moral

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<sup>4</sup> See, T.Judt (1996).

<sup>5</sup> Dahrendorf (2000:281).

support’ and ‘help with the transformation’ of Eastern Europe. The ‘fraternal’ European vision, capable of extending the integration model, is, in its political values, closer to the communitarian model of the polity, which is still a normative one for the EU.

We have very briefly discussed the manner in which the European *telos* and the ideal of reunification is now being called into question. Such doubts, however, should not be taken to mean that there is no potential for idealism within the EU, or with regard to enlargement. Why, then, is the year 1951 so distinct from that of 2000?

In effect, it is not the character of the European *telos* that distinguishes 1951 from 2000, but, rather, its ‘enemies’, historicism and positivism: it is not the status of the ideals that is different, but rather the conditions in which they must be put to work. Firstly, although the history of ‘the six’ was also marked by conflicts, there was, nevertheless, a marked awareness of the existence of a common identity and common fate that does not seem to be present within the current relationship with Eastern Europe. Equally, the creation of the European Communities within a new legal framework, or a ‘ground zero of European integration’, was a great advantage and even a privilege, which cannot be reproduced today. Furthermore, in contrast to the early era of European integration, post-Cold War Europe is characterised by an inability to convert idealism into real-world structures and by disagreement between elites and the general public upon the appropriate nature of enlargement.

### **3. ‘Europe, You will Remain the Same’**

‘A European Federation’ and a ‘core Europe’, unity and increased differentiation are two paramount themes of Fischer speech. Both of them are dressed-up in the rational-normative mantle of the European integration debate. We will not dwell on the false empirical point of departure of Fischer’s speech here, or on the important contradictions within his vision. We are trying, here, to look at Fischer’s speech in the light of its—apparently puzzling—reception in Eastern Europe. Is there a different Eastern-European vision of European integration, or simply a misunderstanding? Equally, if Eastern ideas about European integration are different, why is this so and when do we have to take them into account?

Let us begin with a novel. One of Eastern Europe’s most celebrated novels—*The Doll*, by Boleslaw Prus—describes a situation that is similar to the one in which Eastern Europeans now seem to find themselves with regard to the ‘finality’ of European integration that is described by Fischer and others.



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The novel's main character, Wokulski, a lower class lad, has a crush on an aristocratic maiden. He structures his entire life with a view to conquering the maiden, becomes rich and is on the verge of marrying her—he dreams of living with her in a villa that he will build and name Isabellon—when a single trip to Krakow, just prior to the planned marriage, reveals to him the painful truth that, for him, the maiden's charm has vanished away. One might say that this is a simple illustration of love's fate: it is always an illusion that eventually fades away. One might, of course, also argue that the maiden herself changed during the period of distant adoration. A more cynical, yet subtle view, however, would assert that she must have changed since she would not otherwise have accepted a proposal of marriage from a man of Wokulski's condition. The analogy is now simple and transparent. Yet, this is only the mournful side of the story of the eastward enlargement that might be distilled from Fischer's speech.

The aspect of Fischer's vision of political finality that causes most concern in Eastern Europe is the emphasis placed upon a centre of gravity inside the Union, which is seen as being absolutely necessary in order to maintain the process of European integration after enlargement towards the East. The arguments put forward by Eastern Europeans to account for their reluctance about the creation of a federation with a hard core, primarily stem from historical experience, and are, at the end of the day, only to be expected of states that are not yet full participants within the process of European integration. Clearly, since the vision of unity and an alteration in the Monnet method have become even less realistic today,<sup>6</sup> we now require a more comprehensive debate on the federal traditions of new members.

The first argument relates to federalist ideas and derives from the lack of a strong federal tradition within this part of the continent. Eastern Europe has nevertheless experienced plenty of federalist projects, but here again, memories are mixed. In the last two centuries alone, the mixed fate of federalism within the East is adequately illustrated by reference to the story of the Habsburg Monarchy following the Austro-Hungarian Compromise of 1867, or to the break-up of the former Yugoslavia. These two different forms of federalism and types of political regime were the cause of significant international instability.

As Schlesinger has pointed out,<sup>7</sup> proposals for federal projects such as Neumann's Mitteleuropa or Hodza's Federation in Central Europe were regarded with great suspicion by Eastern Europeans. We can, therefore, agree with the conclusion that 'the people of East Central Europe have not been

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<sup>6</sup> See, R. Dehousse in this Volume.

<sup>7</sup> R. Schlesinger (1945:487-502).

adequately conditioned by their history to embrace readily the habits and attitudes of international federalism'<sup>8</sup> A close analysis of Eastern Europe's federal experiences reveals the fact that an important source of instability was the unequal status of peoples within the federation. This is the story of the Slavs, Magyars and Romanians during the Hapsburg Empire, of the non-Serb population in Yugoslavia and, at the end of the day, of the Slovaks in Czechoslovakia.

The second argument invoked by Eastern Europeans emphasises the importance of preserving sovereignty. We can make mention of the newly acquired sovereignty of Eastern Europe. Certainly, the question of foreign occupation could be discussed at length here, either in Kundera's terms with regard to Communism in Central Europe, or in the geopolitical terms of the Brejnev doctrine. Nonetheless, sovereignty is by no means a simple notion to grasp, either in theory or in practice. It is certainly a particular challenge to discuss its 'permeability' or 'desegregation' within the European Union.

Although Eastern Europeans have attempted to present their viewpoints as being close to those taken by other Governments, such as the UK Government, which was also critical about Fischer's proposal, there still are significant differences between the respective stands. Whilst Great Britain appears reluctant about European integration in general, Eastern European countries are enthusiastic about the current EU, and are sceptical about the Europe envisaged by Fischer.

It is worth noting that among the motivations driving Eastern European countries towards the process of European integration is the equal status that smaller or less developed states seem to enjoy inside the European Union. Pro-integration feelings within Eastern Europe are also bolstered by the fact that other countries that have experienced similarly unfavourable economic conditions were to make great progress as Member States. It has been said of Eastern Europeans that theirs is a pragmatic approach towards the West, and that material advantages explain the attractiveness of the European Union. Undoubtedly, the only guarantee of effective integration between the two regions will be a levelling up of their economic performance. Thus, we can suggest that the Eastern-European vision is more closely related to the supranational approach to integration, a dimension that is lacking within the unitarian-differentiated model proposed by Fischer.

At the same time, however, although Eastern Europeans might wish for Europe to remain the same after the completion of the current enlargement round, they

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<sup>8</sup> V.Mastny (2000).

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are aware that this is not going to be the case. This fact contributes to the stiff competition and lack of solidarity between Eastern European countries, and between them and other partner countries in the EU, which enjoy assistance from it in various forms.

On the other hand, it is equally true that, as enlargement is delayed and accession to the EU grows ever more complicated, enthusiasm for accession to the EU within Eastern European countries is diminishing. Even if it is true that European identity is a constant value for Eastern Europeans, certain groups have begun to discover that integration might work against their economic interests; its contribution to the overall economic growth within individual countries has become less than certain. If we are to explain the process of state preference formation in terms of domestic institutions, we might say that, in Eastern Europe, we are witnesses to an ongoing process of the clarification of market incentives that has motivated domestic actors to advocate certain policies (commercial liberalism), that have begun to counterbalance<sup>9</sup> domestic social identities and values (ideational liberalism).

Although attitudes towards the EU are shaped by historical experiences throughout Europe, Eastern European discourse on integration is particularly marked by historical references. This will come as no surprise. A historical debate on the recent past, *i.e.*, on Communism, is not a current priority. The situation differs starkly from that prevailing after World War Two. The general impression is that the qualification of Communism as totalitarianism is a debate that is not going to, and will never, take place. World War Two was followed by a discourse that held that a totalitarian regime must bear certain responsibilities. These things appear very unclear today: on the one hand, there is dispute about the totalitarian nature of Communism;<sup>10</sup> on the other, there is much ambiguity about the issue of responsibilities.

We can now see more clearly why Eastern European identity formation within the process of European integration can be defined by contrast to identity formation in Germany. Certainly, both demonstrate a deep attachment to Europe. In Germany's case, however, this is concomitant with the fading away of national identity, while in Eastern European attachment goes hand in hand with the assertion of identity. One should also note that all Eastern European countries have a tendency to minimise their divergence from Western Europe, and to assert and emphasise their own performance.

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<sup>9</sup> A.Moravcsik (1997).

<sup>10</sup> See, for example, A.Besancon (1998).

If we were to sketch the identity of Eastern Europe, we would primarily see it as combining attachment to Europe with self-assertion, self-confidence and even a certain kind of nationalism that we might view as being useful.<sup>11</sup> It is highly likely that this identity is conditioned by Eastern Europe's ongoing absence from the process of European construction, and by the requirement that it (almost) unconditionally accepts the existing European legal framework.

## 5. Constitution and Castle-Building in Europe

It is a fact that the interest of the various commentators of Fischer's speech was captured, to the same degree, both by the vision of political finality offered and by the strategy elaborated in order to reach that vision. Whilst it is true that the EU is experiencing a normative revolution, it seems, at the same time, to have great difficulties in defining strategies and policies. Shortly before the deadline for the completion of the IGC meant to prepare for enlargement, the EU has become aware that it lacks the means to achieve the aims it has laid down.

This major strategic difficulty is combined with the EU's deepening lack of social legitimacy, which seems to us to be Fischer's main concern. It has long been noted that a lack of social legitimacy is related to economic performance within the EU. Empiricism in excess governed EU thinking to the point that the danger of the organisation being deprived of this source of legitimacy and being confronted with a democratic deficit was ruled out. As is usually the case, the 'poverty of realism' becomes evident when its effects are made tangible. It is a fact that the EU is now engaged in an effort to tackle this deficit.

This effort—one that addresses the three aspects of deficit: accountability deficit, federal deficit and constitutional deficit<sup>12</sup>—is covered by the notion of 'constitutionalisation'. Thus, everyone now favours a constitution for Europe. Leaving aside the substantive critique of this effort—once again beyond the scope of this essay—it might, for the time being, be welcomed as the only endeavour to shore up EU legitimacy, even though it is not enough and has yet to have a real impact. On a constructive note, we can be confident that this *démarche* will have visible effects in the future.

Most of the positive effects of enlargement will also only be seen in the future. It is noteworthy that although Fischer's speech explicitly pleaded for as fast an enlargement process as possible, it has frequently been read as proposing its

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<sup>11</sup> See, for example, S.Auer (2000).

<sup>12</sup> See, R.Bellamy and D.Castiliogne (2000).

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postponement. It is a fact that, following Fischer's address, there were a series of reactions which, when taken in combination with a perceived reluctance on the part of the French Presidency, were felt by Eastern Europeans to be arguments for the delaying of enlargement. The truth is that EU strategy towards the Eastern countries is changing. This change has come hard on the heels of a clearer view that has been established about the dimensions of enlargement following Helsinki, and the realisation that the financial and institutional means that would allow for the accession process to start have yet to be clarified.

Leaving aside the fact that a polity that has difficulty in taking common political action will always be inconsistent, does this change in strategy really come as a surprise? Has the end of the Cold War had immediate positive consequences for the process of European integration? Recalling the ambiguous impact of the communist era, it is apparent that dialogue and the building up of a common strategy will be difficult. We will further examine these strategic possibilities, even though we are aware that they sometimes seem to belong to an area of unfinished, Cekhovian dialogue, rather than have an existence *per se*.

First, one previously discussed strategic possibility that was revisited following Fischer's speech was the adoption of certain institutional solutions that would bind Eastern Europe to Western Europe without, however, running the risk of eroding the EU. One such institutional proposal, originally formulated by Delors and adopted by Fischer, was the notion of adopting several treaties. Indeed, if you look at enlargement merely in terms of offering solutions to the post-Cold War European balance of power dilemma, or of coming to terms with instability on the continent, multiple treaties would not seem to be necessary. Other institutional mechanisms which have those purposes in mind might be imagined.

Experience nevertheless shows how difficult it is to create functional and effective international institutions, especially in the short-term, as Eastern Europe required. It is also debatable whether such alternative solutions would ever be less costly or enjoy greater legitimacy than enlargement. Certainly, they would have come as a disappointment to Eastern Europeans, and may similarly not have enjoyed any greater a degree of legitimacy in Western Europe.

It now seems that the pro-enlargement argument that Eastern Europe might otherwise pose, challenges the security of the continent—as Fischer indicated in his geopolitical considerations—and is somewhat counterproductive. Despite the recent Yugoslavian crisis, Europeans now appear to be unwilling to accept this argument. Applying a neo-realist balance of power rationale to European security, we can assume that West Europeans will not fear war as long as there

is a United States presence on the continent.<sup>13</sup> At the same time, there have been notable evolutions in the concept of security. Individual, economic or environmental security<sup>14</sup> have gained in importance as threats to national security have become more remote. It is the former forms of security that now appear to be challenged by conditions in Eastern Europe, and this is irrespective of the institutional scenario that is being followed (enlargement or otherwise). It is, however, to be assumed that enlargement will allay these fears in the future.

The second proposal related to enlargement that arose in the debate following Fischer's speech refers to a referendum to decide on new accessions to the EU. Although the idea was presented as a mechanism that might provide the enlargement process with broader popular support, it was also perceived negatively by Eastern Europeans. Not only would this popular consultation in each and every Member State have been a very lengthy process, but it would also have carried with it the danger of negative results.

In terms of substance, the need for a referendum could be deemed the 'realist illusion' or 'political illusion' about enlargement. A first ground for objecting to this is the fact that we are not actually dealing with a reunification of Europe and there is no 'European people' to give their views on its fate. At the same time, it is true that the accession of East European States will bring about major and profound transformations of the European Union. However, what seems to be a constant within the EU strategy on enlargement is the desire that it will not produce substantial changes. By using the same accession procedures and management timetable for accession that was used in previous processes, the EU appears to be maintaining that this enlargement will not cause any greater changes than did previous enlargements. This may very well be an explanation for the frequent changes in strategy and delays in the accession of the first new members.

Third, let us examine the connection between political integration and enlargement. To state that they should go hand in hand would be an oversimplified view on how the EU will be able to achieve enlargement and deepening at the same time. Clearly, postponing enlargement until after the completion of political integration would amount to a *sine die* shelving of the issue. Beyond the lack of clarity in the understanding of its limits, political integration has been notably difficult throughout the history of the EU. This also accounts for the negative reactions coming from Eastern Europeans on the proposed juxtaposition of political integration and enlargement to the East, as

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<sup>13</sup> See, for example, K.Waltz (2000).

<sup>14</sup> See, for example, B.Buzan (1991).

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two processes that are seen as equivalent in terms of political possibilities. Thus, the argument on the need to complete political integration before enlargement, can be seen as being the 'idealist illusion' or 'legalistic illusion' about enlargement. Before the massive enlargement to the East occurs, the European construction must achieve as great a degree of consistency and perfection as is possible.

