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Debating the future of Europe
New polity dynamics

Introduction

The principal purpose of this study has been to provide an overview of the important political and institutional developments in the Union and to link such developments with relevant theory discourses; the most prominent of which being the relationship between theory and reform in the evolving political constitution of the Union. As the discussion in Chapter 2 suggested from a normative standpoint, it is possible to accept that the coming into being of the TEU in 1993, assisted by further treaty reforms, paved the way for a new integrative stage, best captured by the term 'nascent *Gemeinschaft*'. This is not to negate the usage of the term 'integration' in capturing the dynamics of the regional process, as it is still useful in the vocabulary of EU studies, insofar as it attempts to explain the joining together of previously independent entities under a new centre, whether or not federally organised. Yet, the point has been clearly made that 'polity-formation' is better equipped – both conceptually and operationally – to capturing the constitutive nature of European governance. Indeed, the dynamism of EU polity-building over the 1990s has provided some of the necessary infrastructure for the emergence of a 'constitutive' European polity that derives its legitimacy both from the component polities and the member demoi, emphasising the need for greater civic deliberation and participation.

It is not so much the actual provisions stemming from successive treaty reforms or for that matter the way in which they will be carried out that warrant our closer attention, as are the new European polity dynamics, in that questions of democracy, citizenship, rights (and duties) are now an integral part of the Union's agenda. Although a managerial-type reform has largely prevailed since the prolonged course of the IGC 1996/97 and the even more arduous IGC 2000, there is still hope that a more 'democentric' process of union will come about and, with it, a European public sphere founded upon a deliberative politics. This

is the task of a newly-instituted 'Convention on the Future of Europe',[1] following the December 2001 Laeken Declaration and, before that, the initiative taken by the Swedish Presidency on 7 March 2001 to launch a European-wide consultation process to canvass opinion from political, business, academic and civil society circles. This quasi-formal, pre-reform process is intended to lead to yet another review conference in 2004. Its justification lies in the long-standing need to transform the Union into a more participatory system of deliberative governance based on the institutions and practices of civic inclusion, as opposed to the existing forms of executive elite dominance. Arguably, the latter emerges as a chronic malaise of the general system, which recent treaty reforms have failed to address properly. The rationale underpinning this critical assertion is that successive waves of formal constitutional review have fallen short of transforming a shadowy political space into a purposeful *res publica*: a composite polity able to navigate the normative orientations of European civic society, by means of harnessing its deliberative potential, and by elevating its members into a governing and politically self-conscious transnational demos. As for now, however, it could be safely argued that European integration is not about the subordination of states to a federally constituted centre, but rather about the preservation of those qualities that allow the segments – as distinct historically constituted nation-states – to survive as separate collectivities, while engaging themselves in a polity-formation process that transforms their traditional patterns of interaction. Whatever the end result of this elaborate exercise might be, this study has tried to illustrate that the new challenges confronting the Union are not without profound implications for both its present and future theorising.

Amsterdam and Nice in perspective

To start with the moderate treaty reforms embedded in the AMT, it is fair to suggest that the European construction has been 'stirred' rather than 'shaken'. Hailed by some as a 'reasonable step', and criticised by others as lacking ambition and vision, the AMT preserves the Union's three-pillar structure with its two separate legal methods. Some areas previously falling under the third pillar (and thus the intergovernmental method) will be gradually transferred to the first pillar, while the Schengen Agreement is now fully incorporated into the Union (with Britain and Ireland having secured an opt-out).

At the institutional level, it is agreed that at the first enlargement the big countries will lose their second Commissioner, provided that they are compensated through a reweighting of votes in the Council (see below). A final decision has been deferred until a new IGC is convened at least one year before EU membership exceeds twenty. Majority voting has been extended in the fields of research, customs co-operation and fraud, and so has the (now simplified) 'co-decision procedure' in the areas of employment (incentive measures), social policy (equal opportunities and treatment), public health, transparency

(general principles), statistics and data protection (independent advisory authority). The legislative procedures involving the EP are reduced to three: co-decision, consultation and assent.

Moreover, a Chapter on Fundamental Rights and Nondiscrimination has been inserted in the AMT to strengthen the Union's 'human face', safeguard the protection of human rights and, in short, redress the fast-growing 'credibility gap' between EU 'decision-makers' and 'decision-receivers'. Still though, as Shaw rightly argues, the AMT 'is more about "managing" reactions to the Community/Union than it is about seeking to engage in citizen participation'.[2] Further, a new protocol is enshrined in the Treaty in an attempt to define more precisely the criteria for applying the principles of subsidiarity and proportionality. According to the Treaty: 'In exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with'; 'any action of the Community shall not go beyond any action necessary for the attainment of the objectives of the Treaty.' It is also stated that these principles should respect the *acquis communautaire* and the institutional balance, also taking into account that 'the Union shall provide itself with the means necessary to attain its objectives and carry through its policies'. Yet, there is a presumption of competence to the states (but not to subnational units), in that the Community has to justify compliance of proposed legislation to these principles (see below).

As suggested in Chapter 3, flexibility was finally included in the AMT though in a way that precludes the creation of a Europe *à la carte* by introducing stringent conditions for its application. More specifically, such 'reinforced co-operation' should further the objectives of the Union and protect its interests; respect the principles of the Treaties and the single institutional framework; be used only as a last resort; concern at least a majority of EU members; respect the *acquis communautaire*; not affect the competences, rights, obligations and interests of those members that do not wish to participate therein; remain open to all member states; and be authorised by the Council. However, the Treaty precludes member states from initiating flexible arrangements in areas which fall within the exclusive competences of the Community; affect the Community policies, actions or programmes; concern Union citizenship or discriminate between member state nationals; fall outside the limits of the powers conferred upon the Community by the Treaty; and constitute discrimination or restrict trade and/or distort competition between member states. Authorisation for such 'flexible' schemes 'shall be granted by the Council, acting by a qualified majority on a proposal by the Commission and after consulting the EP'. Any objection by a member state on grounds of 'important and stated reasons' results in the whole matter being referred to the European Council for a decision by unanimity. This points to yet another accommodationist-type arrangement that arguably strengthens the Union's consociational properties.

But the question that still remains to be addressed concerns the appropriate institutional structure to sustain successive waves of enlargement in the twenty-first century. On the basis of the (largely incomplete) outcome of the IGC

1996/97, there has clearly been a preference for a managerial type of reform to improve the effectiveness in policy output. Flexibility has been partially elevated to a *modus operandi* of the system, whereas the deepening of integration has been referred *ad calendas Graecas*. In any case, there is evidence to suggest that these moderate trends in treaty reform reinforce the point made earlier in this study about the reversal of the Mitranian logic to international integration, in that function follows form, rather than being followed by it. Interestingly, this is the opposite of what neofunctionalists had hoped to achieve: instead of politicisation (the process of linking the management of integration with the daily lives of EU citizens) becoming an additional weapon in the strategic arsenal of pro-integrationist forces, it is increasingly used by the more sceptical actors, often by means of resorting to nationalistic sentiments, thus making it difficult to mobilise the constituent publics in favour of higher levels of integration and, eventually, towards a 'complete equilibrium' among different levels of authority. Such a development, by contesting the idea that European polity-formation is a linear process towards a clearly discernible federal end, may lead to Schmitter's imaginative depiction of a condominium-type organisation (see Chapter 2), characterised by 'multiple flexible equilibria'.

In the CFSP, as mentioned earlier in this study, the Treaty provides for a limited extension of majority voting for detailed policy implementation; the appointment of a 'High Representative'; the creation of an 'early warning and planning unit'; and the possibility of 'constructive abstention' in Joint Actions. But the outcome of the Amsterdam process shows that Europe did not manage to develop an independent capability within the Union. Yet this is not to say that European states confronted with a choice between national action and integration have chosen the former.[3] In the first place, in opting against an exclusively EU security and defence component, they are opting for strengthening institutionalised co-operation within NATO. Moreover, regional security and defence co-operation shows no immediate signs of lessening in intensity outside the Union's formal institutional structures. Many co-operative ventures have been launched: the European Arms Agency; Eurofor and Euromarfor; the Franco-British Joint Air Command; the Eurocorps, and so on. That this co-operation took place outside the framework of integration is explicable by two factors, as the discussion in Chapters 5 and 6 has shown. First, the very existence of an alternative and highly successful framework tends to divert attention and resources away from the idea of linking defence with the Union. The fact that NATO exists and works cannot be underestimated. Second, states tend jealously to guard their autonomy over public policy unless compelling reasons exist for them to turn to integration as a solution. Even in areas where the Union nominally enjoys a great deal of influence over policy, the member states have been anxious to preserve their freedom of manoeuvre. This is all the more true for defence and security. Moreover, the absence of a direct threat weakens any rationale for agreeing to a higher level of integration in defence matters. In this context, it was not the debate on the Union but that on NATO and its role that

was conceived as the most crucial issue affecting the physiognomy of any prospective security restructuring in Europe, for it related to multiple and interconnected international relations issues: change in the world security polarity; core–periphery relations; definition of threat as a precondition of security configuration; fragmentation and integration; redefinition of power and its effectiveness; redefinition of national visions, preferences and interests; re-evaluation of US leadership and EU strategy; and re-assessment of institutions and demands for international regimes.[4] Finally, as discussed in Chapter 6, the December 2000 Nice European Council formalised developments in EU security and defence by setting up an ESDP within the CFSP as well as a planned ERRF, which is to become 'operational' in 2003.

