The Fischer Proposals for a European Constitution in view of the 2004 Intergovernmental Conference

By Dimitris Melissas *

The Treaty of Nice has organisationally reshaped the European constitutional edifice. However, an answer is still urgently called for: can this new face of Europe live up to and satisfy the needs that gave rise to it, or is there a need for a new architecture for Europe? As the President of the Commission Romano Prodi pointed out before the Plenum of the European Parliament, the paper of the revisionary legislator of the E.U. as expressed in the Treaty of Nice does not make a "qualitative leap". Without underestimating the steps taken forward by the Treaty, after its evaluation in terms of its contribution to the production of a European constitution((1)), we still place our hope in the next Intergovernmental Conference, which has already acknowledged and bound itself to address the necessity of a new strategic planning as well as the procedure and the substantive content of the amendment((2)).

In the 2004 Intergovernmental Conference, the European constitutional legislator is faced more pressingly than ever with the need to decide whether this theory of integration imbuing Europe, is able to meet and materialise the ultimate scope of its designers, that is European political integration. It is in this context that the Fischer((3)) suggestions concerning the teleology and integration of the European Union become relevant.

The Fischer vision remains topical in this post-Nice period despite the fact that it came to life, so to speak, before the completion of the Intergovernmental Conference. It should be borne in mind that Art. 48 of the EU Treaty prescribes only one revisionary paper, which is in any case ratified according to national constitutional rules. On the contrary, the agenda of the next Intergovernmental Conference includes crucial issues of a constitutional nature, which neither the Member States nor the institutions of the European Union seem to treat in an official, holistic, constitutional way. As a result, the next Intergovernmental Conference is de facto defined again as quasi constitutional((4)).

The opinion that the next Intergovernmental Conference is of a quasi constitutional character is also corroborated by the Charter of Fundamental Rights. The eventual inclusion of the Charter, which some consider to be "the core of the next European Constitution" and others its "preamble", in the Treaties will finalise the relationship between supranational power and the European citizenry in an authoritative fashion. It will also contribute further to the autonomisation of its functional field and its interpretative implementation within the competences of the Union.

The role of national parliaments in the function of the EU is also decisive in terms of the character of the 2004 Intergovernmental Conference. Protocol 9, which is attached to the EU Treaty, still occupies a rather marginal place, as the regulation of the information and knowledge of national parliaments concerning legislative proposals is fragmentary and too technical. Moreover, Member States enjoy a very wide constitutional autonomy as far as the regulation of the "internal" side of the assessment of governments by national parliaments is concerned((5)). Thus the thesis is confirmed that any revision through the agenda of the 2004 Intergovernmental Conference regarding the democratic control over the functions of the institutions is essentially of a constitutional character, for it redefines the constraints of the constitutional autonomy of Member States either directly or indirectly.