## **6. Conclusion**

The major part of Fischer's discourse is dedicated to the intellectual exercise of shaping the future of Europe, 'far beyond enlargement', to a European Union that also comprises Central-Eastern European States. But does he really mean it? The speech can be considered to have been instrumental, not only in launching a debate about overall European architecture, but also in offering solutions to very present and practical dilemmas related to enlargement. The real concern of Mr Fischer seems, to us, to be the legitimacy of 'today's' Europe; a concern that is dressed up in the noble mantle of a far-reaching vision. How, then, might we envisage the future? Mr. Fischer is making plans for an as yet unborn Europe, since half a good half of post enlargement Europe will comprise new members, mostly Eastern European states, who have very different identities and visions of the future Europe.

RENAUD DEHOUSSE

## Rediscovering Functionalism

Something strange is going on in Europe. While the academic community, usually not adverse to great theoretical discussions and to attempts to model the world, has so far displayed rather limited interest in the ongoing intergovernmental conference, political leaders of various countries have engaged in an unprecedented debate on the ultimate objectives of the integration process. In the wake of Joschka Fischer's speech at the Humboldt University, several heads of state and prime ministers have outlined their views on the future architecture of Europe, while their representatives were struggling on a draft charter of fundamental rights, which many regard as a first step towards some kind of European Constitution.

Needless to say, this represents a major change in the way national leaders approach the integration process. The history of the last 50 years is a long story of functional arrangements based on concrete projects. We are more familiar with self-proclaimed empiricism and *ad hoc* compromises worked out at a late hour in smoke-filled rooms than with principled deliberations on the common good. While one might wonder about the reasons for this unexpected U-turn, I would like to confine myself to a series of remarks, both of method and of substance. Is functionalism really dead, as is now widely assumed? How likely is it that the present discussion will lead to the emergence of new institutional arrangements that will be perceived as more legitimate by the European citizens?

### 1. Is Functionalism Dead?

Much of the current discussion is based on the view that the functional method worked out by the Monnets and the Schumans, based on concrete objectives and gradual change, has been outlived. The Maastricht ratification debates have signalled a deeply-rooted dissatisfaction with decision-making processes based on accommodation among the elites and a widespread disenchantment about the rather obscure EU system. It has become commonplace to lay the blame for this situation on the functionalist path followed so far: deliberate avoidance of discussions on the ultimate (political) objectives of European integration and the multiplication of *ad hoc* co-operation schemes, it is said, have led to a situation in which citizens are unable to make sense of the present construction. Mr



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Fischer was most explicit in this respect, stressing that the current maze of EU activities was largely the result of ‘inductive communitarisation as per the Monnet method.’ This led him to plead in favour of a radical shift, which would ultimately lead to a federal-type arrangement:

In the past, European integration was based on the ‘Monnet method’ with its comunitarisation approach in European institutions and policy. This gradual process of integration, with no blueprint for the final state, was conceived in the 1950s for the economic integration of a small group of countries. Successful as it was in that scenario, this approach has proved to be of only limited use for the political integration and democratisation of Europe. ... [T]oday a crisis of the Monnet method can no longer be overlooked, a crisis that cannot be solved according to the method’s own logic.

The demise of functionalism is generally attributed to two related factors. First, it is perceived as an intransparent method, unable to respond to the current aspirations of democratic control over the rulers: if the objectives of the whole venture are not clearly spelt out, how can it be democratically legitimated? Second, comes the fear of being trapped in a system from which evasion would no longer be possible—a fear largely fed by reconstructions of integration as a sequence of ‘spillovers’, *i.e.*, the process by which sectoral co-operation schemes create the need for further integration in neighbouring areas, leading to a gradual erosion of national sovereignty, which no-one is willing to accept anymore.

Yet, these misgivings largely stem from a simplistic view of the integration process. With all due respect for the Founding Fathers, it is naïve to depict them as architects of a system supposed to lead to a would-be model.<sup>1</sup> They were rather talented political entrepreneurs, able to transform apparent dilemmas into positive-sum games and to convince the leaders of the day of the wisdom of their views. Likewise, one could argue that spillovers were far from automatic or conflict-free: they always required a political input. This is clear for all major steps in the history of European integration. The 1992 programme was not an indirect consequence of the removal of tariff barriers, nor was the EMU an inescapable corollary of the single market. Both required political decisions in their own right, often painstakingly achieved. And I need not remind you that even in day-to-day decisions in areas where the so-called ‘community method’ applies, national governments, represented in the Council of Ministers, often enjoy the power to oppose decisions, even though, for a variety of decisions they may prefer not to do so. The fear of a political *engrenage* is partly due to the pace of the integration process in the last fifteen years, and partly due to the fact

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<sup>1</sup> Schmitter (1996a:2).

that governments have often found it convenient to hide behind decisions taken by ‘Brussels’.

Thus, it is a mistake to depict Europe as a kind of renaissance cathedral entirely designed by a powerfully-minded architect. To stick to religious architecture, one could say it is more like a medieval cathedral, patiently built by several generations of craftsmen with the materials available to them, in response to what they perceived as the needs of their time—hence, the probably lack of coherence of the whole construction.

It is, of course, nearly impossible to resist an invitation to engage in a more principled discussion on the ideal architecture of tomorrow. Yet, a question needs to be asked: how likely is it that such a discussion will yield positive results? Past functional arrangements were not designed to deceive public opinion or to impose surreptitiously unpopular compromises. They simply reflected a fact known to observers of public policy world-wide: it is easier to achieve compromises on concrete proposals, whose costs and benefits can be (more or less) anticipated, and which can be the subject of trade-offs of various kinds, than to reach a consensus on an abstract definition of the public good, and on ways of achieving it. Visions of justice tend to vary widely: the larger the group in which the discussion takes place, and the more heterogeneous it is, the more difficult it is to find an acceptable compromise. Discussions on institutions tend to follow the same kind of logic. Everyone has their pet solutions, which often reflect national traditions. Thus, French views on the would-be European constitution almost unavoidably foresee an elected president and a hierarchy of norms, as in the constitution of the Fifth Republic, while German drafts ritually include a list of competences designed (so we are told) to avoid any centralist drift. Concepts can also be divisive: federalism, which is the antithesis of centralisation, is often seen as a synonym for uniformity and hierarchy in countries such as the United Kingdom or France, as Mr Fischer rapidly found out. No matter how incorrect these perceptions may be, they are political facts that cannot be ignored. Naturally, the symbolic value of institutions is such that they are difficult to achieve; yet, in a system of decision by consensus, compromises are unavoidable.

The history of European integration is replete with examples that illustrate the comparative advantages of a project-based approach. One of the reasons for the success of the Single European Act was its apparent modesty: far from following the European Parliament’s blueprint of a quasi-federal scheme—Altiero Spinnelli’s Draft Treaty on European Union—it limited itself to what was perceived by many as a minimalist programme of removal of non-tariff barriers. Once the objective was endorsed by the European Council, Treaty changes which had been vehemently opposed by some Member States a few

months before—including an extension of qualified majority voting—suddenly became acceptable to all. Maastricht represents another telling example of the virtues of institutional pragmatism. The Treaty on European Union was prepared by two separate IGCs: one dealing with economic and monetary union and the other with institutional issues, under the rather uninspiring label of ‘political union’. The result is known: while the first exercise, following a project-based approach, led to the creation of a single currency, one of the most fundamental changes in the history of European integration, the IGC on political union will remain in textbooks for having given birth to the pillar-structure of the EU—not exactly a model of inspired statesmanship. Moreover, the most radical changes contained in the EMU part owed more to the nature of the project at issue than to purely institutional considerations. The independence of the European Central Bank, and the fact that not all Member States are ‘represented’ on its governing board, were not decisions inspired by a sudden conversion to federalist orthodoxy but, more prosaically, a way to guarantee the financial markets and German public opinion alike that the ECB, being immune from political interference, could be trusted to pursue its ‘constitutional’ objective of price stability.

What one reads of the intergovernmental conference currently under way would appear to confirm the difficulty of a reform-process exclusively limited to institutional issues.

We had been told it was more reasonable to confine the negotiations to a reduced agenda—the famous ‘Amsterdam leftovers’; the main outcome of months of discussions on these issues seems to have been to resurrect an artificial cleavage between large and small states and the prospects of reaching a satisfactory compromise seem bleak at present.

All this does not augur well for the discussion on the future institutional architecture of Europe which Mr. Fischer has invited us to engage in.

## **2. Institutional Engineering Will Not Do**

To these (admittedly pragmatic) considerations on the dynamics of reform processes, one is tempted to add a word of caution on more fundamental issues, for much of the present discussion seems inspired by somewhat naïve views on the social impact of institutional arrangements.

The starting point of most analyses is a simple finding: there is widespread dissatisfaction with the way the EU system presently operates, which is perceived to be unduly complex and intransparent—hence, a desire to make it

more intelligible even to a lay audience. To be sure, the analysis is largely correct. All three poles of the ‘institutional triangle’ are in crisis. The European Parliament seems unable to decide how best to exploit its newly acquired powers, the Commission is far from having overcome the crisis of March 1999, and it is now widely recognised that there is no such thing as *a* Council: there are regular meetings of members of national governments, often acting without much co-ordination. Add to this, the eagerness of the European Council to intervene in day-to-day matters and the emergence of new actors such as the European Central Bank or the CFSP, and it will be easy to see why making sense of the actual functioning of the whole system has become an arduous task. It is, therefore, tempting to introduce more clarity, preferably by transposing institutions and techniques that have been fully tried and tested at national level to European level: an elected President, a fully-fledged government, an upper house, separation of powers, a constitution, *etc.*.

This is precisely the weak spot in the reasoning. Many value judgements on the present EU system seem to rest on a fairly idealised vision of national governance. The complexity of the European system is implicitly opposed to the alleged simplicity of domestic political systems: reading such judgements, one might be led to believe that, at national level, there is a simple chain of command whereby all decisions can be linked to the supreme will of the people, and public authority is exerted in an orderly fashion, according to crystal-clear principles enshrined in a constitutional text, which is known to every citizen. The reality tends to be slightly more complex: even within unitary nation-states, patterns of governance can vary greatly from one policy area to the other. Foreign policy does not respond to the same kind of logic as domestic policies, nor does civil society exert the same degree of influence on defence issues as, say, on environmental policies, and the independence of central banks is a common feature to many countries. Likewise, there tends to be a fairly wide gap between the ‘dignified’ part of public life—that which is codified in the constitution—and the way the system actually operates: unaccountable bureaucratic structures, obscure committees, and para-constitutional bodies (such as political parties, for instance) can, indeed, wield considerable power. In other words, even at state level the clarity to which many well-inspired critics of the EU aspire looks like a lost paradise, assuming, of course, that it ever existed. The complexity of modern societies has given rise to elaborate governance structures, and it is far from clear that constitutional schemes of any kind will allow a return to the mythical simplicity of a Locke or a Montesquieu.

Secondly, the legitimising power of institutions is very often over-estimated. Except for a few countries, perhaps, such as the United States, where there appears to be a widespread belief in the superior merits of national institutions,

popular adhesion to a given form of institutional architecture cannot be taken for granted. The symbolic value of institutional change is, therefore, likely to be limited. Would British Euroscepticism really fade out, if the EU were to opt for the Westminster model of government? This seems rather unlikely: it is most likely that people would try to see what benefits they might derive from the change. Do they gain a greater say in the decision-making process? Is power (wherever it is located) under control?

The fact that institutions do not command immediate legitimacy may actually be good news for the European Union, which brings together countries with a wide diversity of political cultures, and cannot, therefore, simply replicate any national model. Yet, it leaves the Union with a mighty problem. If enhanced legitimacy is not likely to flow either from a simplified form of governance (which is out of reach) or from instant popular adhesion to a new institutional setting, how can the legitimacy of the present system be improved? Clearly, as Joseph Weiler has repeatedly argued,<sup>2</sup> the EU cannot expect to receive the kind of emotional allegiance which derives from the sense of belonging to a community united by ethnic or linguistic ties, as the latter are notoriously absent at European level: it must demonstrate its usefulness day after day.

### **3. Legitimation by Results**

This, in a sense, brings us back to functionalism. Although the concept is associated to the idea of elite accommodation, functionalism had the immense advantage of providing simple answers to the question: what does Europe stand for? The Coal and Steel Community stood for peace and freedom, the common market for economic prosperity, and so did the single market in the 1980s. This enabled people to make some sense of the project, and it provided some simple parameters to assess the performance of the whole system. Like it or not, years of Eurobarometer surveys have shown that there was a clear relation between the unemployment and the growth rates and support for the EU: pro-EU feelings grow when the economy is in expansion and unemployment declines.<sup>3</sup> Similarly, Europe was judged severely for its failure to prevent the eruption of ethnic violence in former Yugoslavia, and it will probably be blamed for the current weakness of the euro.

This suggests that it is often on the basis of its performance that the European Union will be judged. Arguably, the same is increasingly true at national level,

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<sup>2</sup> *The Constitution of Europe* (Weiler 1999).

<sup>3</sup> Cautrès (1998: 112-13).

where there appears to be widespread disenchantment about politics. But the phenomenon is likely to be stronger at European level, given the weakness of other forms of legitimation. As it is presently unable to create an 'imagined community' like nation-states, the EU has little choice: projects are needed to give sense to the European venture, and its ability to reach positive results is a key element of its overall legitimacy.

Does it follow from this that one should altogether abandon any attempt at institutional reform, and instead focus on developing a managerial culture at EU level, as one often hears in some countries?

Not at all. For the ability to achieve results is naturally determined by institutional design. From this standpoint, the prospect of the forthcoming enlargement is clearly worrying, no matter how justified it may be on historical grounds. As has been amply stressed, it is difficult to conceive of how a Commission of thirty-five members or a Council with about thirty delegations could effectively dispatch their regular duties. The problem is not merely that this would prevent the EU from exploring new shores, as is often suggested, it is rather that it would no longer be able to fulfil its *present* tasks. Would the decentralised competition policy now proposed by the Commission effectively work in countries which have just discovered the market economy. Given the rather diverse expectations of their respective constituencies, will national governments be able to act in common when the next food scare arises?

Thus, even from a down-to-earth efficiency standpoint, institutional reform is much needed. If anything, it should actually go *further* than the current agenda, and encompass issues such as the relationships between the Commission and the Parliament, and the much-needed reform of the Council of Ministers. Likewise, giving a voice to the people appears to be an imperative necessity, in an era characterised by growing mistrust in political elites, at regional, as well as at national, level. But here is the crucial point: no matter how necessary it may be, institutional reform is unlikely to emerge as the result of an exclusive focus on institutional issues.