Turning in greater detail to the Nice treaty-amending process, after four-day marathon talks, an agreement was finally reached that the larger states will retain their second Commissioner until 2005, while each member state may nominate one Commissioner until the time when the Union expands to twenty-seven members (initially, IGC discussions included Turkey, but it was felt that its sheer size, among other issues, might complicate the negotiations). It was also agreed that the four largest states will each have 29 instead of 10 votes in the Council (which means that three large states and a small one could form a blocking minority, whose threshold was raised to circa 73 per cent), while the small- and medium-sized members will each have between 3 and 13 votes (which means that while the larger states' votes have increased threefold, those of the smaller states have only doubled). Also, the threshold of seats in the EP has been raised to 732 in an enlarged EU of twenty-seven members – Turkey was originally included in the logistics but was then dropped owing to its sheer size and controversy surrounding its eventual accession – thus exceeding the 700-seat threshold agreed in Amsterdam. QMV, as in earlier revisions, has been extended to largely non-controversial areas (save for the appointment of the Commission President), including international trade agreements (services, investment and intellectual rights), external border controls and certain visa rules, freedom of movement for non-EU nationals, treatment of illegal immigrants, judicial co-operation in civil cases, emergency supplies in times of crisis and natural disasters, social exclusion and social welfare modernisation, state aid for industry, regional subsidies, financial and technical co-operation with non-EU members, etc.

Other changes included the possibility of applying flexible integration schemes within the Community pillar, but with the Commission's involvement, and under new decision rules in the European Council – i.e., by revising the 'emergency brake' procedure – provided, however, that at least eight states, instead of a majority, were willing to participate. Moreover, the work of the Court of First Instance was linked to the activities of the newly-instituted Judicial Panels, which, courtesy of Art. 225a EC, were authorised to deal with relevant cases. Finally, a fresh round of institutional reforms was agreed to take place in 2004, a time when Poland, Hungary and the Czech Republic (among

others like Slovenia, Slovakia and Cyprus) are expected to join, covering, *inter alia*, the division of competences between the Union, the states and possibly subnational authorities; the status of the Charter of Fundamental Rights; the simplification of the Treaties; and the role of national parliaments in the integration process (see below).

In a high-stakes endgame, which undoubtedly brought on a flash of *déjà vu*, the NIT clearly lacked a departure of substance for the creation of 'norms of polity' centred on the specific constructions of legitimate governance. As the *Guardian* succinctly put it: 'At every stage of the prolonged negotiation, raw national interest has overshadowed the broader vision.'[5] Or, as *The Times* remarked: 'It is, at best, a ramshackle palace that has been cobbled together.'[6] As a result, Nice failed to discover 'a sense of process' (and purpose) over the transformation of a plurality of demoi into a pluralistic demos and, hence, the emergence of a new *pouvoir constituant* as 'the ultimate legitimising referent of the [Euro-] polity'.[7] This is linked to yet another crucial transformation the Union ought to undertake, 'from an ethics of integration to an ethics of participation': 'a deliberative process whereby citizens reach mutually acceptable agreements that balance their various communitarian commitments in ways that reflect a cosmopolitan regard for fairness.'[8] In Mény's words: 'There is a need for a new civic culture . . . which allows for multiple allegiances, which combines the "right to roots" with the "right to options"'.[9]

Following Dehousse's analysis of the Union's 'unstable equilibrium', 'although the parliamentary system remains by far the dominant paradigm in the discourse on the reform of European institutions, the last decade has witnessed a gradual emergence of issues and instruments which do not correspond to the parliamentary tradition'.[10] As Kohler-Koch put it, 'the EU is not just institutionally retired, but lives in a social environment that does not fulfil the prerequisites for representative democracy'.[11] Arguably, recent reforms have placed the EP closer to the *locus decidendi* of the system by extending the scope of co-decision and by simplifying the procedures therein (by changing the 'default condition' in the conciliation procedure). Although these reforms sought to address the Union's 'parliamentary deficit' by facilitating the emergence of a *de facto* European bicameral system, increased co-decision was not always linked with greater QMV,[12] nor has the EP's right of assent been extended to legislation in third-pillar issues, to decisions over the Community's 'own resources',[13] and to formal treaty reform.

Moving on to the issue of transparency, a principle inspired by notions of 'open government', Amsterdam succeeded in providing European citizens with a (conditional) right of information, by covering, in Dehousse's words, 'the practical modalities of [public] access' to official EU documents.[14] But it failed to contribute to a more comprehensible Treaty, as the simplification of some legislative procedures like co-decision was coupled with the institutionalisation (or even instrumentalisation) of other practices like flexibility, exceptions, reservations, safeguards, protocols, declarations and the rest which, taken together,

arguably represent an exercise in 'cognitive difficulty'.[15] On balance, however, a formalisation of transparency procedures has taken place: their *de jure* incorporation into the Treaty. Whereas previously such procedures were determined by interinstitutional arrangements and rules of procedure, the ECJ can now monitor the implementation of a 'norm' of legislative openness as an operational principle of European governance. For all their shortcomings, the new transparency rules are now part of the EU's 'primary law'.[16] Yet, as Cram *et al.* categorically asserted, 'the post-Amsterdam EU is even more arcane and complex than its already impenetrable predecessor'.[17]

Regardless of one's pro/contra integrationist convictions, there is evidence to suggest that the phasing-in of questions of democracy and legitimacy in the Union's public agenda has not yet transcended the anxiety of states, both individually and collectively, to safeguard their own prerogatives, even when these questions became crucial to the political viability of the general system. Instead of focusing on issues that constitute the essence of any well-thought-out process of democratic reform, the largely unimaginative quality of proposals submitted to the review conferences, both of which were assigned the task of preparing the central institutions of governance for further waves of enlargement, highlighted in a most clear and tenacious way the absence of a clear democratic vision to take the European construction dynamically into the new millennium. As Weiler rightly suggests, '[w]hereas in its founding period Europe was positioned as a *response* to a crisis of confidence, fifty years later it has shifted to become one of the causes of that crisis'.[18] Both the Amsterdam and Nice reforms failed on the above accounts, not least because they lacked a kind of 'innovative reflection' on the possibilities of constructing a European civic space out of the segments' varied traditions. Instead, both processes focused on 'distributive compromises',[19] with a view to embodying the particularistic attitudes and claims of self-interested actors in negotiated package deals. This outcome is in line with the EU's *modus consociandi*, resulting in a sacrifice in democratic input for greater efficiency in output.

Indeed, the largest deficiency of both Amsterdam and Nice was their emphasis on policy rather than polity, efficiency rather than democracy, distributive compromise rather than integrative accommodation, functionalist structures rather than shared normative commitments and, above all, the rationalist exercise of competences rather than symbiotic legitimation. In particular, the areas upon which these reforms focused concerned the rationalisation and simplification of decision-making procedures (co-decision), voting adjustments (re-weighting of votes) and voting mechanisms (extension of QMV) and, in general, measures concerning the effectiveness of EU decision-making as a precondition for the future functioning, but not legitimation, of the general system. Ironically, this elaborate exercise in rationalised institutionalism originally aimed at rectifying a long-standing criticism of the Community as a 'joint decision-system', in that it tends to produce suboptimal policy outputs and, at the level of negotiated package deals, an inequitable *status quo*. For these

reasons, both revision processes emerge as managerial types of reform, where affective/identitive politics still remains without reach. Their core principles rest not on the need for cementing the constitutive (even dialectical) norms of a polycentric civic space as a precondition for deliberative equity and substantive public engagement, but rather on a politics of consensus elite government determined by suboptimal exchanges within an overly complex negotiation system. Not surprisingly, then, the general assessment is that a European civic space based on the co-constitution of normative structures has yet to emerge.

