Nice - or a reflection upon the difficulties to progress in the European integration under the present iron law of oligarchy

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In May last year, Joschka Fischer, the German Foreign Minister, gave a speech at the Humboldt University, Berlin, putting forward his future vision of Europe "Vom Staatenverbund zur Föderation – Gedanken über die Finalität der europäischen Integration". Leaving aside the content, about which one can more or less disagree on certain points, the speech had the virtue, of breaking the taboo that it was not politically correct to speak of federalism when referring to Europe. Fischer freed the European lawyers from the risk of being politically condemned almost as soon as we had begun to think. These days in Athens aim to be the beginning of a response.
I shall begin with the Spanish view of the agreements, and go on to refer to some of the background problems which can be summarised in the title given to my speech: Nice – or a reflection upon the difficulties to progress in the European integration under the present iron law of oligarchy. Nice should have consolidated the legal framework for European integration in order to facilitate the accession of new countries. The demands were high. Let us examine the results.

I. The Spanish viewpoint regarding the agreements

The Treaty of Nice places Spain, at last, in its rightful place in Europe: among the great powers! Spain is now a great country, as the president of the government stated to the Congress of Deputies. Spain has achieved the fundamental aims it had set itself, and on the 1st of January 2005 it will find no obstacle or condition to tackling, with complete confidence in herself: on the one hand, enlargement, and on the other, the Intergovernmental Conference which from 2004 onwards will deal with the distribution of competences. With the conclusion of the institutional reform of the Council and the Commission, the European Union overcomes the last barriers to its enlargement to the East and to the Mediterranean.
Spain went to Nice with three aims:
Firstly, to achieve a new weighting of votes in favour of the five most populated countries. Spain regarded this as a vital issue in order to have sufficient votes when matters were being negotiated which were to be decided by qualified majority vote. For Spain, the outcome has been highly satisfactory, since its votes have been multiplied by 3.37%, whilst Germany, France, the United Kingdom and Italy have obtained 2.9% and small and medium-sized countries proportionally received 2 to 2.4%. From previously having eight votes in the Council out of a total of 87 (that is 9.2%), on January 1, 2005 Spain will have 27 votes of a total of 237 (that is, 11.4%). For the first time in the history of the Community, Spain will be considered a great country; Spain will be able to constitute a blocking minority with the same force and effects as Germany, France, the United Kingdom and Italy.
Secondly, to retain unanimity for significant decisions in the short term. So, Spain managed in Nice to maintain unanimity for a) approval of future financial prospects, from January 1, 2007 onwards and b) the approval of the corresponding interinstitutional agreement (to be signed between Commission, Council, and European Parliament). Until the financial outlook

and the interinstitutional agreement are approved, there will be no majority decision on the structural funds and the cohesion fund. Such a formula, accepted with gritted teeth by the net contributor countries – will enable Spain once more to obtain important financial transfers in the form of economic and social cohesion: 9 billion pesetas for the period between 2000 to 2007, in accordance with the European Council of Berlin.
Thirdly, to maintain unanimity in important subjects. Spain has achieved that the unanimity requisite has been kept for a) questions such as fiscal matters, social security, and social protection and b) in some environmental questions such as land regulation, and management of water or sources of energy supply.
So much for the official Spanish address. Were we to believe my government, thanks to Spain, as Pangloss would say, we would find ourselves in the best of all possible worlds!

II. The Nice path towards the federal Union

One can come to Athens, to this working session with you, to acquaint you with and defend the Spanish government version of Nice. Or, instead, one can turn up as a member of the European brotherhood of jurists (as a homage to Peter Häberle), and, then, things look somewhat different. Making an improvised balance one can say that Nice has served to deny that the alternatives are as simple as to win or to loose. As is de rigueur in European summits, Nice gave out contradictory signals regarding the future: once again a compromise was reached between integrationist forces, henceforth to be called federals, and centrifugal ones. The wailing stemming from other countries is just as inadequate as the triumphal statements emanating from Spain, both are out of all proportion.

