

A LIBERAL VIEW ON A EUROPEAN CONSTITUTION

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The greatest problem for Europe is therefore to know: how one can restrain sovereign power without destroying it.

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INTRODUCTION

For the future historian of twentieth-century Europe it will be a difficult problem to explain why the very idea of European union became, all of a sudden, so popular among intellectuals and the public at large. Indeed, for decades the idea of a European union was merely an ideal and – what is more – a project shared by a tiny minority. As you would expect, this very large convergence on European union is made possible largely by the fact that there is no such thing as a reasonably unique concept of what this union should be. ‘Europe’ is becoming more or less by definition a good thing, irrespective of what people mean by it. Given that philosophy is, if anything, the discipline of analysing concepts, in this chapter I shall try to produce some analytical considerations relating to the very idea of a European constitution.

DOES A EUROPEAN CONSTITUTION EXIST ALREADY?

The problem of establishing (or *not* establishing) a constitution for Europe is hardly one of inventing a new text from scratch. It is one of the theses of this chapter that there is valid ground for affirming that a form of constitution has been developed (and partly implemented) by jurisprudence since the very origins of the EC institutions.

As is well known, from the legal point of view there is no such thing as an EC, but three Communities established with the Treaties of Paris of 1951 (the European Coal and Steel Community) and of Rome of 1957 (the European Economic Community and the European Atomic Community). It is on the basis of these treaties and how they have been interpreted and implemented that the problem of the present ‘constitutional’ situation in Europe has finally to be assessed.

Of course the Treaty of Union has represented a major event for Europe. However, it is reasonable to say that the Treaty was – and is – a major *political* event but it has not substantially changed the juridical and constitutional framework of Europe as is

showed by the fact that the European Parliament after the Treaty has called for a European Constitution (1993).

The main question to be addressed is whether the founding treaties of the EC (or EU) have to be considered as purely international agreements amongst sovereign states. The origin and the structure are of course that of multilateral treaties signed by representatives of the states and they have been ratified and empowered according to the principles of international law. However, both the content of the treaties, and in particular the treaty establishing the EEC, and the jurisprudence which has arisen from their implementation qualify them as something essentially different from the classical treaties between states retaining their national sovereignties. Let me recall here the two basic elements which justify this statement.

In the first place, contrary to the basic principles of international law, the Treaty of Rome endows the Community with powers which *apply directly* to the citizens of the states concerned. This is established, for example, by Article 189 of the Treaty. In this way the citizens of the member states are subject both to their national law and to Community law. By the same token, as Michel Massanet (1990: 11) writes, 'contrairement aux traités internationaux de type classique, les traités communautaires confèrent aux particuliers des droits que les juridictions nationales ont le devoir de sauvegarder'.¹ Individuals can protect the rights guaranteed by the Treaty by appealing to the Court of Justice. According to Article 187 of the EEC Treaty the sentences of the Court of Justice are valid *directly in the territory* of the member states. National authorities are obliged to enforce the sentences of the Court against their nationals without an *exequatur* (Art. 192). This also constitutes a strong element of difference between the Treaty of Rome and classical international treaties. (For example, neither the International Court of Justice at The Hague nor the Strasbourg European Court for Human Rights can be appealed to by individuals).

Second, the jurisprudence elaborated by the Court of Justice in interpreting the Treaties has constantly ruled in favour of the pre-eminence of the Treaties over national laws. In the famous *Costa* sentence (1964) the Court ruled that

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system. ... By creating a Community of unlimited duration, having its own personality, its own legal capacity ... and, more particularly, real powers stemming from a limitation of sovereignty or transfer of powers from the States to the community, the Member States have limited their sovereign rights.²

This limitation is *definitive*.

In another famous sentence the Court ruled that, 'It is not for the Court ... to ensure that the rules of internal laws, even constitutional rules, enforced in one or other of the Member States are respected.'³ A *monistic* point of view (in the sense used by Hans Kelsen (1991)) is followed in the relationship between the Treaties and derived jurisprudence, on the one hand, and national laws, on the other. In particular, the national judge is obliged to apply Community law and to consider, on this own

authority, as invalid any national law (be it past or future) which might conflict with it.

