A European Constitutional Treaty: The Blueprint for the European Union

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[*Editors' Note: Justice Di Fabio originally presented the following text as a speech at the European Central Bank on 27 June 2001, at the invitation of Professor Otmar Issing*.] Honorable Professor Issing. I am sincerely grateful for the invitation to speak here, at the very center of European monetary policy. **I.** [1] The debate over a European constitution is fully underway. (1) The issue will play an important role at the 2004 intergovernmental conference, especially if negotiations over a new model for the division of competencies between the Union and its constituent Member States is taken up at the Conference. The various points of inquiry - a Charter of Fundamental Rights, institutional reform, the division of competencies, financing, eastward expansion, finality - belong together and they beg for a solution that is fully conceptualized. With this in mind, the German Federal Government is justified in making sweeping, well thought out proposals. At the same time, the French government is equally correct to promote practical solutions while expressing a healthy suspicion of the formation of a federal state of Europe, which is the holiest of all possibilities for the Germans. Against this background, let me begin by saying a few things with respect to the legal nature of a possible constitution for the EU, before I move on to a presentation of more practical conclusions. **II.** [2] What is a constitution? With constitutions political communities confirm their intent to exercise their power only in the form of the law. Viewed pragmatically, the constitutional idea stands for a special bond between politics and law. Certainly, in their history, constitutions have fulfilled other objectives and ideals. With their constitution, the United States of America formed themselves into a nation. England saw, in the legal stature of the parliament, its fundamental constitutional decision and its guarantee of freedom. The democratic movements in 19th Century Germany that opposed restoration of the monarchy and royal authority found their voice in the constitution. The rational French perspective permitted, from time-to-time, sudden changes to their constitutions to ensure that the constitution reflected the prevailing mode of political organization. (2) Many would regard modern constitutionalism as the continuation, in the philosophy of the state, of the social contract. [3] In recent decades, there has been an enormous expansion of constitutionalism. Perhaps this is because the State is no longer so completely taken for granted and is no longer so completely perceived as effective. In Germany today one rarely speaks of the former, all encompassing and singular State; the hybrid "Constitutional State" seems more appropriate. Those who discuss a constitution for Europe necessarily run into these associated concepts, which have been conceived at the level of the Nation State. Is it at all possible to think of a constitution without thinking of a State, just as we prefer not to think of the State without a free and democratic constitution? Does this not mean, for Europe, that every constitutional proposal unavoidably raises questions about the fundamental political status of the Union? Should the European Union become a State, following a course something like that taken by America in the 18th Century, forming itself into a nation? [4] Those who hope that such a rigid association will be the result of the ongoing development of such an exceptionally successful supranational organization like the EU, those who promote the constitutional spirit because they intend it to lead to the foundation of a European state, actually do the whole project a disservice; they will reap distrust and probably discredit constitutionalism. In the beginning, constitutions were, and should continue today to be, at once the pragmatic and solemn recognition of civil rights, the confirmation of political compromise, and the rational organization of public power. In this light, and when viewed across history, there is no rigid, necessary association between the constitution as a concept and the state as a concept. Today, every sovereign state should be a constitutional state. But an organization that presides over states, consisting of constitutional states, need not be a state in order to have a constitution. [5] Such a perspective carries little weight if the construct long practiced in the context of Nation States holds sway: that with a constitution the EU will be a State or an international sovereign. There are grounds, therefore, in the framework of a debate over a European constitution, to clearly articulate the following possibility: the peoples of Europe could conclude a constitutional treaty and at the same time remain the masters of this treaty. Such a treaty, formed as an instrument in international law, would have the following advantages: (a) the community's competencies could be bound to fundamental rights; and (b) the internal architecture of the Communities and the Union could be established, and in the case that it becomes necessary, corrected. In addition, such a treaty could make the relationship of competencies between the Union and the Member States more explicit and clear. Such a European constitutional treaty must, from the very beginning, seek to put distance between itself and classic notions of constitutionalism. It must be understood as a new kind of legal structure for an especially close supranational organization. A constitutional treaty could be that organization's instrument for consolidation and experimentation. **III.** [6] The aspect last mentioned, experimentation - that is to say, provisional regulation, has a curious resonance because, with constitutions, we hope to establish the most enduring fundamental principles of organization and the division of competencies. Constitutional history reveals, however, that we have seldom achieved such permanence. Even though we have not achieved such permanence, the aspiration to permanence remains a part of constitutionalism. In principle this is now true only for closed Nation States and not for the newly emerging States that are more open to the world, which have sought to bind themselves at a supranational level for the longterm. Still, these open States must, and probably always will be required to, struggle to develop ever-better structures for the exercise of supranational power that are more effective, democratic and that enhance