#### **4. Where do we go from here?**

So far, I have argued that the functionalist approach which has dominated the history of European integration was largely a by-product of structural constraints which rendered an agreement on the ultimate objectives of the process more difficult, not to say unlikely. I have also stressed that given the weakness of emotional allegiance to Europe, the Union's legitimacy is more closely linked to its ability to reach substantive results than to any form of institutional

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architecture. The reader who has followed me up to this point might object by saying that they have found more warnings about evils to avoid than recommendations for the future.

To bring my own brick to the construction, let me then spell out a few points which, in my view, need to be addressed before we can embark on a review of the different institutional options.

The enlargement of the Union is widely regarded as a historical necessity. It is, indeed, a powerful message to send to countries engaged in a painful—and therefore politically costly—transition to market economy and an open society. Yet, beyond this objective, there remains substantial ambiguity as to what the ambitions of an enlarged Union might be. Will the current members, now so obsessed about ‘getting their money back’, be willing to provide newcomers with the kind of financial solidarity that the latter would be entitled to expect from the better off members of the same club? Will the newcomers be able to provide effective guarantees to the safety-minded peoples of Western Europe, which expect a high level of environmental or health protection from the Union? And what kind of relationships should Europe try to build with its neighbours or with partners on the world scene. Difficult questions indeed, but questions that need to be asked now, to avoid major political clashes in the future, and questions whose the answers must shape our institutional thinking.

Those who, concerned about the potential implications of enlargement, have pleaded in favour of a new structure that would preserve the essential features of the European Union, face a similar difficulty. On the level of ideas, one cannot but agree about the importance of the co-operation devices that have played a revolutionary role in interstate relations, by replacing the logic of power with mutual respect, the search for common interests and respect for the rule of law. Yet, on a more practical plane, it remains hard to imagine that national governments, let alone public opinion, prompted by a rational understanding of the situation, would readily subscribe to an abstract project of a supra-nationalist avant-garde of some sort. Short of a project that will give flesh to this intuition and illustrate its concrete benefits, the odds are that it will merely be perceived as a sheer abstraction, generous in its intentions but unable to elicit the degree of support that is needed for any ambitious political design to prevail in a heterogeneous polity.

Making a success of enlargement and preserving the ‘virtuous’ character of European integration are noble aspirations. Their chances of success are dependent on our ability to conceive of ways to make them palatable to political leaders and public opinion alike. What one needs today are not only imaginative political thinkers, but also talented political entrepreneurs.

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## **Die Europäische Union als Herrschaftsverband eigener Prägung**

Der Entwicklungshorizont der Europäischen Union war stets offen: im Hinblick auf ihre territoriale Ausdehnung, ihre inhaltliche Aufgabenbestimmung und ihre Organstruktur. Aus allen drei Perspektiven hat sich die EU von den Anfängen der Europäischen Gemeinschaft für Kohle und Stahl in den letzten 50 Jahren zu einem komplexen Herrschaftsverband entwickelt. Dieses historisch einmalige politisch-ökonomische Projekt ist ohne Bestimmung seiner „Finalität“ kontinuierlich vorangeschritten, war im Ergebnis erfolgreich und hat im Innern wie nach außen Anerkennung gefunden. In der gegenwärtigen Debatte wird nun die Frage nach ihrer „Vollendung“ aufgeworfen, wird eine neuer „Verfassungsvertrag“ gefordert, werden unterschiedliche Entwürfe für eine abschließende Organstruktur gemacht. Auch zu früheren Zeitpunkten gab es „Verfassungsdebatten“. So hatte das Europäische Parlament 1984 den „Entwurf eines Vertrages zur Gründung der Europäischen Union“ vorgelegt. Inzwischen ist durch den Vertrag von Maastricht 1992 die Europäische Union errichtet worden, ohne dass dazu eine neue Verfassung erforderlich wurde. Zahlreiche Verfahrensänderungen haben bislang die Funktionsfähigkeit auch bei erweiterter Mitgliederzahl, neuen Aufgabenfeldern und stärkerer Einbeziehung des Europäischen Parlaments gesichert. Warum dennoch eine erneute „Verfassungsdebatte“?

Für das Denken in Kategorien des Verfassungsstaates scheint es ungewohnt und irritierend zu sein, sich den Herrschaftsverband der EU als einen evolutionären Prozess vorzustellen, als ein Regime—wie man sagt—sui generis. Der offene Horizont soll geschlossen werden. Wird dabei nur ein Bedürfnis nach kognitiver Strukturierung artikuliert? Es gibt aktuellen Handlungsbedarf bei den Entscheidungsverfahren, der Repräsentation der Mitgliedsländer in Kommission und Ministerrat sowie für die Erhöhung der demokratischen Legitimation. Insbesondere für die Repräsentations- und Entscheidungsverfahren bei steigender Mitgliederzahl stehen seit längerem Veränderungen an. Doch daraus allein ergibt sich noch kein Zwang zu einem „Qualitätssprung“, zu einer neuen Paktierung der Union. Auf der Regierungskonferenz in Nizza werden die nötigsten Änderungen wohl beschlossen werden, ohne dass sich die Union im ganzen verändern wird. Hinter den Verfahrensänderungen steht ein anderes Motiv für die Eröffnung einer Verfassungsdebatte. Die Osterweiterung gibt zu



Sorgen Anlass, die Joschka Fischer in die Alternative fasst: „Erosion oder Integration“. Er fürchtet offenbar, dass die Inkorporation von rund 15 Staaten Mittel-, Ost- und Südosteuropas den Besitzstand der Gemeinschaft bedroht, eine weitere Vertiefung der Zusammenarbeit verhindert und „das Vertrauen in einen Staatenverbund Stillstand mit all seinen negativen Folgen bedeuten“ würde. Die ausgelöste Verfassungsdebatte richtet sich offenbar primär gegen eine befürchtete Erosion des erreichten Integrationsgrades und fordert die Ausdifferenzierung jener Altmitglieder, die eine weitergehende politische Union wollen. Die latente Frontstellung gegen die Neumitglieder ist von diesen auch sofort erkannt worden. Auch früher, etwa bei der „Süderweiterung“, wurde die Frage gestellt: Erweiterung oder Vertiefung? Doch diese Alternative hat sich nicht ergeben, die Erweiterung ging mit einer Integrationsverdichtung Hand in Hand. Und wenn die Herstellung einer dauerhaften Friedensordnung im Geltungsbereich der Union deren oberstes Ziel ist, dann könnte die Union auch diesem Ziel Priorität vor einer weiteren Binnenintegration einräumen. Die Osterweiterung—wo immer sie je enden mag—ist ein historisch beispielloser Prozess, auf den die Union sich erst noch einlassen muss. Die Alternative Erosion oder weitere Integration richtet sich auf die „westeuropäische Union“, sie vernachlässigt die „osteuropäische Union“ und ihre Einbindung in die west-osteuropäische Unionsbildung. Den westeuropäischen Kern noch vor Abschluß der Osterweiterungen politisch zu konsolidieren, ist problematisch. Eine Reihe von Stichworten durchziehen die Debatten, sie sollen im Folgenden kurz kommentiert werden.

## **1. Funktionsfähigkeit**

Der Übergang von der Einstimmigkeit zur qualifizierten Mehrheitsentscheidung im Ministerrat gilt als zentrales Mittel für die Sicherung der Funktionsfähigkeit der Union bei steigender Mitgliederzahl. Verzögerungen und Blockaden durch wenige oder ein einzelnes Mitgliedsland sollen verhindert werden, und in der Tat zwingt die Mehrheitsentscheidung die einzelnen Mitgliedsländer zu höherer Elastizität. Niemand möchte gerne zur überstimmten Minderheit gehören, so dass Abwägungen über die jeweiligen Präferenzen und mögliche Koalitionen mit anderen Ländern angestellt werden. Doch Entscheidungen mit einer qualifizierten Mehrheit ersetzen nicht die Suche nach einem möglichst breiten Konsens. Die Mehrheitsregel ist nur ein technisches Mittel, um Verhandlungen zur Konsensfindung abzukürzen.

Die Funktionsfähigkeit der Union wird nicht durch die Möglichkeit, bei immer mehr Sachverhalten mit qualifizierter Mehrheit zu entscheiden, gesichert, sondern durch die Herbeiführung der Entscheidungswilligkeit. Die Mitglieder müssen willens sein, über einen bestimmten Vorschlag der Kommission zu

entscheiden. Diese Entscheidungswilligkeit der einzelnen Ländern erfolgt in deren Hauptstädten, vor den Sitzungen des Ministerrates und parallel zur Arbeit der Kommission. Um diese zu gewinnen, verfügt die Union über zwei konsensproduzierende Gremien: die Kommission einerseits und den Gemeinsamen Ausschuss der Ständigen Vertreter der Mitgliedstaaten bei der Union (COREPER) andererseits. Bei der Ausarbeitung ihrer Vorschläge tritt die Kommission in umfangreiche deliberative Abstimmungsprozesse mit den Regierungen, den interessierten Verbänden und dem Parlament ein, vermittelt zwischen unterschiedlichen Ansichten und wirbt für die Akzeptanz ihres Vorschlags. Die Kommission entscheidet zwar unabhängig und verbindlich, aber sie weiß, dass ihre Vorlagen nur wirksam werden, wenn sie die Akzeptanz der Mitgliedstaaten finden. Die Vertretungen der Regierungen bei der EU bilden in ihrem Gemeinsamen Ausschuss eine der Kommission nachgeschaltete „Konsensmaschine“, die nicht nur die Weisungen ihrer Regierungen schon im Vorfeld mit der Kommission und den Vertretern anderer Regierungen abstimmen, sondern auch die Mehrheitschancen für die Weisungen ihrer Regierungen kalkulieren. Aus der ständigen Einbettung in den Brüsseler Kommunikationsprozess können sie ihren Regierungen empfehlen, Elastizitäten bei einzelnen Punkten zu zeigen und durch Koalitionsbildungen mit anderen Mitgliedern des Ministerrates zur gewinnenden Mehrheit zu gehören. COREPER ist das diplomatische Scharnier zwischen den Ministerien und dem Ministerrat. Er entscheidet nicht nur selbständig über die Masse der Routineangelegenheiten des Ministerrates, er informiert die verschiedenen stimmführenden Minister, er signalisiert zu erwartende Konflikte im Ministerrat und bindet die heimischen Regierungen in die spezifischen Rationalitätskriterien in Brüssel ein.

Funktionsfähigkeit ist nicht nur eine Frage effizienter Entscheidungsregeln, sondern vor allem der gut vorbereiteten und abgestimmten Herbeiführung der Entscheidungswilligkeit. Man sollte nicht glauben, dass mit der qualifizierten Mehrheitsentscheidung die Funktionsfähigkeit der Union schon gesichert sei. Nicht der Entscheidungsprozess ist das Hauptproblem, sondern das Einverständnis der Mitgliedsländer. Dieses wird erreicht über die Akzeptanz von europäischen Rationalitätskriterien, die nicht nur aus nationalen Interessenlagen, sondern durch die kognitive Strukturierung von „europäischen“ Problemen und ihrer Lösungswege entstehen. Das ist die Aufgabe der Kommission bei der Ausarbeitung ihrer Vorschläge und der Urteilsbegründungen des Europäischen Gerichtshofes. Beide „operationalisieren“ Europa. Das formale Mehrheitsprinzip ersetzt nicht das materiale Konsensprinzip. Europa ist im Konsens entstanden. Die beständige Ausgrenzung von Staaten durch das qualifizierte Mehrheitsprinzip würde die weitere Entwicklung gefährden. Im übrigen beseitigt auch die Erweiterung des Katalogs von Fragen, über die mit Mehrheit

entschieden wird, nicht die Einstimmigkeitserfordernis für zentrale Fragen. Strittige und gravierende Probleme, über die der Ministerrat zu keiner Entscheidung kommen kann oder will, können von ihm dem Europäischen Rat vorgelegt werden, und dort herrscht das Einstimmigkeitsprinzip. Blockaden können auch dort eintreten, wie die Ablehnung der Agrarreform der Agenda 2000 durch Frankreich gezeigt hat, oder bei der Unmöglichkeit, den Großbritannien einmal eingeräumten Rabatt auf seinen Mitgliedsbeitrag wieder zu vermindern, wenn Großbritannien dem nicht zustimmt. Europa ist ein Konkordanzregime. Institutionelle Reformen sollten das nicht verändern wollen, denn die Legitimationsbasis liegt im Konsens.

## **2. Kompetenzverteilung**

Immer wieder wird auf die unklaren Zuständigkeitsregeln hingewiesen. Der gegenwärtige Zustand ist in der Tat weder systematisch geordnet noch mit eindeutigen Abgrenzungen versehen. Die Kompetenzen der EU haben sich aus Einzelermächtigungen durch den Ministerrat oder den Europäischen Rat ergeben, sind im Laufe der Zeit durch die Kommission ausgefüllt und erweitert und durch den EuGH bestätigt worden. Das jüngste Urteil des EuGH, mit dem das durch eine EU-Richtlinie ausgesprochene Verbot der Tabakwerbung aufgehoben wurde, zeigt die Problematik der Kompetenzverteilung. Das Gericht sah in der Richtlinie keinen unmittelbaren Bezug zu den Grundfreiheiten des Binnenmarktes und zur Wettbewerbssicherung; deswegen sei sie aufzuheben. Es folgte insoweit einer strengen Interpretation der Zuständigkeit der EU für die Ausgestaltung des Binnenmarktes. Das Gericht folgte nicht dem Argument der klagenden Bundesregierung, die Kommission dürfe nicht in den Bereich der Gesundheitspolitik eingreifen; es bejahte auch gesundheitspolitische Maßnahmen der Kommission, sofern sie sich direkt auf die Ausgestaltung des Binnenmarktes richteten. Diese, auf ein bestimmtes politisches Ziel bezogene funktionale Kompetenzbestimmung lässt keine klare Kompetenztrennung nach großen Politikbereichen zu. Die größten Eingriffsrechte hat die Kommission daher über das von ihr verwaltete Wettbewerbsrecht, über das zahlreiche Sachverhalte betroffen werden können, solange sich daraus eine Wettbewerbsverzerrung konstruieren lässt. Über die Grundfreiheiten des Binnenmarktes und das Wettbewerbsgebot hat die EU breite Eingriffsrechte gegen die nationale Gesetzgebung auch auf den Gebieten der Bildungspolitik, der Sozialpolitik und der Strukturpolitik. Im Ergebnis besteht eine scharfe, in diesem Ausmaß bisher unbekannte Isolierung einer Teilordnung, der Binnenmarktordnung, mit Rationalitätskriterien, die sich gegen andere Rationalitätskriterien, die für den gleichen Sachverhalt Geltung beanspruchen, durchsetzen. In diesem Sinne urteilte der EuGH auch, dass Frauen in der

Bundeswehr nicht vom Dienst mit der Waffe ausgeschlossen werden dürften, weil dies eine im Binnenmarkt verbotene Diskriminierung bedeute. Dem entgegenstehende Wertvorstellungen über die Beteiligung von Frauen an Kampfeinsätzen mit sogar verfassungsrechtlicher Fundierung wie in der Bundesrepublik spielen keine Rolle. Die EU-Kompetenz ist eine segmentäre mit weitgehender Externalisierung der Kontingenzen. Darin liegt die Wirkungskraft der EU. Sie entscheidet zielbezogen, politische Kontexte auflösend, mit direkter Wirkung auf das Rechts-Justiz-System der Mitgliedsländer.