Are these characteristics of Community sufficient for us to affirm that the Treaties (and their interpretation) represent a constitution? As you would expect in such cases, much (too much) depends on the content you attribute to the concept of constitution. If 'constitution' means an explicit agreement made by individuals upon the basic rules of their society, then obviously the Treaties are not a constitution, and Community/Union law is not a constitutional law. However, it is even truer that following this criterion there would be no 'true' constitutions around at all.

On the other hand, if – from the viewpoint of legal positivism – the constitution is taken to mean the highest law valid in a given territory, then the situation becomes more complex. Provided that member states have agreed to accept both the content of the Treaties *and* the interpretations of the Court of Justice, the Community/Union law *is* the highest law. Albeit in very different ways, all the highest legal authorities of the EC/EU states have accepted the supremacy of Community/Union law over their national law (see Isaac, 1990: 172-82).⁴

At the same time, Community/Union law is not the source of the validity of all the other laws enforced in the European states. If this logical dependence is considered an essential feature of a constitution, as it is in a contractarian view, or even in some legal positivism perspective, then obviously Community law is not constitutional law. However, by this same token, would the American Constitution be a constitution? And would there exist at all any constitutional law in England? Note that, even if you consider nation-states with civil law systems such as Italy or France, it is very difficult to affirm that there is a strict logical dependence of the bulk of the law on the constitution.

Normally laws remain relatively unchanged when a new constitution is adopted, and the pre-eminence of constitutional law means that previous laws that conflict with it are abolished.

Some time ago Norman Barry stressed the difference between the traditional liberal meaning of 'constitution' as 'a set of substantive rules protecting a fully-fledged individualistic political morality, or as a set of neutral but rigorously strict procedural rules' and the 'mistaken idea of constitution ... prevalent in much of contemporary welfare economics'. The liberal constitution is not designed to implement the people's choice 'but to impose significant constraints on government, whatever form it takes (majority rule or otherwise)' (Barry, 1989: 270-1). In terms of this distinction, it seems to me that Community law is very close to the concept of a liberal constitution. It imposes constraints on national governments and majorities on the basis of *individual* freedoms (the 'four freedoms' stated in the EEC Treaty).

There is barely any need to stress that Community/Union law does not possess all the desirable features that a constitutional law should have to effectively contain governments and preserve individual rights. There is no list of individual rights in the EEC Treaty, and of course many points of the Treaties and of jurisprudence do not correspond to a liberal view. But this is no ground for denying that

Community/Union law possesses a remarkable amount of the formal features of a liberal constitutional law.

BACK TO THE AMERICAN MODEL

Since its very foundation the United States of America has provided an endless source of arguments both in favour of and against the idea of a European union (for an overview, see de Rougement, 1991).⁵ The question has been revived by James Buchanan:

Europe in 1990 finds itself historically positioned in a setting analogous to the United States in 1787. There are, of course, major differences as well as similarities, and analogies can always be overdrawn, But if attention is placed on the comparison between the unrealised opportunity that is (was) within the possible and the alternative future that failure to seize the opportunity would represent, the similarities surely overwhelm the differences.

(Buchanan, 1990: 4)

The lessons of the American experience for the Europe of 1990 are clear. The citizens of the separate nation-states face an opportunity to enter into a federal union that can be an instrument for achieving the enormous gains of economic integration. In this respect, the parallel with the America of 1787 is direct. In the process of establishing an effective federal union, a central political authority must come into being with some sovereignty over citizens in all the nation-states.