freedom. A European constitutional treaty must, to this extent, bring to an end one of the common expectations or myths that accompany the creation of a constitution: a European constitution will not form a sovereign State, it will instead empower the conceptual responsibility of the Member States. A constitutional treaty will not be a capstone to the work of building European unity but a new cornerstone in the foundation of institutional learning and experimentation. The Member States would find in a constitutional treaty, when conceived in this way, the legal framework for the fundamental questions facing the European Union and a platform for the public attention that will necessarily accompany these fundamental questions, questions that must be approached with a kind of concern that differs from that applied to the detailed questions that are otherwise involved in the management of European cooperation. One can imagine the preamble to such a Constitutional treaty, which could read: *The free peoples of Europe conclude a treaty over the fundamental principles of the European Union. The Union presides over the States as an enduring political organization. It serves their peaceful and mutually advantageous coexistence in Europe. The Member States share final responsibility for the powers conferred on the Communities of the Union and their institutions. The fundamental rights guaranteed by this treaty bind the public competencies exercised by the institutions of the Communities. Amendment of this constitutional treaty can be accomplished, without prejudice to the participation of the institutions of the Communities, only by a treaty in international law that fulfills the requirements of each State's internal constitutional provisions.* [7] From the beginning these fundamental principles provide two insights: (a) For further steps in the development of Europe, a convention like that employed on the occasion of the preparation of the Charter of Fundamental Rights, is principally suitable only as a preparation- and advisory-committee. The Member States may not shift to the Union their responsibility for their treaty, as they are occasionally glad to do at the domestic political level with the commissioning of all sorts of committees and consensus-groups. With respect to the convention model, and who could be more competent and impartial, Roman Herzog recently pointed out on the occasion of the Sinclair-Haus-Discussion that he in no way regarded the convention that was used for the preparation of the Charter of Fundamental Rights as a method superior to the classic intergovernmental conference of the kind that will be necessary for the elaboration of a European constitution. (3) (b) A compromise on the division of competencies struck, possibly as early as 2004, should not, under a sword of Damocles, be assigned a permanent and final status. The EU presently needs flexibility and will continue to need flexibility in the future. It could, for example, undertake wider authority for a collective asylum policy. Other areas over which the Community has exercised competence could be partially returned to the competence of the Member States if, for whatever reason, the Community has proven to be a less than optimal administrator. The agricultural sector might be an example. In no case should such a return of competencies to the Member States be allowed to undermine the successful precondition of the European Union: the idea of a functional unity. The Communities must retain their role as the established regulator of competition and they must represent the trade policy of Europe with single voice. We should not take for granted the fact that the common market has, in a few areas, already achieved a higher level of harmonization than the U.S. market. Harmonization, however, is not a value unto itself and it is not an end in itself. The Member States must be empowered to ensure that competition between the Member States is extended for the longterm, within the framework of the Communities' regulation of competition. **IV.** [8] The division of competencies will always be a point of political contention among the Member States as well as between the Member States and the Community institutions. And it is good that it is so. Only in this manner will pragmatic solutions emerge along the path toward a new European order of peace and prosperity, a path that is without precedent and in no way without risks. The old orientation in European politics towards ever more competence at the European level is categorically incorrect, if the objective of a new political division of competencies is to strike a balance between Member States that are self-confident and capable of leadership on the one hand, and a successful, autonomous European Union on the other hand. It is much more important that the competencies are sensibly divided, that the results convince and that the division of competencies at certain levels is in accordance with the political will of the peoples of Europe. It is also important that all levels remain responsive to democratic expression with more than the minimum amount of room for adjustment. What that means in individual cases can only be determined in the political arena. The constitutional treaty could, however, through its formalities, make a special call to let political wisdom prevail. **V.** [9] Such political wisdom will be blocked, however, if fiscal matters are at stake. Every political community - from regional associations, to Nation States as well as supranational organizations - has its Achilles' heal in the transfer of wealth through a system of leveling or balancing. The concept of solidarity at a higher level often stands in conflict with the concept of freedom with respect to those situated beneath the united whole. Still, the respective supporters of a centralized redistribution, as well as those perceived as being the most likely to benefit from such solidarity, welcome solidarity as an appeal for the most unified possible coexistence. Thus, a transfer of competencies back to the Member States might be met with little welcome from those states that could expect fewer financial transfers from the EU. More freedom and more responsibility have, in this respect, an identifiable price in Euros. The experience in federal States de-monstrates, however, that mixed fiscal systems involving regional subsidization and a horizontal leveling of wealth may not be exaggerated because they produce political inflexibility due to the dependence on compromise in fiscal matters and because they make it difficult for citizens to ascribe accountability. [10] Herein lie a few advantages at the European level, if the EU constitutional treaty develops competence for a moderate range of further fiscal matters, without threatening the revenue structure of the Member States. Along with this is the above described principle: the Member States also retain the conceptual responsibility for the direction of the Union in fiscal matters and the EU acquires none of the fiscal sovereignty to which the States are entitled. At the same time the