Bei dieser Ausgangslage ist eine eindeutige Kompetenzverteilung zwischen der EU und den Mitgliedstaaten schwierig. Nicht Politikfelder können verteilt werden; es handelt sich um die Spezifizierung von Geltungsbereichen von Rationalitätskriterien mit je eigenen Funktionslogiken, die in verschiedene Politikfelder ausstrahlen. Die EU schneidet aus den prinzipiell interdependent wirkenden Politikfeldern spezifische Sachverhalte heraus und unterwirft sie einem supranationalen Gestaltungsauftrag. War dies am Anfang noch ein relativ leicht isolierbarer Wirtschaftszweig, die Kohle- und Stahlindustrie, so ergreift die EU jetzt große Teile des Wirtschafts-, des Wettbewerbs- und Freizügigkeitsrechts. Diese Verselbständigung bestimmter Teilordnungen hat zu der raschen Durchsetzung des Binnenmarktes und nationaler Deregulierung geführt. Insoweit die „Wirtschaft“ in den Mitgliedstaaten als ein relativ eigenständiger Politikbereich institutionalisiert ist, war dafür die Akzeptanz gegeben. Anders wäre es vermutlich gewesen, wenn es sich um die Sozialgesetzgebung oder das Steuerrecht gehandelt hätte, die keine vergleichbare „instrumentelle“ Isolierung in der politischen Wahrnehmung haben.

Immer wieder wird eine Kompetenzverteilung nach Politikfeldern gefordert. Dabei wird der EU etwa die Außen- und Sicherheitspolitik, die Regulierung von Binnenmarkt, Wettbewerb und Agrarmarkt, die Asyl- und Einwanderungspolitik, auch die grenzüberschreitende Umweltpolitik und die Förderung der europäischen Spitzenforschung zugewiesen. Bei den Mitgliedstaaten sollen die Beschäftigungspolitik, die Daseinsvorsorge, Gesundheit, Kultur und Strukturpolitik bleiben. Solche Vorschläge des bayerischen Ministerpräsidenten sind plausibel, doch schwer umsetzbar, es eröffnen sich breite Überschneidungen. Insbesondere die Forderung, ein europäische Sozialmodell herauszuarbeiten und neben der Markt- und Wettbewerbspolitik als zweite Legitimationsgrundlage auszubauen, lässt die Abgrenzungen verschwimmen. Auch der durch die Währungsunion und die Europäische Zentralbank erforderlich werdende „makroökonomische Dialog“ überschreitet eine Politikfeldaufteilung. Die Koordination der Wirtschaftspolitiken der Mitgliedstaaten umfasst nicht nur die Haushaltsdisziplin der Nationalstaaten, sondern auch deren Beschäftigungs- und

Lohnpolitik. Die für die Bundesrepublik charakteristische Politikverflechtung bestimmt auch die Verflechtung der europäischen und der nationalstaatlichen Kompetenzen. Ein Blick auf die Verhältnisse in der Bundesrepublik zeigt die Schwierigkeiten bei einer Kompetenzaufteilung in Föderativsystemen mit einer breiten Rahmenkompetenz der Bundesebene. Alles, was auf der EU-Ebene beklagt wird, ist deutscher Alltag: die Verflechtung von Verwaltungsstäben und die mangelnde Transparenz, die Ausdünnung der parlamentarischen Beschlusskompetenzen, die mangelnde Zurechnungsfähigkeit von politischer Verantwortung in der Politikverflechtung.

Es muss schon verwundern, wie immer wieder eine Kompetenzverteilung gefordert wird, ohne die damit verbundenen Probleme beim Namen zu nennen. Dazu gehört insbesondere die Problematik der Finanzverfassung einer ins Auge gefassten Konföderation. Die wirksamste Kompetenzkontrolle der EU besteht heute in den von den Mitgliedstaaten zu beschließenden Zahlungen an die Union. Solange diese niedrig gehalten werden, kann die EU keine großen verteilungspolitischen Projekte betreiben und bleibt daher primär auf die Regulierungspolitik verwiesen.

Im übrigen ist auch der viel berufene Grundsatz der Subsidiarität kein wirksames Mittel der Kompetenzverteilung. Auf welcher Ebene eine politische Maßnahme angesiedelt werden soll, ist unter den Kriterien der Subsidiarität stets eine kontrovers debattierbare Zweckmäßigsfrage, die sich für die einzelnen Mitgliedstaaten auch durchaus unterschiedlich stellen mag. Im Konfliktfall gibt es zur Entscheidung der Subsidiaritätsfrage keine operationalisierten Kriterien. Auch fehlt es an klaren Anspruchsgrundlagen, um seitens eines einzelnen Mitgliedstaates gegen eine EU-Verordnung vorgehen zu können.

Das schwierige Problem liegt in der Aufteilung von Rationalitätskriterien und deren Zuordnung auf verschiedene Steuerungs- und Legitimationsebenen. Soweit diese im Fall des Binnenmarktes und der Wettbewerbsordnung relativ instrumentell aus dem Politikverbund herausgelöst werden können und für die Mitgliedstaaten eine gleichartige Wirkung haben, ist eine Kompetenzfragmentierung möglich. Verbleibt den Mitgliedsländern bei der Umsetzung ein Gestaltungsspielraum, können auch die Kontingenzen abgedeckt werden. Soweit aber die Zahl und die Heterogenität der Rationalitätskriterien für die EU-Politik zunehmen, also etwa die Struktur- und Beschäftigungspolitik umfassen, entstehen komplizierte Vermittlungs- und Abwägungsprobleme. Die Gegensätzlichkeit der Rationalitätskriterien und die zwischen ihnen bestehenden Konflikte müssen dann zentral gesteuert werden; sie lassen sich nicht mehr durch Fragmentierung nebeneinander von verschiedenen Steuerungsebenen gestalten. Die Vermittlung von gleichrangigen Rationalitätskriterien und ihre Geltungsabwägung erfolgt in parlamentarischen Systemen durch

Mehrheitsentscheidungen und Haushaltsbeschlüsse. Es entsteht die Forderung, die Kompetenz-Kompetenz auf die Ebene der „Föderation“ zu übertragen. Insofern sind die Vorschläge von Fischer in sich konsistent: „die Kernsouveränität und nur das unbedingt notwendig europäisch zu Regelnde (sollte) der Föderation übertragen (werden)“, und die europäische Gesetzgebung solle voll parlamentarisiert werden. Doch das bedeutet über die Frage der Kompetenzverteilung hinaus eine Souveränitätsteilung.

### **3. Die Souveränitätsteilung**

Die EU beruht auf der Kooperation von souveränen Staaten. Sie alle sind Mitglieder der Vereinten Nationen, und sie besitzen auch die alleinige Kompetenz zur Gestaltung der Verträge, auf denen die EU beruht. Die Übertragung von Kompetenzen auf die europäische Ebene bedeutet nicht die Aufgabe des Souveränitätsanspruchs der Mitgliedstaaten, sondern die Bereitschaft, Souveränitätsrechte in einem Verbundsystem wahrzunehmen. Die Forderung Fischers, die „Kernsouveränität“ auf die Föderation zu übertragen, steht insofern auch deutlich im Gegensatz zur Formel des französischen Staatspräsidenten Jacques Chirac, der von der „gemeinsamen Wahrnehmung eines Teils der nationalstaatlichen Souveränitätsrechte“ sprach. Die Konsequenzen sind klar. Solange die Mitgliedstaaten „Teilkompetenzen“ gemeinsam wahrnehmen, bleiben sie die zentralen Ordnungseinheiten, denen die Souveränität zugerechnet wird. Sollen aber die—wie immer bestimmten—„Kernsouveränitäten“ auf die „Föderation“ übertragen werden, so wird diese zum Träger der zentralen Souveränitätsrechte. Um dieses zu erreichen, müsste eine Konföderation mit originärer Souveränität gegründet werden. Erst dann wäre auch eine Zurechnungsinstanz konstituiert, die einen „Bundesstaat“ ausbilden könnte; denn „Föderation“ ist doch wohl nur ein euphemistischer Ausdruck für das eigentlich Gemeinte, nämlich den europäischen Bundesstaat. Für die Konstituierung eines eigenständigen Souveränitätsträgers müsste sich auch aus der Bevölkerung der EU das europäische Volk als Inhaber der Souveränität konstituieren. Das wäre dann in der Tat der „große Sprung“, der die bisherige Ordnung der EU auflöst. Ob ein solcher „Sprung“ wünschenswert ist und unter welchen Bedingungen dieser gelingen könnte, wäre im einzelnen zu prüfen. Ob dieser „Sprung“ für den Integrationsprozess notwendig ist, ist eine andere Frage.

Im Zuge der Integrationsverdichtung hat sich eine „Säulenarchitektur“ in der Europäischen Union ausgebildet, die verschiedene Aufgaben einerseits in supranationale Beschluss- und Verwaltungsregime überwies und andererseits internationalen Kooperationssystemen vorbehalten hat. Es bestehen verschiedene Regime nebeneinander, das Regime für den Binnenmarkt, das Regime für den „Schengener Raum“, das Regime des „Euroraums“ und die gemeinsame Außen-

und Sicherheitspolitik. Die Mitgliedstaaten der EU gehören nicht alle den gleichen Regimen an. Die gewünschte „Flexibilität“ hat in der „Säulenarchitektur“ bereits ihren Ausdruck gefunden. Will man auf diesem Wege in der Integrationspolitik fortschreiten, so sollte man die lose Konstruktion der „Säulenarchitektur“ nicht aufgeben. Die bisherigen Erfolge der europäischen Integration wurden durch einen evolutionären Prozess der segmentären Koordination erzielt. Der „Sprung“ in einen Herrschaftsverband mit „Kernsouveränitäten“ und dementsprechend einer Kompetenz-Kompetenz würde diesen evolutionären Prozess unterbrechen und eine normative Integrationsdichte ansinnen, die zu erheblichen Anspruchserhöhungen an die Regulierungs- und Redistributionskraft der europäischen Ebene führen müsste. Die sich daraus ergebenden Konflikte und Enttäuschungen liegen auf der Hand und würden die europäische Integration in eine konfliktverschärfende Politisierung führen. Es erscheint nicht zweckmäßig, eine politische Ordnung zu konstituieren, die aller Voraussicht nach die an sie gerichteten Erwartungen, etwa auf dem Gebiet der Beschäftigung und der Angleichung der Lebensverhältnisse, nicht erfüllen kann und die sich dadurch selbst in Legitimationsnot begibt. Der bisherige Erfolg der Integration beruhte darauf, dass die einzelnen Integrationsschritte konsensual beschlossen, durch die Binnensysteme der Mitgliedsländer hinreichend legitimiert wurden und in ihren Ergebnissen auch die geweckten Erwartungen erfüllen konnten. Die Kompetenz-Kompetenz wird durch den Europäischen Rat im Namen der nationalen Souveränitätsrechte konsensual wahrgenommen. Der Europäische Rat verlöre diese Kompetenz-Kompetenz, wenn es einen eigenen Souveränitätsträger neben ihm gäbe. Fischer schreibt zwar: „die Vorstellung eines europäischen Bundesstaates, der als neuer Souverän die alten Nationalstaaten und ihre Demokratien ablöst, erweist sich als ein synthetisches Konstrukt jenseits der gewachsenen Realitäten“, aber eine „Souveränitätsteilung von Europa und Nationalstaat“ muss zur Begründung eines neuen Trägers von Souveränitätsrechten, eines „europäischen Volkes“, führen, eben zu dem, was er ein „synthetisches Konstrukt“ nennt.

#### **4. Die Rolle der Nationalstaaten**

Der Nationalstaat soll nicht „abgeschafft“ werden, er soll in die Konföderation „mitgenommen“ werden, denn der „Nationalstaat mit seinen kulturellen und demokratischen Traditionen (wird) unersetzlich sein, um eine von den Menschen in vollem Umfang akzeptierte Bürger- und Staatenunion zu legitimieren“. In diesen Formulierungen erscheint der Nationalstaat als durchaus nachgeordnete „Selbstverwaltungseinheit“ mit schätzenswerten kulturellen Traditionen, in die sich die Bürger eingewöhnt haben. Man ist erinnert an die

Rolle, die Gemeinden in den modernen Staaten spielen: die eigentlichen Strukturierungen des Lebens erfolgen an anderer Stelle, aber die örtliche Anpassung an diese Strukturen wird mit beschränkten Mitteln den Gemeindebürgern überlassen. Eine solche Sicht verkennt die Rolle der Nationalstaaten gerade für die Legitimation der EU. Sie schaffen die Einheiten, aus denen eine europäische Union entsteht. Wenn die EU ein „Vielvölkerstaat“ ist, dann ergibt sich daraus, dass die Interessen der Bürger der Union nicht gleich sind und über sie nicht in hochaggregierten Repräsentationssystemen mit Mehrheit entschieden werden kann. Die einzelnen Völker repräsentieren nicht nur pittoreske Traditionen, sie konstituieren in sich demokratische „demoi“ mit einem allgemeinen Herrschaftsanspruch. Diese Einheiten haben eine Absorptionskraft für die Bewältigung sozialer Konflikte, die für die EU unverzichtbar ist. Diese Absorptionskraft liegt insbesondere in der Fähigkeit der Nationalstaaten, über die immer bestehenden Ungleichheiten und Ungerechtigkeiten in der Verteilung der Lebenschancen Einverständnisse auf Zeit zu paktieren und Vorstellungen über eine ausgleichende Gerechtigkeit zu formulieren. Daraus entsteht bei materieller Ungleichheit eine ideelle Gleichheit der Staatsbürger. Das demokratische Ideal der staatsbürgerlichen Gleichheit muss mit der Alltagserfahrung der Ungleichheit vermittelt werden. Aus dieser Selbstpaktierung der Ungleichheit erwächst die moralische Solidarität. Diese beständige Reproduktion der „moral fabric“ ist die Basis des sozialen Friedens. Wo immer sie ge- oder zerstört wird, treten schwere Konflikte auf, wobei man nicht nur an Bosnien und das Kosovo denken muss, es reichen die Erfahrungen mit Nordirland und dem Baskenland. Jahrzehntelanger Terrorismus lässt sich politisch nicht beherrschen, auch nicht in Ländern, die seit Jahren demokratische Systeme haben und zur EU gehören. Die zentrale Leistung der Nationalstaaten ist die Herstellung moralischer Ordnungen, die nicht nur da Ergebnis von politischen Institutionen sind, sondern der Stützung einer Sprachgemeinschaft, der Binnentoleranz und Solidarität und der Selbstzurechnung von Verantwortung für Mängel und Entwicklungsrückstände bedürfen. Die Abstufung der Nationalstaaten, die Begrenzung ihrer Handlungsmöglichkeiten und die Fragmentierung ihrer formalen Kompetenzen haben erhebliche Konsequenzen gerade für ein territorial ausgedehntes Herrschaftsgebiet mit hochaggregierten Interessenvertretungen in den Entscheidungszentren.