(Buchanan, 1990: 6)

More or less the same words were used by Luigi Einaudi in 1947 about the reconstruction of Europe (Einaudi, 1948).⁶

Oddly, one of the fathers of European federalism shared a completely differently view about Europe and America:

La situation n'était pas la même et le précédent n'est pas convaincant. Loin d'avoir derrière eux un long passé d'indépendance, ces Etats [the America States] venaient de s'affranchir ... d'un régime colonial; ils étaient à la recherche d'une formule selon laquelle s'organiseraient leur cohabitation future et même cela n'allait pas tout seul, ni tout de suite. ... L'Amérique était un pays neuf qui se donnait les institutions de son choix, sans avoir à remplacer les institutions antérieures, ni à rechercher une entente avec d'autres pays.⁷

Schuman re-echoed here a famous statement of de Tocqueville (1835: 176):

The circumstance which makes it easy to maintain a federal government in America is not only that the states have similar interests, a common origin, and a common language, but that they have also arrived at the same stage of civilisation

... the difference between the civilisation of Maine and that of Georgia is slighter than the difference between the habits of Normandy and those of Brittany.

De Tocqueville concluded that it was easier for Maine and Georgia to federate than for Normandy and Brittany.

You will not find much in the current anti-federalist views. For example, in commenting upon Buchanan's article, a prominent antifederalist, Alan Sked (1990: 1), writes that, 'The conditions which, according to Buchanan, determined America's position in 1787 do not apply to Europe today. The result is that his paper appears to be based on a completely false premise.'

In examining these matters the analytical level gets more or less inevitably mixed up with value judgements. Consciously designed institutional arrangements (be they constitutional or otherwise) are technologies, and technology is defined both by the existence of 'valid' scientific laws ('regularities') and by states of things which are wished to be produced ('ends'). 'Ends' are the difference between technology and scientific predictions of phenomena. Assuming that regularities are beyond possible change,⁸ different ends will be produced by different arrangements of 'specific conditions'. Strictly speaking, you cannot assess the 'technological' rationality of an institution if the ends are not specified.

In proposing his constitutional view for Europe Buchanan's ends are quite clear: 'the achievement of widely recognized and shared objectives, those of internal (intra-European) peace and economic prosperity, within political arrangements that ensure individual liberties and, at the same time, allow for the maximal practical achievement of standards of justice' (Buchanan, 1990: 2).⁹ Buchanan thinks that these objectives can be attained by a European constitution envisaging: first, the right to secede from union 'upon agreement of some designated supra-majority within the seceding jurisdiction' (Buchanan, 1990: 7). The lesson from the American experience is that the formal rules of the constitution do not suffice to contain the powers of the central government or to avoid a 'federal Leviathan'; and second, rules ensuring *competition* 'among producers and consumers of goods and resources across the territory that encompasses the several nation-states' (Buchanan, 1990: 11). Of course, the problem of the possibility of implementing a federal constitution for Europe is quite different from the problem of whether the specific model proposed by Buchanan will produce the effects it is intended to produce. Let me start with the first question.

Is Europe today in a situation similar to that of America in 1787? Basically, it depends on what you consider the relevant elements to be. Having no universally valid general theory about the rise (or failure to rise) of federations, we have no objective rule for establishing what has to count as a 'relevant' element. Any answer will therefore hardly be a scientific one. My guess is that the parallel is not very useful in descriptive terms. We lost a long time ago the faith the Framers had in the possibility of looking at Greek or Roman history for deciding which political institutions would work and which would not.

Obviously we do not have arguments, other than analogies with the framing of the American Constitution, in favour of the possibility of implementing a federal constitution in Europe. If we assume that in democratic regimes, without external threats, citizens finally get the institutional arrangements they prefer, then there is wide scope for the possibility of implementing a sort of European union. Let me refer to the 1987 special edition of *Eurobarometer* 'Europe 2000'. About two-thirds of the interviewees declare themselves to be 'much in favour' or 'quite in favour' of the United States of Europe (23 per cent and 40 per cent respectively). Some 13 per cent are 'quite against' and 7 per cent 'strongly against'. For the six founding countries of the EEC, this figure rises to 70 per cent (83 per cent of respondents). To the question of when they would like to have a European government responsible for the economy, foreign affairs and defence, 9 per cent answered 'immediately', 21 per cent in the next ten years, 17 per cent in the next ten to twenty years, 11 per cent in the next twenty to thirty years, 7 per cent in several generations, 9 per cent said 'never', and 26 per cent gave no answer. Some 53 per cent of all the interviewees believe that in the year 2000 Europeans will vote on a European constitution proposed by a European Parliament; 24 per cent said they did not agree with this, and 22 per cent gave no answer (*Eurobarometer*, 1987).¹⁰ There is obviously no reason to assume that opinion polls reflect the stablest and 'deepest' preferences of individuals and that these preferences will convert more or less directly into electoral preferences. Nevertheless, the overwhelming majority of politicians who declare themselves in favour of a federal Europe is a good indication of the fact that they believe this to be true.

