EUROPE, ITS MEMBER STATES AND ITS CITIZENS: DO THEY NEED A CONSTITUTION?

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When the President of FIDE, judge Nial Fennelly, contacted me about this discussion he said that he was looking for someone who could speak for the Scandinavian countries. Well, that is, of course, an impossible task. The Scandinavian countries are certainly very close in many ways – but in political terms, such as membership of the EU and NATO – they have followed different paths. Four of these countries were at war or occupied during the Second World War, while one of them has, in effect, never housed hostile troops on its present territory.

For these, and many other reasons, there are many different views about the need for a European constitution in each of these countries. Well, since I have agreed, all the same, to represent some form of northern dimension I have chosen a somewhat sceptical approach. Firstly, because I think that doing so serves the debate. Secondly, because, in the Scandinavian countries, there really are quite a lot of people who are basically positive to the EU but who are at any rate questioning parts of the Constitutional Treaty and also parts of the process that has led to this Treaty.

I would like to make clear at the very outset that I do not intend to appear here as a spokesman for the Swedish Government – it has responded largely positively to the outcome of the Convention on the future of Europe and accepted the new constitution on the whole. Instead, my ambition for today is to bring out some of the problems and tensions lurking beneath the shining surface.

The very title of this discussion – Europe, its Member States and its citizens: do they need a Constitution? – invites two different kinds of objections. The first is that, strictly speaking, it is not correct to equate Europe with the Euro-

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pean Union. Europe is a geographical, cultural and historic concept. The European Union is none of these. It is, in point of fact, a political concept. So anyone who poses the question of whether *Europe's* Member States need a constitution is disregarding the fact that a large number of European States are not members of the Union. Surely no one questions whether Norway and Iceland belong to Europe, yet neither of these countries is a member of the Union.

It is interesting that this tendency in the Union to appropriate the concept of Europe has been there from the very outset. It is sufficient to remember that the parliamentary assembly was already given the presumptuous title of the European Parliament in 1962, even though at that time the Community only consisted of six out of all the States in Europe. I am mentioning this because I think that here we are dealing with a factor that can go some way towards explaining both the driving forces behind work in recent years to draft a constitution for the European Union and the differences that have come to light.

It is clear that the States that once joined forces to set up the Community felt that they had a special responsibility for peacekeeping and for developing prosperity in Europe. What the Community's founding nations succeeded in doing in the 1950s was an unique achievement worthy of respect and admiration. Since then the Union has undergone five successive enlargements, growing to 25 countries. The vision once shared by all Member States of ever stronger cohesion, of a Europe moving without interruption in an integrationist direction is now clashing with a wide range of other ideas and conceptions of what Europe should be and should strive for. Here I can also mention the well-known fact that all founding states are also NATO and EMU members, while several Member States of the European Union of today prefer other models for cooperation in the fields of defence policy and monetary policy. There are also – though here we are not dealing with equally clear facts – differences in mentality and ways of thinking between more recent members and the original States. For instance, a view that is more commonly held in the Scandinavian countries than in the original Member States is that the Union should consolidate what has already been achieved and make sure that existing decisions are implemented before shaping new visions for cooperation. Another common view in somewhat phlegmatic and pragmatic Scandinavia is that only changes occasioned by concrete and practical needs should be implemented. A wise manager does not change a winning team, and nor should radical changes be made to a Treaty that is working, is what many people say.

Thinking of this kind is found in many of the Member States that have not been involved from the outset of cooperation. And it should be remembered that those Member States are in a clear majority. In fact, 13 of the 25 Member States have joined in the past 10 years.

Naturally these more recent Member States want to share as equal partners in shaping the future of the EU on the basis of *their* ideas of what is useful and

essential. These countries are not prepared to accept that the more established countries have some kind of monopoly on representing Europe; that they alone define what is meant by a European way of thinking, etc. The new Member States are probably not even prepared to agree that there is any such concept as the often used term "Europe proper", except in the sense of a synthesis of the ways of thinking, views and traditions found in all European States.

But if, despite this, some Member States still want to claim that they are more genuinely European and have a greater duty than others to lead developments, then this naturally provokes the other Member States and tensions arise. One could already see some signs of such tensions in work on the first Convention on the European Charter, and they became even more evident in the Convention that prepared the ongoing IGC. In both cases the initiative had originated in countries that like to see a historical necessity in completing what is often called the "European Project." And work in the Convention was led with efficiency and skill by people rooted in these countries.

