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What a European Constitution Could and Could Not Achieve

1 Introduction

For a long time, European constitutional issues were an academic, rather than a practical concern. In any case, their discussion was quite unrelated to the actual processes of institutional change, moving forward in many small steps through difficult compromises worked out in a long series of Intergovernmental Conferences. With the commitment to Eastern Enlargement, and the widely publicized failure of the Nice Summit, however, disputes over the future shape of the European polity have gained in practical importance and political salience.

The media as well as practicing politicians at European and national levels are publicly worrying not only the capacity of present institutions to cope with an enlargement from 15 to 25 or more member states. They have also begun to debate the ultimate goals — aka *la finalité* — of European integration, the relationship between Europe and the nation state, the structure and relative weight of institutions at the European level, and the problems of democratic accountability in the European polity. For sorting out these questions, moreover, the previous procedures of intergovernmental bargaining and compromise were considered inadequate. Instead, the Laeken Summit did set up a “European Convention” in which members of (European and national) parliaments outnumber the representatives of national governments. Ultimately, of course, their recommendations will only become effective if they are accepted in another Intergovernmental Conference. For the time being, however, the Convention is operating under an extremely broad mandate, adopted at the Laeken Summit: It is encouraged to show the way toward “a clear, open, effective, democratically controlled Community approach”.

The adjectives used here suggest that two types of criteria should play a role in discussions of the future constitution of the European Union. At the most abstract level, the first might be described as arising from concerns over the *normative appropriateness* of EU institutional structures and processes in light of demands for the greater clarity of competencies, the greater transparency of decision processes, and the greater democratic accountability of decision makers. The second type of criteria arises from concerns over the *problem-solving effectiveness* of EU institutions in light of substantive policy challenges which, allegedly, cannot be met under present conditions.

There is no question that both of these criteria are relevant and that they are also interconnected. Good proposals ought to satisfy both of them. In the past, however, institutional reforms (such as those adopted in the Single European Act or in the Maastricht Treaty) were primarily driven by serious concerns over substantive policy problems or agreed-upon goals with little regard for the simplicity, clarity, transparency and democratic propriety of institutional designs.

By contrast, present debates — not only in the Convention but also among active politicians, academic observers and in the media — appear to be preoccupied with criteria of institutional appropriateness with little regard to the problem-solving effectiveness of proposed solutions. It is for that reason that I will today focus on three substantive policy

challenges facing the EU which, in my view, cannot be met within the present institutional framework of the Union, namely

- the challenge of a more effective Common Foreign and Security Policy,
- the challenge of integrating the Eastern European accession states, and
- the challenge of defending the European Social Model.

In order to appreciate the difficulties of coping with these substantive challenges, however, one needs to have a good understanding of the present functioning of EU institutions.

2 Three Modes of Governing in the EU

At present, EU policy-making is conducted in three distinct governing modes differing greatly in their problem-solving effectiveness and legitimacy.

- The basic mode is "*intergovernmental negotiations*" requiring unanimous agreement on policy choices in the Council or the European Council and, in the case of Treaty amendments, parliamentary ratification in all member states.
- At the other extreme is the mode of "*supranational centralization*" where European policy choices do not depend on the agreement of any national government. This is true of the monetary policy of the European Central Bank and of the policy choices implied in the interpretation of European law by the European Court of Justice and by the European Commission when it is prosecuting alleged violations of Treaty obligations.
- The most frequently employed mode, however, is the one which I have labeled "*joint-decision making*" and which the Commission sometimes describes simply as "The Community Method". At the level of technical detail, it comes in a bewildering number of procedural variants (which the Convention is supposed to reduce to a simpler pattern). For present purposes, however, it seems sufficient to focus on the variant that has become dominant in recent years: Here, European policy must originate from a proposal coming from the Commission which, in order to become effective, must be approved by a qualified majority of votes in the Council of Ministers and by an absolute majority of the members of the European Parliament (Art. 251 TEC).

Considering the range of potential action, the *intergovernmental* mode clearly has the widest sweep. By amending the Treaties, member governments are able to transfer all types of governing powers to the European level, and even within the existing Treaty they may rely on the "necessary and proper clause" of Article 308 TEC to expand existing powers by unanimous agreement in the Council. At the same time, the *legitimacy* of the intergovernmental mode was generally considered beyond challenge in the history of European integration: What better basis than the unanimous agreement of democratically accountable national governments and, in the case of Treaty amendments, ratification by all national parliaments?