Union does not remain a dependent, relying on fiscal transfers from the Member States. (4) **VI.** [11] In another difficult area, the constitutional treaty will be expected to address the structure of the various institutions of the Communities and the Union, including the division of competencies among these institutions, their com-position in terms of personnel, the weight each institution is given and their in-teraction with one another. The following factors, however, establish firm boundaries within which there is very little flexibility with respect to these questions: (a) the demands of technical functionality; (b) the rule of political wisdom; (c) concrete power relationships; and (d) the status of the Union in international law. Nonetheless, proposals are being made which, with a remarkable freedom, seek to overstep this limited flexibility because the existing margins are considered too narrow. These proposals would make the leap to a totally new institutional architecture. Proposals like a Commission President directly elected by the people or a proposed Council of the European Communities (the so called Council of Ministers) serving as a federal, second chamber along the lines of the German *Bundesrat* move in this direction. Both proposals are unambiguously aimed at federalism as well as the founding of a sovereign federal European state. Being elected by the people, it is intended that the Commission President will politically assimilate the peoples of Europe into a single citizenry. The Member States, thus, would no longer approach the European project from an external position, supported by their sovereignty in international law, *determining* the affairs of the Communities in an organ of the Community. Acting under the legitimacy of European constitutional law, they will be reduced to a *co-determining* role. Those who hope for a United States of Europe, those who hope to have the States of Europe part with their sovereignty in international law in exchange for their emergence as dependent members of a European State, claim that these proposals are progressive, simple and logical. Therefore, those who promote such proposals, harboring no doubt regarding this finality, self-confidently, unselfconsciously and at the same time react irritably to those holding other positions, who are once again characterized as being blind to the necessities of progress. [12] However, if one approaches the issue with a clearheaded British pragmatism or by way of the French tradition of rationality, the endlessly repeated concern over a supposed total and fundamental democratic deficit at the European level appears far less threatening. Instead, it is the proposed remedies for the supposed democratic deficit that trigger concern. This is true even from the per-spective of the Germans who are always seeking to develop deeply thought out, large systems. A European constitutional treaty, if it is politically desired by all, could provide for more clarity in the institutional structure of Europe and thereby mitigate the so-called democratic deficit. As of yet, no one has stated the obvious: that a democratic deficit can also exist if the proposed, genuinely political institutions are created and the massmedia, and therefore the public, is not adequately prepared to introduce, understand and respond to the new institutions. It is appropriate that the public is seized with an uneasy feeling when they no longer know when they should take odds with specific errors in political developments. In such a situation "accountability" is lacking, the