

THE POST-NICE-PROCESS: TOWARDS A EUROPEAN CONSTITUTION?

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ÖZET

Avrupa Birliğini genişleme sonrasına hazırlama amacını güden Nice Antlaşması bu amaçla kurumsal yapıda birtakım değişiklikler öngörmekle birlikte genişleme sonrasının tüm problemlerine çözüm getirmekte yetersiz olarak değerlendirilmektedir. Özellikle Avrupa Birliğinin gelecekte alacağı şekli ve yapısını belirlemek, amaç, araç ve yetkilerini gözden geçirmek, bu çerçevede anayasal nitelikte bir metin hazırlamak ihtiyacı ile "Nice Sonrası Süreç" adı verilen bir girişim başlatılmış ve bu girişim Laeken Zirvesinde alınan kararlar bir "Avrupa Birliğinin Geleceği Kurultayı"nın oluşturulması ile yeni bir aşamaya girmiştir. Nice Zirvesi Sonuç Bildirisinde 2004 yılında toplanması kararlaştırılan Hükümetlerarası Konferans'a hazırlık niteliğinde çalışmalar yürütecek olan Kurultay'ın en önemli konularından biri Avrupa Birliğinin bir anayasaya ihtiyacı olup olmadığı ve bu anayasanın niteliği ve içeriği olarak ortaya çıkmaktadır. Bu çalışmada söz konusu sürecin niteliği, amacı ve işleyişi üzerinde durulmakta, süreç sonunda ortaya çıkması muhtemel anayasal antlaşmanın niteliği ve içeriği incelenmektedir.

1. From Amsterdam Leftovers to Nice Hangovers

The Treaty of Nice was signed on 26 February 2001 and will come into effect after all fifteen EU Member States have ratified it. But as ratification of an international treaty requires changes to the Irish Constitution, Ireland had to hold a referendum on the Treaty (and on three other matters) on 31 May. Though the Irish government postponed the referendum until June because of the perceived negative effects of the foot-and-mouth crisis, the majority of the Irish voters then dismissed the Treaty. This came as a surprise to the other Europeans because traditionally Ireland has been among the most committed of EU members benefiting clearly from EU membership. But a well-organised anti-EU campaign argued convincingly that the Treaty would endanger Irish

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neutrality and relegate the country to the EU 'second division'. Also by 2004 Ireland is predicted to become a net contributor to the EU budget. Therefore, governmental appeals to acknowledge EU benefits which helped to boost the domestic economy and now to support the Treaty and EU enlargement did not convince the Irish electorate. In spite of problems with democratic legitimacy, the European heads of government were unwilling to renegotiate painful amendments to the Treaty in favour of a single member state. Thus, they encouraged Dublin to just repeat the referendum at the earliest convenient date under the same premises while declaring to respect Irish neutrality in the future.

While giving the government a second chance to convince the sceptical Irish with slogans like "Yes to Europe and Yes to Nice" and "It's better 2 B Inside" (Frankfurter Allgemeine Zeitung 16.10.2002: 3) the pending Irish referendum, which will take place on 19 October 2002, caused disarray in Brussels not only with the timetable. Admittedly, in the meantime most other Member States have already ratified the Treaty via a parliamentary process but the Treaty was expected to come into effect in early 2002 at the latest (Miller 2001:7, 51-58). And, indeed, various elements in the Treaty do not require immediate implementation and will be enforced at a deferred date. The whole Treaty will therefore take effect over time, rather than upon ratification by the Member States.

What matters more is the fact that the new Treaty amends the Treaty of Amsterdam provisions on the EU institutions in order to prepare the Union for enlargement. It was concluded on 10 December 2000 after a lengthy meeting of the Intergovernmental Conference (IGC) in Nice and followed by the European Council summit that agreed on the institutionalisation of the European Security and Defence Policy (ESDP). Complicated diplomatic formulas were agreed on these essential areas of institutional reform, the so-called "leftovers of the leftovers" (Zervakis/Cullen 2002: 9) from the last IGC meetings in 1996-97 preparing the Treaty of Amsterdam which then amended the Treaty of Maastricht. In Nice it was decided on the size of the Commission and the Parliament, the weighting of votes in the Council and the increase of Treaty Articles that will in future be subject to Qualified Majority Voting rather than unanimity. Also the Treaty amends provisions on the procedure for enhanced cooperation and a range of other articles effecting the EU judicial structure *inter alia* (Miller 2001: 16-51; see Müller-Brandeck-Bocquet 2002, Usher 2002, and Téo 2002). The Nice Treaty aims to prepare the Union to expand to 27 new members. Failure to ratify and implement the Treaty within the end of the year could have serious repercussions for the enlargement process to be decided upon finally at the December summit in Copenhagen, particularly if rejection of the Treaty meant that parts of it had to be renegotiated, as in 1992/93 after the negative Danish referendum on the Treaty of the European Union (TEU).