Nationalstaaten formen auch die Zurechnungseinheiten, von denen Leistungen erwartet werden. Ein gutes Beispiel bietet die Veränderung des Sozialsystems bei der Bevölkerung Ostdeutschlands. Erwartungshorizont und Vergleichsmaßstab haben sich mit der deutschen Einheit von der DDR auf die alte Bundesrepublik verschoben, und damit ist eine neue Wahrnehmung der Diskriminierung oder der Benachteiligung bei den Ostdeutschen eingetreten. Nicht die objektive Verbesserung der Lebenslage in Ostdeutschland, sondern die



## *Kommentare*

Differenzen zur Lebenslage der Westdeutschen bestimmt deren Erwartungshaltung. Vergleichsprozesse und ihre Strukturierung durch sozialmoralische Einheiten, wie sie die Nationalstaaten darstellen, sind daher von zentraler Bedeutung für die Stabilität in Europa. Die Portugiesen, zum Beispiel, haben ihre Erwartungen nach dem Beitritt zur EU nicht sofort auf die Standards der wohlhabenden Wohlfahrtsstaaten gerichtet und von diesen eine entsprechende Alimentierung erwartet.

Die Osterweiterung öffnet den Weg nach Europa für viele Gesellschaften, die auf einem viel niedrigeren Niveau leben als die Völker in Westeuropa. Sie müssen sich auf Jahrzehnte hinaus auf ein starkes Gefälle einrichten. Diese Akzeptanz der Benachteiligung kann nur innerhalb eines nationalen Selbstverständnisses erfolgen. Diese Prozesse können nur im Rahmen von nationalstaatlich strukturierten Vergleichs- und Verteilungsprozessen durchgeführt werden. Die Europäische Union ist ein Vielvölkerverband, dessen Bestandteile einen von ihrer Bevölkerungszahl und von ihrer Wirtschaftskraft unabhängigen eigenen Gestaltungsraum beanspruchen und die sich nicht für alle zentralen Entscheidungen Mehrheiten anderer unterwerfen können. Die EU ist bisher vom Konsens der nationalen Eliten getragen worden. Überall dort, wo dieser nicht bestand, haben sich auch bei den Völkern Widerstände oder Vorbehalte gegen weitere Integrationsschritte ergeben, so in Norwegen, Schweden und Dänemark. Dieser Elitenkonsens entsteht im politischen Milieu der Nationalstaaten aus der Meinungsbildung der demokratischen Institutionen, den Medien, der öffentlichen Meinung und der daraus sich einstellenden Orientierung der Bürger. Die Legitimität der EU ruht daher auf dem Einverständnis der Bürger der Nationalstaaten, nicht auf der Meinungsbildung eines europäischen Volkes. Auch das Europäische Parlament repräsentiert die Bürger der Mitgliedstaaten, nicht die Bürger der Union. Auch seine Basis ist die nationale Meinungsbildung. Sie ist grundlegend für die Legitimierung der europäischen Integration; die Nationalstaaten sind dafür die Basis. Diese Abstufung, ihnen die zentralen Souveränitätsrechte über die weitere Entwicklung der Union zu beschneiden, gefährdet den politischen und sozialen Frieden der Union.

M. RAINER LEPSIUS

## **The European Union as a Sovereignty Association of a Special Nature\***

The European Union's prospects of development were always open in relation to its territorial extent, the definition of its powers and its organisational structure. From all three viewpoints, the EU has, over the last 50 years, developed, from its beginnings as the European Coal and Steel Community, into a complex sovereignty association. This historically unique political and economic project, though successful in outcome and meeting with recognition both internally and externally, has continuously advanced without defining its 'finality'. The current debate is now raising the question of its 'completion', with calls for a new 'constitutional treaty', and various drafts of a conclusive organisational structure. There were 'constitutional debates' at earlier points in time, too. Thus, in 1984, the European Parliament presented the 'Draft Treaty establishing the European Union'. The 1992 Maastricht Treaty has since set up the European Union without a new constitution having been required. Numerous procedural changes have so far assured its functionality, even with an expanded number of Members, new areas of competence and greater involvement of the European Parliament. Why, then, a renewed 'constitutional debate'?

To minds used to thinking in categories of the constitutional state, it seems unaccustomed and irritating to conceive of the EU sovereignty association as an evolutionary process; a regime *sui generis*, as it is put. The open prospect ought to be closed. Does this simply express a need for cognitive structuring? Currently, there is need for action on decision-making procedures, on Member State representation, on both the Commission and the Council, and on enhancing democratic legitimation. In particular, as regards representation and decision-making procedures which have created rising membership numbers, changes have been due for some time. But this alone is not yet enough to compel a 'qualitative leap' towards a new covenant for the Union. At the Nice Inter-Governmental Conference, the most needful changes will likely be decided without the Union having to change as a whole. Behind the procedural amendments lies another ground for opening a constitutional debate. Eastward enlargement is giving occasion for concern, summed up by Joschka Fischer as the alternative between 'erosion or integration'. He evidently fears that

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\* Translated by Iain L. Fraser.

incorporating some 15 states of Central, Eastern and South-Eastern Europe will threaten the *acquis communautaire*, further obstructing the deepening of co-operation, and that ‘relying on an alliance of states would mean a standstill, with all its negative consequences.’ The constitutional debate that has been sparked off is evidently primarily directed against a feared erosion of the degree of integration already reached, and is calling for the singling out of such older members as may desire a more far-reaching political union. The latent formation of a front against the new members has also immediately been recognised by the latter. Earlier, too, for instance in the case of ‘southward enlargement’, the question of ‘widening or deepening’ was also raised. But the alternative did not present itself: the enlargement went hand-in-hand with an enhancement of integration. And if creating a lasting peaceful system in the area covered by the Union is its highest objective, then the Union could also give this goal priority over further internal integration. Eastward expansion—wherever it may end—is a historically unprecedented process that the Union has still to enter into. The alternative between erosion or further integration is directed at the ‘West-European Union’, neglecting the ‘East-European Union’ and its inclusion in the formation of the West-East European Union. Consolidating the Western-European core politically before completing the eastward expansions is problematic. A number of keywords run through the debates; we shall briefly comment on them below.

## **1. Functionality**

The transition from unanimity to qualified-majority decision on the Council counts as the central means to secure the Union’s functional capacity with the increasing number of members. Delays and blockages by a few Member States, or even a single one, ought to be prevented, and majority decision indeed compels the individual Member States to greater elasticity. No one wants to belong to the outvoted minority, thus respective preferences will be weighed up, and possible coalitions with other countries will be contemplated. But decisions by qualified-majority do not replace the search for as broad a consensus as possible. The majority rule is only a technical means of shortening negotiations in order to reach consensus.

The Union’s functionality will not be assured by the possibility of deciding on a growing range of situations by qualified-majority, but by the bringing about of a willingness to decide. The members must be willing to decide on a particular Commission proposal. The willingness of the individual countries to decide is brought about in their capitals, before Council meetings and in parallel with the Commission’s work. In order to attain it, the Union has two consensus-producing bodies available: the Commission on the one hand, and the Joint

Committee of Permanent Representatives of Member States to the Union (COREPER) on the other. In working out its proposals, the Commission enters into extensive deliberative co-ordination processes with the governments, the associations involved and the Parliament, and mediates between differing viewpoints and lobbies to get its proposal accepted. While the Commission decides independently and bindingly, it knows that its submissions can become effective only if they secure acceptance from Member States. In the Joint Committee, the government representatives to the EU constitute a 'consensus engine' switched in after the Commission, and not only harmonise their governments' instructions with the Commission and the representatives of other Governments beforehand, but also calculate the chances of securing a majority for their governments' instructions. Being constantly in touch with the Brussels communication process, they can advise their governments to show elasticity on particular points, and join the winning majority by forming coalitions with other Members on the Council. The COREPER is the diplomatic hinge between the Ministries and the Council. Not only does it decide autonomously on the mass of routine matters before the Council, but it also informs the various voting Ministers, points out the likely conflicts in the Council, and provides a link between the home governments and the specific rationality criteria in Brussels.

Functionality is not just a question of efficient rules of decision, but of well-prepared, co-ordinated production of willingness to decide. It should not be believed that qualified-majority decision will guarantee the Union's functionality by itself. It is not the decision-making process that is the main problem, but getting countries to agree. This is achieved through acceptance of European rationality criteria that emerge not only from national-interest positions but from the cognitive structuring of 'European' problems and ways of solving them. This is the Commission's task in working out its proposals, and a task that is grounded in the judgments of the European Court of Justice. Both of these 'operationalise' Europe. The formal majority principle does not replace the principle of substantive consensus. Europe arose from consensus. The continual exclusion of states through the qualified-majority principle would endanger further development. Moreover, extending the list of issues to be decided by majority will not remove the unanimity requirement on central questions either. Controversial, weighty problems where the Council cannot, or will not, arrive at a decision can be brought before the European Council where the unanimity principle applies. Blockages can arise there, too, as France's rejection of the Agenda 2000 agricultural reform shows, as does the impossibility of reducing the rebate granted to Britain on its membership contributions again, unless Britain agrees. Europe is a regime of concordance. Institutional reforms ought not to seek to change this, since the basis for legitimation lies in consensus.

## **2. Distribution of Powers**

The unclear competency rules are repeatedly pointed to. The present arrangement is indeed neither systematic nor unambiguously demarcated. The EU's powers have arisen from individual empowerments by the Council or by the European Council, which have been fleshed out and expanded by the Commission over time, and subsequently confirmed by the ECJ. The latest ECJ judgment, removing a ban on tobacco advertising imposed by an EU directive, shows the problems with the division of powers. The Court did not see any direct relation in the directive to the fundamental freedoms of the internal market or to the assuring of competition; accordingly, it was to be abrogated. Here, it was following a strict interpretation of the EU competence to shape the internal market. The Court did not accept the argument of the plaintiff, the German Federal Government, that the Commission ought not to interfere in the sphere of health policies; it even approved of Commission health-policy measures on condition that these were directly aimed at developing the internal market. This functional definition of powers relating to a particular political objective does not allow a clear division of powers by major policy sectors. The Commission thus has the greatest rights of intervention from the competition law it administers, which may be made to apply to many situations as long as they can be construed as a distortion of competition. The basic freedoms of the internal market and the competition requirement give the EU broad rights of intervention against national legislation in areas of educational policy, social policy and structural policy, too. The outcome is a sharp isolation, which is unprecedented in extent, of one sub-system, the internal-market system, with rationality criteria that outweigh other rationality criteria that also claim validity in the same area. It was in the same sense that the ECJ ruled that women in the Bundeswehr could not be excluded from arms-bearing duties, since this would amount to discrimination forbidden in the internal market. Contrasting value concepts about the involvement of women in combat, even with the constitutional foundation existing in the Federal Republic, play no part. The power of the EU is a segmental one, with far-reaching externalisation of contingencies. This is the EU's effectiveness. It decides in relation to objectives, by dissolving the political contexts, and has direct effect on the law and justice systems of Member States.

From this starting position, a clear division of powers between the EU and the Member States is difficult. It is not policy areas that can be divided; the point is to specify the areas to which rationality criteria, each with their own functional logic extending into various policy areas, apply. The EU cuts specific situations out of the policy areas which, in principle, operate interdependently and subjects them to supra-national structuring requirements. While at the outset what was

involved was still a branch of industry fairly easy to isolate, coal and steel, the EU now covers broad areas of economic and competition law, and free movement. This autonomisation of particular sub-systems has led to the rapid establishment of the internal market, and national deregulation. To the extent that 'the economy' in the Member States is institutionalised as a relatively independent policy area, the acceptance was there for that. Presumably, it would have been otherwise in relation to social legislation or tax law, which do not have a comparable 'instrumental' isolation in political perceptions.

A division of powers by policy areas is continually being called for. Here, the EU is allotted such things as foreign and security policy, regulating the internal market, competition and the agricultural market, asylum and immigration policy, and also cross-border environmental policy and the promotion of fundamental European research. Employment policy, welfare, health, culture and structural policy are to remain with Member States. Such proposals by the Bavarian Minister-President are plausible, but hard to apply, since broad overlaps emerge. In particular, the call to develop a European Social Model and establish it alongside market and competition policy as a second basis for legitimation, blurs the boundaries. Again, the 'macro-economic dialogue' necessitated by monetary union and the European Central Bank transcends a division by policy areas. Coordinating the economic policies of the Member States covers not just the budget discipline of the individual nation-states, but also their employment and incomes policies. The policy entanglement typical of the Federal Republic also determines the interpenetration of European and national competences. A look at the positions in the Federal Republic shows the difficulties of the division of powers in federal systems with a broad framework of competence at federal level. Everything complained of at EU level is everyday material in Germany: interpenetration of administrative staffs, lack of transparency, dilution of parliamentary powers to decide, and lack of accountability for political responsibilities in the interpenetrating policies.

It has to be surprising how often a division of powers is called for without calling the associated problems by their names. This applies, in particular, to issues of the financial constitution of a contemplated confederation. The most effective control on EU powers today lies in the payments to the Union that Member States have to decide. As long as these are kept low, the EU cannot pursue any major distributive projects, and must remain primarily oriented to regulatory policies.

Nor is the oft-proclaimed principle of subsidiarity an effective means towards the division of powers either. The level at which a political measure is to be located is always a controversial, debatable matter of expediency among subsidiarity criteria, and may very well present itself differently for the various

## *Comments*

Member States. In the event of conflict, there are no operational criteria for deciding the subsidiarity question. Nor are there any clear entitlements for an individual Member State to proceed against an EU directive.

The hard problem lies in the division of rationality criteria and their allocation to various levels of control and legitimation. As with the internal market and competition arrangements, as long as they can relatively be detached instrumentally from the policy complex and have more or less the same effect for Member States, fragmentation of powers is possible. Where Member States are left with room for manoeuvre in implementation, contingencies can also be fended off. But as soon as the number and heterogeneity of rationality criteria for EU policy increase, to cover, say, structural and employment policy, then complicated problems of mediation and balancing arise. The contradictory nature of rationality criteria and the conflicts existing among them need, at this point, to be centrally controlled; they can no longer be handled through the fragmentation of various control levels alongside each other. Mediating between equal-rank rationality criteria and balancing their validity comes about in parliamentary systems through majority decisions and budget resolutions. The call is being made to transfer the competence for jurisdictional conflicts to the level of the 'federation'. Here, Fischer's proposals are internally consistent: 'Core sovereignty and only what it is absolutely necessary to regulate at European level [should be] transferred to the Federation,' and European legislation should be fully parliamentarised. But this means a division of sovereignty which goes beyond the question of the division of powers.