By the same token, however, the *problem-solving effectiveness* of the intergovernmental mode is quite limited. Since each government has a veto, agreement on European policy is easily blocked by divergent member state interests or preferences, and the compromise solutions that can be worked out are often unsatisfactory from a problem solving perspective. Over time, these difficulties increased as the European *agenda* was expanded beyond the widely shared interest in creating, or gaining access to, a larger common market, and as each round of enlargement had increased the *heterogeneity* of member state interests and political preferences. The *supranational-centralized* mode has gained

greatly in scope by the creation of the European Monetary Union and the establishment of the European Central Bank whose independence from the influence of member-state governments is even more securely protected than was true of the German Bundesbank. The same is true of the policy-making powers of the European Court of Justice and the Commission. Moreover, in its recent White Paper on European Governance, the Commission envisages not only a further expansion of its own policy-making powers but also the establishment of additional (semi-) "independent regulatory agencies" under its exclusive control. However, the example of the ECB also illustrates the limits of the legitimacy and problem-solving effectiveness of the supranational-centralized mode. Monetary policy is clearly of major importance for the performance of economies — and hence of a correspondingly high need for legitimation. Under the intellectual dominance of the "sound money paradigm" in the 1990s, however, governments of EU member states had come to agree on both, the institutional independence of the ECB and to the rule that its "primary objective ..shall be to maintain price stability" (Article 105 TEC).

Given this intergovernmental agreement on a clear objective, the policies of the ECB appear to be both legitimate and effective. Legitimacy and effectiveness would be undermined, however, if a majority of member governments should in the future revert from "monetarist" to "Keynesian" preferences — in which case the Treaty would prevent them from realizing their objectives as long as even one member state would prefer to maintain the old regime. That suggests two conclusions:

The supranational-centralized governing mode can achieve very high problem-solving effectiveness because it cannot be impeded by conflicts of interest and political preferences among member-state governments.

By the same token, however, its legitimacy is restricted to policy areas where member-state governments agree on the objectives that are to be achieved. Moreover, supranational-centralized seem fully justifiable only in policy ar eas where the preferences of member states can be expected to be highly stable over time.

These conditions were largely satisfied by the original commitments of member states to create a Common Market and the later commitment to complete the Internal Market. The same was true when a majority of member states went ahead in creating the European Monetary Union. Within these policy areas, therefore, the supranational powers of the Commission, the Court and the Central Bank to interpret and enforce these commitments are both effective and accepted as legitimate even where enforcement in the individual case goes against the interests or preferences of a particular country.

By the same token, however, supranational powers could not be employed to resolve politically salient policy conflicts among member states without undermining the foundations of their own legitimacy.

The *joint-decision* mode, by contrast, involves both supranational actors and national governments and hence is less affected by the constraints limiting the legitimacy and effectiveness of the other two modes. The most common decision rule in the Council is now qualified majority. Even though the threshold is high (over 70% of all votes) and governments still try to achieve overall consensus, it is no longer possible that a single member state could hold up all others by threatening a veto. In comparison to the intergovernmental mode, therefore, the problem-solving effectiveness is considerably greater.

At the same time, supranational actors — the semi-independent Commission and the directly elected European Parliament — are playing an important role in defining and promoting European objectives, and they also have considerable bargaining power in negotiations with the Council. Nevertheless, they cannot impose their own preferences unilaterally. Compared to the supranational mode, therefore, the legitimacy of policies adopted in the joint-decision mode has a much broader foundation combining the broad support of democratically accountable national governments with the support of a majority in the directly elected European Parliament.

By and large, this combination of three distinct governing modes in the present de-facto constitution of the European Union appears to be quite sound — and I also am convinced that these differentiated institutional arrangements go about as for toward legitimate and effective European political integration as will be possible in the foreseeable future. It would, of course, be desirable to simplify the bewildering variety of procedures and to systematize the assignment of policy functions to one of the three modes. But it is not at all clear that Treaty revisions of this nature would greatly add to either the legitimacy or the problem-solving effectiveness of EU policies.