The Nice Summit of December 2000 was officially hailed as making the European Union fit for enlargement, but it has also been dismissed by many commentators as a half-hearted and inadequate attempt at institutional reform (for a thorough media analysis see Miller 2001: 9-16; Zervakis/Cullen 2002: 9). Particularly given the Irish "no" to Nice, the legitimacy and effectiveness of the EU as a whole have been called into question. The European Commission and European Parliament were disappointed with the agreement reached at Nice. They regarded it as a somewhat weak compromise engineered to appease the larger member States such as Germany and France at the expense of EU institutional influence (Brok/Höfer 2002: 103-11). Among the Member States there was a general consensus that the new Treaty was probably the best possible outcome, given the sensitivity of some of the subject matters. But during their long arguments at Nice about the future balance of power between them, the EU heads of government as the real power brokers showed a remarkable lack of mutual trust that one doubts whether they are adequately prepared for enlargement in a political sense. Intergovernmentalism failed once again to work in the common European interest. The applicant states were among the most positive about the Treaty because they now see "the green light to membership" and have yet shown but a slight interest in how European Governance (see the Commission's White Paper in COM 2001 428; European Law Review 46, 2001: 411/12) works by itself (Fiala 2002: 197-203; Jasinski 2002: 205-212; Duff 2001: 13, 19).

In terms of summitry, the Nice IGC showed serious organisational weaknesses. The physical and material limitations of the venue and the increasingly difficult working conditions over an extended period led not only British Prime Minister, Tony Blair, to moan that the EU could not go on doing business like this. The Treaty amendment agreed at Nice to hold one European Council meeting per Presidency in Brussels as from 2002, and all summits in Brussels when there are 18 members, was perhaps the least controversial of all amendments (Declaration 22 "On the Venue for European Councils" 2000: 78). In some of the more difficult areas stated national preferences had barely yielded since the negotiations were launched in February 2000. The IGC reached a mutual agreement in the essential areas of institutional reform, the so-called 'Amsterdam leftovers'. Though literally speaking there are no 'Nice leftovers' to complain about, the results effecting the equilibrium of the EU "institutional triangle", composed of the Council, the Commission and the European Parliament, seem to be so uneven and controversial that they might yet prove in reality to be inadequate. This may indeed be the case with a rapid eastward extension of the Union embracing ten new candidate states from 2004 (plus Bulgaria and Romania from 2007 onwards) or for expansion beyond 27 members, especially if the EU does not make extensive use of a system of variable geometries foreseen in the Nice Treaty. Variable geometry would allow the possibility of resorting to closer cooperation with a minimum of eight states,

a necessity in an EU of more than 15 members (see Gozi 2001 and Yataganas 2001). Like a hangover, things can only get worse before they get better.

However, the problematic Nice Treaty is not the only outcome of the Summit. Even before the Treaty had been signed, views were forthcoming on preparations for the next IGC. The proponents of a closer Union, notably Germany, won agreement to launch a new IGC, potentially leading to a "Constitution for Europe" (see for instance Weiler 1999; for a recent bibliography see Wissenschaftliche Dienste des Deutschen Bundestages, 2002).¹ Therefore, the Nice Treaty includes a Declaration in Annex IV on some areas for the next IGC to consider when it is supposed to convene in 2004 tackling issues raised by the Nice process and matters that will become more urgent as enlargement begins. In this way, the IGC institutional reform process itself is becoming temporarily conditioned by the enlargement process.

In my view, three questions have dominated and continue to pervade the post-Nice constitutional process:

1. Has the Treaty of Nice truly prepared the EU institutionally for enlargement, and what further institutional changes are needed to meet this objective?
2. What scope is there - politically and legally - for a new set of constitutional arrangements, especially ones providing for a new, clear delineation of powers and responsibilities between the Union and its member states?
3. What are the prospects for conferring constitutional status upon the Charter of Fundamental Rights of the European Union, a step forward that might initiate a new impetus for the EU's development towards a federal or quasi-federal entity?