### **3. Division of Sovereignty**

The EU is based on co-operation among sovereign states. They are all members of the United Nations and they possess sole competence to shape the treaties that the EU is based on. Transferring competences to European level does not mean giving up the claim of the individual Member States to sovereignty, but the willingness to exercise sovereign rights in an associative system. Fischer's call to transfer 'core sovereignty' to the Federation is, to that extent, in clear contradiction with French President Jacques Chirac's formula of 'joint exercise of part of the national sovereign rights.' The consequences are clear. As long as the Member States exercise 'sub-competences' jointly, they remain the central units of the system to which sovereignty is attributed. If, however, 'core sovereignties'—however defined—are transferred to the 'Federation', then it becomes the bearer of the central sovereign rights. In order to achieve this, a confederation with original sovereignty would have to be founded. Only then would an accountable entity that could form a 'federal state' be constituted; for 'federation' is, after all, without doubt just a euphemistic expression for what is

really meant, namely, the European federal state. To constitute an autonomous bearer of sovereignty, the population of the EU would have to be constituted into a European people as the possessor of the sovereignty. This would indeed be the 'great leap' that would transcend the EU's existing order. Whether such a 'leap' is desirable and in what circumstances it could succeed would have to be considered in detail. Whether this 'leap' is necessary for the integration process is another question.

In the course of deepening the integration, a 'pillar architecture' has been formed in the European Union, with various tasks allotted to a supra-national system of decision and administration on the one hand, and to international co-operative systems on the other. Various systems exist alongside each other: the system for the internal market, the system for the 'Schengen Area', the system for the 'Euro Area', and the common foreign and security policy. EU Members do not all belong to the same systems. The desired 'flexibility' has already found expression in the 'pillar architecture'. If integration policy is to be advanced in this way, then the loose construction of the 'pillar architecture' should not be given up. The successes in European integration to date have been achieved through an evolutionary process of segmental co-ordination. The 'leap' into a sovereignty association with 'core sovereignties', and correspondingly a competence for jurisdictional conflicts, would interrupt this evolutionary process and demand a density of normative integration that would have to lead to considerable increases in the claims on the regulatory and redistributive power of European level. The resulting conflicts and disappointments are easy to see, and would lead European integration into a politicisation that would intensify conflicts. It does not seem advisable to constitute a political system that, in all likelihood, cannot meet the expectations held of it in such areas as employment and harmonisation of standards of living, therefore itself running into legitimation problems. So far, success with integration has been based on deciding the individual steps towards it consensually, adequately legitimising them through domestic systems of the Member States and, in the long run, making them capable in the upshot of meeting the expectations aroused. The competence for jurisdictional conflict is exercised consensually by the European Council in the name of the national sovereign rights. The European Council would lose this competence for jurisdictional conflicts if there were a separate bearer of sovereignty alongside it. While Fischer writes 'the concept of a European Federal State replacing the old nation-states and their democracies as a new sovereign is a synthetic construct going beyond existing realities', a 'division of sovereignty between Europe and nation-state' must lead to the establishment of a new bearer of sovereign rights, a 'European people': exactly to what he calls a 'synthetic construct'.



#### 4. The Role of the Nation States

The nation-state is not to be ‘abolished’; it is to be ‘brought into’ the confederation, since the ‘nation-state, with its cultural and democratic traditions, will be indispensable for legitimising a union of citizens and states that can be fully accepted by people.’ This formulation presents the nation-state as a quite subordinate ‘self-governing entity’ with valuable cultural traditions to which citizens have grown accustomed. This is reminiscent of the role that municipalities play in modern states: the real structuring of life occurs elsewhere, but local adjustment to these structures is left up to the citizens of the municipality, with limited means. Such a view fails to see the role of the nation-states specifically in legitimising the EU. They create the units from which a European Union arises. If the EU is a ‘multi-people state’, then it follows that the interests of the Union’s citizens are not identical and cannot be decided about by majority in highly aggregated representative systems. The individual peoples do not just represent picturesque traditions, but are constituted as democratic ‘*demos*’ with a general sovereignty claim. These entities have the absorptive power to handle social conflicts that is indispensable for the EU. This absorptive power lies particularly in the capacity of nation-states to reach temporal agreements over the ever-present inequalities and injustices in distribution of life chances, and formulate ideas about a compensatory retributive justice. Despite material inequality, there emerges an ideal equality of citizens. The democratic ideal of citizen equality has to be reconciled with the everyday experience of inequality. It is from this self-binding of inequality that moral solidarity grows. This continual reproduction of the ‘moral fabric’ is the basis of social peace. Wherever it is disturbed or destroyed, severe conflicts arise: and one need not think only of the Bosnias and Kosovos, it is enough to consider Northern Ireland or the Basque Country. Decades of terrorism cannot be politically controlled even in countries that have had democratic systems for years and belong the EU. The central achievement of nation-states is the creation of moral orders that are not just the result of political institutions but need the support of a linguistic community, internal toleration and solidarity and self-allocation of responsibility for shortcomings and lags in development. Downgrading the nation-states, limiting their possibilities of action and fragmenting their formal competences, would have considerable consequences, especially for a territorially extended sovereign territory with highly aggregated interest representation in the decision-making centres.

Nation-states also constitute units of accountability that can be expected to do things. A good example is offered by the change in the social system for the population of East Germany. German unity shifted both the horizon of expectation and the criterion of comparison from the GDR to the old Federal

Republic, bringing a new perception of discrimination or disadvantage among East Germans. It is not the objective improvement in living conditions in East Germany, but the differences from living conditions for West Germans that determine their expectations. Comparison processes, and structuring them through the social and moral units that nation-states are, are accordingly of central importance to stability in Europe. For instance, on entry to the EU, the Portuguese did not immediately shift their expectations to the standards of the prosperous welfare states and expect support payments from them.

Eastward enlargement opens the way into Europe for many societies living at a much lower level than the peoples in Western Europe. They will have to put up with a sharp discrepancy for decades. This acceptance of disadvantage can come about only within a national self-consciousness. These processes can only be carried through in a context of comparison and distribution processes structured on a nation-state basis. The European Union is an association of many peoples, the components of which lay claim to creative freedom of their own, irrespective of population size or economic power, and cannot be subjected to others' majorities for all the central decisions. To date, the EU has been supported by the consensus of the national elites. Wherever this was not present, resistance or reservations about further steps in integration have emerged among the peoples, too, as in Norway, Sweden and Denmark. This elite consensus arises in the political atmosphere of nation-states from opinion formation in democratic institutions, the media, public opinion and the resulting orientation of citizens. EU legitimacy is thus based on agreement by the citizens of nation-states, not on opinion formation by a European people. The European Parliament, too, represents the citizens of the Member States, not the citizens of the Union. Its basis, too, is national opinion formation, which is basic to legitimising European integration; but the nation-states are the basis for this. Downgrading them, taking central sovereign rights over the Union's further development away from them, endangers the political and social peace of the Union.



DIETMAR NICKEL \*

## **Maintaining and Improving the Institutional Capacities of the Enlarged European Union\*\***

The current Inter-governmental Conference (IGC), due to wind up at the European Council meeting in Nice, has the explicit mandate to prepare the European Union for the expected enlargement.

What does the EU need in order to be prepared? You would probably expect a civil servant of the European Parliament to offer—or try to sell you—the European Parliament's expectations and requirements as set out in its resolution of 13 April 2000.<sup>1</sup> There are, naturally, other approaches to the issue. Here is one that I recently heard: change the legal basis for the adoption and revision of the financial regulation from unanimity to qualified majority voting, and turn the agriculture budget from compulsory into non-compulsory spending, and you will obtain the necessary financial margins for enlargement. I must confess I can see the charm of this proposal. There are even people who think that all these proposals—even those put forward by the European Parliament, were they to be adopted—would not be sufficient.<sup>2</sup> And indeed, even the more radical reformers cannot figure out what it will mean for the Union to be enlarged by twelve or more new Member States, to increase both its current population and its current territory by a third. This will by no means be an enlargement comparable to the previous ones.

Is it useful to try to address this problem at this stage? We all know the kind of answer which the IGC is likely to produce. We all know that it will fall far short

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\*\* Speech held at the International Conference, 'From the Founding Treaties to a Constitution for the European Union? Constitutional Perspectives for an Enlarged European Union,' European Association of Researchers on Federalism (Tübingen), Salzburg, 21-23 September 2000. The format of the oral presentation, made on 22 September 2000, has been maintained.

<sup>1</sup> Provisional minutes of 13.4.2000; not yet published in the Official Journal.

<sup>2</sup> Klaus Hänsch, *Frankfurter Rundschau*, 23.2.2000, p. 9.

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of the solutions, reforms, revisions, and ideas required. But what will it, actually, produce?

- a) a decision on the number of Commissioners and some arrangements with regard to the internal structure of the Commission;
- b) a re-weighting of votes of the Member States in the Council and an adaptation of the definition of qualified majority;
- c) a certain increase in the number of legal bases providing for qualified majority;
- d) and, in addition to these so called left-overs from Amsterdam, probably something on re-enforced co-operation, the monitoring of fundamental rights and values, the judicial system, but probably nothing on defence policy despite the fact that this will be the really important item on the Nice agenda.

One can therefore conclude that the future shape of Europe will have to be decided upon later and this means that it will be decided together with the future Member States.<sup>3</sup> This is certainly appropriate because what matters is not how difficult decision-making can be when a considerably increased number of participants is involved—what matters is that the applicant states have a chance to contribute in a constructive manner to defining the future European house. The *diktat* of the *acquis* in the enlargement negotiations should not be matched by a *diktat* on the future structure of the European Union.

So, there will be further steps to take after Nice. When? In 2004 it would seem, from listening to Chancellor Schroeder.<sup>4</sup>

But (1) in which direction? and (2) how?

### 1.

Some of the issues which will be on the agenda are already well-known. There is the idea, based on the work carried out by the European University Institute in Florence, of splitting the Treaty in two. To have a first part which contains all the provisions at constitutional level and then a second part with all the remaining rules would, of course, be an important step towards an EU constitution, especially if the revision procedures for these two parts differ. Another item could well be the Charter on Fundamental Rights, provided that it is not already integrated into the Nice Treaty. Then, there is the wish expressed

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<sup>3</sup> See, Klaus Hänsch, *Frankfurter Allgemeine Zeitung*, 6.9.2000.

<sup>4</sup> *Handelsblatt*, 8 September 2000, p.8.

by the Germans to have a new catalogue of competences. Finally, the most dynamic policy field in European politics nowadays is probably Security and Defence. Despite this, however, there seems to be little intention to translate these developments into treaty changes in Nice. Were it not for reasons of constitutional *hygiene* at least, the next IGC would have to introduce a developed security and defence scheme into the Treaty. So far, it looks as if these items are going to be the future left-overs from Nice. There are, however, other issues which, in my view, are the real challenges of the 2004 appointment. The most important one is, of course, the future institutional set-up for what, by then, will be a partially enlarged Europe. An idea of Europe's future institutional structure was given by Joschka Fischer in his by now famous Humboldt speech of 12 May 2000.<sup>5</sup>

The German Minister for Foreign Affairs has, in the recent past, held a number of speeches on the future of the EU, for example, one at the European Parliament on 12 January 1999<sup>6</sup> in his presentation speech for the German Presidency of the Council and another on 20 January 1999<sup>7</sup> at the National Assembly in Paris. These speeches were of the more orthodox kind and thus received nothing but praise. The Humboldt speech is certainly breaking new ground, in the sense that we can see and hear somebody thinking aloud without necessarily coming to a convincing conclusion. Naturally, this explains why the criticism concerning the Humboldt speech was much stronger.<sup>8</sup>

First of all, let me say how pleased I am that the German Minister for Foreign Affairs, even if he was not speaking in that capacity, is involved personally in reflecting on the future of European integration. He certainly is committed to a degree which goes well beyond the involvement of most of his colleagues.

The speech came at an interesting moment, 12 May being very close to Schuman day, and almost exactly three months after the opening of the IGC. It has been correctly remarked that Joschka Fischer wanted to play down expectations with regard to the outcome of the IGC. It has become very clear that the current IGC will not go very much beyond the very limited agenda it started off with. At the same time, Joschka Fischer is also putting the current

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<sup>5</sup> *Integration* 3/00, p.149 *et seq.*, English translation provided by the Ministry of Foreign Affairs.

<sup>6</sup> OJ Annexes to the debate n. 531, pages 27-52.

<sup>7</sup> Bulletin des Presse-und Informationsamtes der Bundesregierung Jg.1999 Nr.4 (25 January 1999), p. 36 *et seq.*

<sup>8</sup> Müller-Graff (2000), operated a decapitatio; Schneider (2000), proceeded to what one could better describe as a handbagging operation.

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IGC into perspective. This is his major achievement. He is the one who has focused people's attention on the question of the future of the European Union, and he is the one who has been able to impose a debate revolving around the idea of an EU constitution; something which, for years, had been reserved to academic circles like ours, and has finally come to the fore of political debate. Just remember that President Chirac felt obliged to give an answer on the same level, using the same categories of thought, and to conclude in favour of a European constitution. Consider also the sudden spate of constitutional drafts, this time coming mainly from France.

Joschka Fischer used, and made other people accept, a word such as 'finalité'. A few years ago, this would have been considered just another 'F' word.

I am not going to proceed with a detailed analysis of the speech, but there is one paragraph that I would like us to look at together:

And this means nothing less than a European Parliament and a European government which really do exercise legislative and executive power within the Federation .... This will only be possible if this European Parliament actually brings together the different national political elites and then also the different national publics.

In my opinion, this can be done if the European Parliament has two chambers. One will be for members who are also members of their national parliaments. Thus, there will be no clash between national parliaments and the European Parliament, between the nation-state and Europe. For the second chamber, a decision will have to be made between the Senate model, with directly-elected senators from the Member States, and a chamber of states along the lines of Germany's Bundesrat. In the United States, every state elects two senators; in our Bundesrat, in contrast, there are different numbers of votes.

Similarly, there are two options for the European executive or government. Either one can decide in favour of developing the European Council into a European government, *i.e.*, the European government is formed from the national governments, or—taking the existing Commission structure as a starting-point—one can opt for the direct election of a president with far-reaching executive powers. But there are also various other possibilities between these two poles.

## ***Looking Through a Glass, Darkly***

These were not Mr Fischer's last words and this is why there should be no final judgement on the proposals made.