3 New Challenges

But why, then, should one also think that the new challenges facing the European Union could not be adequately met by these three-fold options of the “Community Method”? The reasons can be summarized by three propositions:

- Even when operating in the joint-decision mode, European policy processes still depend on high levels of intergovernmental consensus for effective solutions.
- At the same time, European policy making is committed to the principle of uniformity. Subsidiarity may be invoked to leave matters at national levels; but if European solutions are required, these should to result in uniform rules implemented equally in all member states.
- When faced with the new challenges, however, the European Union is confronted by the dilemma that effective solutions could not be both, uniform as well as consensual.

In the field of *Foreign and Security Policy*, it has become clear over the last decade that vital European security interests cannot be safeguarded by member states acting individually. At the same time, it is doubtful that the United States will continue to provide leadership and carry the major burden of common action in conflicts where American interests are not immediately at stake. In response to these insights, the Union has committed itself to a Common European Security and Defense Policy and to the creation of a Rapid Reaction Force (RRF). But that is where the dilemma arises. As of now, the European Reaction Force will be made up of contingents of national armed forces (rather than being organized as a separate European volunteer army) As a consequence, the decision to send “our boys” to fight and possibly die in a European mission would have extremely high political salience in all member states, and governments would jeopardize their own legitimacy if they were bound by majority votes in this regard. At the same time, however, unanimous agreement on European missions would be extremely hard to achieve, given the heterogeneity of interests, preferences and historical memories among EU member states — some of them invigorated by a victorious past, others still trying to cope with the moral catastrophe of having waged and lost the Second World War; some trying to honor post-colonial obligations, others committed to universalistic UN programs; some with self-chosen or imposed commitments to neutralism, others firmly rooted in the

NATO alliance; some in a deeply emotional "special relationship" with the United States, and others with equally deep suspicions of U.S. motives, and so on.

In short: unanimous agreement on European missions will generally involve difficult and quite diverse political debates nationally and even more difficult negotiations at the European level — none of which is conducive to the coherent diplomatic initiatives and, if need be, rapid military reactions that might be necessary to settle conflicts before they escalate into major conflagrations. As regards the challenges of *Eastern enlargement*, the difficulties are already manifest in the bilateral accession negotiations conducted by the Commission — which is here operating de facto in a supranational-centralized role. As a precondition of entry, each candidate country is required to demonstrate compliance with the *acquis communeautaire* — which represents a huge body of uniform rules adopted for capitalist economies at high levels of productivity and international competitiveness. If these rules are now to be applied to countries that are still struggling with problems of economic, social, political and institutional transition from socialism to democratic capitalism, the danger is that their chances of further development will be curtailed as much as East German economic development has been stymied by the imposition of West German law and institutions.

But that is not the only challenge. Once admitted, accession states will also have a veto when unanimity is required in the Council, and their votes will matter if a qualified majority must be reached. Since their economic, social, political and institutional conditions will continue to differ fundamentally from those in the present member states, the heterogeneity of interests and preferences is likely to increase to such an extent, that the adoption of new and uniform European policies will become considerably more difficult. In other words, everything else being equal, enlargement will greatly reduce the present problem-solving capacity of the European Union.

Even in the absence of enlargement, however, the challenges to the "*European Social Model*" could not be met by policies that are both uniform and consensual. These challenges are in part a consequence of demographic changes and the "graying" of European populations, and in part a consequence of slower economic growth and higher rates of unemployment. If that were all, surely, national solutions would be possible and entirely sufficient. That they are not sufficient is due to the success of European economic and monetary integration:

The integration of European capital and product markets is now comparable to that of large federal nation states — with the consequence that tax competition and regulatory competition has become an important economic constraint on national policies which would increase the costs of production or reduce the after-tax profitability of investments. In federal states, therefore, regulations of production, social policies and capital taxation have generally been shifted to the level of the central government. But ultimately the pressures of economic competition may be less important than the legal constraints imposed by European integration. Obviously, members of the European Monetary Union have lost the option of dealing with economic problems through devaluation or through deficit-financed spending programs. Moreover, European competition law rules out most of the subsidies which in the past would have been used to aid distressed firms, industries or regions. Potentially even more important is the impact of European rules on the liberalization of service industries and infrastructure functions which, in the mixed economies of most countries, had been protected against market competition either by state ownership or through tightly regulated cartels.