1. Gains of the federal forces

The battle between European integration and the idea of Europe as a free exchange area was decided in favour of the federals. This can be seen from a series of decisions. Germany yielded to French opposition, and graciously accepted not to increase its number of votes compared to the rest in majority decisions. The total votes of the six original member states of the European Community are 117, that is 51%. There is a long-standing tradition of agreement among them. If, as is to be expected, Spain, Austria and Portugal align with them, there is no doubt as to the direction which the construction of Europe will follow – even in terms of the federal distribution of competences proposed by Germany. The British-Scandinavian bloc, albeit victorious in general during the nineties in terms of market expansion and the principle of free competition, is, on the other hand, weaker when voting in the Council. This dividing line is henceforth going to have more clout than the one separating large and small states.
Nor should we fail to learn either from the fact that in the report to the House of Commons, Prime Minister Blair used a more pro-European language than usual; or that he has accepted both the European Rights Charter, when, if he had had anything to do with it, it would never have seen the light of day, and the 2004 Intergovernmental Conference, despite his manifest opposition to holding it before the first enlargement.
Finally, the results in a series of controversial questions are noteworthy:
Gratitude is owed to France for preserving – for everyone – the European idea of public services – Article 133 TCE has been kept. That culture (audiovisual production and the right to intellectual property included), education, public health, social services and intellectual

property are in the treaties general interest services and not to be considered as just merchandises, is no small victory. The attention given to reinforced co-operation (arts. 11, 43 to 45 TUE) confirms the willingness of the majority of states to make progress in integration.
The statute of the European corporation has been approved after thirty years of negotiations – but still does not clear up the uncertainty as to whether it has been a success for the public interest in general in the production and distribution of goods and services, in the face of Blair's schemes, in cahoots with the London Stock Exchange, to make companies give prime consideration to the short-term interests of their shareholders.
The Europe of Defence has been endowed with a 60,000 strong rapid Intervention Force to act in times of crisis. This also means a significant beginning; on the other hand it requires that the European parliament should be granted as soon as possible the faculty of control over any military action.
Until the European Court has given its verdict on the connection between the European Rights Charter and arts. 6.2 and 46 d TUE no one should claim victory regarding its lack of normative force.

2. Federal dreams under control

Thus dazzled by the lights of Nice, it would be naive of us to ignore the shadowy parts; in plain language we have witnessed the staging of a triplebarred law of oligarchy of the Heads of State or Government. It is no secret that under the immunity of the European councils they gerrymander vetoes and concessions as if they were their own private property. For example, regarding the right of asylum and legal regulation of immigration, (arts 63, 67, 251 TCE), fiscal matters (arts 93, 175 TCE), social security (art 137 TCE), economic and social cohesion (arts 159, 161 TCE), the environment (arts 2, 3, 6, 175 TCE) certain states would have kept at all costs their right to veto against general interests. France would, indeed, have sacrificed on the altar of particular national interests their plan to make out of the co-ordination of economic policies (arts 99 TCE) the government which Europe so badly needs. The imposition at any price of national interests functions as a threepadlock bolt which our princes draws in the face of the Union of an equally free citizen. Thus might we wonder whether we should, just like in children's tales, seek the magic formula to enable us to open such padlocks.

a) The first padlock is to be found in the refusal to reduce the number of commissioners in the Commission. Behind this padlock is concealed the view of commissioners as representatives of each national government. This becomes even more blatant with the watering down of the design of the founding fathers to have the Commission as an institution producing legislative initiatives and with a European vocation overriding national interests.

b) The second padlock in the European Council can be seen not only in the right of veto with its paralysing power, but also in the disproportionate relationship of votes to the detriment of small states – which hardly squares with the idea of a guarantee for minorities in what after all is a territorial chamber.

c) The third padlock consists finally of the national composition of the European Parliament. Albeit the corrections according to population in the distribution of seats in Nice means less unequal voting, it is time to establish equal suffrage with regard to European constituencies and candidatures.

Getting rid of the three padlocks seems even more urgent when, aside from its blocking effects, it produces undesirable results with a direct effect on the bases of European construction and raises questions of principle. These are:

Dilatorische Formelkompromisse (delaying compromises). Whether it is a question of economic and social cohesion, fiscal matters, or Commission reform, the only possible agreement needed the concession by the majority of more or less extended time periods. The results are ambivalent, since, if on the one hand, a progressive rationalisation and integration by stages is achieved, on the other hand, blocking of progress in integration is institutionalised for several years.