Essentially, the EU aspires to clarify "who is responsible for what" and what is the right balance of powers or competences among the multiple levels of the European governance system. With the "simplification of the Treaties" as an ultimate EU goal, a constitution could address the delineation of powers issue

¹ There is some confusion as to whether the constitution of the EU already exists, or whether it is something that may (or may not) come into existence in the future. Factually, the term "European Constitution" is often referred to describe the current EU system (Treaty and legal order). This is often justified by citing the European Court of Justice. In a few of its judgements it uses the expression "constitutional charter" to name the EEC Treaty. For a discussion see Witte 2001: 21-24.

while reinforcing the principles of subsidiarity and proportionality and increasing the transparency of the ever complex EU institutional framework. Therefore, not only European political leaders, but also ordinary citizens are left asking what a European constitution will look like and what it will mean for the future of the EU and its members.

In the last year, a series of events have made the previous questions increasingly relevant, stimulating European integration and the constitutional debate since Nice. During the Belgian Presidency, the "Declaration of Laeken" emerged from the summit of the European Council in December 2001. In this declaration, the EU heads of state agreed to establish a Constitutional Convention for the future of Europe, headed by the former French President Giscard d'Estaing. Comprised of various national, regional and EU political figures, especially representatives from the national and EU parliaments, this Convention had its plenary session for the first time in 28 February 2002 in the Brussels location of the European Parliament. Until mid-2003 it will attempt to compose a constitutional proposal in order to prepare the EU for the next IGC in 2004 and propel the member states to reflect upon the possibilities and logistics of a European Constitution. The Convention also includes delegates from all the Accession Countries including Turkey which signifies an important precedent.

Following a discussion on the deeper reasons for initiating the Constitutional debate, especially in Germany and France, I will focus next on the Nice Declaration which inaugurated the post-Nice process and is already widely known as the timely debate on a constitution for the European Union. Given the imminent enlargement of the EU, which is going to incorporate soon up to ten Central Eastern and South-eastern European Countries, the necessity of further institutional reforms becomes even more apparent. Therefore, I will finally try to evaluate whether the Constitutional Convention is an appropriate new instrument for a final breakthrough to solve the ever lasting question of determining the *finalité* or institutional future arrangement of the enlarged European Union.

2. Relaunching the Constitutional Debate: The Fischer Debate and Beyond

Europe (or rather core Europe) seems for some time to be in need of a formal written constitution, at least if the emerging conventional wisdom can be trusted. Leading politicians of various parties and cleavages in the countries of Western Europe, but, especially, in Germany and France, have been in rare accord with academics from various disciplines and the media (Witte 2001: 24, note 11; Chrysochoou 2002: 2-5; Kühnhardt 2002). Despite a prior decision of

the June 1998 Cardiff European Council to start a broad debate on the future of the Union, two speeches made by the German foreign minister Joschka Fischer in the European Parliament on 12 January 1999 and the famous one on "Quo vadis Europe?" at Berlin's Humboldt University on 12 May 2000 (http://www.auswaertiges-amt.de/6_archiv/2/r/000512c.htm) triggered a renewed interest by the political actors in Europe to reflect in public on a written European constitutional treaty (*Verfassungsvertrag*) as one of the *leitmotifs* of the EU and an indispensable element of a legitimating reform package (on academic reactions see Joerges / Mény / Weiler 2000).

The idea itself of giving Europe, and now more concretely the EU, a federal type constitution, one has to admit, was not very original and was at least as old as the history of European integration (Dastoli 2001: 55). But it was due to the tendency by the "private individual citizen" and MP Fischer, head of the German Green Party and Gerhard Schröder's foreign minister, to portray himself as the heir to Helmut Kohl's federal visions for Europe that his proposal received such a huge publicity and was immediately translated into three languages (see Yoerges, Mény, Weiler 2000). Even the detached "Economist" (28.10./3.11. 2000) came out with its own draft of a Constitution, which is another sure sign for the worldwide interest in the future of the regional integration project. Together with the subsequent responses given by French President Jacques Chirac before the German parliament, the *Bundestag*, a few weeks later, Fischer brought back to the attention of public opinion the following four key elements to be focused on in the process of European unification (Witte 2001: 25/26; Chrysochoou 2002: 3):

1. The separation of the essential from the less important provisions in the existing text of EC and EU Treaties. Such a "basic treaty" (*traité fondamental*), already supported by the Dehaene Report in 1999 (following earlier suggestions by the EP) and the Robert Schuman Centre in May 2000, would allow the truly constitutional norms to become more visible and would thus receive appropriate attention.
2. A clearer definition of the "vertical" division of powers between the EU and the member states (*Kompetenzabgrenzung*). The idea of a *Kompetenzkatalog* was strongly emphasised by the German Bundesländer, and remained distinctly German for some time (Leonardy 2002).
3. The incorporation of a basic human rights chapter or preamble based on the Charter of Fundamental Rights of the EU which was elaborated during 2000. The Summit however refused to confer the legal status of an EU Treaty on the Human Rights Charter (see Walker 2002).