Let me just raise a few questions, the first of which is the wish to *parliamentarise*.<sup>9</sup> The institutional framework of the European Union starts with a description of a European Parliament with two chambers...

One will be for members who are also members of their national parliaments...

...This is the situation that I experienced when I started to work for the European Parliament. Members were elected to a national parliament and then delegated from there to the European one. Mr Fischer does not talk about delegation, so he does not exclude the possibility that there could still be direct elections to the European Parliament, which, after all, was one of the major achievements in European institutional history. In this case, the necessity to be a member of a national parliament would just be a qualifying factor, but what would be the result? Contacts between national parliaments and their relation with national governments would be closer, provided that the Members of the European Parliament had the time to look after their obligations in the national parliaments. Would this be feasible? It is more than doubtful. Firstly, is it conceivable that a national parliament (The House of Commons, The Bundestag, The National Assembly of France, *etc.*) could replace their influence in legislation by a delegation, be it as representative as it can?<sup>10</sup> Secondly, there are also practical considerations to take into account. The non-directly elected European Parliament suffered from the absence of entire national delegations whenever there was an election at national level, or some national crisis that required their presence in the national parliament. Before 1979, this did not do very much harm. The then European Parliament had almost no legislative powers and was not subject to any specific requirements concerning voting majorities, with the vote on the budget being the one exception. The situation already today—and we are not yet in a fully parliamentary system—is entirely different. The European Parliament is co-legislator on an equal footing with the Council for probably the majority of legislative business. This certainly means that it bears a totally different responsibility. Just think of the need to gather the support of the majority of the members of the house, in order to assert Parliament's prerogatives in second reading, and perform this within strict deadlines. To be an MEP today is a 24-hour full-time job. Were we to support Mr Fischer's proposal we would either end up with a European Parliament failing to make efficient use of its prerogatives, or we would deprive national parliaments of their European components. In both cases, the intended objective would be missed.

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<sup>9</sup> For the meaning of this notion, see, Lijphart (1984:68).

<sup>10</sup> This doubt is also voiced by Mrs Uosokainen, Speaker of the Eduskunta, the Finnish Parliament, in her address to the Conference of Presidents of the EU Parliaments which took place in Rome on 22 September 2000 (unpublished).



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For the second chamber, a decision will have to be made between the Senate model ... and a chamber of states along the lines of Germany's Bundesrat...

...Both models are well known. Admittedly, they work in very different systems. The most remarkable thing for me is that Mr Fischer avoids creating a more complicated and cumbersome situation, which would exist if such a model was applied to the existing structure. He avoids the creation of a third parliamentary chamber by abolishing the Council's legislative functions. This is simply revolutionary. Since 1958, the Council has retained almost all legislative power and only since Maastricht has it partly shared it with the European Parliament. The Council has, of course, always had executive powers as well. In one of the two options for the EU executive put forward by Mr Fischer, these powers could be maintained.

Member States are the masters of the treaty. This is a fundamental constitutional principle of European integration. Depriving the Council, which is the institution representing the governments of the Member States, of its legislative role is an entirely new idea, and would certainly put a bomb under the traditional integration structure. Is this intended? Or is this only a reflection of Mr Fischer's well-known dislike of the Council's proceedings?

There are two options for the European executive or government. Either one can decide in favour of developing the European Council into a European government: or—taking the existing Commission structure as a starting-point—one can opt for the direct election of a president with far-reaching executive powers...

...Article 4, paragraph 2, TUE, reads, '[T]he European Council shall bring together the Heads of State or Government of the Member States and the President of the Commission. They shall be assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission....' What would happen if Mr Fischer's first option were to be applied? When Mr Fischer explains that in this case the European government would be based on national governments, surely he is not referring to the Heads of State and Government? Probably not—because we cannot imagine a Head of State or Government being part of the European executive, involving him or her from dawn to dusk with European governmental functions. The next question concerns the President of the Commission in his capacity as a Member of the European Council. What will happen to him in this option—or has he just simply been forgotten?

As for the second option, namely, the direct election of a president with far-reaching executive powers, this is a well-known idea. The election does not seem to be linked in any way with the European Parliament polls, and thus deprives the European Parliament of at least part of its appointment functions, which have been the subject of discussions on future developments. There seems

to be a very strong influence coming from the US model. The idea of parliamentarisation has been given up in favour of a strong executive.

There is no explanation at this stage of the links to be established between the directly-elected president of the executive and national governments. This again raises the question of what will be the future of the masters of the treaty.

The questions raised by the Humboldt speech should not necessarily be answered at this stage. As already indicated, Mr Fischer has engaged in a long-term discussion and reflection. The Humboldt meditations were not his last words. Indeed, we had the opportunity to see how his thoughts had developed when he attended a public meeting of the Committee on Constitutional Affairs of the European Parliament in Strasbourg on 6 July last. A number of important developments in Mr Fischer's views can be observed. With regard to the future government, he now comes out in favour of a directly-elected President, whose Commissioners would be coming from national governments. He explains his choice by making explicit reference to the American model in the years between 1776 and 1789. To make it even clearer, he is against an indirect election by the European Parliament, because in this case the president would be too weak(?!). In his opinion, the indispensable combination between community and national principles, between democracy and respect of the national states can be attained only by directly electing the President and by recruiting Commissioners from the governments of the Member States. The Commission as it is today—according to him—is merely the depository of the Community values stemming from the Treaty and lacks the legitimacy which is derived from national level. This future government would thus find its constitutional legitimacy through the direct election of its President. Another way of achieving this could be the use of electors, along the lines of the US presidential election.<sup>11</sup> In this case, the legitimacy of the government would find its origins in the Council as a body representing its different national components.

The parliament would consist of two chambers: one directly-elected (and there is no longer any mention of membership of a national parliament as necessary qualifying requirement) and the other (a senate) made up of members of national parliaments. The German model of the Bundesrat with representatives from the national governments does not seem to be sufficient for Mr Fischer.

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<sup>11</sup> Why not start from here and foresee the electors in the directly-elected European Parliament, in which case the candidates for the presidential job would be the top candidates of European lists common to all Member States: see, Nickel (1998:3), which is available at: <http://www.law.harvard.edu/programs/jeanmonnet/papers/98/98-14.html>.

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We see that the number of options has been narrowed down—with one element of continuity: national governments would no longer have any share in legislative powers. Furthermore, the question concerning the legitimacy and the efficiency of a chamber composed of delegations of national parliaments remains on the table.

There seem to be two driving forces behind Mr Fischer's vision: one is his conception of the Monnet method. To his understanding, the Monnet method has become the victim of its own success and has already been overtaken by Maastricht. This is revelatory: Mr Fischer understands the Monnet method as an enterprise started by technocrats who have no idea about the final objective. From this assumption, it is only too normal that somebody claiming to know what the 'finalité'—the objective—should be considers the method outdated. It has already been shown that this conception of the Monnet method is erroneous.<sup>12</sup> Maybe, Mr Fischer is confusing the day-to-day muddling-through method with the Monnet method. There is another reading of the Monnet method which disappears entirely in Mr Fischer's approach. This particularly concerns the role of the Commission as a supra-national organ, committed to the protection of the interests of the Community or Union, independent, having an exclusive right of initiative, the possibility of blocking draft legislation if it disagrees with the direction it is taking, the role of the guardian, and the driving force of the Treaty. All of this, in Fischer's conception, seems to be forgotten. Is this the understandable result of his misconception of the Monnet method or, worse, is it intentional?

The second driving force concerns the role which the national parliaments want to play in the European construction. This goes back to growing frustration in various national parliaments, due to the fact that they discover that more and more issues are dealt with and decided upon at European level. And this also goes back to the myth of the democratic or legitimacy deficit. If one considers citizens' involvement, there may well be such a deficit. But switching from one level of democratic representation to another does not solve the problem. And to seek the, as shown before, impracticable involvement of national parliaments by sacrificing national governments seems to be too high a price.

To do something about the frustration of national parliaments seems to be difficult if one follows the path chosen by Joschka Fischer. Maybe, the procedure to be followed for the next steps provides us with an opportunity:

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<sup>12</sup> Schneider (2000).

## 2.

If there is something outdated in the Union's way of evolving, it is probably not the Monnet method—at least, in the way I understand it—but in the treaty revision procedure, *i.e.*, the so-called Inter-governmental Conference. The current IGC is the fourth IGC since 1985. In reality—from a political, not legal point of view—there has been one single IGC which has been interrupted from time to time in order to ratify its intermediate results. I have come to this conclusion, not simply because of the rapid succession in time of these Conferences, but also because of the links established between the IGCs. When, in Milan in June 1985, the Heads of State and Government convened an IGC by majority vote, they wanted to provide the Community with the instruments necessary for the realisation of the single market. The best expression of their expectations with regard to this IGC is the title of their final text: The Single European Act. But there was a trick to it. Commission President Delors had convinced the IGC to introduce Article 102(a) EEC, the second paragraph of which made it mandatory to have recourse to the procedure of the treaty revision (the then Article 236) for the establishment of a monetary union. Until then, it had been argued by some that the then Article 235 (now Article 308) was sufficient to do so. What seemed to be a step back at that time was the real starting point of a continuing IGC. It was this Article 102(a) which made the Maastricht conference necessary. Maastricht itself contained an appointment for the next IGC in 1996,<sup>13</sup> because of the general feeling that the appropriate answers to the political union had not been found. Amsterdam created the so-called left-overs and thus the obligation to hold the current IGC,<sup>14</sup> and now we are talking about the next appointment in 2004.

There is a decline in the quality of the IGCs. No doubt, the creation of the single market was a major development. No doubt, the same applies for the Maastricht creation of the monetary union. The following steps are more an effort to tidy things up. If Amsterdam was intended to create a political union, it did not achieve this objective, and without diminishing the importance of the so-called left-overs, the current one is even less ambitious. Despite this, we expect this same procedure to deliver a major qualitative step, to establish the European constitution, to put the final touches to the European house in 2004? The question is rhetoric. The current method of the IGCs is unworkable.

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<sup>13</sup> See, Declaration No. 16 annexed to the Final Act.

<sup>14</sup> See, the Protocol on the institutions with the prospect of enlargement of the European Union and the Declaration by Belgium, France and Italy on this Protocol.

## Comments

But there is a new model on hand: consider the procedure for the establishment of a Charter on Fundamental Rights. The Convention operates with fifteen personal representatives of the Heads of State and Government, sixteen members from the European Parliament, one Commissioner and 30 representatives coming from the national parliaments. So, here is a model fully integrating national parliaments in the procedure for the establishment of a piece of the future constitution. There is no going back now. National parliaments will never again accept being only confronted with a new treaty negotiated exclusively between the governments, and being simply asked to ratify it.<sup>15</sup>

Certainly, the Convention procedure for the charter could be improved. Especially the representation of the national parliaments could be looked at afresh. The number of thirty provides for two delegates per Member State. It does not relate to the different population sizes represented nor to the number of chambers involved (24). One could also question the capacity of the national parliaments' delegation to work out a coherent line.

The idea of such an involvement of the national parliaments is certainly not the last word and, with regard to the IGCs, it might be even unrealistic. This would be sad, because, in such a case, we would go back to the misconception of the Monnet method—the muddling through. The results achieved in the permanent IGCs would be smaller and smaller.

This sounds pessimistic and is not justified if one considers the achievements of the last fifteen years: the single market, EMU, almost full parliamentary involvement in legislation, the by now realistic prospect of an area of security, freedom and justice, and the emerging common foreign security and defence policy.

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<sup>15</sup> Mrs Vosukainen (*loc cit* n. 10) seems to be sceptical about this: national delegations could not bind their national parliaments. This is true. However, national parliaments would retain their ratification right and they would be better informed about progress in negotiations than before. Her argument is totally correct with regard to ordinary legislation, where the last word is said at European level, but not for treaty revision.

Whenever I feel prone to growing pessimism, I go back to the comments made by the British observer at the mid-term session of the Messina conference, Mr Russel Bretherton. Before rising from the negotiating table, he said: ‘Gentlemen, you are trying to negotiate something you will never be able to negotiate. But if negotiated, it will not be ratified. And if ratified, it will not work.’<sup>16</sup> Compared to this, we have not done so badly.

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<sup>16</sup> Young (1998:93).



J.H.H. WEILER

## Epilogue

### Fischer: The Dark Side

#### A Parental Parable

Let me start with a parental parable. You face your five year old child and say: 'Please have a glass of milk.' 'I don't want milk' is the precocious reply from the annoyingly independently minded future citizen of our polity. 'Milk is good for you.' 'That's what you say' or 'I don't feel like it' or 'if it is so good, why don't you have some' or, simply, 'no thank you.' So, next time you revert to the old classic: 'Would you like strawberry milk, chocolate milk or plain milk?' It almost always works: they get a choice, or rather the feeling of choice, and you are the thoughtful, liberal minded non-authoritarian parent. It's a win-win situation.

#### Europe's Tragic Choice

Europe is now in an interesting lose-lose situation—facing a veritable tragic choice, only partially of its own making. Fischer's speech should be understood as a response to this situation; though like an entire European political class, the makings of this tragic choice have been masked, tabooed and 'Haiderised'.

Consider, first, the following ubiquitous irony. On its face the speech is the 'nth' response by a European politician to the dilemma of architectural reform in the face of an enlarging Union. The diagnosis, discussed *ad nauseum* for at least two decades, is simple enough: the current Commission-Council-Parliament architecture, the essential design of which has survived the first half-century of Community and Union life, will implode with any further enlargement. It will implode functionally—robbing the Union of its greatest (if discomfoting) achievement, namely its remarkable efficiency in achieving its ambitious original goal with a stunningly small bureaucracy (the Union employs less officials than any middle-sized European city) and a laughably small budget. It will implode normatively too: the ability to deliver the goods has been the single most important source of Community legitimacy lulling the European citizenry into a sated tolerance of the many, many democratic defects of the Community



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and Union. Once removed, the intolerability of governance without government, will, indeed, become intolerable. The violation by Europe of the most basic and fundamental norms of democratic accountability—the ability of the electorate ‘to throw the scoundrels out’—and its violation of the most basic and fundamental norm of democratic representation—the ability of the electorate to influence, through elections, the policy orientation of European Institutions—will begin to undermine the success of the past and impede would-be successes of the future. Hence the need to touch the hitherto untouchable: the basic Community architecture.

The virtues of the Fischer speech are many and were mentioned in the Prologue to this volume and elsewhere.

First, he is, surely, the most ‘simpatico’ of our political masters. Honest in his enjoyment of power and status and the good life and not pretending to be a suffering public servant; very good at it, as well. (That is important). And, how flattering, he chose to make the speech in a University setting honouring the professorate and intellectuals in general.

