

ENHANCED COOPERATION AS A EUROPEAN FORM OF GOVERNMENT

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Certainly, the European constitution entails, on the one hand, rights and freedoms with the force of law and an extension of decision making by qualified majority; on the other, progress in democratisation as witnessed in the presence of the Parliament in legislation and that the latter will invest the President of the Commission. There is no lack of descriptions underlining, as decoration, the new figures of a President of the Council and a Minister of Foreign Affairs. Rather more important, it seems to me, is the progress achieved in questions of legal acts: that is, the differentiation between legislative and executive acts; the establishment of the hierarchy principle of sources; in fact, the establishment of co-decision as a normal legislative procedure.

In terms of playing to the gallery, the European Constitution is not bad. Halfway between euphoric and sceptical, in order to arrive at a definitive judgement, we need to know what is at stake. A political association has as its purpose that of guaranteeing citizens' rights and freedoms (art. 2, Declaration of the Rights of Man and the Citizen, 26 August 1789; arts. s 1-3, 1-7, II-Preamble; II-47 II-51; II-52 European Constitution). Simply the goodness of a form of government is measured by how effectively it achieves the aim of union. In our case, the constituent debate on the form of government has hinged on the alternative of federation – that is, with priority given to supranationality, and citizens as subjects and general interests as a ruling parameter-versus the State directories – or what amounts to the same thing, reasons of state as a leitmotiv. Let us see how well the form of government works in terms of citizens' rights and freedoms stemming from the Constitution. And, thus, in order to discover what the underlying basis of the Constitution is, that is, what is the relationship between the exercise of power and the achievement of rights, bear with me whilst I give a brief review of what is backstage, the question of home affairs, to go no further. Or, that of economic policy and foreign policy and security, so as not to leave anything out.

1. Common home, economic, foreign and security policies. How effective the European form of government is in terms of citizens' fundamental rights and liberties

1.1 Scope for freedom, security and justice.

Of questions on the scope of *freedom, security and justice* (arts. III-158-178, European Constitution) I will merely refer to *asylum, immigration and border policies*, which, on the one hand, are particularly illustrative on the basic lines constituting Europe and, on the other, bring to mind the *historic memory* of our *outlandish Spain*. Nobody knows better than the Spanish the mass adventure during the 19th and 20th centuries of emigration and all the uncertainties of their arrival in other lands, thus there are few like us able to put ourselves in the emigrants' place. So, by not requiring unanimity for such European policies the constitution took a step forward; when they come into force, regulations will be adopted by qualified majority, within the framework of ordinary legislative procedure (arts. I-3.2; I-II. 2; I-22; I-24; I-41; II-15.I and.3;

II-18; II-45; II-52.5 regarding II-47; II-53; art. 2 Protocol on weighted voting in the Council of Ministers; III-167; III-302 European Constitution).

It is the same with the common *asylum and immigration* policy where some progress has been made. The Commission had designed a two-stage harmonisation plan for the right of asylum. The state of the still-to-be-approved Guidelines leads one to assume that, by June 2004, we shall have the first stage of incipient legislative standardisation on a European scale at the lowest level of protection. The Constitution already includes the second stepping stone towards harmonisation. Therein is created a statute of *asylum* and secondary protection, uniformly for all Member States, and a common procedure is set up for granting or withdrawing this statute. In the event of Europe being flooded with displaced persons, a regime of temporary protection is also established (Art III 167.2 European Constitution).

In *immigration*, however, so far there are slim pickings. The Commission project allowed, on the one hand, for the statute of longstanding Union resident and, on the other, the right to bring families together as key instruments to promote the social integration of immigrants. The idea was to assimilate the immigrant of long standing (five years or more as a resident in a Union country) to the community citizen, with full liberties and rights to take part in civic and political activity that that entails. At the end of this process there would only be two groups of citizens, nationals and those of the European statute, in place of the present tripartite system of nationals, community and extracommunity citizens. However, the States have considerably watered down the contents of both Guidelines, and filled it with caveats, so as to reserve the right to decide to what extent it will be applied. Thus a series of steps is maintained in which, however many years immigrants may have been with us, as far as being citizens with civic rights is concerned, they are always going to be condemned to exclusion.

Advances in the constitutional text include, on the one hand, a generic reference to the fact that *common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows* (art III-168.1 European Constitution) and, on the other, provide for laws or European framework laws in questions of entry conditions, of long-term visas and residence permits. Whereas in the treaty of Amsterdam provision was made only for regulating the statute of *long-term* residents, henceforth there will also be European regulations for the rights of foreigners who are normally resident in the European Union. As far as *border policy* is concerned, on the one hand, the absence of controls on persons, regardless of their nationality, when crossing internal borders, is noticeable as is, on the other hand, provision for adopting “*any measure necessary for the gradual establishment of an integrated management system for external borders*” (art III-166.1 European Constitution). This where the Constitution takes us. On the debit side of the text must be included, on the one hand, reservations in the states’ favour, and, on the other, a politically poor concept of *immigration*.

a) Reservations in favour of the States.