Reflections on the future of Europe

The intense debate during the period leading to the AMT continued with the occasion of a publication by the Commission under the title 'Agenda 2000'.[20] It is worth looking at the content of this initiative as it constituted the prelude to a more engaging debate that was to follow a few years later on the future of Europe. The Commission put forward in the report its views on the future development of the Union ahead of the enlargement negotiations with each of the applicant countries. In particular, it 'outlines in a single framework the broad perspectives for the development of the EU and its policies beyond the turn of the century, the horizontal issues related to enlargement, and the future financial framework beyond 2000 . . . in an enlarged EU'. The report is divided into two parts, dealing with internal and enlargement issues, respectively. Internally, it sets four priority areas for action. The first concerned the setting of the conditions for sustainable employment and intensive growth, prescribing all those initiatives where priority is given either *de facto* or by choice of policy. Thus EMU and the introduction of the Euro on 1 January 1999 within the European banking system (for public use since January 2002), together with accompanying and/or supportive measures such as the Stability and Growth Pact (SGP), and the Action Plan endorsed in Amsterdam (emphasising rule simplification and the consolidation of the single market programme).[21] Competition rules were to be simplified and surveillance and enforcement structures modernised in partnership between national and central levels of governance. Priority was also given to the small and medium-sized enterprises (SMEs), and measures were proposed to facilitate their performance.[22] Sustainable development, which became part of the Union's objectives with the AMT, was expected to enhance the competitiveness of the European industry and services if reflected in environmentally sustainable production and consumption patterns and if the newest technologies were incorporated into the Union's environmental policy. Trans-European networks were given priority 'to enhance both the sustainable development and the internal cohesion of the Union',[23] with the new rounds of enlargement also in mind. The second area was the placement of knowledge and technology at the forefront. Here, the Commission proclaims that research, innovation, education and training are of 'decisive importance for

the development of the Union'.[24] Priority was given to research and technological development, focusing on ways of enhancing European competitiveness and creating jobs. Education and training received priority status, too, with emphasis on the exchange of personnel. The third area related to the modernisation of employment systems. Labour market and employment policies were to achieve maximum flexibility for the enterprises and maximum security for individuals in conjunction with the new Title on Employment in the AMT. Issues such as investment in the skills of the existing workforce, increase in participation rates, encouragement of mobility and dialogues between the workforce and management in anticipation of restructuring of the enterprises receive added currency. Reform of pensions and healthcare systems in view of adverse demographic developments represented another major challenge in the Commission's report. These were to be reconciled with budgetary rectitude, with the Union acting in a co-ordinating capacity, serving as a forum for promoting better mutual understanding of long-term perspectives and for identifying common challenges.[25] The fourth area finally related to the improvement of living conditions. Expected growth was linked with the promotion of a more cohesive and inclusive European society, with the Union intensifying its efforts to combat all forms of social exclusion and discrimination. Public health, the environment, the free movement of people, adequate levels of security and justice, the fight against fraud, crime, corruption and so on – all add up to a quality of life problem for post-materialist European societies, and have to be addressed as a priority, in light of increased public awareness.

With reference to the Union's external relations, the Commission's slogans were 'a stable Europe that is open to the world' and 'a strong and coherent Europe'. Relations with Russia, mainly owing to the eastward enlargement of NATO and of the Union itself with the possible inclusion of populations of ethnic Russian origin, mainly in Latvia and Estonia, were singled out for improvement, as were those with the Balkan countries that have signed association agreements with the Union. The latter, provided that it does not repeat the CFSP fiasco of the Yugoslav civil war, can become a stabilising force in the wider area, as these countries are actively seeking to become its members. The democratic reform process in these countries, currently in severe financial difficulties (especially Romania, Albania and Bulgaria), should be kept alive with the active support of the Union. The report also stresses the importance for the Union of the south Mediterranean area in relation to the Barcelona Process: a partnership agreement between the Union and the twelve non-EU Mediterranean countries (including the Palestinian Authority) covering political (security), economic (free trade area and financial projects) and sociocultural (civil society and intercultural dialogue) issues.[26] Development co-operation constituted the third major item in the Commission's agenda, and a new but unspecified form of partnership between the Union and the African, Caribbean and Pacific (ACP) countries was put forward, although, surprisingly, relations with Latin American countries, but also with the US, were somewhat downgraded in the report.

For the more effective intervention of the Union in international affairs, the report suggested that a more integrated approach should be built, meaning, and rightly so, that the artificial distinction between external economic and external political affairs be gradually phased out with more use of QMV. But all the above are more easily said than done, as successive treaty reforms have time and again reminded us. Thus, if the Union is going to move where the Agenda 2000 report wishes, it will need all the stamina and courage it can mobilise to persuade both its member states and demoi that this course of action is the best way forward.

But what might the best way forward be for the fledging European polity? A positive attempt at defining the new challenges confronting integration post-Nice can be attributed to the Commission's White Paper on European Governance, published in July 2001.[27] In it, the Commission identified the reasons for reforming existing modes of European governance and ascertained those principles of good governance that should guide the formulation and delivery of common policies and regulations. Among these principles, openess, transparency, participation, accountability, effectiveness and coherence – all of which are also linked to proportionality, subsidiarity and flexibility – figured prominently in the Commission's reformist menu, which represented a comprehensive approach to the challenges of complex institutional restructuring and positive European awareness-formation at the grassroots (with renewed emphasis on the future role of civil society representatives in EU policy-initiation). The White Paper formed part of a long-awaited European public debate, effectively launched with the address of German Foreign Minister Fischer to Humbold University in Berlin on 12 May 2000.

In particular, Fischer's *Vom Staatenverbund zur Föderation*,[28] by embodying a strong normative orientation towards some prototype European *Bundesrepublik* – i.e., to the extent that the end product will also be democratically structured – was instrumental in reviving European public debate and in some instances re-activating dormant national reflexes about the *finalité* of the Union. Likewise, it ignited the interest of both academic and policy communities about the future political – and, this time in more explicit terms than hitherto – constitutional evolution of the European polity. The timing of Fischer's federalist blueprint was rather strategically calculated, as it was launched three months after the IGC 2000 had been formally inaugurated and only three days after the fiftieth anniversary of the Schuman Plan. Although the then ongoing review conference was generally regarded as dealing with the 'Amsterdam leftovers', as opposed to being a self-conscious attempt at polity transformation through a substantive constitutional re-ordering or even re-design, the 'Fischer debate' – taken as a debate on good European governance – received a warm welcome, least of all by integration scholarship, as it signalled 'a truly bright and refreshing breath of fresh air in today's politics'.[29] Whether 'an unconventional type of political act', Fischer's address inspired, if not nurtured, a shift in emphasis from the unimaginative language often articulated by high-ranking technocrats to a more accessible terminology, mirroring

some fundamental – and conceptual – challenges and dilemmas confronting European political society.

More specifically, in his capacity as a European and German parliamentarian, rather than as the official foreign representative of the German federal government, Fischer posed the question *Quo vadis Europa?* In the interests of economy, we offer a summative account of the normative underpinnings of his answer, which are to be found in his deontological call for a European constitutional treaty or *Verfassungsvertrag* centred around basic human rights; shared sovereignty; a division of competences between the Union and the states via a *Kompetenzkatalog*; a clear division of powers among the central institutions, including full parliamentarisation through the institutionalisation of a European bicameral structure – leaving, however, the option for the nature and composition of the upper house open between a US-inspired Senate model of directly elected members and a German-type chamber of state representatives with different numbers of votes; and a European Government formed either by the unit governments (thus developing the European Council into a government proper) or by a directly elected Commission President with extensive executive and administrative powers (thus transforming the existing Commission into a hierarchical structure of government). Far from encouraging the abolition of the member states, not least owing to the richness and diversity of their historically constituted cultures and traditions, his vision encompasses the notion of a lean but fully fledged European federation.