4. A reform of the "horizontal" division of powers to reinforce efficiency, transparency and democratic control (Chirac in his Berlin speech). Reforming the role and decision-making procedures of the European institutions was also the purpose of the last two IGCs. But the two continental political leaders broadened the debate by suggesting a "European government" and a second chamber of the EP with delegates of the national parliaments of the member states.

Far from encouraging the abolition of the European member states because of the wealth and diversity of their historically determined cultures and traditions, the visions of Fischer's "European Federation" and Chirac's "Europe of Nations" concepts would surely not create a European federal state but, at most, a "federation of nation states" (Witte 2001: 27). A constitutional treaty is not expected to modify the legal nature of the EU's founding Treaties but as an international agreement it would be different from the present European treaties by its content and by a particularly solemn procedure for its adoption. Still it would be based on the collective decision by the member states, made in accordance with the relevant rules of public international law and within the limits set by their own national constitutions. At a closer glance their proposals follow two rather distinct, but not necessarily exclusive objectives:

1. On the one hand, a systematic approach is demanded to order the current fragmented and intransparent EU system. Such a concise constitutional document would hopefully increase the citizen's understanding of the basic rules of a better-structured EU and would favour their participation in the integration process.

2. On the other hand, the European integration process would shift in a particular direction oscillating between closer and looser forms of integration trying to make the Union more perfect.

Since then, all protagonists of this full-sized constitutional debate on the future of Europe are aware of the fact that, without a radical transformation of its institutions, the European Union will be unable to withstand the impact of its own enlargement. Consequently, the Community risks to disintegrate, with catastrophic consequences for peace, democracy and well-being in Europe. In the meantime, the final destination of the integration process, the "*finalité politique*", whereby referring to the two crucial concepts of "constitution" and "federalism", and the time frame within this might be reached, have become hot issues that are now widely discussed (see Leslie 2002). However, the debate is still contaminated by the presence of national ambiguities and contradictions. Whether Tony Blair, Jacques Chirac or Gerhard Schröder intervene, all claim their respective country as sole role models for a new Europe. In this way, they

confirm the saying of Carlo Schmid, one of the founding fathers of the German constitution (along with Konrad Adenauer), who once stated that basically it should be easy to compose a European Constitution, you just need to take out the best parts of the national constitutions of the Member States. But is this really so?

In a constitutional sense, the European Union is founded on a chain of basic treaties, which have become effective through ratification in the Member States of the Union: the Treaties of Rome in 1957, the Single European Act in 1986, the Treaty on European Union (Maastricht Treaty) in 1991, the Treaty of Amsterdam in 1997, the Treaty of Nice in 2000, and the Charter of Fundamental Rights (2000) all constitute the current path from the European Economic Community to the European Union. Whereas some scholars think the consolidated Treaties already form a kind of a 'constitutional arrangement' or a 'pre-constitution' of the European Union, others refuse fiercely to accept such terminology. They argue that this wording does not respect enough the basic distinction between states and non-state organisations like the EU. A European Constitution should be implemented only after a deliberate decision has been taken by the peoples of Europe. A third group of scholars, finally, adheres to the description of the EU legal order as a constitutional system but criticises it for being a "constitutional system without constitutionalism" because of the perceived democratic deficit in legitimacy and the lack of judicial protection of individual rights, mainly related to the EU's intergovernmental pillar system (see Weiler 1999; Witte 2001: 23).

In sharp contrast, the use of the term "constitution" was absent from the official debate ever since the Amsterdam IGC. The reason for this intended abstention may be found in the ambiguous nature of the EU. State-like, the Union is a menace to those who fear a super state, but not being a state, it disappoints the ardent supporters of a European statehood in the long run. The heads of the member state at the Helsinki summit in 1999, therefore, decided unequivocally to continue to camouflage the Union by labelling it simply as *sui generis*. Instead, Peter Ludlow (2001: 2-6, 22) tries to convincingly flesh out the term "European federation of states". Though this labelling is in Peter Leslie's view (2002: 229) "self-contradictory", Ludlow's authoritative line of arguments describes impressively the present-day realities as well as the future vision of a minimalistic European "confederalism":

1. The European Council, not the Commission, is the core institution of the EU. The Monnet conception of the European Community must be abandoned as a false description of the system as it developed in spite of the official rhetoric.

2. Intergovernmentalism is not contrary to supranationalism, but its precondition. The Council, though intergovernmental in composition, is supranational in the way it works. It can only be effective through its member states that are central elements collectively in the council and at the level of administration.