This is not meant as criticism; if you have a conviction, then obviously, actually following it is more or less a point of honour. Also, with the exception of the Convention's very last stage, the work was characterised by exemplary openness. But the fact remains that other views on the desirable future of the Union had difficulty making themselves heard in the work of the Convention and had little impact on the final outcome. Many people, not least in the Scandinavian Member States, were also irritated that the overruns of the time limits were so substantial that the period of about one year originally set aside for national reflection and debate was reduced to only a couple of months. They were even more imitated as this shortened period was defended with the distinctly elitist argument that the Convention's proposal was so perfect that no amendment would be needed on any single point.

This feeling in some Member States of having been steamrollered by a strong and visionary, but also somewhat autocratic, political establishment is the first reason to hold misgivings about the outcome of the ratification process concerning the Constitutional Treaty in the 25 Member States. Especially as more and more countries appear to be deciding to submit the question of ratification to a referendum.

The second reason is to do with the substance of the Constitutional Treaty itself. The question is how far populations throughout the EU feel ready for radical changes of the kind that the new constitution will bring. In what is perhaps the most sensitive question – the question of the distribution of power between Member States and the institutions – it should be noted that quite dramatic changes are involved. Let me mention some of them very briefly.

In a number of areas the Union is given increased competence; these areas include intellectual property law and the right to enter into international agreements. In the area of police and criminal law, where Member States have pre-

viously been sovereign, the Union will have shared competence, which will require an extensive transfer of authority to Union bodies. The application of the flexibility clause, which has until now been limited to the internal market, is replaced by a general reference to the policies of the Union, giving the Union greater possibilities of taking decisions that are now the reserve of Member States. In a large number of areas there is a shift to decision-making by qualified majority voting, which means not only that the veto right of individual member States disappears, but also that the European Parliament will be able to share in decisions, weakening the influence of the Council and therefore of national governments. The influence of national governments is weakened further through the bridging clauses, that give the Union the right to decide by itself on a shift to qualified majority voting in areas where unanimity was previously required. Moreover a defence dimension is added to the Union, which means that a characteristically national area is brought under the Union's competence. Finally, the standing of Member States is in a way weakened through the EU Charter of Fundamental Rights.

This brings us back to the title's question of whether Member States and citizens need a new constitution. And then we come to my second objection concerning the title: It is questionable whether the document now on the table of the European Council deserves to be called a constitution at all. Surely, the document has similarities with a constitution. But the most characteristic feature of a constitution is missing. The Constitutional Treaty does not give EU institutions – not even the European Council – legitimacy and power to act by themselves to extend their authority. In principle no change can be made without the unanimous approval of national parliaments. So Member States remain the masters of the Treaty, when they act in unity. The bridging clauses that give the European Council itself authority to amend the decision rules in the constitution may appear to falsify this situation, but on closer examination these clauses are not about transferring new competence from Member States to the Union but solely about regulating how the Union will take its decisions, which is in itself a very important – but different – matter.

Why has it been seen as so important to call the new Treaty a constitution, even though, in substantive terms, it is doubtful whether there is sufficient justification for such a designation? Probably the answer has to do with the power of language over thought.

Those who have most energetically advocated the term constitution are those who have wanted to reinforce the impression that the Treaty is the start of a new era in the history of Europe, an era in which the Union will have a more dominant role and Member States a more subordinate one. At the same time the intention has probably also been to increase the status of the European Convention and to establish the Convention as a model for future treaty revisions.

I see similar motives at work behind the Charter of Fundamental Rights, part II of the Constitutional Treaty. A charter of rights certainly has a natural place in a constitution, but the fact is that, to a great extent, the rights that citizens are guaranteed through the Charter are rights that citizens already have today through national legal orders and through the European Convention on Human Rights, which is part of the Community legal order.

The real importance of adopting the Charter, which took place in 2000, and of making it legally binding, which is now under consideration, is therefore – and now I am expressing myself in a provocative way for the sake of debate – to get citizens used to a new way of thinking, namely to instil in them the notion that their fundamental rights are guaranteed by the Union in the first place and are only guaranteed by Member States' own constitutional systems in the second place. In this way a gradual strengthening is achieved of the sense citizens have of belonging to the European Union. A change of this kind is desirable if you want to clear the way for the citizen's acceptance of a strengthening of the power of the institutions and of further developing the European Project.

