

The Nice Declaration: Time for a Constitutional Treaty of the European Union?

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During the Nice European Council meeting in December 2000, the heads of government approved a Declaration on the Future of the European Union.¹ This Declaration is not a legally binding text, but is to be annexed to the text of the Treaty of Nice at the time of its signature. It is another of those “rendez-vous clauses” that the member states of the European Union agree upon when adopting a reform of the European treaties: each time, the reform compromise is not entirely satisfactory to all, so a commitment is made to look again at some unresolved issues on a future occasion. This time, the agreement is to launch “a deeper and wider debate about the future development of the European Union”, which will go through several phases and end with a new intergovernmental conference (ICG) on treaty revision in 2004. Although the words “constitution” and “constitutional” are carefully avoided in the Declaration (these terms being unacceptable to some European governments), the post-Nice process is already widely known as the debate on a constitution for the European Union. This article aims at clarifying some aspects of this new debate.

Does the European Union already have a constitution?

It may be appropriate to note, first of all, that there is some confusion as to whether the constitution of the European Union already exists, or whether it is something that may (or may not) come into existence in the future. In fact, the terms “European Constitution” and “European constitutional law” are often used, especially by the European legal community, to describe the current EU system. Many present

¹ See the text of this Declaration in Annex, p. 29.

and former members of the European Court of Justice (ECJ) have used these expressions in their scholarly writing.² They are used in the titles of general textbooks, collected essays on EU law,³ and countless articles in law reviews. Entire monographs have been devoted to the systematic examination of the constitutional character of European law,⁴ and universities all over Europe offer courses on “the constitutional law of the European Union”. All this is often justified by reference to a few judgments of the European Court of Justice in which it used the expression “constitutional charter” to describe the EEC Treaty. The ECJ which is, after all, the authoritative interpreter of European law, used this term in 1986 (*Les Verts* case) and in 1991 (*Opinion 1/91* on the European Economic Area Agreement). The latter of these two judicial rulings was given very shortly before the Maastricht summit, but the expression “constitutional charter” has not been used in ECJ rulings since Maastricht. There may be doubts, in fact, as to whether the EU Treaty, as adopted in Maastricht, deserves the qualification of a “constitutional charter”. There are essentially two reasons for this:

- the way in which the EU Treaty, in 1992, turned the relatively stable constitutional order based on the EEC Treaty into a “constitutional chaos”⁵ of pillars and opt-out protocols that are insufficiently connected with each other to justify the name of “constitution”;
- the fact that the EU Treaty did not respect the “rule of law” principle which the ECJ considered an essential element of a constitutional charter and which it had defined in *Les Verts* as meaning that neither the member states nor the institutions “can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional character, the Treaty”. If judicial review is indeed an inherent part of a constitutional order, then the Treaty on European Union did not, and still does not, deserve the qualification of “constitutional charter”, because it does not provide for review, by the European Court of Justice, of the legality of acts taken within the context of the European Union’s “second pillar” (Common Foreign and Security Policy).

Despite this, there has been a tendency among legal scholars in the last few years to use constitutional language to describe the EU Treaty and the EU legal order as well. There may be various explanations for this evolution: gradual

2 Note, however, that the Court’s President Rodriguez Iglesias referred to the “constitution” between inverted commas in the title of his article “Zur ‘Verfassung’ der Europäischen Gemeinschaft”, *Europäische Grundrechte Zeitschrift*, 1996, p. 125.

3 A prominent example is J. H. H. Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999).

4 See, in particular, J. Gerkrath, *L’émergence d’un droit constitutionnel pour l’Europe* (Editions de l’Université de Bruxelles, 1997).

5 A term used in an influential legal analysis, written *à chaud*, after the adoption of the Maastricht Treaty: D. Curtin, “The Constitutional Structure of the Union: A Europe of Bits and Pieces”, *Common Market Law Review*, vol. 30, no. 1, 1993, pp. 17-69, at 67.

recognition of the fact that the EU legal order forms a structural unity encompassing the EC Treaty, so that one could not continue to attribute constitutional quality to the EC Treaty without extending it to the EU Treaty; recognition of the fact that the Maastricht Treaty, despite its chaotic nature and rule-of-law deficit, introduced important constitutional innovations in the text of both the EC and EU treaties (citizenship, subsidiarity, co-decision, principle of respect for fundamental rights); the constitutional language again inserted in the EU Treaty in Amsterdam.⁶