Second, though there was nothing all that remarkable in the content (Delors has been up and down that path on more than one occasion) what was remarkable is that it was a Member State foreign minister, expressing in a programmatic speech, preferences for a series of options which one would, indeed, normally expect from a Delors: from someone socialised into Commission-think and Commission-speak. And therein lay a valuable honesty: acknowledging, at least in speech-acts, that the architectural *status quo* will not suffice, and that talk of important re-design, rather than tinkering was not something that Commission bods are prone to do only to be shot down, or dismissed, by those who really count, the Member State governments. Fischer has dealt a straight hand: enlargement requires a solution of the magnitude elaborated in his speech. And then, though Nice itself will be just another postponement, we suddenly have Chirac and Amato and others throwing their respective thoughts into the cauldron presenting a variety of options which we can now debate, assess, advocate, eventually even choose.

So what do we choose? Do we want the plain plan? The strawberry plan, or perhaps the chocolate plan? And therein lies that dark and unpleasant irony. A speech dedicated in its content to the values of democracy, in its method to the process of deliberation and consultation and in its intended consequences to the most profound constitutional overhaul since World War II, is premised on something that has somehow been put beyond the values of democracy, deliberation and consultation—‘enlargement’. Enlargement represents, easily, the single most important constitutional event in the history of the Community

and Union since inception. The move from fifteen to twenty or so is of an order of magnitude which makes it a change of kind, not a change of degree as has been the case with previous enlargements. And yet, the decision on this constitutional overhaul was adopted in a manner typical of the worst in Europe—white smoke emerging from the Copenhagen summit of 1993, wherein our Heads of States and Government, like so many Princes, without a serious debate in any of the national parliaments, without a serious debate in the European Parliament and most importantly, without a serious debate in the European public space or the European public spaces, just made it a *fait accompli*.

Strawberry or chocolate? That we may choose. But do we actually want the milk? That is a question European public opinion was never asked and has been put beyond bounds of decency. Machiavelli was ‘simpatico’ too.

And herein irony dissolves into tragic choice. The case for enlargement is easy to make. It is about a moral responsibility towards the emergent democracies—could we look into our own faces if through Community passivity these democracies became destabilised? It is about social solidarity—could we allow the disparity in wealth and prosperity to create a new velvet curtain through Europe? It is about cultural identity—could we artificially consolidate a short lived separation of West and East Europe and condition yet another generation to think of that dividing line as natural in any plausible sense? And there are, of course, also a slew of utilitarian arguments which have to do with security, alliances, and all the rest.

But, and this should be stated with no shame and no fear: to question and even challenge enlargement is not, as current European political correctness would have us believe, a question which is proto-facistic, Haiderist or morally deplorable. And, unintentionally, the Fischer speech makes that very clear. Cut through the verbiage and his proposal falls into a genus with rather dubious CSU ancestry—the genus of the West and the Rest dressed up in earnest constitutional garbs. From a Centre-Right perspective it is perfectly honourable to oppose the inevitable diminution and further erosion of national identity which the constitutional consolidation of the core would occasion, pious statements about a ‘State of Nations’ by Habermas, Mancini or Fischer notwithstanding. From a Centre-Left perspective one can resent the breach of the principal of solidarity which the West and Rest concept would entail, pious statements about ‘them’ being always welcome notwithstanding. There is something ugly about a ‘you can join, but at the moment of joining we will be leaving for something else’ construction. And democrats on the Right and Left could jointly, and most honourably, simply resent the idea of enlargement which

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will bring even further diminution of the specific gravity of each individual, pious statement about subsidiarity notwithstanding.

The choice is truly tragic: stop enlargement and you commit to a course with grave moral and political consequences. Proceed with enlargement and you commit, too, to a course with grave moral and political consequences, if we are to take the Fischer prognosis seriously as we should.

But should not this be at the centre of the European public debate? It should, but it will not. When a hapless German Member of the Commission had the temerity to suggest a couple of months ago that the issue of enlargement should be a legitimate issue of public deliberation and decision, his wings were clipped so quickly he barely made it back to his cosy Brussels nest.

### **Which is the Promised Land?**

The second distinct contribution of the Fischer concept has been the huge boost it has given to the idea of a ‘Constitution for Europe’ (or rather for ‘core Europe’). The idea of a constitution is presented as an indispensable part and parcel of a legitimating reform package. Here, too, the idea is not original. But coming from Fischer it received a huge boost. Even the Economist has already come out with its own draft constitution which is a sure sign of a new fad.

Whether one could have a Europe which would respect the current constitutional *acquis*, would embed it in a formal constitution adopted through a European constituent power, but which would not, at the same time, become a federal state in all but name is very doubtful and is examined in other papers in this volume. I think this view is a chimera. But the very idea of a formalised constitution requires some serious critical reflection. What appears to be progressive may in fact be regressive. In his ideas of a new constitution for Europe, Fischer may be leading us away from the Promised Land into a familiar and boring desert.

Here are some well known facts that barely bare repeating. As a result of a combination of express Treaty provisions—such as those stipulating that certain types of Community legislation would be directly applicable—of foundational principles of international law—such as the general principle of supremacy of treaties over conflicting domestic law, even domestic constitutional law—and of the interpretations of the European Court of Justice, a set of constitutional norms regulating the relationship between the Union and its Member States, or the Member States and their Union, has emerged which is very much like similar sets of norms in most federal states. There is an allocation of powers, which, as has been the experience in most federal states, has often not been respected;

there is the principle of the law of the land, (Direct Effect); and there is the grand principle of supremacy, a principle which is every bit as egregious as that which is found in, say, the American federal constitution itself.

Put differently, the constitutional discipline which Europe demands of its constitutional actors—the Union itself, the Member States and State organs, European citizens, and others—is, in most respects, indistinguishable from that which you would find in advanced federal states.

But there remains one huge difference: Europe's constitutional principles, even if materially similar, are rooted in a framework which is altogether different. In federations, whether American or Australian, German or Canadian, the institutions of a federal state are situated in a constitutional framework which presupposes the existence of a 'constitutional demos', a single *pouvoir constituant* made up of the citizens of the federation in whose sovereignty, as a constituent power, and by whose supreme authority, the specific constitutional arrangement is rooted. Thus, although the federal constitution seeks to guarantee state rights and although both constitutional doctrine and historical reality will instruct us that the federation may have been a creature of the constituent units and their respective peoples, the formal sovereignty and authority of the people coming together as a constituent power is greater than any other expression of sovereignty within the polity and, hence, the supreme authority of the constitution—including its federal principles.

Of course, one of the great fallacies in the art of 'federation building', as in nation building, is to confuse the juridical presupposition of a constitutional *demos* with political and social reality. In many instances, constitutional doctrine presupposes the existence of that which it creates: the *demos* which is called upon to accept the constitution is constituted, legally, by that very constitution, and often that act of acceptance is among the first steps towards a thicker social and political notion of constitutional *demos*. Thus, the empirical legitimacy of the constitution may lag behind its formal authority—and it may take generations and civil wars to be fully internalised—as the history of the many federal states will testify. Likewise, the juridical presupposition of one *demos* may be contradicted by a persistent social reality of multiple *ethnoi* or *demoi* who do not share, or grow to share, the sense of mutual belongingness, transcending political differences and factions and constituting a political community, that is essential to a constitutional compact of the classical mould. The result will be an unstable compact, as the history of Canada and modern Spain will testify. But, as a matter of empirical observation, I am unaware of any federal state, old or new, which does not presuppose the supreme authority and sovereignty of its federal *demos*.

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In Europe, that presupposition does not exist. Simply put, Europe's constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional *demos* and, hence, as a matter of both normative political principles and empirical social observation, the European constitutional discipline does not enjoy the same kind of authority as may be found in federal states where their federalism is rooted in a classic constitutional order. It is a constitution without some of the classic conditions of constitutionalism. There is a hierarchy of norms: Community norms trump conflicting Member State norms. But this hierarchy is not rooted in a hierarchy of normative authority or in a hierarchy of real power. Indeed, European federalism is constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and real power.

You would think that this would result in perennial instability. One of the virtues of the European construct is that it produces not only a surprisingly salutary normative effect but also a surprisingly stable political polity. Member States of the European Union accept their constitutional discipline with far more equanimity than, say, Quebec. There are, surely, many reasons for this, but one of them is the peculiar constitutional arrangement of Europe.

This distinct constitutional arrangement is not accidental. 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 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 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, Member States.

Whence the drive for a formal constitution of which the Fischer speech has been such a powerful catalyst?

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. As mentioned above, it is widely assumed, correctly it would seem, that the current institutional arrangements would become dysfunctional in an enlarged Union of, say, 25. 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.

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.

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’. A constitution is thought an appropriate means to place limits on the growth of Community competences.

Of greatest interest to me is the final normative and conceptual drive behind the discussion. Normatively, the disturbing absence of formal constitutional legitimisation 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

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be legitimised by a constitution which has the explicit consent of its subjects instead of the current pastiche which, like Topsy, just ‘grewed’.

Conceptually, the disquiet with the current European constitutional arrangement must be understood against a European constitutional discourse which for years has been dominated by a strange combination of Kelsen and Schmitt. It is Kelsenian in its attempts, under many guises to describe, define and understand the European ‘Grundnorm’—the source whence the authority of European constitutional disciplines derives. The search for this Kelsenian holy grail, whether or not acknowledged explicitly, underscores the great bulk of the academic literature theorising European constitutionalism. And this holy grail is, typically, understood in Schmittian terms: the search is for the *ultimate* source of authority, the one that counts in the case of extremity, of conflict. That is the true criteria of the ‘real’ Grundnorm.

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 reason the question of *ultimate* authority and constitutional Grundnorm seems so important is that we consider the integrity of our *national* constitutional orders not simply as a matter of legal obedience and political power but of moral commitment and identity. Our national constitutions are perceived by us as doing more than simply structuring the respective powers of government and the relationships between public authority and individuals or between the state and other agents. Our constitutions are said to encapsulate fundamental values of the polity and this, in turn, is said to be a reflection of our collective identity as a people, as a nation, as a state, as a Community, as a Union. When we are proud and attached to our constitutions we are so for these very reasons. They are about restricting power, not enlarging it; they protect the fundamental rights of the individual; and they define a collective identity which does not make us feel queasy in the way some forms of ethnic identity might. Thus, in the endless and tiresome debates about the European Union constitutional order, national courts have become far more aggressive in the last decade in their constitutional self-understanding. The case law is well known. National courts are no longer at the vanguard of the ‘new European legal order’, bringing the rule of law to transnational relations, and empowering, through EC law, individuals vis-à-vis Member State authority. Instead they stand at the gate and defend national constitutions against illicit encroachment from Brussels. They have received a sympathetic hearing, since they are perceived as protecting fundamental human rights as well as protecting national identity. To protect

national sovereignty is passé; to protect national identity by insisting on constitutional specificity is à la mode.

Thus, on this new reading, to submit to the constitutional disciplines of Europe without a proper Kelsenian constitution, which formally vests in Europe Schmittian ultimate authority, is something that not only contradicts an orderly understanding of legal hierarchy but also compromises deep values enshrined in the national constitution as well as a collective identity which is tied up with these values. Indeed, it is to challenge the idea of constitution itself.

Modern liberal constitutions are, indeed, about limiting the power of government vis-à-vis the individual; they do, too, articulate fundamental human rights in the best neo-Kantian tradition; and they reflect a notion of collective identity as a community of values which is far less threatening than more organic definitions of collective identity. They are a reflection of our better part.

But, like the moon, like much which is good in life, there is, here, a dark side too.

It is, first, worth listening carefully to the rhetoric of the constitutional discourse. Even when voiced by the greatest humanists, the military overtones are present. We have been invited to develop a *patriotism* around our modern, liberal, constitutions. The constitutional patriot is invited to *defend* the constitution. In some states we have agencies designed to protect the constitution whose very names are similar to our border defences. In other countries, we are invited to *swear allegiance* to the constitution. In a constitutional democracy we have a doctrine of a *fighting* democracy, whereby democratic hospitality is not extended to those who would destroy constitutional democracy itself. To be a good constitutional liberal, it would seem from this idiom, is to be a constitutional nationalist and, it turns out, the constitutional stakes are not only about values and limitations of power but also about its opposite: the power which lurks underneath such values.

Very few constitutionalists and practically no modern constitutional court will make an *overt* appeal to natural law. The formal normative authority of the constitutions around which our patriotism must form and which we must defend is, from a legal point of view, mostly positivist. This means that it is as deep or shallow as the last constitutional amendment: in some countries, like Switzerland or Germany, not a particularly onerous political process. Consequently, vesting so much in the constitutional integrity of the Member State is an astonishing feat of self-celebration and self-aggrandisement, of bestowing on ourselves, in our capacity of constituent power, a breathtaking normative authority. Just think of the near sacred nature we give today to the



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constitutions adopted by the morally corrupted societies of the World War II generation in, say, Italy and Germany and elsewhere.

A similar doubt should dampen somewhat any enthusiasm towards the new constitutional posture of national courts which hold themselves out as defending the core constitutional values of their polity, indeed its very identity. The limitation of power imposed on the political branches of government is, as has been widely noticed, accompanied by a huge dose of judicial self-empowerment and no small measure of sanctimonious moralising. Human rights often provoke the most strident rhetoric. Yet, constitutional texts in our different polities, especially when it comes to human rights, are remarkably similar. Defending the constitutional identity of the state and its core values turns out in many cases to be a defence of some hermeneutic foible adopted by five judges voting against four. The banana saga, which has taxed the European Court of Justice, the German Constitutional Court, the Appellate Body of the World Trade Organisation, and endless lawyers and academics is the perfect symbol of this farce.

Finally, in an exquisite irony, there is also, in a constitutional ethos which, while appropriately suspicious of older notions of organic and ethnic identity, at the very same time implicitly celebrates a supposed unique moral identity, the wisdom, and, yes, the superiority, of the authors of the constitution, the people, the constitutional *demos*, when it wears the hat of constituent power and, naturally, of those who interpret it.

It was Samuel Johnson who suggested that patriotism was the last refuge of a scoundrel. Dr Johnson was, of course, only partly right. Patriotism can also be noble. But it is an aphorism worth remembering when we celebrate constitutional patriotism, national or transnational, and rush to its defence from any challenges to it. How, then, do we both respect and uphold all that is good in our constitutional tradition and yet, at the same time, keep it and ourselves under sceptical check?

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, 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. The problem of Haider's Austria is not an absence of democracy. The problem is that Austria is a democracy; that Haider *was elected democratically*, and that even the people who did not vote for him are content to see him and his party share in government. 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 with the source of these attitudes at a deeper level. 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' statement, 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

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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 current European constitutional architecture represents this alternative, civilising 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 in this chapter:

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 being 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 internalisation—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 organisation 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 States 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 the 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, the act of doing 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.

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, 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 recognise the very concepts and principles I have articulated, my answer is simple: Europe now has such a constitution. Europe has charted its own brand of constitutional federalism. It works. Why fix it?



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