By far the strongest argument that has been cited for giving more power to the institutions, especially the Council and in the Council especially the largest Member States is, in fact, the argument of efficiency. It has been argued that it was hard enough already for EU15 to take decisions and that a Union with 25 Member States risks being unable to act at all if present decision rules are retained. Thus, there is reason to examine the strength of this efficiency argument. I can see at least three objections.

Firstly, in very many areas, above all the internal market but also other areas, qualified majority voting is already the rule today. A significant expansion of qualified majority voting was introduced through the Nice Treaty, specifically in view of what was then the coming enlargement of the Union. The impression has sometimes been given in the constitutional debate that without new rules it would have been more difficult to take decisions after enlargement even in the areas that were already covered by qualified majority voting. This is not the case; the Council and the Parliament are just as efficient and capable of obtaining a majority prescribed for as they previously were in these major areas of importance for the activities of the Union. So, in this respect, enlargement does not mean any change in relation to EU15. It is only if you are dissatisfied with the decision power of EU15 that you also have reason to be dissatisfied with the decision power of EU25.

It is, however, true that without new rules the relative decision power of the largest countries decreases in all areas where decisions are taken by qualified majority voting. This is not unique for the largest countries, even small and medium sized countries, such as the Scandinavian countries, are seeing their decision power reduced through the present enlargement. But it is important to be aware

that this reduction in the relative influence of the 15 old Member states does not lead by itself to reduced efficiency in EU25.

Secondly, experience tells us that the difference between unanimity and qualified majority voting is often exaggerated and is quite small in practice. In unanimous decision-making a non-complying country is exposed to strong pressure from other Member States and risks having to pay a high political price if it uses its veto. Therefore the veto is rarely used. It is striking that, even in the area of criminal law, the need for unanimity has not prevented Member States from taking a series of significant decisions. It is equally striking how the ability to obtain unanimity has been manifest when it has been the needed most, for example when threats of terror have induced swift and resolute interventions.

Thirdly, unanimous decision-making contributes to conflict reduction, a factor that will be particularly important in EU25. In the remaining areas where unanimity is still the rule according to Nice there is a value in all Member States being able to feel that they have voluntarily agreed to new common rules, albeit under strong external pressure. In addition, retaining the requirement of unanimity enhances states' responsibility for and participation in the development of the Union. Another important matter is that rules that states have agreed on voluntarily become more deeply embedded and gain greater legitimacy than rules forced upon them. This is especially true of what are usually called core areas for a state governed by law.

So it can be seen from these three objections that the argument that the EU needs a constitution for reasons of efficiency is by no means a clear-cut one. If you think that today we have just the right balance between Member States and the institutions and also have just the right balance between Member States themselves, that is the balance as determined through the Treaty of Nice, then you should be able to assume that the present institutional rules will work just as well in EU25 as in EU15. And that *this* is not the reason why a new constitution is needed for Europe. But I can agree that if the balance is disturbed in any way, for example by giving the European Parliament additional powers, then there may be reasons to compensate the other institutions in order to maintain the balance. And this is exactly what has happened in the constitution, where, for instance, the Council will have an elected chair and the Commission a Foreign Minister.

If you believe that the vision on which EU6 was once founded must be passed on and developed at any price, then you should be pleased about the new constitution with its strong orientation for change, and you should be pleased, not least, that it includes a legally binding charter. Having said that, I am aware that there are people who would have liked to go even further, and that these include many members of the European Parliament.

If, however, you primarily represent a practical and pragmatic approach, if you want to proceed cautiously and think that cooperation is already working

well and is at just the right level today, then you have reason to wonder whether the constitution is not too bold an experiment, especially in terms of the expansion of the Union's competence combined with the institutional changes. Many other changes are of the kind that even pure EU sceptics should be able to welcome them. I am thinking of aspects like holding the whole Treaty text together in one single document, that the Union is explicitly given legal personality and can therefore enter into international agreements and the creation of a legal basis for the accession of the Union to the European Convention.

My reply to the question of whether Europe needs a constitution or whether present rules are also suited to the enlarged Union will consequently be that both views can be accommodated alongside one another and that, ultimately, it is the perspective of the observer that determines how this question is answered.