Let us now turn to the second question. The advantages of federations in terms of the keeping of internal peace, providing defence and removing internal barriers to trade, are well known. There is not a great deal to be added to the classical theses of the *Federalist* or, more recently, of Lionel Robbins (1937, chapter 9, and 1963, chapter 7). However, we should not forget what recent experience has taught us: these advantages are *not* the result of federalism in its more general sense, namely, as a *technique* for creating new political entities out of pre-existing sovereign states by sharing sovereignty,¹¹ but of a mixture of federalism and liberal democratic institutions.

The real debate arises when we consider the problem of whether the federal Leviathan can be effectively tamed. In discussing this I think that we should carefully distinguish between two different questions: first, how to prevent a *Bundesstaat* from becoming an *Einheitsstaat*; and second, how to prevent the creation of a federal union from increasing the total amount of government over citizens. The two questions are historically and conceptually related, but are nevertheless distinct.

Let us consider the first point. The right to secede is the mechanism that, for Buchanan and for Peter Bernholz (1991) in his detailed constitutional project,¹² should ultimately guarantee that the federal government stays within its constitutional limits. I would like first to quote a passage from a 1969 article by Buchanan:

The cost of making any change in structure from what was to what is has been borne in *past periods*. The cost involved in making a change to something different must be borne *at the time of decision*. There is always a bias toward the status quo, toward continuing in existence the set of organisational rules that exist.

(Buchanan, 1977: 278)

Mutatis mutandis, this holds if we mean by ‘rules’, not constitutional rules but the actual, more centralised rules that the political federal process might produce. The real working of the right of secession as a guarantee of constitutional framing supposes that the cost of seceding is not too high. Is this a realistic premise? We may notice that the higher the level of economic integration, the higher this cost will be – let alone for the ‘regional’ division of labour that the extension of markets will produce. We have neither theoretical nor empirical evidence that the corresponding cost imposed upon the union by the secession will result in bargaining situations which will tend towards the restoration of the constitutional rules, or towards a higher equilibrium. Depending upon unpredictable conditions, the threat to secede could be either ineffective in restoring the original framing, or ruinously disruptive of any co-operation.

Probably some suggestions could come from the history of the decline of the American federalism. Peter Aranson focused on the primary role of the Supreme Court in this process. Aranson distinguishes between ‘constitutional’ and ‘contingent’ decentralisation. The first ‘is guaranteed as a matter of organic, constitutional law’; the second is the result of a government's decision, ‘as a matter of prudential or political judgement’ (Aranson, 1990: 20) of how much authority to devolve to the constituent units. Following a shift from doctrine to utilitarianism,

[the Supreme Court] soon gave way to a consequentialist jurisprudence. The Court thereby replaced its earliest understanding of federalism as contingent decentralisation. The inevitable result of this shift has been the increasing centralisation of the American polity along with the decline of federalism itself.

(Avanson, 1990: 25)

There is a contrast between this explanation and the explanation given by von Mises. For von Mises the centralisation of the United States was not the result of any deliberate attempt by Washington bureaucrats and lobbies to deprive the states of authority and to create a centralised government and can in no way be considered as unconstitutional. The equilibrium between the states and the federal government was disrupted because the new powers created by public intervention in the economy went to the federal government. And this was absolutely necessary for the unity of the internal market to be preserved. It was not possible to leave to each state the power to control the economy according to its own plans. Von Mises concluded that the autonomy of the states as guaranteed by the constitution was possible only if there was not public intervention in the economy. Voting in favour of governmental control over economic activities the citizens, implicitly, albeit unwillingly, voted in favour of

higher centralisation (von Mises, 1983, section 2). From this point of view the shift in the intellectual doctrine of the Court does not represent at all the basic cause of the decline of American federalism (even if, of course, it may well be complementary, or even an induced consequence).