In response to Fischer's proposals, a clear, albeit qualified, federalist orientation was also recorded from many high-ranking figures like Rau, Schröder, Verhofstadt, Barnier, Bayrou, Prodi and Simitis; Chirac and Blair, opting for rather less federalist polity ideas and assorted policy *menus* that strengthen national statehood (envisioning an enhanced Council Secretariat, greater agenda powers for the Council and a Senate composed of national parliamentarians); and Jospin, influenced by Delors' preference for a 'mixed' system of governance (favouring greater central powers and even a directly elected President, but rejecting both the ideas for a second chamber and a federal core). But there has also been some justified criticism by EU scholarship regarding the emphasis placed in Fischer's federalist blueprint on the division, rather than the sharing, of sovereignty rights between the Union and the states. Börzel and Risse make the point well: 'Fischer still thinks in categories of the hierarchically structured nation-state with its exclusive authority over power and territory, including the legitimate monopoly over the use of (internal and external) force.'[30] Instead, they conceptualise a European federal order from the perspective of multilevel governance, stressing the importance of distinguishing between 'formal' and 'material' sovereignty: the former, they claim, is already divided, but also shared, between EU and nation-state authorities, whilst the latter is defined in degrees of the capacity for autonomous action.[31] Material sovereignty is central to understanding the Union as a multilevel system of governance, in that it 'does not easily translate into a constitutional language, which should

delineate who is in charge of what and when, and thus, should define structures of formal sovereignty'.[32]

Thus depicted, the present-day European polity encompasses subnational, national, supranational and transnational institutions and processes, public, semi-public and private interests, as well as a plethora of 'governance arenas', 'negotiating networks', 'functional regimes' and the like, within which material sovereignty is shared across and between levels by a multiplicity of actors that interact regularly in the determination of policy outcomes. A further line of criticism was directed against Fischer's conceptual typology, in that his envisaged *finalité* amounted to a European federation but not a federal state, thus on the one hand attempting to escape the confines of classical constitutional theory without, on the other, formulating a conceptual alternative. Even the term he uses to describe the Union, *Staatenverbund* – a term inspired by the *Bundesverfassungsgericht* in its oft-quoted 'Maastricht ruling' – is, according to von Boyme,[33] practically untranslatable in all but the Swedish language, courtesy of the term *Statsförbundet*. If, then, such is the confusion over the Union's present stance, and for that matter Fischer's conceptual departure, and if no alternative term is offered for the imagined end state, how can one conceptualise Fischer's 'third-way' construct of 'federation without a state'? A plausible answer is offered by Leben, who notes that federation *à la* Fischer might have been influenced by Schmitt's ideas on a 'federative pact', aiming to reconcile seemingly irreconcilable elements, by advancing a public law conception of the federation, whereby the member states, both as the authors of the pact as well as constitutive units, retain their sovereignty.[34] Yet, whichever direction the constitutional development of the Union takes, Fischer's blueprint requires, in his own words, 'a deliberative political act to re-establish Europe'. This observation has fundamental implications for the emergence of a genuine European public sphere in the sense of becoming something more than the Europeanisation of the component political spaces. The institutionalisation of the envisaged composite public sphere lies, in our view, at the heart of any substantive move towards a qualitatively new European polity characterised by symbiotic legitimation, accountability, and communicative structures. In Olsen's words:

> A *public* discourse about the adequacy, or inadequacy, of existing institutional arrangements can be a process of civic education through which European citizens develop an understanding of what constitutes a good society and system of governance, ie, the legitimate constitutional principles of authority, power and accountability, and the normative-ethical basis, and value commitments and beliefs, of the polity.[35]

In this civic conception of the European polity, the constituent publics, in the form of a transnational civic demos, are capable of directing their democratic claims to, and via, the central institutions, through free public deliberation. In this context, democratic deliberation takes precedence over interest aggregation, as does civic over state/Union competence, and social over empirical legitimacy.

Finally, and whether or not further integration is to be pursued through 'a Hayekian discovery procedure' or through a 'pre-thought-out blueprint',[36] the search for legitimate forms of collective governance in Europe is central to the construction of a political community founded on more active and inclusionary virtues of belonging such as civic self-reliance and institutionalised participation: a European *res publica*, that is, composed of constitutive but equally sovereign citizens. The task at hand requires also a fundamental change in the current philosophy of European governance, in the sense of moving away from output-oriented, utilitarian, task-driven and cost-effective/reducing problem-solving modes of collective action, embracing instead the long-standing need to call greater attention to the relationship between the Union and 'the civic', with the view to transforming the governing capacity of its nascent demos into a system-steering agency. For ultimately, it is within this embracing civic space that a feature central to the democratic process – national or transnational – becomes crucial, that of 'civic competence': the institutional capacity of citizens *qua* social equals to enter the realm of political influence and sustain a vital public sphere – 'a network that gives citizens . . . an equal opportunity to take part in an encompassing process of focused political communication'.[37] Here, the pairing of 'civic' and 'competence' does not embody a category mistake, but rather acts in the interests of engaging the demos in the management of public affairs, institutionalising, through the granting of substantive civic entitlements, a normative commitment to core democratic values, while giving an institutional face to a central task of legitimate public life: active civic participation in the governance of the polity.

The above discussion brings to the fore the question of strengthening common citizenship rights and duties: a debate, however, which needs to be linked with the prospects for constitutionalisating the Charter of Fundamental rights. Indeed, the IGC 2004 offers an excellent opportunity for adding to the existing corpus of EU citizenship rights with a view to elevating this novel *status civitatis* to an independent sphere of civic entitlements. The need for positive action in that regard is urgent, especially in view of the importance of providing a sense of civic attachment to the collectivity and a shared sense of the public good that transcends the nationally determined fix between norms of citizenship and the (territorial) state. But this requires in turn a certain dosage of determination by the Union to redress effectively its constitutional shortcomings and to strengthen the range and depth of civic participation (deliberative or other) in the exercise of political authority. Out of a voluminous set of measures to build on the development of a transnational civic demos, the following merit our attention: institutionalising at Union level the notion of civic competence, thus adding it to the more conventional way of thinking about competences as statutory guarantees or the capacity for authoritative action; extending the right to vote and to stand as a candidate at national elections for citizens residing in a member state other than their own; introducing the right of European citizens to hold public office anywhere within the Union; enshrining the citizens' right

to information on all EU issues, while making all the official documents of the Union available to the public; introducing the right of European citizens, individually or collectively, to be informed when a decision of the Union impinges on specific interests; recognising full political rights to legally resident third-country nationals (denizens), thus transcending any liberal–statist norms of civic inclusion and rejecting a 'dissociational-type democracy' at Union level; and codifying the principles of additionality and non-regression so that Union citizenship rights are established in addition to national ones, while ensuring that existing rights are not reduced.

At a more general level, the distinction between an extra-treaty arrangement – i.e., an EU Charter that provides only for a standard for fundamental rights – and a legally binding instrument that provides for a set of basic rights guarantees is vital, for in the latter case, a Charter incorporated into the Treaty would also be made subject to the jurisdiction of the ECJ. It would also grant the latter a crucial interpretative function with regard to human rights respect and protection throughout the Union. Also, with an internally justiciable Charter, the Union would make a positive as well as credible move towards what has been described as 'a more human rights-based constitutionalism'. Yet, a potential problem remains, as many legal experts were quick to point out: were the ECJ to be become the last instance of appeal in the Union for human rights issues, this might deprive its citizens of a final external appeal against violations of their fundamental rights. The only sensible way to avoid this predicament, as well as the possibility of two competing jurisdictions, is for the Union to accede to the European Convention on Human Rights (ECHR). In that way, it is claimed that ECJ rulings related to the ECHR would be made subject to the supervision of the ECHR, thus enhancing the accountability of the ECJ itself. This brings us to another complex legal issue, but with crucial political implications, not only for the quality of human rights protection and enforcement standards within the Union, but also for transnational demos-formation. Would a legally binding Charter have general application throughout the member states, or would it be restricted to fundamental rights protection only in the context of EU action? Put differently, would the Charter apply in cases of member state action (taken by central, regional or local authorities, or public organisations) that is not directly linked to the implementation of EU law, as Art. 51(1) of the Charter currently provides for? Assuming that the prevalent interpretation is that the Charter is indeed confined to EU action alone, and despite the drafters' *prima facie* intention to consolidate the current method of the ECJ to deal with questions of basic rights as 'general principles of Community law', given the nature and scope of the rights enshrined in the Charter, far more positive action is needed. Such action could take the form of amending Art. 51(1) with a view to extending the Charter's applicability to state action that is not linked directly to EU activities. Bold as this step may be, its case becomes even stronger if one links fundamental rights protection with the free movement of people within an integrated economic space operating under a single currency system. Taking rights (more)

seriously, ascribes to the concept and process of 'Chartering Europe' their proper meaning, while endowing the Union with a political constitution proper. In line, finally, with a neo-republican approach to EU polity-building (see Chapter 2), the Charter attempts to bridge the long-standing rights/duties divide, by explicitly stating in the preamble that '[e]njoyment of these rights entail responsibilities and duties [especially the provisions on solidarity] with regard to other persons, the human community and to future generations'.