3. The EU is in the words of Arend Lijphart (1969; 1979) is a "consociational democracy" and is committed to consensus which is a basic principle since the still-applicable Luxembourg Accord of 1966. If it cannot be expected that a member state, regardless of size, decides contrary to its perceived vital national interests, than this implies that the elaborate weighting of votes in the Council and the rules for Qualified majority Voting, as set out in the Nice Treaty, are of secondary importance.

4. Despite the key importance of the European Council, it is essential to involve the political elites of the member states, including those in opposition, in the work of the EU, through a European Parliament with an upper house (Senate) consisting of representatives who remain members of national parliaments to play their role in the governance of the Union, including policy implementation.

5. There is no need for new or additional competences to be transferred to the EU.

6. The real essence of needed reforms are: accountability, a more efficient executive focusing on the European Council, the Council, the Council Secretariat, COREPER, the Presidency, and the High Representative. Ludlow avoids talking about the Commission.

7. The EU will become increasingly asymmetrical and, therefore, exceptions must be foreseen for multiple opt-outs and should not be resisted. In the reforms envisioned for 2004, no state should be obliged to conform, but dissenters cannot veto.

If Ludlow is right in his description of the main features of the EU in which the member states exert full control, then the Union is far from becoming more federal. In virtually all existing federations there are at least two major orders of government that have no capacity to dominate nor to control the other, or even to determine the extent of its policy role. In a unitary (even regionalised) system, by contrast, the centre controls the entity; in a confederal one, on the other hand, the component parts exercise control collectively (Leslie 2002: 226).

Today, there are mainly four factors which explain the renewed interest in a formal constitution rather than to acquiesce in the existing 'constitutional arrangement' based on the Treaties:

1. The first factor is political. It is widely assumed that the current institutional arrangements would become dysfunctional in an enlarged Union of up to 27 (or even 28, including Turkey). A major overhaul seems to be called for. Some even believe that the current constitutional arrangements would not work. In particular, the absence of a formal constitution leaves all important constitutional principles of the Union at the mercy of one or the other Member State's veto powers thus threatening both the principles of uniformity of the law and of equality before the law as well as an orderly functioning of the polity. A formal constitution, enjoying the legitimacy of an all-European *pouvoir constituant*, would, once and for all, settle that issue.

2. The second factor attaches importance to the constitutional procedure. The process of adopting a constitution - the debate it would generate, the alliances it would form, the opposition it would create - would make the public in Europe conscious of the democratic and civic ethos (the *Wertegemeinschaft*) and praxis of the polity. Here one would wish to see a discussion, for instance, on the implementation of the unique European social model, in case there is one.

3. The third factor aims at the material construction of the Union. A constitution is thought not only by the German Länder to be an appropriate means to place limits to the growth of Community competence.

4. The fourth and perhaps most important factor deals with the norms and the concepts behind the constitutional discussion. The disturbing absence of formal constitutional legitimisation is problematic for a polity that makes heavy constitutional demands on its Member States, their institutions and their peoples. Therefore, obedience to European norms should be legitimised by a written constitution which has the explicit consent of all its subjects, instead of the current situation of indirect governmental consent.

3. Fostering the Constitutional Debate: The Nice Declaration on the Future of the Union initiating the post-Nice process

The European Council in Nice of December 2000, the longest and probably most problematic one in the history of the Union, has promoted and substantiated the constitutional discussions further. A substantial and vocal minority, proponents of "an ever closer Union of the peoples of Europe" (first line of the Preamble of the Treaty of Rome), notably Germany and Italy, won

agreement to launch a new Intergovernmental Conference, potentially leading to a European Constitution in 2004. There has already been some criticism of the timing of the next IGC, as there will also be elections to the European Parliament in June that year, thus adding to an already heavy European agenda. On the other hand, it was argued that an IGC debate at this time would offer the European electorate a broad range of topical issues on which to base their voting preferences, thereby giving the IGC process a greater degree of democratic legitimacy.

The Declaration on the Future of the Union represents therefore both success and failure of the Nice Intergovernmental Conference (IGC). It signifies failure since the provisions of the Declaration are in practice a response to all that was lacking in Nice. It also constitutes a success since it is a positive reaction which opens the doors to a new way of thinking about Europe.

According to the Declaration four issues are to be addressed the so-called "post-Nice" constitutional process:

1. How to establish and monitor a more precise delimitation of powers between the EU and the member states in accordance with subsidiarity and proportionality.