In the Fischer proposals emphasis is placed on the danger inherent in and stemming from the tension between the transfer to the Union of sectors that until recently belonged to the exclusive competence of Member States on one hand and the lack of structures of political and democratic assessment on a supranational level on the other.
His perception of the expanded European Union revolves around the notion of a federal formation with clearly distributed sovereignty between the European Union and the nation-states, which will be the outcome of a Constitutional Treaty((6)). Such a Treaty will define the sphere of power of both sides conferring full sovereignty to the Federation and unquestionably recognising a substantive role and decisive powers to the States. Furthermore, it will render the Federation more accessible and easier to be monitored by the citizens. In other words, Fischer attempts to temper the concern that state formations, national constitutional traditions, and the historical identities of the Peoples of Europe will become obsolete while at the same time he does not overlook the subsidiarity principle((7)).
Fischer believes that the Federation will find its legitimation and the democratic problem of the Union will be resolved in and through nation-states, their institutions and traditions. He also emphasises that the new political entity that will be founded will continue being a union of states and citizens.
For Fischer, political integration presupposes a kind of political pragmatism, which will be opposed to the emergence of an impersonal and centralised federal European state.
Fischer perceives the Constitution of that Union((8)) as a text, which will refound Europe institutionally and organisationally. Fischer appears to refer to the founding of a formal European Constitution, which will not be the outcome of a revision of the current Treaties but will voice the constitutional will of the States and citizens of the Union, for it will be founding the European Federation as the holder of unquestionable yet probably not uniform sovereignty((9)). The hard core of the Constitution aims primarily at the re-definition of the horizontal – i.e. between the institutions of the Union, the European Parliament and the European Government – and the vertical – i.e. between the Federation, the States and the Regions – distinction of functions, and furthermore at the establishment of fundamental human rights.
The issue of political integration until the enactment of a European Constitution and the founding of the Federation are of central importance in Fischer's thought. In the first instance, he argues for the expansion of enhanced co-operation in sectors of common interest. He does not overlook the fact that this constitutional paper presupposes the creation of a smaller but open core of countries ready and able to see through the institutional preparation of the Constitution and to "recruit the first members" to take part in the first Constitutional Assembly, whenever that may take place. The enhanced co-operation during the preparatory period for the enactment of a Constitution will have to guarantee the achievements of the Union as well as the participation of the States that do not wish to become founding members of the Federation.
It is precisely in this that the positive contribution of the Fischer proposal lies: it is the presentation of a conception of a new constitutional architecture for Europe as a necessary tool for the promotion of the idea of integration in view of the needs arising by the expansion of the Union.((10))
According to Fischer's rationale, the Treaty of Nice aims at the resolution of the governmental problem of Europe and leaves plenty of room for the expansion and deepening expanding its democratic legitimisation and making it more profound. It is a valuable text that attempts to regulate the exercise of supranational power. However, it is still too reluctant to define the technique of political freedom in the European Federation.

To be sure, a lot of questions can be raised about the Fischer proposals. How does this Treaty cover its actual political deficit? What can Fischer's reflections be on rights and the need for gradual enhancement of the European civil society?
More importantly though, what the Fischer proposals and other such proposals that will follow must demonstrate is to what degree they can contribute to the discourse on the enactment of a new Constitution, which will constitute the expression of the will of the peoples of Europe and define the goals, the values and mechanisms of their political unity. A draft of a formal Constitution for Europe, that is a Fundamental Law, a Grundgesetz, enjoying direct legitimacy from the citizens, does not predetermine its political character nor does it classify it automatically in a specific typology of systems of government((11)). Such a theoretical debate would perplex the constitutional problematic to the effect that intense controversies would arise before even the real legitimacy deficit would be discussed in its essence. At the same time, a formal Constitution does not cancel the constitutional sovereignty of Member States. On the contrary, it places it precisely where it belongs: in a distinct sphere of competences regulated and consolidated by the Constitutional Treaty. The crucial matter is not whether the Union will be called Federation but whether it will be able to set the prerequisites of its finalisation; to set its goals in a binding manner; to do away with the always immanent risk of constitutional conflicts; to restore the democratic principle as a method of distribution of powers horizontally and vertically; finally, to render its internal and external sovereignty visible.
The 2004 Intergovernmental Conference could not provide an answer as to why we need a European Constitution but which Constitution we need as citizens and what Constitution it is worth aspiring to. The European Constitution can embody symbols and assume a symbolic function (similar to that of Art. 114 of the Hellenic Constitution of 1952, which introduced the concept of constitutional patriotism). It can also promote and enhance the democratic principle and crystallise and finalise its firm embeddedness in the rule of law. This symbolic function is not merely a technical procedure for the simplification of the Treaties, as some, possibly including Fischer, seem to accept.
The simplification of the Treaties is in turn not merely a technical procedure nor does it self-evidently constitute a quasi-constitutional outstanding matter. On the contrary, under certain conditions it can be of an instrumental value in the making of the Constitution of the Union. The present Constitution of the Union comprises a number of Treaties, Protocols, Statements and Appendices which include rules of a greater or lesser significance as well as rules of a more technical nature referring to details. This complex bundle of sources of law makes it impossible for the citizens, for the sake of which the supranational power of the Union exists in the first place, to locate those fundamental norms of the Constitution granting rights and defining their permissible limitations. For instance, there is no panegyric declaration of the democratic principle. Moreover no autonomous mention is made to the value of human beings and, in any case, the crucial web of non-amendable norms of primary law such as those concerning primacy of Union over national law, the direct effect of European law and so forth. ((12))
The simplification of the Treaties in their present form clearly cannot be exhausted in a painless authentic interpretation, renumeration or systematic categorisation of norms. The whole endeavour presupposes the production of a new Constitutional Charter, which will express fundamental values, permeated by fundamental principles, laconic, straightforward, and legible, and indisputably satisfy the call for it to play the part of regulator, guarantor and symbol.
For those reasons, any amendment included in the agenda of the 2004 Intergovernmental