Arguably, all the above proposals are easier said than done. But if properly institutionalized, they would bring about an EU citizenship policy proper, as they ultimately depend on the political will of the member state executives, rather than on an overarching European *volonté générale* at the grassroots. In this way also, the Union would be equipped to allocate authoritatively, and not merely derivatively, rights (and values) within European civic society. The outcome would be not to create a 'community of fate' or *Schicksalsgemeinschaft* shaped by common descent, language, history and the like, but rather to 'democratise' the constitution of European citizenship and facilitate the horizontal integration of citizens in conformity to the norms and practices of EU-wide civic inclusion. It would also elevate its civic status to a distinctive form of 'meta-citizenship' and endow the Union with a distinctive political subject, whose collective civic identity exists independent of national public spheres, but whose 'politics' extends to both European and national civic arenas. Moreover, such a move would signal a shift in the basis of legitimation from a functionalist-driven, segmentary-type of (mainly) economic European civic body to a political community of free and equal citizens – i.e., a *populus liber* driven by a *charitas civicum*. Although such profound changes in the political constitution of Europe would almost certainly spark a series of substantive, and for some even unpleasant, amendments to national constitutions, basic laws or parliamentary statutes, for any well-thought-out and at the same time consequential debate on European democracy to come full circle – assuming of course that such a democracy will not go through all the developmental stages of Western liberal democracy – such proposals should be part of the discursive agenda on the constitutional (or other) future(s) of Europe, the member states and, crucially, the candidate countries. Such normative commitments at instituting a multilevel civic space within which the constituent publics are recognised as bearers of rights, freedoms and duties in relation, however, to the larger polity can also act as an antidote to the growing impoverishment of national public life, where an apparent decline in the quality of public discourse and civic participation is met by a shrinking (social) legitimacy of 'the political'.

Turning finally to the Charter's drafting process, and *pace* the absence of any formalised selection criteria, it has opened the way for a more visible, deliberative and inclusive method of EU polity-building – i.e., a European public process. Indeed, the symbolic importance attributed to the composition of the drafting Convention, but also of the new Convention in view of the IGC 2004, is that it marked a 'break point' in the politics of institutional representation at

Union level, particularly with reference to the transparency and social legitimacy of collective constitutional engineering (both elements were emphatically absent in previous treaty reforms, although during the IGC 2000 an abundance of related material became available in cyberspace). In addition, such a strategy has exemplified an acute and increasingly alarming 'democratic disjunction' between the state-controlled nature of treaty change (through unanimity and asymmetrically negotiated outcomes) and the impact of civil and civic society on the debate about the future of Europe. Accordingly, to ensure the pluralistic and participatory nature of the Charter's drafting formula, it would be desirable, at least from a political–constitutionalist perspective, to use its template for future treaty-amending processes. Should that prove too much for sovereignty-conscious states to digest, and there is an abundance of realist state-centric explanations and reasons why it should, an alternative, more pragmatic scenario would be for the EP to be granted constitutional competence over treaty reform through the assent procedure, acting by an absolute majority of its members. Having looked at the Charter, we can now turn to the remaining items on the IGC 2004 agenda: competence allocation, Treaty simplification, and the role of national parliaments.

Prospects for the IGC 2004

Allocating competences

Since this question is linked in both conceptual and operative terms with the governing structure of multilevel polities, some general observations are in order. To start with, multilevel polities perform functions that are either shared in common among different levels of decision-making, or are assigned to particular governmental settings that are seen as being either more legitimate or efficient structures for the performance of given tasks. Such polities are compound states based as much on informal and *ad hoc* arrangements of shared rule as on internal political pressures for self-governance. Hence, the search for appropriate forms and means of a division of competences is at the heart of the viability of composite systems aiming to reconcile what constitutes the cornerstone of all systems of dispersed authority: 'unity in diversity' and, at the level of joint decision-making, 'consensus in pluriformity'. A voluminous literature exists on both formal and informal constitutional and procedural mechanisms through which polity-builders attempt to transcend real or perceived divisions over what can be termed as 'capacity for governance'. Central to this issue is the distribution of formal legislative and executive authority, the form and range of such distribution, and the variegated possibilities for exclusive, concurrent or residual competences. In Western liberal polities, there is a strong predisposition to safeguard the essential norms of democratic governance, with the tensions between different levels of authority often being exacerbated by reference to their acclaimed 'democrativeness'. Such problems are compounded further

by the extent to which the polity at hand is characterised by centralised or decentralised tendencies, symmetrical or asymmetrical relationships among the subunits, centripetal or centrifugal dynamics, and constitutional or less formalised guarantees for constituent autonomy. When the founding act of the polity is not a formal constitution accompanied by a supreme court, a system of rule based on Montesquieu's *trias politica* and a *Kompetenzkatalog*, but instead rests on a constituent act, pact, contract, convention or treaty, then the level of systemic ambiguity increases dramatically.

The Union is an excellent case for studying questions of multilevel competence allocation – and even of multilevel constitutionalism – owing to its in-built pluralism and variability. But the way in which subsidiarity operates in the Union chimes well with a consociationalist understanding of politics, as it justifies a potential flow of decision-making powers to nation-state authorities, thus offering a 'partial offset' to the quest for legislative autonomy within the component polities. This line of reasoning confirms the view that the principle resembles a kind of 'reserved powers' to the states: a self-defence mechanism against the accretion of competences to the centre. From this prism also, it is difficult to overlook signs of an inverse type of federalism, favouring the diffusion of power down to national tiers of governance, with the 'burden of proof' lying with the Community that has to justify through a public reason argument the compatibility of proposed legislation with the subsidiarity principle. Like previous references to the latter (a 'bottom-up' approach to fiscal federalism, or in the context of cross-frontier dimension effects, or as a policy instrument of economic intervention), there is no provision in the Treaties for the precise allocation of competences, nor is there any distinction between different types of competences – i.e., exclusive, concurrent and potential. This amounts to 'the problem of competence': the absence of an explicit formal mechanism for allocating responsibilities within the Union, outside the areas that, in principle, are considered to be its exclusive prerogative: the four freedoms of movement and the policies that are a corollary to them. It follows that the areas falling within the internal market sphere are not subject to the principle of subsidiarity, but are determined by the pre-emption doctrine, in that once the Community legislates in one area, then national action is being precluded. Accordingly, subsidiarity can be used as a rule for competence allocation only in cases of concurrence, or when the Community has for the first time passed legislation in a new field. In matters unaffected by Community law, the argument goes, it is presumed that the component states retain exclusive competence.

There is a case to be made for the powers specifically entrusted to the centre to be enlisted in the Treaty, as for instance the Australian Constitution does (Art. 51 stipulates thirty-nine areas which fall within the jurisdiction of the Federal Parliament); or that a clear mechanism to delegate specific competences to the centre be provided for, as in the case of the German *Grundgesetz* (Art. 72 II listing the conditions under which the *Bund* has the right to legislate); or that there is an explicit reference to the sovereignty of the parts as in the Swiss Constitution

(Art. 3 stating that the cantons are sovereign insofar as their sovereignty suffers no restriction from the federal constitution); or even that a 'residual clause' be included in a manner similar to the US Constitution (the Tenth Amendment of 1791 which created a sense of 'constitutive autonomy'). These polities, similarly to the Union, have followed, *ceteris paribus*, a pattern of competence attribution, where the emphasis was on specifying a limited set of central competences, with the residual powers resting with the subunits. Reflecting on their experience, the case for centralised governance has to be proved. This is justified on the grounds that the segments, in the form of previously independent polities, have preceded the creation of the federation. Such an approach falls within the logic of 'bottom-up' subsidiarity, derived from the Catholic social doctrine on the relationship between the individual, the state and society, as well as on a vertical division of power within federal polities. Although an ensemble *sui generis* formula should not be excluded for the Union, central to any constitutional settlement is the principle of proportionality, already an element of Community case law: 'Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty', a principle which does not alter the attribution of competence, but concerns the way in which central power should be exercised once the Community level has been authorised to take appropriate action. The rationale here is that central legislative action should not exceed what is necessary to meet the end in view. In other words, such action has to be *intra vires*.

In attempting to clarify the conditions for applying subsidiarity, the Commission has explicitly asserted the primacy of states, in that '[the] conferment of powers is a matter for the writers of our constitution, that is to say of the treaty. A consequence of this is that the powers conferred on the Community, in contrast to those reserved to the states, cannot be assumed.' The point here is that the states, as the conferring agency, could 'de-confer' if they wish to. In the end, the following criteria for central action were set out as guidelines on subsidiarity: whether the issue at hand has transnational effects that cannot be satisfactorily regulated by state action; whether state action or lack of Community action would conflict with Treaty requirements and significantly damage states' interests; whether the Council must be satisfied that Community action would produce clear benefits of scale or effects. Although these guidelines found their way into a detailed protocol agreed in Amsterdam, it is still the Community that has to justify compliance of proposed action to these principles. Moreover, there is no mention of substate units. *Ceteris paribus*, directives should be preferred to regulations, and so should framework directives (assigned the task of fixing objectives and guidelines) to detailed measures, thus leaving as much scope for national decision-making as possible. Although this may be revisited by the Convention and, eventually, by the 2004 IGC itself, it should be linked both to the preferred means of implementing and monitoring EU law (when different formulas are required according to different policy stages) and to the question of creating a hierarchy of Community Acts.