2. The legal status of the Charter of Fundamental Rights, which was only 'proclaimed' at Nice.

3. A simplification of the Treaties to make them clearer and better understood without changing their meaning.

4. The role of national parliaments in the European architecture.

In the Nice Declaration on the Future of the Union the objectives of the Agenda, the procedure, and the working method as well as the timetable for the reform process is already outlined:

a) Objectives

The Nice Declaration states the topics for the next reform, but does so in open-ended rather than exhaustive fashion and makes it quite clear that the four above mentioned specific topics may be supplemented by others. The four objectives are already in themselves highly significant since the allocation of powers, the role of the national parliaments, the simplification of the Treaties and the status of the Charter of Fundamental Rights are issues that profoundly

affect the constitutional structure of the Union and even its founding principles. They correspond quite closely to the themes mentioned in the pre-Nice debate. Only the word "constitution" is carefully avoided.

In any event, these four issues, and two in particular, represent a complete turnabout in the process of European integration: the establishment of a clearer demarcation between the competences of the European Union and those of the Member States (in accordance with the subsidiarity principle) and the role of the national parliaments in the structure of the Union. The first demand for the drawing-up of an inventory of powers is characteristic of a federal system. Once applied to the Union, it would involve drawing up an exclusive list of powers to be conferred on the European Union, a second list relating to the Member States and a third list of shared powers, and in each specific case it would be determined on the basis of the subsidiarity principle. If this were to come about, it would constitute a radical break with the Community (or Monnet) method since the gradual transfer of powers to the Union would be replaced by the establishment once and for all (in the manner of a frozen image) of the various spheres of competence. But this is totally at odds with what has been done in the past.

This also applies to the second topic, namely finding a new role for the national parliaments within the structure of the European Union (see for a full length discussion Maurer/Wessels 2001). Historically, the Community's Parliamentary Assembly was made up of national MPs and only since 1979 has the European Parliament been elected by universal suffrage. Such a step reflects both the principle of democratic legitimacy and the fact that the EP has developed from a purely consultative body into one with powers of co-decision. The possible involvement of the national parliaments in legislative decision-making raises numerous questions that need to be discussed in depth. One has to draw the general public's attention to the radical change which the setting of these two objectives will make to the development of the EU. Such a change calls for a major public debate regarding the type of Union which its peoples want. Therefore, this is the reason why the IGC in 2004, instead of involving revision of the Treaties like the previous revisions, will assume constitutional significance. What we are faced with is a debate on the very nature of European integration. Whatever topics are placed on the table, they must provide answers to two questions: what do we want to do together in Europe and what role do we want Europe to play in the world?

b) Procedure, working method and timetable

Though the substantive aspects of the future constitutional arrangements are the main objects of the debate, there is more interest for the formal aspects

of constitutionalisation such as the procedure for adopting the reforms. The reason, why the method seems to a certain extent to be more important than that of the content, Jacques Delors commented:

"...by means of the debate on the Constitution, the citizens of Europe may be led to take an interest in Europe...Not only the governments, the political parties and the parliaments, but also civil society, social partners, intellectuals...paving the way for the formation of a European public opinion...and an education in democracy."(Le Monde, 1.2.2001: 16)

The Nice Declaration describes, therefore, a three-stage process:

- The first stage, launched in the course of the 2001 Swedish and Belgian presidencies, is to comprise a broad debate involving the EU-institutions, the national parliaments and the general public. The main objective of this initial stage (in addition to noting the opinions and the initiatives which emerge from the public debate, including even "university circles") is to develop a strategy for the second stage, to which the conclusions of the Laeken European Council in December gave further substance.

- The second stage will both continue the public debate initiated in 2001 and formalise it during 2002/3. In order to keep the process open, the nature of the type of intergovernmental exercise has to be altered in a way that - as the European Parliament has expressed it - 'a drafting and proposals forum' must be formally established. Despite its pragmatic achievements in the last 15 years, neither the work of a committee of wise men nor the intergovernmental conference mechanism are regarded as appropriate for the drafting and adoption of a constitution, especially after the last frustrations in Nice. But the first Convention mechanism, which drew up the Charter of Fundamental Rights, was esteemed as the sole alternative to purely intergovernmental high-level diplomatic negotiations. Such a 'convention' has some advantages: it enables representatives of the Member States (governments and national parliaments) to work together with representatives of the Community institutions (the EP and the Commission). The Convention was thus constituted in a form serving to combine political representativity with legal training, for both are necessary in order to draw up a text intended to become part of the Treaties. The convention system made it possible to abandon unanimity, because its bodies acted collectively and could not veto each other's proposals. Furthermore, each body proceeded on a basis of consensus, paving the way for broad majorities that did not require the unanimous agreement of all participants. And the most powerful argument in favour of the convention model is the result that it managed to agree upon the Charter of Fundamental Rights after just nine months of discussions.