By itself, liberalization would only require the admission of foreign providers on the terms prevailing nationally. As understood by the Commission and the Court, however, liberalization also implies that these protected sectors are transformed into markets in which all rules of European competition law should be enforced — which generally also implied privatization and deregulation. In telecommunications; air and road transport, market competition has brought great benefits for consumers, even though on balance more jobs were lost than created. It is less clear whether similar benefits for consumers were or will be achieved through the liberalization of railroads and urban transport, of energy and water supply or of television services and banking — but it seems quite clear that important purposes of public environmental, industrial or cultural policy will become more difficult or impossible to achieve as a consequence. The reason is that under the Treaty, as interpreted by the Commission and the Court, European rules of market integration, liberalization and unfettered competition take absolute precedence over national law. As a consequence, all policy purposes that are not also enshrined in European law are in fact relegated to secondary status in a kind of lexicographic ordering. When applied to welfare-state and industrial-relations institutions (which, after all, are designed to restrain market competition and to compensate for the inequities of market distribution), this asymmetry is truly worrying.

An early warning was the decision that ended the monopoly of public labormarket placement in Germany. Then the Luxembourg health insurance system was obliged to pay for private services obtained in neighboring countries. The next targets are likely to be public pension insurance systems and the privileged of position of nonprofit charitable organizations in providing publicly subsidized social services in several continental countries.

In all of these cases, there is no question that existing national regimes, *when viewed from a market perspective*, represent severe distortions of competition. It is also true, however, that within the constitutional framework of member states, these socialpolicy regimes were never meant to approximate perfect markets, but represented complex solutions to multi-dimensional social problems that were heavily influenced by normative aspirations with very high political salience.

To appreciate the seriousness of the challenge: There is no reason why European competition law should not also require the Swedish system of universal social services to be liberalized. When that is achieved, it would also be logical to demand that — in order to eliminate distortions of the market — commercial providers should receive the same per-client subsidies as their public competitors. Since private agencies would be free to charge additional fees for more attractive services, they would attract middle class clients — which would also undermine the support of middle-class voters for the tax-financed system. In the end, therefore, the universal Swedish welfare state might develop into an “American” two-class system — with privately financed high-quality services for the rich, and tax-financed minimal services for the poor. In other words, the interference of Court-defined European rules of service liberalization cuts even deeper into the fabric of European welfare states than is true of economic competition in unified product and capital markets. Hence if “Social Europe” is to be defended, that defense must be supported by European rules that enjoy the same legal status as does the European law of economic integration and liberalization. At that point, however, European social policy is also confronted with the dilemma that it could not be uniform and consensual at the same time.

A series of uniform “social regulations” was launched by the Delors Commission in the early 1990s to complement the Internal Market program and the Monetary Union. In the end, however, those initiatives that did not fail altogether did merely prescribe minimum

standards reflecting the interests and preferences of the most reluctant member states. It is easy to see why this had to happen: Since per-capita incomes are about three times higher in Denmark than in Portugal or Greece, differences in the ability to pay explain much of the story. But that is not all. Sweden and the United Kingdom have similar per-capita incomes, but they surely could never agree on common European rules for the welfare state. The reason is that national welfare states have started from different historical origins and have developed into very different models — Scandinavian, Continental and Anglo-Saxon — during the post-war decades. In the minimal British welfare state, citizens have come to rely on private pension insurance, private savings and private services. Hence they could simply not live with European solutions requiring the high levels of taxation needed to finance the generous Scandinavian welfare state. Swedish families, in turn, have come to rely on high quality and universal social services for the young, the sick and the aged, and they would be shocked if Europe imposed a Continental model where these services are mainly provided by mothers, wives and daughters in the family. At the same time, German patients and doctors would be horrified if health insurance were replaced by a British-type National Health Service, and so on ....

The political implications are clear: citizens everywhere have adjusted their life plans to the features of their specific national welfare systems. As a consequence, even incremental national reforms are highly controversial and politically dangerous for the government. It is inconceivable, therefore, that democratically accountable national governments could reach consensus on uniform European solutions which inevitably would require radical system changes at national levels.