If von Mises's argument is correct, then federalists are faced with a very serious problem. As a matter of fact, it is scarcely credible that state interventionism in the economy will return to what it was in the nineteenth century, and the tendency of federations to become more centralised would be unavoidable.

Let us come now to the second point. In Buchanan's view, constitutionally guaranteed cross-national competition will ensure that

particularised interferences with internal economic relationship within a single national unit will be policed with reasonable effectiveness. ... Politically orchestrated regulatory activity will tend to be restricted to that which increases overall efficiency, *as this criterion may be defined by the preferences of citizens.*

(Buchanan, 1990: 11, my italics)

This problem of cross-national competition is probably one of the main differences between the liberal view of federalism for Europe, and the standard 'federal' view which is today prevailing in Europe – and which Jacques Delors represents at its best. However, I think that we have to be careful in assessing the *constitutional* role of cross-national competition, *if* by constitution we mean 'liberal constitution'. There are few doubts of course that guaranteeing to citizens and firms of the states of the federation the right to free trade and free location within the federation, as well as free trade and free migration with foreign countries, is a way of limiting the power of the states over the citizens. But in order to avoid this 'efficiency' becoming compatible with a more or less unrestricted domination of the majority over the minority, the overall cost of relocation within the federation should be quite low. There are serious doubts whether this is so. The cost for 'exploited' minorities of resettling in another member state of the union is not comparable with the cost that an American has to bear in moving from one state to another. 'European differences' mean that for the great majority of citizens differences in language, legal systems and customs are very effective barriers.¹³

Of course, in arguing in favour of a European federal constitution we do not need necessarily to show that it will reduce the total amount of government over European citizens. All that we need to show, from a liberal point of view, is that this amount will not increase substantially. According to Sked, this is what liberal federalists are unable to do:

It is more or less an axiom of government that the more levels of government that are provided for, the more government and bureaucracy one will get. The idea that government can be spread over more layers is proved false by all human history.

(Sked, 1990: 6)

This is an important argument, which cannot be easily dismissed. Let me note some points. If we take Sked's thesis as one of comparative politics, it is obviously false in several instances. For example, Switzerland has more levels of government than France or Sweden, but it has less overall government. Therefore, a proof of Sked's thesis should consist in showing that an increase in government arose in the past as a consequence of *adding* more levels of government. This is not easy to do. If we consider modern and contemporary European history, the increase in government (and bureaucracy) has been the result of the formation of the nation-states, i.e. of the progressive weakening of 'lower' levels of government. We simply do not have the reasonably large and stable evidence which would be needed to support Sked's thesis. And going back in history to find random examples would prove – as ever – nothing at all. The example of the United States (and, perhaps, Switzerland) has therefore (again!) necessarily to be the basis for Sked's thesis. To draw conclusions, not to say 'axioms', from cases which are more or less unique is very difficult indeed. The risk is producing loose talk rather than scientific argument, given that we lack the relevant nomological (comparative) knowledge. There is no ground for denying that there would have been more government in America if no federation had been established.

OLD REASONS FOR A EUROPEAN FEDERATION, AND SOME NEW PROBLEMS

As I said before, the arguments in favour of a European federation which are currently presented are more or less the same as they have been since 1930s. Since that time there have not been many cases around of successful federations, and therefore the evidence in favour of implementing a federation independently of the detailed structure that one might imagine for it needs perhaps some qualifications.