At the same time, it should be noted that the description of both the EC and EU treaties as “constitutional charters” continues to meet with the consistent opposition of a sizeable group of scholars, who feel that the use of such terms blurs the basic distinction between states and non-state organisations, and that a European Constitution should be held to exist only after a deliberate decision to that effect has been taken by the peoples of Europe.⁷ There is another large group of scholars who agree to describe the EU legal order as a constitutional system but criticise it for being a “constitutional system without constitutionalism” because of a perceived deficit of democratic legitimacy and judicial protection of individual rights, to be found particularly, but not only, in the EU’s intergovernmental pillars.⁸

The common use of constitutional language by the legal community has been contrasted by a decline in explicit constitutional language in the European political debate since the 1992-93 “depression” during ratification of the Maastricht Treaty. This political down-curve is well illustrated by the fact that the resolution on the “Constitution of the European Union”, patiently prepared by the European Parliament’s institutional affairs committee before Maastricht, was all but shelved in the EP’s plenary session of February 1994.⁹ At the time of the Amsterdam IGC, there was a very wide-ranging debate on institutional reform, but the term “constitution” was strangely absent from the official debate, even in the statements adopted by the earlier champion of European constitution-making, the European Parliament. The modest goals which the European Council set in 1999 for the most recent IGC could seem even less conducive to the use of constitutional language, and the

6 The “constitutional upgrading” resulting from the Treaty of Amsterdam is strongly emphasised, e.g., by I. Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited”, *Common Market Law Review*, vol. 36, no. 4, 1999, pp. 703-50, at 729-47.

7 See, among others, M. Pechstein and C. Koenig, *Die Europäische Union*, 2nd ed (Tübingen: Mohr Siebeck, 1998), Chapter 10; C. Franck, “Traité et constitution: les limites de l’analogie”, in Magnette, P. (ed.) *La constitution de l’Europe* (Brussels: Editions de l’Université de Bruxelles, 2000) p. 31.

8 See e.g. the work of Weiler mentioned in footnote 3; furthermore: G. de Búrca, “The Institutional Development of the EU: A Constitutional Analysis”, in Craig, P. and G. de Búrca (eds) *The Evolution of EU Law* (Oxford: Oxford University Press, 1999) p. 55; N. Walker, “European Constitutionalism and European Integration”, *Public Law*, summer 1996, pp. 266; J.-V. Louis, “Le modèle constitutionnel européen: de la Communauté à l’Union”, in Magnette P. and E. Remacle (ed.) *Le nouveau modèle européen. Vol. 1: Institutions et gouvernance* (Brussels: Editions de l’Université de Bruxelles, 2000) p. 31.

9 The draft Constitution of the European Union, proposed by Fernand Herman, the rapporteur of the committee on institutional affairs, was not formally adopted by the plenary of the European Parliament but published as a mere “annex” to its resolution. It may have been the right text at the wrong time. For a recent reflection on the European Parliament’s constitution-making initiatives, see J.-V. Louis, “Les projets de constitution dans l’histoire de la construction européenne”, in Magnette, *La constitution de l’Europe*, p. 41.

word “constitution” was not highlighted in the member states’ contributions to this IGC (nor in those of the Commission).

The German relaunching of the European constitutional debate

Nevertheless, there has been a sudden flourish of new designs for a European constitutional document. None of them has taken the form of concrete proposals for immediate adoption in Nice and all are framed as longer-term projects filling the *après-Nice* horizon. It is fair to say that this sudden constitutional urgency originates in Germany. Its re-emergence can be dated to two speeches by German Foreign Minister Joschka Fischer. In his 12 January 1999 speech to the European Parliament,¹⁰ he called for a debate on the creation of a constitution for the European Union. At first, this debate seemed confined to Germany, with the contributions of several political heavyweights and a number of academics.¹¹ It led to one major European initiative, namely the decision taken by the June 1999 Cologne European Council, on strong insistence from the German government, to set in motion the process of drafting the EU Charter of Fundamental Rights, but the general debate on the European Constitution did not really catch on outside Germany.¹²

The spread to the rest of Europe of this German debate took place suddenly, and astonishingly quickly, with Fischer’s second speech, at Humboldt University on 15 May 2000. Although its main theme was that of the “finality” of the European integration process, Fischer also reiterated his call for the adoption of a “constitutional treaty” (*Verfassungsvertrag*).¹³ The call was well received among political leaders of a number of member states (in fact, the original Six!): most prominently by Chirac in his baffling speech in the Bundestag on 27 June 2000,¹⁴ but also by Italian President Ciampi,¹⁵ Belgian Prime Minister Verhofstadt,¹⁶ and the Dutch

10 *Bulletin der Bundesregierung* 2/1999, p. 9

11 President Rau, opposition leader Schäuble, Minister of Justice Däubler-Gmelin, to mention just a few. For a useful panorama of the 1999 debate in Germany, see C. Dorau and P. Jacobi, “The Debate over a ‘European Constitution’: Is it Solely a German Concern?”, *European Public Law*, no. 6, 2000, p. 413; see also B. Kohler-Koch, *A Constitution for Europe?*, Arbeitspapiere Nr.8 (Mannheim: Mannheimer Zentrum für Europäische Sozialforschung, 1999).