4 Non-Solutions

So there we are: All three challenges discussed here — developing an effective Foreign and Security Policy, coping with Eastern Enlargement, and protecting Social Europe — seem to require policy responses at the European level. Yet in each case it also appears that uniform European solutions could not be adopted under the high consensus requirements that have to be met in all European governing modes — intergovernmental, joint-decision and supranational. Hence if the challenges are to be met at all, something ought to give — either the uniformity of European policy or the consensual character of European decision making.

Where the problem is at all recognized in the present constitutional debate, the responses of the Commission, of the European Parliament and of pro-European national politicians all point in the second direction: If European solutions are blocked by disagreement in the Council, the influence of member governments should be reduced

- by lowering the threshold for qualified majority votes in the Council;
- by further strengthening the role of the European Parliament in the legislative process;
- by enlarging the domain in which the Commission could legislate autonomously; and ultimately,
- by transforming the Commission into either a parliamentary or a presidential European government in order to increase and extend the political legitimacy of its supranational roles.

In other words, it is assumed that uniform European solutions could simply be imposed through democratically legitimated majorities at the European level — just as they may be imposed on dissenting minorities by parliamentary majorities in (some) democratic nation states. In my view, however, such proposals are based on an inadequate understanding of

the normative preconditions of legitimate majority rule. The vote of a legitimate majority has the effect of denying legitimacy to actions that would realize the interests and preferences of the opposing minority. To be normatively acceptable, this presupposes the belief in a common interest that is considered more important than sectoral, regional or class interests, and a belief that the majority vote may, in principle, be considered a representation of the common interest.

In the nation state, these legitimating beliefs may be supported by emotionally charged attachments to a strong collective identity. Even then, certain basic interests are often protected against majority rule by a bill of rights and constitutional checks and balances. Moreover, in polities with highly salient ethnic, linguistic or religious cleavages, the attachment to a collective identity may be so weak that the imposition of majority would either produce violent conflict and civil war (as was true in Northern Ireland or in the former Yugoslavia) or may lead to disintegration (as was true in the former Czechoslovakia).

In successful multi-ethnic democracies like Switzerland, Belgium or Canada, civil war and disintegration could be avoided. But they were avoided by the adoption of non-majoritarian ("consociational") constitutions under which minority interests are protected by multiple veto positions against being overruled by potentially hostile majorities.

In other words, their policy processes are easily blocked by divergent interests and preferences and successful policy must be based on broad consensus. In the European Union, surely, the economic, institutional, ethnic, linguistic and cultural diversity among member states is much greater, and emotional attachments to a collective identity are still weaker than is true of consociational nation states. By comparison, the national identities of EU member states are still much stronger than the collective identities of provinces, states, Kantons or Länder in federal nation states. It seems quite inconceivable, therefore, that government in the EU could be less consensual than it is in consociational nation states, and there is no reason to expect that the next Intergovernmental Conference could move European institutions very far in a majoritarian direction.

On the contrary, if a general move toward majority rule should be promoted too aggressively in the Convention, the public debate might well backfire. If opponents should highlight potential threats to vital national interest, even the acceptance of present governing institutions could be undermined. Instead, it would be useful to dissociate discussions of legitimacy from the rhetoric of a European collective identity. In spite of its weakness, there could be shared European interests that are considered so important that opposing national or sectoral interests or preferences could be legitimately overridden. But in the absence of strong collective identity, these conditions would not be true across all policy areas.

What is needed, therefore, are issue-specific discussions of European legitimacy — or, conversely, issue-specific discussions of illegitimate and legitimate insistence on national diversity in the face of European majorities. In such discussions, one would discover significant differences among policy areas — ranging from broad agreement on the illegitimacy of national obstacles to free intra-European trade to equally broad agreement on the legitimacy of national divergence in the fields of language, culture and education policy. There would also be a broad middle-ground of issues where common interests are considered important but should not be pursued without a serious effort to accommodate divergent national preferences.

What one would also discover, moreover, is the wisdom incorporated in present European institutions. The differentiation of supranational, joint-decision and intergovernmental modes

of governing allows a very flexible accommodation of policy areas differing in the relative legitimacy of European purposes and national diversity. While it would certainly be possible and useful to shift the assignment of some policy areas from one mode to another, there is little reason to think that the basic institutional pattern could be greatly improved upon.