Conference concerning the democratic assessment of the institutions is of an essentially constitutional character as it will relocate the boundaries of the constitutional autonomy of member States either directly or indirectly. Therefore the 2004 Intergovernmental Conference is called to provide answers to issues that constitute the core of a Constitutional Treaty draft. It will be judged in 2004 or even at a later stage whether the practice of amending by adding to the existing Treaties will be continued without such an amendment becoming visibly part of a holistic constitutional architecture for the future of the Union and to what degree this practice satisfies the constitutional strategy of the Union in view of the challenges that it will be faced with. However, the danger is still present that Fischer's positive ideas will remain ineffective if they do not become part of a new Constitutional Charter that will incorporate and give expression to a new social contract with a political content. At the same time, this new Constitution must not fall short of the existing constitution of the Union in terms of its normative content.

*) Professor Dr, Secretary of the Board of Directors, Center for European Constitutional Law, Athens- Themistoklis and Dimitris Tsatsos Foundation.

1) The Treaty of Nice came as a response to an urgent need that was strictly defined from the outset, namely the need to adapt the institutions of the Union in view of the expansion towards Eastern and South-Eastern Europe according to the dicti of Agenda 2000. With sole exception the parallel sessions of the Commission on the Charter of Fundamental Rights, the discussion during the Intergovernmental Conference focused on technical matters thus enhancing the character of the Union as one of States rather than one of Peoples. The Conference was called to address three issues: the composition of the Commission, the weight of votes in the Council and the proliferation of instances of qualified majority. The discourse concerning those issues as embodied in the body of the Treaty reveals the political power constellations at play, the intense processes that took place behind the curtains, and decisions lacking a broader vision. That was repeatedly pointed out by the European media and, more importantly, it was conceded by the Heads of States and Governments that took part in the European Council of Nice.

2) Cf. Statement to be entered in the final act of the conference, concerning the future of the Union, Appendix VI of the Treaty of Nice 2000.

3) J. Fischer, From Confederation to Federation: on the finality of European Integration, delivered in Humboldt University Berlin, May 12, 2000.

4) Concerning the "quasi constitutional" character of the IGCs in general, see A. Bleckmann, Europarecht: Das Recht der Europäischen Union und der Europäischen Gemeinschaften, sechste, neubearbeitete und erweiterte Auflage, Köln, Karl Heymanns Verlag, 1997.

5) For the notion of autonomy in the ECJ case law, see Rideau Joel, Le rôle des états membres dans l'application du droit communautaire, Annuaire Français de Droit International 18: 864-903; ibid, Droit institutionnel de l'Union et des Communautés Européennes. Paris: LGDJ, 1994, pp. 665-675.

6) The rest of the points in the Fischer proposals will not be analysed here, so as to avoid overlaps with other papers in this volume.