Though, as part of European policies a *suitable management of migratory flows* is established, no reference is made to any instrument for achieving it. In this sense, it is significant that it provides for the signing of agreements with third countries to readmit citizens who are illegal residents, but the corresponding establishment of Union agreements with third countries to create legal immigration channels (art. III-168.3 European Constitution) is not considered. If the European Union works to expel foreigners, the States keep the competence to create legal

immigration channels. It is not simple forgetfulness. The setting up of *legal immigration* channels has, meanwhile, become a subject of compulsory reference in any debate on *immigration policy*, and figures prominently in the November, 2000 *Commission Communication on Immigration*. If not mentioned in the constitution it is because the wish is that, as hitherto, States should have exclusive competence to decide on the creation of these channels.

Another turn of the screw against a *European immigration policy* is the integration of foreigners resident in the Union States. Certainly a welcome is given to European measures to promote and support action by Member States, but, with an express *exclusion of "any harmonisation of the laws and regulations of Member States"* (art. III-168.4 European Constitution). Thus, it becomes obvious that the will of States is to prevent the European Commission being able to propose uniform minimum standards for the social integration of immigrants. And the ensuing picture could not be more grotesque: in terms of integration, each foreigner will be treated differently, as decided by the authorities of the state where he lives; on the other hand, when expelled, all foreigners are equal. As a candidate for a job, the foreigner will find himself in Spain, France, Italy...., when expelled he will be expelled from ...Europe—and, for the Schengen area, saddled with a ban on returning for between three and ten years.

b) *Narrow concept of immigration and asylum.*

Immigration and asylum are conceived as questions fundamentally related to border control, and not, for example, as elements of a socio-economic, educational and cultural policy,... The text is drawn up as though, while maintaining our systems of social security, demography, culture,.. there had not meanwhile been a flood of hundreds of reports from international and national institutions. That the fight against racism and xenophobia is included in the area of *police and penal* measures (art. III-158.3 European Constitution) fits in with such a narrow idea of immigration. At a time when the idea should be to channel social processes which are the fount of such a phenomenon, the fact is ignored that in order to combat such xenophobic behaviour *police and penal* measures can only be the weapon of last resort. The role of the States is, thus, a determining one and, what is more, in the sense of repression of rights.

First. In the area of *frontiers, immigration and asylum*, the European Union exercises, according to the constitution, functions, particularly, of coordination and border policing, including the processes of expulsion and repatriation. As far as the right to *asylum* and the legal statute of foreigner is concerned, it is also their responsibility to harmonise the organisation of different states.

Second Notwithstanding the disappearance of unanimity and the ordinary legislative procedure, which operates from now on in this area, for laws and framework laws, the States keep control over any decisions that may be adopted in the European area by means of a double path: on the one hand, the Council's power to define the strategic directions of the legislative and operative program; on the other, the non-inclusion among European competences of any harmonisation in questions of the social integration of immigrants.

Third This limitation of competences and the awarding of limited competences to the European Union reveal yet again a more than clearly defined repressive *immigration and asylum policy*, which attempts to ensure not the defence of the general interests of its citizens or its own legal arrangements but rather the particular interests of those in government.

1.2 Economic policy

If that is the form of government of common home policies what will it be in questions of economic policy? Indeed, no-one should be mistaken: economic policy is the competence of the States (art III-70 European constitution, former 98 TCE) without affecting its coordination on a European scale, (arts. III-69 European Constitution, former art.4.1; arts. III-70-76 European Constitution, former arts. 98 to 104 TCE). The *Stability and Growth Pact*, of June 1997, completes the original Law of the Nice Treaty.

Following on from the precedents of the treaties of Maastricht, Amsterdam and Nice, the constitution confirms the States when, until recently, the outcomes of the application of such regulatory assumptions could hardly have been more unsatisfactory and as though our experience were not all too full of casting doubt on them. If you do not believe it, have a glance at the European economy. European economic policy is non-existent. The *eurogroup* or euro Council does not work, nobody is in charge there, no-one allows co-ordination to take place. That is a shambles where everyone goes his own way. The so-called *coordination of economic policy* is a euphemism for a jumble of divergent national policies and inability to make decisions in the common interest. Merely at the table where the States' economic policy should be coordinated nobody is in charge – and no-one will be subordinated to a well-thought out and decided economic policy for Europe. No politician or government, no-one is responsible for European growth. Who indicates the direction that European economic policy should take? Who creates confidence both in European businessmen and consumers? Who speaks in the name of Europe to financial markets and to our Central Bank? In a word, who are the political leaders of Europe? The answer is nobody!