12 But see the contribution to the debate published in 1999 by a “semi-political” actor, the chief legal adviser of the Council: Jean-Claude Piris, “Does the European Union have a constitution? Does it need one?”, *European Law Review*, no. 6, 1999, p. 557.

13 For the English version of Fischer’s speech, together with a sample of scholarly reactions to the speech, see C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (Florence, The Robert Schuman Centre for Advanced Studies at the European University Institute, and Cambridge (Ma.), Harvard Law School, 2000). For some of the reactions in Germany, see P.-C. Müller-Gräff, “Europäische Föderation als Revolutionskonzept im europäischen Verfassungsraum”, *Integration*, vol. 23, no. 3, 2000, p. 157; H. Schneider, “Alternativen der Verfassungsfinalität: Föderation, Konföderation – oder was sonst?”, *Integration*, vol. 23, no. 3, 2000, p. 171.

14 J. Chirac, *Notre Europe*, speech at the Bundestag, 27 June 2000: www.presidente-europe.fr/pfue.

15 C. A. Ciampi, *Verso una Costituzione europea* (Rome: Presidenza della Repubblica Italiana, 1999-2000).

16 “A Vision for Europe”, speech at the European Policy Centre in Brussels, 21 September 2000.

government.¹⁷ The European Parliament, though worried by some of the concrete proposals put forward by Fischer and Chirac, welcomed the return to the use of constitutional language after more than six years, and was able to plead once again for a “constitutionalisation of the treaties” (Duhamel Report and subsequent EP Resolution of 25 October 2000). Suddenly, at the end of 2000, an important part of the political elite of the EU seemed ready to undertake a *saut qualitatif* from the EU’s current messy legal reality towards a system based on a constitutional document.

What is the nature of this proposed *saut qualitatif*? The primary focus of the political protagonists mentioned above is clearly the substance of the proposed document rather than its form. The primary difference from the existing Treaties has to be sought not so much in the process of adoption of the constitutional document, or its legal status, but in the fact that its content would be so innovative as to deserve the label “constitutional”. In trying to collate the various contributions to the debate, the main innovative elements seem to be the following:

- The separation of the essential from the less important provisions in the existing text of EC and EU Treaties, so as to allow the truly constitutional norms to become visually more prominent. This idea of elaborating a “basic treaty” or “*traité fondamental*” was supported by the Dehaene Report in 1999 (following earlier suggestions made by the European Parliament) and experimented in a report written for the Commission in May 2000.¹⁸
- A clearer definition of the “vertical” division of powers between the EU and the member states.¹⁹ The *Kompetenzkatalog* idea was, first, strongly emphasised by the German *Länder*, and remained for some time a distinctly German obsession, but in the course of 2000 it started finding favour in French and British government circles as well.
- A fundamental rights chapter (or preamble?) based on the Charter of Fundamental Rights of the European Union that was elaborated during 2000 but whose legal status for the time being is that of a “Solemn Proclamation”, kept quite separate from the text of the EU Treaty.
- A reform of the “horizontal” division of powers, “pour renforcer l’efficacité et le contrôle démocratique” (as Chirac put it in his Berlin speech).²⁰ Reforming the role and decision-making procedures of the European institutions was, in fact, the aim of both the previous and the latest IGC, but new and broader questions were introduced into the debate last year (identifying a “European

17 “De staat van de Europese Unie – De Europese Agenda 2000-2001 vanuit Nederlands perspectief”, Dutch Ministry of Foreign Affairs, September 2000.

18 The report on “reorganisation of the treaties” written for the European Commission by a group based at the Robert Schuman Centre of the EUI in Florence of 15 May 2000 is available on the IGC website of the Commission: europa.eu.int/comm/igc2000/offdoc/discussiondocs/index_en.htm. The Commission published its reaction to this report in its communication *A Basic Treaty for the European Union*, COM(2000)434 of 12 July 2000.