What still remains of crucial importance, however, is for a balance to be struck between state and EU competences on what level of aggregation should act on which types of issue. In view of the discussion above, and given the existing difficulties in implementing subsidiarity, a possible outline of action in relation to the IGC 2004 is to 'constitutionalise' the process of competence attribution, instead of delineating *expressis verbi* spheres of legislative authority and to set up a new instrument – i.e., a Committee of Competence Attribution – of a mixed composition (consisting of national representatives as well as members of the major EU institutions, including the CoR and the ECJ) that would provide complementary checks and balances to the existing framework by assessing disputed acts, should any of the actors involved in EU legislation call into question a proposal on the grounds of subsidiarity and proportionality. The proposed Committee would not have to be permanent (although that would help to develop its own institutional culture) and its rulings could take the form of recommendations. Given the immense complexities in the Union's legal system, the interconnectedness of national and collective modes of policy action, and the profound cross-border effects of joint decisions, it is fair to say that the idea of a *Kompetenzkatalog* is not the most productive way forward, as it could deprive integration from its inherent dynamism and flexibility. But equally problematic is Blair's view, as expressed in a speech delivered in Warsaw in October 2000, to contain a general delimitation of powers in a politically binding 'Statement of Principles'. Interesting as the idea of a Charter of Competences may be for future reference – i.e., on the eve of drafting a material European Constitution through a European Constituent Assembly – a more plausible alternative to those presented above is to enshrine in the Treaty, under the heading 'Competence Attribution', a core set of basic principles governing the attribution of competences within the Union, including also provisions for the active participation of subnational authorities. Such an arrangement, as noted earlier, should be seen within the wider context of framework directives becoming more widely used by the central authorities.

Pace the constitutional arrangements currently in place in some of its federal subsystems, and particularly the insistence of the *Länder* for a strict division of competences, one could legitimately argue that both the constitutional architecture and decision-making culture of the Union *qua* 'non-state polity' are not (as yet) in a position to resolve questions of competence allocation through an explicit delineation of legislative powers among the Union's constitutive levels of governance. Moreover, whether or not the existing *acquis* is inherently incompatible with the principle of subsidiarity, the fact remains that a system of delimited competences is prone to limit the future ambitions of the Union, not least of all in terms of extending its grip over new or relatively undeveloped policies (such as taxation and education); open the way for the re-nationalisaton of common policies (especially in agricultural matters); and create a complex world of 'micro-competences' that would deprive the Union of the levels of flexibility needed to deal effectively with new challenges (most notably in the social

field). Thus, the drawing up of a set of governing principles (and mechanisms) for competence attribution within the Union, as opposed to a legally or politically binding Charter of Competences *à la* Fischer or Blair, fits better the current profile of the larger polity as a constitutional system *in statu nascendi*.

Simplifying the treaties

The perennial issue of simplifying the Treaties has been the subject of inquiry for some time. Most prominent among these studies has been the report commissioned to the EUI by the Commission. It appeared under the title 'Reorganisation of the Treaties' on 15 May 2000, that is, a few months after the IGC 2000 began its work and only three days after Fischer's address. The resulting draft was entitled 'Basic Treaty of the European Union' consisted of eight Titles and ninety-five Clauses (incorporating the major constitutive features of the Union), and demonstrated the feasibility of the exercise, as the task required a great amount of technical work, as well as its desirability, in that an exceedingly complex set of Treaty provisions would become simpler, more readable and, hence, more accessible to both European citizens and the candidate publics. Hardly surprisingly, the work of the drafting group revealed numerous ambiguities, inconsistencies, lacunae and contradictions inherent, to borrow a metaphor, in the 'loose and baroque structure' of the existing Treaties and subsidiary texts. *Pace* its limited mandate – i.e., it had to avoid any changes to legal status or substantive provisions – by dividing and re-classifying in a consistent manner the whole primary law of the Union, the group paved the way for a more apparent, comprehensible and transparent basic instrument. It also linked the project of 'rationalisation through simplification' with the future of Europe debate. Modest in ambition, as it was an exercise *à droit contant*, the Basic Treaty managed in the end to achieve its near-impossible objective: 'to restructure without modifying' the Union's *acquis constitutionnel*. Short of a European Constitution, at least with reference to statist analogies, the EUI brought to the fore the tension between legal and political arguments for and against a substantive reshuffling of the Union's constitutional basis.

Grosso modo, the restructuring operation aimed at preserving three types of balances, summarised by Mény thus: the *grands équilibres* among Community policies; the balance between substantive and institutional law; and that between Community action in the first pillar and intergovernmentalism in the remaining two.[38] A similar suggestion was made by the EP, in that the Treaties should be split into two parts: a constitutional part (enshrining fundamental principles and procedures) and an operational part (incorporating policy issues). Patterned on the TEU model, the Basic Treaty, which effectively replaces the TEU as amended by the AMT, remains a 'framework treaty' and covers all EU activities. Hence its equally flexible nature, also evident in the tripartite structure of the TEU. Although he EUI report did not make it to the negotiating table at Nice, it has both a symbolic and identity-creating impact, as the Convention can use it as a good starting point for the search of a truly intelligible basic

instrument – i.e., a constitutional treaty. An important issue that merits our attention concerns the setting up of different and less cumbersome procedures for revising the Treaties. The EUI report took notice of this point by suggesting that present treaty-amending processes should be eased in future Treaty negotiations. Few would disagree that the traditional exclusionary and sovereignty-cautious method of 'qualified unanimity' for reforming the Treaties, as epitomised in Art. 48 TEU – i.e., unanimity between the member states and adoption by the latter according to their constitutional requirements – has clearly reached its limits, especially with the Nice experience, where even relatively small and, logically, less conflict-prone amendments became troublesome to negotiate and agree upon. But what alternatives are there for a more inclusive and at the same time efficient process of EU constitutional change?

To start with, the drafting group's recommendation for changing the rules guiding treaty reform – produced in a separate report envisaging greater parliamentary input, was for different procedures to apply to different Treaty provisions according to the relative political importance and/or sensitivity of the issues at hand. Incidentally, a similar proposal is found in the report drafted at the Commission's request prior to the IGC 2000 by the three 'Wise Men' (Simon, Dehaene and Weizsäcker). Doubtless, one could envisage numerous scenarios based on a distinction between 'major' and 'minor', or indeed 'constitutional' and 'non-constitutional' amendments, with each category guided by different revision rules: the former dealing only with issues regarding the reallocation of competences within the Union (and between the central institutions) through some form of legislative co-determination between the Council and the EP, and conditional upon the ratification of a majority of, say, at least three-quarters of the member states, or even without any ratification obligations; the latter, requiring a more vigorous fourth-fifths majority in the Council, the assent of the EP through an absolute majority of its members, and conditional upon the ratification of, say, at least four-fifths of the member states. Other amending procedures could involve various combinations, including the conduct of European-wide referenda, especially if the underlying objective is to move towards the further politicisation of treaty revisions. The same, of course, applies to the process of initiating treaty reforms or for that matter the idea of a European Constitution proper, say, on the joint initiative of certain central institutions (through some form of majority) – i.e., the Council, the EP (with or without prior consultation with national parliaments) and/or the Commission acting as a 'college' – or 'by popular demand' after a general referendum, or by a combination of both. These formulas for treaty-amendment are merely to indicate the wide range of possibility according to different logics (and motives) of EU constitutional reform.

Yet, functional differentiation in amending the Treaties, especially in areas where the constituent units strive for higher levels of integration and, hence, are prepared to make greater use of QMV (and also extend it to all areas of parliamentary co-decision, which could in turn be applied to cover most EU

decision-making), may not always act in the interests of a more 'user-friendly' Treaty. But it would most likely reduce the sheer volume and inordinate complexity of asymmetrically negotiated outcomes – usually producing an inequitable *status quo* among small(er) and large(r) states, as the Nice process has so dramatically exemplified – through the traditional intergovernmental practices of horse-trading, log-rolling, side-payments, and the like – all of which, are part of what essentially constitutes the EU's *acquis conferenciel*. Be that as it may, post-Nice, the European polity is once again in search of new procedures to inflict upon its still uncrystallised political constitution the appropriate dosage of democracy and efficiency. In the hope that the end product of the IGC 2004 will not result in a deadly mix, we shift our emphasis to the last substantive item that appears on the Union's reformist agenda.