There are public needs and tasks that only a European government will be able to tackle. Only on a European scale can we develop a network of centres of excellence in research and teaching; set in store financial markets able to bring out vanguard projects; establish industrial regulations for tomorrow's products, to sum up, to set technology and people going. The market and mere deregulation are not enough in themselves. For services, even more than for goods, there is no market without good public regulation. This is evident for banking and insurance companies, but also for telecommunications, transport and energy. To face the next few years strong regulation of the European market is a priority: or, shall we wait till we awaken tomorrow to a banking crisis or to suffer an energy shortfall, through having left important decisions which should be taken by a European government in the hands of the market?

Decisions as important as monetary union impose a logic which cannot be avoided any longer by the relationship between a common currency and economic policy. What can be done? Doing nothing is not an option, we cannot leave things as they are. But that will turn Europe into an auxiliary economy, increasingly a satellite of the United States. What is at stake is to know whether we have launched the euro just to reduce the instability of our economies or whether we wish to take advantage of its potential to boost them do we or do we not want to give the euro a political content?

The future of the euro depends upon Europe's capacity, on the one hand, to assert itself in the face of financial markets and, on the other, to give its citizens the sense of a shared destiny. By recovering the lost ability to call a spade a spade, we must say that with the *Convention* we have let the opportunity escape to equip ourselves with a government in which Europeans

could recognise ourselves in order under their leadership to deal with the community in which we are destined to live and as an institution to make it express our common political will.

Europe's economic policy cannot be restricted to a set of disciplines or a collection of automatically functioning mechanisms; the Dublin *Stability Pact* is not enough. We should have given the Commission the power to take initiatives in developing sustainable economic and social development; in the stability pact supplementary criteria should have been introduced such as future investments and the youth employment rate and long-term unemployment, as has been suggested by Jacques Delors recently. We have been unable to express in the constitution the role to be played by budgetary policy as an alternative to those who claim that the market should be the sole regulator of the economy.

We need a government which would take immediate decisions, fiscal systems, regulation of financial services, harmonisation in questions of social rights, which would represent the euro abroad; a European government which would generate growth and employment and give out a feeling of solidarity would outlaw financial speculation and would deter any centrifugal movements. But do not deceive yourselves, for our oligarchs, what is important is not so much creating the material conditions for the exercise of our freedom as for the States to continue at the controls.

1.3 Foreign and common security policy

The design of the *form of government* seen so far, culminates in the constitutional treatment of foreign policy and security. Member States have proposed ambitious aims: both to strengthen the role of the Union in the Community of States to maintain the peace in international relations (arts. I-15; I-39; III-195 to 209; III-210 to 214, III-206 European Constitution, former art. 17.1 TUE). There is a specific underlining of *in accordance with the principles of the United Nations Charter*. To this end, (art. I-15; I-39; I-40; III-195 to III-210 European Constitution). For the moment we rely on the legal nature of the Union (art. I-6 European Constitution) and the agreement to designate a Minister for Foreign Affairs for the Union (art. III-194.2 to 208 European Constitution). All of this has a flipside. The big hurdle is still unanimity in decision making (art. III-194; art. III-201; I-39.7 and 8; III-201 European Constitution). This means that each state has a right to veto. Only when the decision has been adopted can proceedings continue by a qualified majority.

The presence of national governments in the Council of Ministers is an unnecessary complication in the decision-making process. If to this we add that the constitution provides for a strictly egalitarian rotation of Commissioners among States (arts. I-25.3a) I-26.2 European Constitution...) the slightest flexibility has been lost. In such terms, our prospects for the future are to have a Commission with a Greek or Cypriot Commissioner, one or two Baltic Commissioners and in no time at all, two or three Yugoslavs, whilst for five of every ten years the chance of having a German, British or French Commissioner will be excluded. While the United States today deals with the Muslim world, tomorrow with China, the great countries of Europe complicate their relations with Lithuania and Malta. In the end, we finish up accepting the evidence that an *entente* among twenty-five countries can only be maintained by complete inaction.

In any case, it is clear that equality among States cannot be the guiding principle. The great decisions on *foreign policy* will have to leave a margin for States who may not be willing to assume certain responsibilities. Such an idea has been expressed in arts. III-196; III-201 European Constitution which by means of *constructive abstention* allows a State to distance itself from a resolution. That the special role of the two European States with a permanent seat in the Security Council of the United Nations has been consecrated (arts. 206.2; III-210; III-213.1; 215.4 and in the Protocol X European Constitution, former art. 19.2 TUE), also represents a serious handicap for the Union.