19 On the feasibility of such a project, see the reflections of Ingolf Pernice, “Kompetenzabgrenzung im europäischen Verfassungsverbund”, *JuristenZeitung*, vol. 55, no. 18, 2000, p. 866.

20 Chirac, *Notre Europe*.

government"? creating a second chamber of the European Parliament with national delegates?).

From this rapid glance at the proposed content of the future constitutional documents, it would seem that its advocates pursue two rather distinct types of objectives: 1) introducing greater *order* in the current fragmented and intransparent EU system: a concise constitutional document would increase the citizens' understanding of its basic rules and favour their participation in the integration process;²¹ 2) moving the European integration process in a particular direction, which may be closer integration but also, in some cases, looser integration.

These two types of objectives are not mutually exclusive: one may advocate a better-structured European Union that would have stronger federal traits than at present; or one may propose, to use the words of *The Economist*, "a more perfect – but not ever closer – Union".²²

The Nice Declaration

The *suite de l'histoire* is well known. At the Nice Council of December 2000, all fifteen heads of governments let themselves be convinced to add a Declaration to the draft Treaty of Nice in which they committed themselves to a "deeper and wider debate" about the future of the European Union, in the course of which they would address *inter alia* the following questions: the delimitation of competencies between the EU and the member states, the legal status of the Charter of Rights which had just been proclaimed a few days earlier, the "simplification" of the Treaties, and the role of national parliaments. The words "*inter alia*" indicate that this is an open-ended agenda, the four items expressly mentioned merely being the common denominators which all member states could agree to discuss and put on the agenda of a new IGC to be held in 2004. The subjects mentioned in the Nice Declaration correspond quite closely to the themes mentioned in the pre-Nice debate. The only word that is carefully avoided is "constitution"!

Although, as argued above, the substantive aspects of the future constitutional arrangements are the main object of debate, there is also a more subdued interest for the formal aspects of constitutionalisation, such as the procedure for adopting the reforms, and the legal status of the resulting constitutional document. As for the drafting and adoption process, there seems to be a tendency to consider the intergovernmental conference mechanism, despite its pragmatic achievements in the last fifteen years, less appropriate for the drafting, and adoption, of a constitution. This feeling was reinforced by the frustration which many of the

21 For a strong statement, see the Duhamel report in the European Parliament, Doc. A5-0289/2000, p. 11: "In practice, we already have a constitution in the form of the Treaties, but that constitution is dense, piecemeal, confused, nameless, unreadable and invisible. The time has come for greater openness and clarity."

22 Title page of *The Economist* of 28 October 2000.

participants of the Nice summit felt about the primitive way in which the final phases of IGCs are currently conducted. The “convention” mechanism, associating European and national parliamentarians to the drafting process, was chosen perhaps unthinkingly by the member states for the drafting of the Charter of Fundamental Rights, and has rapidly emerged as an alternative route for the adoption of future constitutional reforms. The Nice Declaration firmly retains the basic rule that any reforms will eventually have to be agreed by an intergovernmental conference, but also states that this should be preceded by “wide-ranging discussions with all interested parties” (including even “university circles”!). Equally innovative is the view expressed in Chirac’s Berlin speech that the text of a future constitutional treaty, after being approved by the governments, would also have to be approved by the peoples of Europe. The EP, somewhat more hesitantly, hopes that “the citizens of the Union will be consulted in due course by means of a referendum”.²³

What is clearly not intended by the main players is a full-scale modification of the legal nature of the EU’s founding instrument. The “constitution” advocated by Fischer, Chirac and the like would be a constitution in quotation marks! It can more precisely be identified as a constitutional treaty, that is, an international agreement that is distinguishable from the present European treaties by its content and, perhaps, by a particularly solemn procedure for its adoption, but would still be based on a 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. Both Fischer and Chirac are adamant that this constitutional treaty would not create a European federal state but, at most, a “federation of nation states”. It would formalise the European dimension of the “multi-level constitutional structure”, of which the national constitutions will continue to form essential building blocks.