possibility to promote accountability is lost. (5) In this situation, the citizen occasionally feels as if he or she is in the corridors of a Kafkaesque institution, passed back and forth and being informed at each turn that no one is responsible. The leaders of the national governments would have already taken decisive action, if only there were not the opposing will in Brussels. Similarly, the EU institutions would have acted already but for the Member States. [13] One can hack his or her way through such camouflage with a machete and call for a responsible European government as the outcome of the progressive development of the Commission. One can also see in the present balance of powers a step forward for the principle of accountability, if only specific enough accountability were demanded from the various actors. In a European Union in which the Council is strong and the Member States internalize the concept of their responsibility as masters of the treaties, the national government *must be held accountable* by the parliamentary opposition and public opinion, because, in the end, corrections to flawed developments can be pushed through at future intergovernmental conferences where they must be unanimously approved. A mature public open to the new forms of supra-national governance would then have to judge, what is a necessary compromise and what is not. If such concurrent controls are already in place before an intergovernmental confe-rence, as well as in the further development of a constitutional treaty, every government can calculate the political risks and incorporate them into its negotiating strategy. The German *Länder* (Federal States) and their institution the *Bundesrat* have already learned this lesson: originally the *Länder* had practically no role with respect to the European policy of the Federal Republic of Germany, which was characterized as belonging to the domain of the federal government's foreign policy. (6) The *Länder* were not given the right to consent to European policy, even if the decision of the federal government involved the extreme case of transferring to the EC, as its own sovereign power, the power of the *Länder* to legislate. This situation, with pressure from the *Länder*, has finally changed with the new Article 23.1 of the Basic Law. Now the *Länder* can let every amend-ment to the European treaties founder in Germany, therefore causing any amendment to founder for all of Europe as well. Also, when judicious politicians are in no way of a mind to organize such ostracism, today the *Länder* and *Bundesrat* can still carefully formulate their positions with respect to a new regulation regarding the division of competencies between Member Sta-tes and the Union and in so doing send an important political signal to the federal government. In practice one can also observe a growing self-consciousness of this matter; public opinion lags behind in the observation and the critical deve-lopment of the themes in the system of divided responsibility. [14] Much more important than the often exaggerated criticism concerning the supposed democratic deficit, are concerns for the functioning of the European institutions connected with the expansion of the EU. It is difficult to reconcile the fundamental principle of the equality of States and the fundamental principle of assigning States weight in proportion to their population, if the heterogeneity and number of states grows significantly. The principle that every State has its Commissioner and a Judge at the European Court of Justice, obligates the