So, it is not clear how the Ministry of Foreign Affairs is going to solve the conflicts of loyalty between the Commission and the Council. On the one hand, it is certain that, finally, Europe and its spokesmen will have one voice ; on the other, the European Foreign Minister will only be able to act on the basis of internal agreements on European action; he will be able to promote, negotiate, give out signals, but it will be difficult for him to free himself from whatever mandate he may receive. That is, in his case, he will still be at the end of the day, a figure who is more an executive with no weight of his own rather than a leader and integrating figure for member States.

To all this must be added how slowly the military component of the foreign and common security policy is getting under way. In the Council of Laeken they managed to produce a *Declaration on arrangements for military action*, in which it was stated that the Union is able to carry out *military operations to overcome a crisis*. With the Constitution, the European Armaments Research and Military Capabilities Agency (art. III-212 European constitution) was created. In Salonica, the European security strategy has been passed, *A secure Europe in a better world*. Certainly, on January 1, 2002, we sent a European police mission to Bosnia-Herzegovina. But we must recognise that any greater need cannot be publicly revealed.

Recognising the Union as a legal entity in International Law, improving the procedure for adopting decisions by majority and the figure of a Minister of Foreign Affairs are steps forward. But this does not affect the determining role, both in foreign policy and security, of the States, and it is obvious that they are not going to agree. In a crisis let no-one place their hopes on the European Union.

2. Enhanced cooperation as a European form of government

Speaking frankly, neither the rights to be guaranteed nor external challenges to be tackled can be dealt with by means of a *form of government* which inherently suffers a blockage when making decisions and taking action. If we are consistent in finding fault with the constitution, I think that due to the external restraints and the very nature of things, the competences of the federal government which Europe needs can be no other than

- a) Direction of policy and monopoly of legislative initiative
- b) Executive and control function (Right of competition, supervision of state subsidies, Union budget, financial control, administration of structural funds, agriculture and commercial policy, European Administration
- c) power to make rules
- d) External representation and negotiation

But the *Convention*, which has had the chance to decide it, has allowed itself to be downgraded to the state of a *Chamber for the reading of first drafts* of a Bill which certain governments wanted to be a fainthearted one. If we are aware of this, if we wish to drive forward tomorrow's federal Europe, I can see no alternative to, Germany, France, and the Benelux countries, as a transitory measure, implementing in questions of internal, economic, foreign and security policy, *enhanced cooperation* (arts. I-43; III-322-329 European Constitution; former 43 TUE). Specifically, and without detriment to being open to all members of the Union, (arts. III-214 arts.III-322 to III-329 European constitution) *enhanced cooperation allows states to have at their disposal higher military capacity criteria and wish to enter into a more binding commitments in this matter with a view to the most demanding tasks* (art. III-213, European Constitution).

3. Towards the future

The European Union has the responsibility, on the one hand, of setting an example in the guaranteeing of rights, and, on the other, of sustaining the United Nations and international Law and moderating the Leviathan on the other side of the Atlantic. The problem weighing on the opened constituent process is political dithering in granting us the necessary means to achieve the fundamental rights and play the role of main characters in the world. Europe is permanently a phoenix bird, it is reborn from its ashes two or three times a year when it holds its statutory meetings, always heralded as decisive ones and which are, in fact, a joke. And now, everyone sees how Europe lays the foundation of its own impotence, whilst sliding down the slope which will lead it to be once more a mere geographical expression. The logic of the situation thus requires strengthening the Franco-German axis – If not even going as far as, in economic, diplomatic and military affairs, an organic merger of France and Germany. I see no other way of saving the threatened European idea.

The challenge we face is, first of all, defining an ambitious shared project. In the battle that has been launched someone, immediately, will have to lead those who want a constitution (Hesse), we opt for a weighted balance between, on the one hand, the preservation of our States, constitutional traditions and cultures and, on the other, a strong federal power. There is no alternative to maintaining the adequate positions against the attack from economic and political forces who, from the denial of Law, try to turn the clock of History back.

Certainly, Europe was for centuries both the renaissance and enlightened idea of Man as a repository of religious and cultural traditions; in the post-war, Europe emerged from its ruins as a Christian-democratic dream. At this moment in time, on the other hand, a nuclear Europe which can be constituted around Germany, France and the Benelux countries is the only possibility available to us, to give our needs and convictions the shape of a political will under the Law. In the face of this mandate from History to achieve our general interests, private interests and belfry visions – of capital and the government of the United States first of all, and our Heads of State and government secondly, cannot help surrendering. All resistance, in the end, will be futile.