This reluctance to modify the legal nature of the European Treaties may explain the fact that the constitutional blueprints launched in the past few months do not refer to certain questions that would seem to fit well in a future constitutional document, namely the relation between European and national law, and the procedure for future revision of the constitution. The former question may, perhaps, conveniently be ignored and left for further development through the practice of the judicial institutions at both the European and national level (“let sleeping dogs lie”), but it would leave a clear gap in the effort to formalise the existing constitutional order. The latter question, on the contrary, must necessarily be addressed in a future constitutional document. One will have to tackle the hitherto taboo questions of whether the European Parliament should have a power of co-decision for constitutional treaty revisions, and whether, in a Europe of 27 or 30 members,

²³ European Parliament resolution on the constitutionalisation of the Treaties, A5-0289/2000, 25 October 2000, point 20. On the possible role of referenda in the European constitutional process, see also the far-reaching proposals of Philippe Schmitter, “An Excursus on Constitutionalization”, *Constitutionalism Web-Papers*, <http://www.qub.ac.uk/ies>.

one can still preserve the rule that all member states should agree with any future amendment of the constitutional treaty.²⁴

One consequence of the adoption of a constitutional document is that it would transcend the boundaries between the EC Treaty and the EU Treaty, and between the pillars. A constitutional document with the type of content indicated above would necessarily deal with subject matter that is now dealt with in both the treaties. The new constitutional treaty might either leave in existence the remaining provisions of the EC and EU Treaty, but there would then have to be a conflict clause ensuring the prevalence of the constitutional treaty, or it could replace the EC Treaty and the EU Treaty, and the provisions of the treaties not incorporated in the constitutional treaty would have to be re-enacted into some other instrument (possibly a series of protocols to the constitutional treaty). Whatever the technical solution chosen, the enactment of a constitutional treaty would undoubtedly reinforce the unitary structure of EU law.

But what about the fact that the “constitution of the European Union” is used both as a term describing the EU system as it exists at present, and as a description of an innovative institutional system that might be created in the future? A reason for this apparent contradiction is that the former usage has continued to be reserved to the – rather narrow – legal community formed by the European Court of Justice and academics writing on EU law, and has not penetrated into the wider world of politicians and the media, who definitely consider the constitution of the European Union a matter for the future. But even legal scholars who use constitutional language to describe the law as it stands recognise the distinct nature of a future reform aimed at addressing, in a comprehensive and consistent way, the existing deficits of the EU institutional order. In fact, when looking more closely at the constitutional reforms being advocated by Fischer, Chirac and the EP, it appears that most of them aim at adjusting existing rules and principles rather than creating entirely new principles or institutional mechanisms. It remains to be seen whether the Charter of Fundamental Rights, even if eventually turned into a chapter of a constitutional treaty, would add much to the existing EU system of fundamental rights protection; whether it would be possible (as many politicians unthinkingly assume) to divide the competencies of member states from those of the EU/EC in a more straightforward and unambiguous way than today; and whether major innovations of the institutional balance and the decision-making process are desirable at all. In the end, the substantive changes from the present situation may not be that important. The main effect of the operation might be merely a greater degree of formalisation and clarification of the constitutional principles that characterise the EU system today.

²⁴ For a discussion of these questions, see the Second Report of the Robert Schuman Centre at the EUJ “on the reorganisation of the Treaties”, submitted to the European Commission in July 2000. It can be found on the latter’s IGC website: eu.int/comm/igc2000/offdoc/discussiondocs/index

Declaration on the Future of the Union

1. Important reforms have been decided in Nice. The Conference welcomes the successful conclusion of the Conference of Representatives of the Governments of the Member States and commits the Member States to pursue the early ratification of the Treaty of Nice.

2. It agrees that the conclusion of the Conference of Representatives of the Governments of the Member States opens the way for enlargement of the European Union and underlines that, with ratification of the Treaty of Nice, the European Union will have completed the institutional changes necessary for the accession of new Member States.

3. Having thus opened the way to enlargement, the Conference calls for a deeper and wider debate about the future of the European Union. In 2001, the Swedish and Belgian Presidencies, in cooperation with the Commission and involving the European Parliament, will encourage wide-ranging discussions with all interested parties: representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc. The candidate States will be associated with this process in ways to be defined.

4. Following a report to be drawn up for the European Council in Göteborg in June 2001, the European Council, at its meeting in Laeken/Brussels in December 2001, will agree on a declaration containing appropriate initiatives for the continuation of this process.

5. The process should address, *inter alia*, the following questions:

- how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity;
- the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice, in accordance with the conclusions of the European Council in Cologne;
- a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning;
- the role of national parliaments in the European architecture.

6. Addressing the abovementioned issues, the Conference recognises the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States.

7. After these preparatory steps, the Conference agrees that a new Conference of the Representatives of the Governments of the Member States will be convened in 2004, to address the abovementioned items with a view to making corresponding changes to the Treaties.

8. The Conference of Member States shall not constitute any form of obstacle or pre-condition to the enlargement process. Moreover, those candidate States which have concluded accession negotiations with the Union will be invited to participate in the Conference. Those candidate States which have not concluded their accession negotiations will be invited as observers.