For the challenges discussed here, however, the implications are negative: There is no general agreement on European purposes that would invalidate the legitimacy of divergent national interests and preferences — and there is also no practical chance that governments could agree to supranational or majoritarian decision rules that could override legitimate diversity in these policy fields. As a consequence, the Union will remain impotent unless it is willing to compromise on the requirement of uniformity.

5 Coping with Legitimate Diversity

In principle, opportunities for "differentiated integration" are already available within the framework of the Treaties. Thus, if agreement on Europe-wide policies cannot be reached, the provisions for "Closer Cooperation" introduced in Title VII of the Amsterdam Treaty would allow groups of member states to make use of "the institutions, procedures and mechanisms" of the Treaties to adopt solutions that will only apply to members of the group. Moreover, the Treaty distinguishes between two types of binding European legislation: Of these, "*regulations*" are "directly applicable in all member states" — which also implies that they must be uniform. By contrast, a "directive" (which is the much more frequently used form of legislation) is binding "upon each Member State to which it is addressed" (Art. 249 TEC) — which clearly implies that directives need not necessarily apply to all member states.

In theory, it would thus be possible for some governments to pool their military resources and to integrate their foreign policy even if such initiatives were not supported by all member states. Similarly, countries trying to reduce very high non-wage labor costs might find it useful to harmonize their tax reforms. By the same logic, directives might only apply to the accession states in Central and Eastern Europe, or to Scandinavian welfare states with a high commitment to universal social services, or to member states trying to reform a compulsory health insurance system.

In short, differentiated integration could facilitate European solutions in policy areas where unilateral national solutions are no longer effective while uniform European solutions could not be agreed upon.

So why are these statements in the conditional mode? For differentiated directives, the simple answer is that the Commission has never proposed them. As of now, there also have been no initiatives for "Closer Cooperation". The superficial explanation is that the rules adopted in the Amsterdam Treaty are exceedingly restrictive and practically unworkable. Several governments tried to change that at the last Intergovernmental Conference, but hardly any progress was achieved in the Treaty of Nice. Closer Cooperation would still require the participation of at least eight member states and the policies which they might adopt still could not challenge the existing body of European law.

In other respects, the constraints were made even tighter: The possibility that policies adopted through Closer Cooperation might interfere with free trade or distort market competition is explicitly ruled out (Art. 43 TEU). Moreover, such policies could not themselves become part of the *acquis communeautaire*. In other words: For most of the policy challenges discussed here, the rules governing Closer Cooperation according to the

Treaty of Nice would not allow effective solutions. But why this seeming hostility against differentiated integration?

In part, it is explained by the unfortunate “framing” of a debate which, ever since Willy Brandt had talked about “two-speed Europe” in the early 1970s, has always been associated with the notion of an “avantgarde” or a “core group” — implying that others would be relegated to the “rearguard” or the “periphery” in a two-class European Union. But even if such misconceptions could be cleared up, there are still stronger ideological commitments to uniform law as a precondition of fully integrated markets. And to uniform law as the symbol of sincere commitments to European integration. From this perspective, Closer Cooperation appears as a regression from the ideal, a backward move toward disintegration and “Balkanization”, that all good Europeans must resist.

It is this frame of mind which the present constitutional debate must overcome. It is not true that we must choose between integration and disintegration, or even between integration and subsidiarity. It is even less true that in order to achieve progress in integration we must create institutions that are able to override legitimate diversity. Instead, we should acknowledge that economic integration has undermined the viability of purely national solutions without, at the same speed, creating the preconditions for uniform European solutions.

What we need, in academic as well as in political discourses, is a better understanding of the distinction between legitimate and illegitimate diversity. Even if protectionism is illegitimate, it does not follow that all measures designed to protect or promote environmental, social or cultural goals at the national or subnational level must be automatically illegitimate as well if they depart from the ideal of perfectly competitive markets. And even if European solutions are considered necessary, it does not follow that these must ignore all existing differences in the economic, institutional, cultural and political conditions of EU member states. It is these issues, I suggest, which ought to preoccupy the present constitutional debate in the multi-level European polity.