Remodelling the legislature

Much like the debate on the reorganisation of the Union's primary law and the apparent wealth of constitutional choices between 'soft' and 'hard' methods for amending the Treaties, the questions of how best to remodel the European legislature and what input (in terms of powers and functions) there should be from national legislative bodies have no easy answers. For one thing, there is an *a priori* normative choice to be made between a clear-cut European bicameral structure patterned on some federal-type legislature or other (and likely to involve national parliamentarians) and building on the existing quasi-federal (the other half being presumably confederal) constitutional architecture of the Union, by means of developing further the co-legislative (and controlling) powers of the EP, but without formally incorporating national parliaments into the EU legislative process. Opting for the first choice implies, *inter alia*, either the establishment of a new upper house composed solely of representatives of national parliaments, or the creation of a 'mixed' legislative body consisting partly of national parliamentary deputies and partly of Council members. Opting for the second choice means that new checks and balances would have to be found in the current (and not so co-equal) process of legislative co-determination between the Council and the EP (with the former reforming its internal structure).

Little doubt exists that European integration has strengthened the executive branches of the member polities (especially in terms of national parliaments holding ministers to account on their EU actions or inaction), even to the extent that some confidently point to the 'de-parliamentarisation' of national political systems. The combined effects of national parliaments' inability to exercise effective control over both their government and the Brussels apparatus, along with the transfer of national legislative powers to a Council that – to this day – remains collectively unaccountable, has resulted in a dual, if not multilevel, 'democratic deficit' in the Union. But the Nice mandate for further reforms carefully camouflages the seriousness of the situation by simply referring to the role of national parliaments in the integration process. Our previous analysis

has touched upon the different (and often differing) views expressed by various EU leaders in the context of the 'Fischer debate'. As Duff put it:

> Mr Blair apparently wants to introduce a third chamber into the legislature of the Union, composed, like the old European Parliament, of national MPs. Mr Verhofstadt seems to have the US Senate in mind when he looks at the future of the EU's Council of Ministers; Mr Schröder, the Bundesrat. Other luminaries, like Mr Fischer, just seem muddled, and national parliaments themselves differ widely in their reaction to the perceived problem.[39]

The problem, however, is compounded further by the failure of past initiatives, like the 'Assizes' (a forum bringing together more than 300 national and European parliamentarians), courtesy of TEU Declaration 14, as it was convened only once in November 1990 in Rome. Also, although Protocol 13 of the AMT granted Treaty status to the Conference of European Affairs Committees (COSAC) – first set up in 1989 following the initiative of the French Presidency – acknowledging its role in commenting on various pieces of EU legislation, this mechanism reflected a compromise between those who wanted its formal institutionalisation along the lines of an upper house (and, hence, its incorporation into the EU legislative process), and those who hailed its informality as its crucial property. (During the IGC 1996/97, there were voices arguing the case for COSAC to become a kind of second EP, rather than EU, chamber representing the national parliaments.) This proposal, however, would require the existing EP structure to be split into two constituent bodies (though not necessarily on an equal basis), whose members would be elected through national and EP elections. The point to make here is that the original role envisaged for COSAC was to engage national parliamentarians in dialogue, something that could be institutionalised more vigorously in the existing institutional setting, and even linked with the creation of a new Inter-Parliamentary Committee (composed of an equal number of COSAC and EP members) without, though, altering the present representative (and legitimising) function of the EP. At a speech given in Paris in May 2001, Jospin called for a similar body in the form of a permanent Congress of Parliaments to hold annual debates on the 'State of the Union', to make sure that the principle of subsidiarity is being observed, and to be involved in the modification of technical or procedural rules in certain policies. The new institution could be involved in certain fields of EU legislation, either by means of performing political review functions, or by monitoring policy implementation. The same could easily apply to the Commission's annual legislative programme and, as suggested by Jospin, to a multiannual programme that the European Council could adopt. In this way, the EP would get involved in the day-to-day negotiations with the Council and the Commission, and the Committee would thus provide additional democratic oversight. This depiction also preserves the foundations of the EU's double democratic legitimacy, with the EP representing the constituent publics directly and the Council, the member governments.

It is important to stress that various other institutional improvements could be introduced to the existing quasi-bicameral structure, which could prove more significant to the democratisation of the Union – in both political and operational terms – as compared with a radical remodelling of its legislature and, hence, either the restructuring of the EP into a lower house of a mixed composition as suggested by Blair, or the transformation of the Council into a *Bundesrat*-like assembly – what Schröder called a European Chamber of States – to sit beside the EP. In terms of improving the present institutional system, the EP should be granted full co-legislative powers with the Council, including the area of compulsory expenditure, as well as the right to co-initiate legislation with the Commission. Simplifying further the co-decision procedure is crucial in terms of increasing visibility and public awareness over joint decision-making. In relation finally to the Council, a new European Affairs Council (EAC) could be set up composed of Ministers for European Affairs. This body should remain distinct from the Foreign Affairs Council which, in turn, should be made responsible only for second-pillar issues.[40] As the General Affairs Council is presently overloaded, it experiences grave difficulties in performing effectively both legislative (including preparatory) and co-ordination functions. Furthermore, there is a missing link between the COREPER and the European Council that the proposed EAC could fill, while at the same time becoming more involved in the preparatory work of the European Council, and co-ordinating the activity of all other Councils to provide additional coherence.

The philosophy underlying the preferred means of associating national parliaments with the EU political system is neither through the creation of a new upper house, nor through the reconstitution of the lower chamber, but rather through the setting up of an Inter-Parliamentary Committee to provide additional checks and balances in the process of scrutinising EU legislation, the equalisation of legislative powers between Council and the EP (combined with a further simplification of co-decision), and the internal restructuring of the Council through the establishment of the EAC to enable it to cope more effectively with an ever-more complex interinstitutional apparatus, as well as with an ever-expanding and increasingly state-like EU agenda. To the above list one could add measures such as the reduction of Council-formations (by grouping together some policy areas), the generalisation of QMV, increased transparency in Council meetings (especially when it meets as a legislature), greater involvement of the CoR in those areas of EU legislation that affect subnational units more closely and importantly (including the observation of subsidiarity), the active involvement of the Council's Secretariat in the preparatory work of the Council Presidency (so as to relieve the latter of a variety of time-consuming and technical tasks), the assignment of greater implementation responsibility to the Commission but with enhanced national parliamentary oversight, and so on.

Having examined several possibilities for further institutional reform, and before turning to the final section of this study in an attempt to summarise the

limits of institutionalising democratic norm-orientation in the Union, it is worth recalling Olsen's architectural analogy on EU institution-building:

> Building European institutions of governance may be compared to building San Pietro in Vatican – Saint Peter's Basilica. Some trace its history nearly two thousand years back, and even the current (new) Basilica took generations to build. There have been many builders, popes and architects, as well as artists and workers. Plans have been made, modified and rejected. There have been conflicts over designs and over the use of resources. There have been shifting economic and political conditions and changing cultural norms, including religious beliefs and fashions of architecture. Such factors have affected both the motivation and ability to develop the Basilica. Yet, as parts have been added, modified and even demolished, the project has had a dynamic of its own, constraining both the physical development, the use of, and meaning of, the Basilica.[41]

Concluding remarks

At a time when the Union remains much of an unspecified entity, and in Delors' words *un objet politique non-identifié*, its dynamism is caught between federalist aspirations of becoming a more congruent polity and a modified type of intergovernmentalism, currently in the form of confederal consociation (see Chapter 2), confirming the centrality of states in the general system, by retaining ultimate control over both system-wide constitutional choice and change. In support of state-centrism also comes the view that even the recently observed dialectic between sovereignty and integration, carrying with it the implication of an explicit right to political co-determination, has failed to produce credible commitments towards a common strategy for democratising the collectivity by means of strengthening European civic competence. Arguably, however, in the midst of a near-chaotic state of theorising the EU polity-building, the normative agents of legitimate governance, 'post-national constitutionalism',[42] and the gradual but steadfast Europeanisation of civil society have raised the expectations of successive treaty amendments in endowing the Union with a clearer constitutional physiognomy and civic identity. Yet, by consolidating national autonomy, and by acknowledging the innate need of states to retain their formal sovereignty by continuing to act as *Herren der Verträge*, the limits of treaty reform in the late 1990s and early 2000s represent a clear illustration of the limits of EU polity-building itself.