institutions to inflexible structures. The predictability of the decisions of the Council is also threatened. The large Member States, when also representing a majority of the overall population of the Union, do not want to be cast in the role of minority by the construction of coalitions of several of the smaller States. At the sa-me time, small Member States do not know whether they will be able to make their voice heard in the clamor of soon possibly more than 20 members. And to the degree that a sensible political compromise among so many divergent interests is at all possible, it threatens to be the result of an unpredictable bazaar. [15] Especially with respect to such pressing questions, all deliberate speed is required. Every organization develops in a few different directions, occasionally into forms of rationality that cannot be predicted. It is also the case that a Council consisting of more than 20 Member States would develop processes for its work and for reaching decisions that are not always foreseeable. Nice is an expe-rimental step in this direction. One should also not forget that the EU has been and is an unparalleled success, although the original institutional infrastructure still in use was tailored for a Western Europe of six States and not the Europe of fifteen States. [16] From these general considerations, the following practical conclusions follow: (a) The heads of the executive branch of the Member States as well as the controlling national parliaments should remain the determinative actors in the EU, acting to amend the European treaties and their fundamental principles only through the Council or at intergovernmental conferences. The Council of Ministers may not, in the course of further treaty developments, materially forfeit its weight. It would be improper for the Council to assume the posture of a reactive, second federal chamber, because, even though such a structure is appropriate for the division of power in a federal state, it is not compatible with the funda-mental principle of the institutional equality applied in the most contemporary supranational associations. (b) The European Parliament must take a strong position over and against the Commission and normally be an equal partner with the Council with respect to law making. The Council of Ministers and the Parliament move towards passing legislation employing the procedure of co-decision in most important subject areas. The Parliament, thereby, will always be the forum of consequence for the citizens and will serve as a forum for pan-European balancing of interests beyond the compromises struck by the governments of the Member States. (c) The Commission is in all cases, and by way of its administrative assistance, a special guarantee for the rationality of European integration. It is the true institutional innovation of the European project. It should seek, in order to improve the manner of its work, to raise the level of transparence and to submit itself to stronger control by and cooperation with the Parliament. (d) Within the Council, and as regards its authority to make decisions, a tendency towards qualified majorities would be welcomed. Combining the ideas of relative equality of the Member States and double weighting, dependent on the propor-tion of citizens the State represents, this would be a meaningful procedure in accordance with the spirit of balancing. **VII.** [17] Allow me to venture a summary of this incomplete collection of thoughts. Those who want to provoke a political Europe need not, here and now, see a Constitution as the decisive first step in the direction of the statehood and sovereignty of the Union. The renunciation of the international law sovereignty of the Member States, which is otherwise inseparable from competence over certain subjects, is not on the agenda. Rather, the freedom of the citizen, the academy, the economy, and the culture would be better served if a new concept for the separation of public power were to emerge, a concept other than that of the closed State. The old and existing horizontal mechanism of the separation of power into the categories of legislative, executive and judiciary should be expan-ded by a vertical balance of competencies between sovereign Member States and an autonomous European Union. To this balance also belongs a politically independent Central Bank. The stature of this institution could be secured in a constitutional treaty. The new paradigm is already in place, we must only come to understand it. The selfconscious and self-assured constitutional States open themselves for a lasting, stable and effective cooperation at a level above them-selves. They profit thereby from internal peace, a greater influence in the world, and economic prosperity. A constitutional treaty for this Union would not be the presentation of an unbound will of the people, and also not an original social contract which Thomas Hobbes saw as summoning to life and then justifying the Leviathan. It is instead a new step in the search for European unity in the midst of Europe's diverse peoples and States. We should, out of pragmatism and practical wisdom, and based also on respect for proven institutions, allow those institutions to lead. We should not yield to the charms of the all to easy constructions which have their origins in the historical world of the closed State.

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(1) That is the conclusion of the FRANKFURTER ALLGEMEINE ZEITUNG (FAZ) (May 16, 2001).

(2) For a discussion of the French tradition of rationally coherent state structures, *see*, CLAUDE NICOLET, HISTORIE, NATION, RÉPUBLIQUE (2000).

(3) Roman Herzog, *Ist Europa reif für eine Verfassung?* FRANKFURTER ALLGEMEINE ZEITUNG (May 14, 2001).

(4) Compare, THOMAS OPPERMAN, EUROPARECHT 307 (2d ed. 1999).

(5) Ludger Kühnhardt, Die Zukunft des europäischen Einigungsgedankens, ZEI, C 53, 1999, p. 28.

(6) The participation of the *Bundesrat* by way of Art. 59.2 of the Basic Law would, normally, be understood only as a

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surmountable veto-right of the *Bundestag*. Today, as a result of Art. 23.1 of the Basic Law there is an obligation to obtain consent from the *Bundesrat*.