- The third and final stage will be the 2004 Intergovernmental Conference, as provided for in the Declaration. If it is to become an effective method for reforms of the Treaties, the new IGC cannot merely repeat the arrangement for the previous conferences. It must mark the culmination of the groundwork carried out by a convention reflecting the outcome of the open public debate in the years leading up to the Conference.

In adapting the Convention's working method to the reform of the Treaties two issues are worth to further consideration:

- the composition of this open forum should be as uncontroversial as possible. In order to increase democratic legitimacy, four parties should be involved: the national parliaments, the EP, the Commission and the representatives of the governments.

- the forum should not play a decision-making role since that would not be allowed under the Nice Treaty. Here there are two ways to be considered: either to prepare for the IGC by pointing out alternatives within the various fields and, therefore, at least presenting a consensus *vis-à-vis* the agenda for the conference or to draw up an agreed project like the model of the Convention which drew up the Charter of Fundamental Rights.

Support for a European constitutional settlement - always a contentious project - seems to be growing, although it does so for different reasons among different constituencies at the national and European levels, mainly due to the inexistence of a unifying European constitutional *demos* (Chrysochoou 2002: 5). However, the post-Nice European dialogue is characterised at the same time by considerable reservation and scepticism, as numerous interest groups and national political actors prefer to sustain a limited European Union. In contrast to the Euro-philés (or integrationists as they are often been called) devoted to a federation, numerous opponents of further European integration dispute the need for a constitution because they feel such a document would clearly enhance the state-like quality of the EU. Consequently, the post-Nice socio-political debate seems to be even more divided between pro-integrationists and those who favour a nationally oriented conglomeration of loosely organised European countries. On the other hand, a number of Euro-sceptics support the adoption of a constitution as a device which would limit EU competences. As a result, the post-Nice process encompasses a complex debate that cannot be classified simply along traditional left-right scale nor the conventional "pro" versus "anti-integration" division.

4. The Constitutional Convention: A Crucial Role for Implementing a European Constitution?

A year after the failure at Nice, the European Council gathered new momentum at Laeken and laid the foundations for a Convention tasked with preparing long awaited institutional reforms starting its work in early 2002 (see Riedel 2002; Vos/Beillieul 2002). The term "Constitution" can be found here for the first time in an official Council's Conclusion after a summit (Brok/Höfer 2002: 115). It is remarkable to note when reading the Laeken Declaration that with regard to the issue of strengthening the role of the European Parliament or the national parliaments, the heads of member state governments asked simply whether that role should be strengthened at all, and whether the creation of a new institution representing the national parliaments should be considered. As regards the Commission, on the other side, the question raised was how to strengthen its authority and efficiency. Similarly, the governments asked how to guarantee mutual checks and balances among the Union bodies and how to simplify and speed up the co-decision procedure between Council and Parliament. The term "new institution" that was used with regard to the national parliaments was certainly not chosen by coincidence. "New" could mean "supplementary", reflecting the governments' reluctance with regard to the idea of creating a second chamber of the EP composed of members of the national parliaments. Moreover, such a "new institution" could cause additional complications in the decision-making process which is not that convincing. Is the idea to strengthen the parliaments' right of oversight or simply to extend their right to be informed and consulted? Should the national parliaments play a new collective role within the Union, or is their role to be limited to individual scrutiny of their respective governments? Should they play a role in those areas in which the EP does not have competence? The Convention is challenged to find answers to all those questions until mid 2003 at the latest.

The debate on the role of the national parliaments in the EU institutional triangle could easily be extended to include the question of which body should in the future be the legislative power-holder. Can the Council continue to exercise both executive and legislative power? Should not the national parliaments be more closely involved in co-legislation, in a scenario where the EP would be the main legislative body? Once it is realised that the Council performs that double function - contrary to the principle of the separation of powers - an inter-parliamentary body is no longer perceived as the core for a "third" or "supplementary" chamber, but rather as a possible second chamber (Hilger 2002:9).

When the Convention convened for the first time in 28 February it consisted of 105 members, among them just 66 with full voting rights (30 Member of National Parliaments, 16 MEPs, 15 governmental envoys, the

President and his two vice-presidents, and two Commissioners). Thus the deputies of the parliaments in the EU have a clear majority in the Convention. Among this circle, the Convention presidential committee is formed by 12, mainly governmental, members and additionally three state representatives of Spain, Denmark and Greece, representing the EU Presidency. For the first time, the 13 Candidate countries are permitted to send their representatives (one governmental envoy and two MPs). They are present at all meetings but cannot prevent a formal consent between the member states (Kaufmann 2002: 30).