Another important implication is the perception that because the recent review conferences carried a mandate for limited reforms, the development of European citizenship and corollary democratic concerns would be dealt with at a later stage. Judging, however, from the end product of Amsterdam and Nice processes, it is not certain that the IGC 2004 will be equipped with the necessary mandate for establishing conditions of legitimate governance based on an extensive 'deepening' of common citizenship rights and the emergence of a new

balancing act between social norms of legitimacy and actual policy performance. Particularly with reference to the recent Nice reforms, far from representing a *cause célèbre* for a substantive re-ordering of civic spaces and public spheres, they amount to a cautiously negotiated deal of 'partial offsets' to key democratic problems facing the Union. Hence, a new dynamic tension between the promise of democratising the collectivity and the actual management of integration manifested itself not only after Nice but, crucially, because of Nice. What the latter failed in the end to produce was not only a common democratic vision *per se*, but rather a belief that such a vision remains without reach, at least for the foreseeable future. This critical assertion is justified further by perceiving the NIT as the product of a predominantly utilitarian, cost–benefit calculus among divergent and often ambivalent national interests along the lines of an overall rationalist settlement.

To the above, one could add that it is hardly possible to introduce substantive democratic reforms without civic participation, now that the once unquestionable 'permissive consensus' cannot generate the necessary public commitment to an EU politics where 'the provision of public welfare is best met through the process of elite-led, regional integration'.[43] If anything, the exclusion of citizens from European governance, compounded by their lack of effective civic competence, is at the expense of popular fragmentation itself. But it is also against the interests of better equipping citizens to become agents of civic change within a nascent pluralist order composed of increasingly entangled arenas for action. Like any other polity that aspires to becoming a democracy, the Union has to engage itself in a constitutive process based on a deliberative rather than aggregative model of governance, thus instituting a new framework of politics that embraces the virtues of civic freedom and civic solidarity, by means of inventing and, whenever necessary, re-inventing a sense of European *res publica.* After all, as Bellamy insightfully argues, 'Europe long ceased to be Holy, but its future may be Roman'.[44]

Notes

1 Following the Laeken Declaration of 15 December 2001, and in addition to its Chairman (d'Estaing) and Vice Chairmen (Amato and Dehaene), the Convention will be composed of fifteen representatives of the Heads of State and Government of the member states, thirty members of national parliaments (two per member state), sixteen members of the EP, and two Commission representatives. Accession candidate states will also be represented in the same way as the current member states, without however being allowed to prevent any consensus which may arise among the member states. Regarding its working method, it is worth noting that the Convention's discussions and all official documents will be in the public domain.

2 J. Shaw, 'The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy',*European Law Journal*, 4:1, 1998, p. 85.

3 A. Menon, 'Defence Policy and Integration in Western Europe', *Contemporary Security Policy*, 17:2, 1996, p. 279.

4 See Fergus Carr and Kostos Ifantis, *NATO in the New European Order*, London: Macmillan/St Martin's Press, 1996, p. 154.
5 *Guardian*, 11 December 2000.
6 *The Times*, 12 December 2000, p. 23.
7 J. H. H . Weiler, 'Legitimacy and Democracy of Union Governance', in G. Edwards and A. Pijpers (eds), *The Politics of European Treaty Reform: The 1996 Intergovernmental Conference and Beyond*, London: Pinter, 1997, p. 250.
8 R. Bellamy and A. Warleigh, 'From an Ethics of Integration to an Ethics of Participation: Citizenship and the Future of the European Union', *Millennium*, 27:3, 1998, p. 448.
9 Y. Mény, *The People, the Elites and the Populist Challenge*, Jean Monnet Chair Paper RSC, No. 98/47, European University Institute, 1998, p. 9.
10 R. Dehousse, *European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?*, EUI Working Paper RSC, No. 98/11, 1998, p. 13.
11 B. Kohler-Koch, *Europe in Search of Legitimate Governance,* ARENA Working Papers, WP 99/27, 1999, p. 9.
12 A. Duff, (ed.), *The Treaty of Amsterdam: Text and Commentary*, London: Sweet & Maxwell, 1997, pp. 145, 152–3.
13 *Ibid*, pp. xxxvi–xlii, 143.
14 Dehousse, *European Institutional Architecture*, p. 10.
15 Robert A. Dahl, *The Future of Democratic Theory*, Estudios Working Papers, No. 90, 1996, pp. 13–14.
16 M. Nentwich and G. Falkner, *The Treaty of Amsterdam: Towards a New Institutional Balance*, European Integration Online Papers, 1:015, 1997, p. 11.
17 L. Cram, D. Dinan and N. Nugent, 'The Evolving European Union', in L. Cram, D. Dinan and N. Nugent (eds), *Developments in the European Union*, London: Macmillan, 1999, p. 363.
18 J. H. H. Weiler, 'Bread and Circus: The State of European Union', *The Columbia Journal of European Law*, 4, 1998, p. 230.
19 R. Bellamy and M. Hollis, 'Consensus, Neutrality and Compromise', *Critical Review of International Social and Political Philosophy*, 1:3, 1998, p. 63.
20 See European Commission, 'Agenda 2000: For a Stronger and Wider Union', COM(97) 2000 Final, Vols 1 and 2, Brussels, 15 July 1997.
21 On this see 'The 1996 Single Market Review', Commission Communication to the Council and the European Parliament, COM(96) 520 Final, 30 October 1996.
22 'Agenda 2000', p. 11.
23 *Ibid.*, p. 11.
24 *Ibid.*, p. 12.
25 *Ibid.*
26 For a comprehensive account of the Euro-Mediterranean Partnership see D. K. Xenakis and D. N. Chryssochoou, *The Emerging Euro-Mediterranean System*, Manchester and New York: Manchester University Press, 2001.
27 European Commission, 'European Governance: A White Paper', COM(2001) 428 Final, Brussels, 25 July 2001.
28 Speech by J. Fischer, 'From Confederacy to Federation: Thoughts on the Finality of European Integration', in C. Joerges, Y. Mény and J. H. H. Weiler (eds), *What Kind of Constitution for What Kind of Polity?*, Badia Fiesolana, FI: European University Institute, 2000, pp. 19–30. See also Stelios Stavridis, *Confederal Consociation and the Future of the European Union*, ELIAMEP Occasional Papers, OP01/09, 2001.
29 C. Joerges, Y. Mény and J. H. H. Weiler, 'The Fischer Debate: The Bright Side', in Joerges *et al.* (eds), *What Kind of Constitution?*, p. 1.
30 T. Börzel and T. Risse, 'Who is Afraid of a European Federation? How to Constitutionalise a Multi-level Governance System', in Joerges *et al.* (eds), *What Kind of Constitution?*, p. 48.

31 *Ibid.*, p. 49.
32 *Ibid.*, p. 50.
33 K. Von Boyme, 'Fischer's Move towards a European Constitution', in Joerges *et al.* (eds), *What Kind of Constitution?*, p. 77.
34 C. Leben, 'A Federation of Nation-States or a Federal State?', in Joerges *et al* (eds), *What Kind of Constitution?*, p. 110.
35 J. P. Olsen, 'How, Then, Does One Get There?', in Joerges *et al.* (eds), *What Kind of Constitution?*, p. 175.
36 Joerges *et al.*, *What Kind of Constitution?*, p. 4.
37 Jürgen Habermas, 'Why Europe Needs a Constitution', *New Left Review*, 11, 2001, p. 17.
38 Yves Mény, 'A Basic Treaty of the European Union: The EUI's Draft', in Kim Feus (ed.), *A Simplified Treaty for the European Union?*, London: Federal Trust, 2001, p. 34.
39 Andrew Duff, 'Constitution or Bust: The Laeken Declaration', in Martin Bond and Kim Feus (eds), *The Treaty of Nice Explained*, London: Federal Trust, 2001, p. 239.
40 For more on this see G. Durand, 'The Need for Council Reform', Working Paper, European Policy Centre, Brussels, October 2001.
41 J. Olsen, 'Organising European Institutions of Governance: A Prelude to an Institutional Account of Political Integration', ARENA Working Papers, WP 00/2, 2000, pp. 20–1.
42 Jo Shaw, 'Postnational Constitutionalism in the European Union', *Journal of European Public Policy*, 6:4, 1999, pp. 63–86.
43 Bellamy and Warleigh, 'From an Ethics of Integration', p. 453.
44 Richard Bellamy, 'Una Republica Europea?', *Europa*, Anno VII, 2000, pp. 5–21.