Overwhelming particular interests and defence of the principle of balance of power against general interests. Without prejudice against the possibility of counting from now on greater European integration than under the Amsterdam Treaty, in Nice, the Heads of State or Government have made a welter of corporate statements (the factions of The Federalist Papers) on behalf of particular interests which separate us Europeans and the precarious intraeuropean balances of power (Fischer), above general interests which unite us. Europe goes out of Nice without a vision or a political project which articulates and binds it together. One issue, for example, which would have made the front rank of the European public forum in terms of the public interest or the common good would have been the establishment of social responsibility for property and capital: How long are we going to accept the fiscal opacity of the London Stock Exchange or Luxembourg's status as a tax haven as values of greater weight than fiscal justice? The argument made by the representatives of private interests in England and Luxembourg that the justification for this is that we cannot bother capital reminds one, leaving aside the obvious historical differences between now and the War of American Secession, of old echoes of the Southern defence of slavery which was, so it was said, the economic basis of the southern states. When, on the contrary, it would have been so agreeable if during the long days and nights of the summit, someone had referred to the link in sense between institutional reform and the brand-new European Charter of Rights.

The Heads of State or Government as private lords of the Treaties. We have been present at a ceremony to maintain States as Lords of the Treaties and, thus, their Heads of State or Government. These have unfolded their own vision of Europe as a private contract for promoting their respective interests. We are lacking in reasons to give the lie to those who argue that reform of majority voting in the Council, the refusal to reform the Commission and the redistribution of seats in the parliament are, not, as a last resort, simply a cosmetic change in the positions of power in the state itself and in the European Council – that is, no more than window dressing of the conversion of the European Union into a private fiefdom and the privatisation of Public Law, scorning aspirations of solidarity and equal freedom for all.

But the triple bar effect has not run its course in what we have said above. Simply, the States, lords of the Treaties, have not carried out in Nice the task they had set themselves, and I am by no means sure that when the reform of the Union Treaties comes into force it will have

the organisation ready to make enlargement effective.
A confused political order. We shall have to see what type of confused political order may be the result when we move from a European Community initially conceived as a functional organisation for the achievement of the common market (H.P. Ipsen, 1972) to a European Union as a political integration regime (Maastricht, 1992; Amsterdam, 1997; Nice, 2000), without changing the Treaties' reform procedure. The institutional balance of powers, however much it may be intermittently operative in isolated episodes in which either the European Parliament or the Justice Tribunal is the protagonist, is no less an obsolete model, for which the time and place were the period prior to Political Union and the Brussels which since Maastricht (1992) we have left behind. This means the certain danger that on the day the reform of the Treaties comes into force, the organisational mechanisms will not be in place to make extension effective.

III. An alternative law policy: Europe for its citizens!

Finally just a few words as to the direction in which an alternative law policy should proceed. Precisely because the Nice commitments are too reminiscent of the old deutsche Bundesakte of 1815 and because the Heads of State or Government who are so familiar to us are convinced that they are Staatsführer, it must be pointed out that the private interests represented by such personalities do not have too much to do with the general ones; consequently, we must declare as Ancien Régime, for once I am ready to accept it as enlightened despotism, the Political Union of Maastricht, Amsterdam and Nice. Admiring the wisdom of the founding fathers, of the American Constitution, Tocqueville emphasised that only the citizens make a Union a political community above territorial interests! Even more, in Europe, only the citizens can cause the padlocks of private-national interests to be broken in the balance of power that really exists. If we think that codifying the share-out of competences between regions, States and the Union and a Constitution should follow and never precede full political rights for the citizens, it is high time that peoples' constituent power should be under way.
We as lawyers have the task of defining procedures and drawing up mechanisms to make the inversion of the relationship between the prevailing private logic and the alternative logic of public representation possible. But, if European Heads of State or Government have, in spite of their contradictions, been able to agree on the type of balances of power and compromises which enable us to make stumbling progress towards integration, for what reason should European lawyers, distrained in our mission under the lead of Dimitris Tsatsos, Ingolf Pernice and Dimitris Melissas, not be able to perform as European midwives at the birth of a new phase in the history of enlightenment?

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