Members of the Convention fall into three ideological groupings due to their shared values on the future of European integration: On the one hand there are the Euro-phobes who want to stop the post-Nice process and re-nationalise parts of the Union. Then opposite to them are the enthusiastic Euro-federalists who aim to define once and for all the *finalité* of the Union. Somewhere in the middle is the large majority of Euro-realists who want to consolidate and improve the present "institutional chaos". But, so far the Convention has not overcome the problems with its image, failing to make its work more visible (Bond 2002. 20).

Unfortunately, the share of women among the Convention participants is slightly over ten percent (Kaufmann 2002: 31). Furthermore, the European Council's selection rules practically favour the representatives of the two major political party families in the EU, the Social Democrats and Conservatives as well (see Johansson/Zervakis 2002). Then, in the presidential committee the state nominees dominate clearly over the elected deputies and this occurs in a far more striking way than in the former Convention on the Charter of Fundamental Rights. One should recall that the heads of the member states already named the chairman and his vice deputies far in advance of the first session of the Convention. Regarding the administrative support for the Convention, it comes according to the Laeken Declaration from the secretariat provided and controlled by the Council and its member states. The participation of Commission and EP staff was considered only as a possibility, but did not materialise (Bender 2002: 66).

Also one can be concerned about the problems with the delivery of policies, their implementation, and the future changes in the institutional design to which the Convention does not pay enough attention.

Besides the plenary sessions that take part in public, six working groups headed by members of the presidential committee have been set up according to the main issues to be treated: on Subsidiarity, on the Charter of Fundamental Rights, on the legal personality of the Union, on the National Parliaments, on Complementary Competencies (a neat new title for an old problem) and on

Economic Governance. The president has suggested that more groups like Justice and Security could be installed depending on the work load of the Convention (Bond 2002: 19).

In the first six months of its existence the Convention was still in the listening phase, with consultation of the Commission regarding the objectives of a "Constitutional Treaty" (COM 2002, 247: 2), a variant of NGOs representing civil society and a Youth Convention. But even then substantive discussions about some of the key issues occurred. Formal speeches in the plenary sessions are now more often interrupted by other members who wave a 'blue card' to show the president its intention to comment. Some form of dialogue is starting, with members commenting on each others speeches rather than simply reading prepared statements. The real hard work is happening outside the plenary meetings. Party networks and national caucuses are gaining prominence as the contributions in plenary are now grouped by the Secretariat to reflect the main elements in the Convention's composition: MEPs, national parliamentarians, governmental nominees. What the candidate countries have in common is becoming gradually clearer (see Hajos et al. 2002). But the clearly demanded dialogue with all elements of civil society has not yet convincingly taken place.

But the historic opportunity of the Convention remains clear: though substantive changes from the present situation may not be realised in the long run, the main effect of the constitutionalisation might lead to a higher degree of formalisation and clarification of the constitutional principles characterising the EU political system today.

Conclusions

Finally, because of the lasting absence of one European people and state, I would argue with Joseph H.H. Weiler, the eminent Harvard scholar, against a formalised written constitution but suggest to keeping the 'unique brand of European constitutional federalism, the status quo'. The introduction of majority voting in most domains of the Single Market and the establishment of the European Monetary Union caused the most dramatic institutional evolution in Europe. The combination of a 'confederal' institutional agreement with a 'federal' legal order is the distinct constitutional arrangement that marks Europe's *Sonderweg* - its special way and identity. Originally, in a welcome decision, Europe rejected the federal state model. In the most fundamental statement of its political aspiration articulated in the first line of the Preamble of the Treaty of Rome (and repeated in all subsequent Treaties since then), the gathering nations of Europe "...determined to lay the foundations for an ever closer Union of the peoples of Europe". Thus, even if European integration will once become a reality, the distinct people hood of its components is to remain

intact - in contrast to all federal states which assume the existence of one people. Consequently, the Treaties have not changed their original intention as found, for instance, in Article 2 of the European Community Treaty in effect, aspiring to achieve "...economic and social cohesion and solidarity among Member States."

Neither one people nor one Super-state, federal or otherwise organised, but the consensus of the national elites with the Community's institutional arrangements strengthening its Member States is the basis of the European Union (Chrysochoou 2002: 20). Downgrading the Member States by transferring their basic sovereign rights – their very control over the EU's future development – to the Union, endangers the political and social balance of the Union.

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The Post-Nice-Process: Towards a European Constitution?

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