7) On the issue of subsidiarity, see Koen Lenaerts & Patrick van Ypersele, Le Principe de Subsidiarité et son Contexte: Étude de l'Article 3B du Traite CE, in: Cahiers de Droit Européen, vol. 30, nos 1-2, 1994, pp. 3-85; also, Michael Burgess, Federalism, Subsidiarity and the EU, in: Paul Furlong and Andrew Cox (eds.), The EU at the Crossroads, Boston, UK, Earlsgate Press, 1995, pp. 11-35.

8) For the importance of a European Constitution, see Dominique Rousseau, Pas d'Europe sans Constitution, in: Le Monde, 18. 1. 1997, p. 17. See also Thomas Laeufer, Zur künftigen Verfassung der EU-Notwendigkeit einer offenen Debatte, in: Integration, 17. Jahrgang, No 4, pp. 204-214; Roland Bieber, Verfassungsentwicklung und Verfassungsgebung in der EG, in: Rudolf Wildenmann (Hrsg.) Staatswerdung Europas?, Baden-Baden, Nomos, 1991; Gunnar Folke Schuppert, On the Evolution of a European State: Reflections on the Conditions of and the Prospects for a European Constitution, in: Joachim-Jens Hesse and Nevil Johnson (eds.), Constitutional Policy and Change in Europe, Oxford, Oxford University Press, 1995, pp. 329-368; Andreas Gross, Why Europe needs a European Constitution as a Foundation for a Transnational Democracy, paper prepared for the Annual Conference of the British Political Studies Association Conference, held at the University of York, April 19, 1995.

9) Many maintain that the European Union is already a system of divided exercise of sovereignty between supranational and national spheres of power. This complex constitutional architecture is repeatedly reproached on grounds of its critical legitimation deficit. Let us not forget that it caused constitutional friction due to the attitude of certain national constitutional courts that reserved for themselves the role of the guarantor of national constitutional legitimacy (Hüter der Verfassung). It is clear, and this is not refuted by any of the conflicting sides, that although the European Polity as it emerged from the founding Treaties and their amendments possesses sovereignty albeit partial, it does not acknowledge officially the bearer of the ultimate power, that collective subject, for which the Polity was constituted on grounds of national constitutional rules expressing the will of the national demoi. Those national demoi do not constitute a common political market, although they created a rapidly developing common economic market. For an approach to the relationship between the European Constitution and the prospect of a Federation see Philip Raworth, Too Little, Too Late? Maastricht and the Goal of a European Federation, in: Archiv des Völkerrechts, Bd. 32, Heft 1, Marz 1994, pp. 24-53.

10) See also "Europe's Tragic Choice", (2000), Harvard Law School, The Jean MonnetChair, on http://www.law.harvard.edu.

11) In principle, the definition of competences of the Union and the States belongs to the core of federal way of thinking. However, it is not clear how the Conference will model the distribution of competences. Will the German example be followed and a list of competences be composed or will a different solution be promoted? It must not be forgotten that this definition will establish sectors competence that will thereafter belong to the Union. Therefore the finalisation of a partial sovereignty of the Union will be a constitutional principle of the European edifice. The problem that will arise lies in the

inability of integration clauses included in most European national constitutions in dealing, in their present form, with the essentially constitutional tasks that will arise. Decisions of High Constitutional Courts corroborate that suspicion. The French Constitutional Council provides a particularly interesting example, as it has stood firmly against any transfer of sovereignty as such and ruled that it is only the transfer of the exercise of sovereignty that is constitutionally allowed. In this context, I cannot broach on the legitimation of national courts to pass judgement on issues of constitutional therefore primarily political nature, it must be emphasised that there is a lack of constitutional debate in Member States concerning the eventual decrease of their sovereignty and subsequently the partial suspension of national Constitutions. Cf. Ingolf Pernice , Artikel 23 Rn 35 ff., in Dreier (ed), Grundgesetz Kommentar,Band II, 1998.

12) For further elaboration on this topic see also J. H. H. Weiler, The Constitution ofEurope, Cambridge University Press, 1999, p. 221 ff