Let us start from federations as a means for keeping intra-European peace. The traditional idea that intra-European wars in this century have been the result of the concept of the absolute (unlimited) sovereignty of nations has been recently reaffirmed by Maurice Allais (1990: 17-18):

Aujourd'hui la situation est claire: ou bien nous fonderons à nouveau l'organisation de l'Europe sur le dogme de la souveraineté nationale *illimitée*, et, tôt ou tard, les mêmes causes entraînant les mêmes effets, nous serons à nouveau amenés à nous affronter dans des conflits sans issue, et finalement à la décadence; ou bien nous fonderons notre avenir ... sur des bases nouvelles.¹⁴

However, something new should supplement, and perhaps replace, this point of view. What the argument fails to consider is that the evidence we have today has considerably changed the nature of the problems. The basic fact is that liberal democratic regimes have never engaged in *mutual* war (even if they engaged in many wars with countries having different regimes)¹⁵ Of course, from the point of view of the so-called realist theory, which is represented in our century by such people as

Edward Carr, George Kennan, or Henry Kissinger, this would be more or less a coincidence, the causes of wars having little to do with the nature of the national regimes, and very much with the traditional geopolitical factors and the 'balance of power'. One virtually immediate consequence is that the problem of preventing intra-European wars is a legitimate one, if one shares the 'realistic' point of view, but not if one shares the point of view which considers the liberal and democratic nature of the European regimes. One could be tempted to argue that liberalism and democracy are not necessarily irreversible, and that a federation would therefore ensure a double security. The weakness in this argument is that there is no evidence that federations of undemocratic countries would be effective peacekeepers. Dramatic evidence of the contrary is provided in the present times.

It does not seem that any new perspective about keeping intra-European peace is likely to affect the perspectives for European external defence. As a matter of fact, for any reasonable future it seems quite unlikely that solid liberal and democratic regimes will be established in the east and in the south of Europe. However, the point at stake here is that arguments in favour of a European common external defence are not necessarily arguments in favour of a European union – be it federal or otherwise. A sufficient degree of protection from an external foe for a set of actors sharing a common set of vital interests can be provided, under a reasonably wide range of conditions, by collective action. Of course, there are good strategic and historical reasons for saying that the highest degree of protection will be attained by unifying the several actors as a single actor. But this highest degree of protection might be unnecessary, and a military alliance could suffice.

The experience of NATO as a guarantor of Europe's defence provides very mixed evidence. On the one hand, it could be seen as the proof that an effective protection from an external foe can be provided by an alliance of independent states. But the predominant role of the USA leaves very wide room for arguing that it has not been the alliance of independent states which has finally guaranteed their protection.

A very complex problem is represented by the arguments in favour of a central government as the sole effective guarantee of a free European market. One of the elements of the problem is that of assessing the necessity for such a central government against the historical experience of the EC. In 1959 Allais criticized the mode of integration which dominated Community action for decades. As he put it, 'l'union politique doit précéder l'union économique. C'est là une condition fondamentale. Il faut absolument détourner l'opinion publique de la dangereuse illusion suivant laquelle l'union économique peut préparer la voie à l'union politique' (Allais, 1960: 135-6).¹⁶ This view has since then become extremely popular, especially among socialist and *dirigiste* supporters of a unified Europe. At first sight it might seem to be just a refuted prediction. Europe reached a relatively high degree of economic integration without a political union, and nobody could doubt that this economic integration is today the most solid basis for building a politically united Europe.

However, such a view would underestimate the role that EC institutions played. As I argued in the first section of this chapter, the Treaties and the subsequent

jurisprudence represented a sharing of sovereignty between the nation-states and the Community/Union. It would therefore be one-sided to affirm that any form of political union – for good or for bad – was absent from the process of economic integration. The history of the EC and the EU is for a significant part the history of the taming of the attempts by nation-states to protect – directly or indirectly – their markets and their enterprises.

WHAT KIND OF A EUROPEAN CONSTITUTION ARE WE GOING TO GET?

One of the main areas of confusion in the current debate about the constitutional future of Europe is about the meaning of ‘federalism’. If you claim, as Jacques Delors once did, that as a result of the move towards federal Europe, ‘In ten years, 80 per cent of economic legislation, and perhaps fiscal and social, will have its origin in the Community’, then the obvious conclusion is that the concept of federalism is employed in different and even contradictory ways, and that Delors's federal state is much closer to the classical European nation-state than to the federal state of the framers of the US constitution. The very concept of ‘subsidiarity’ would become not just somewhat vague as it is anyway, but even empty, if it is assumed that the federal/central authority will be in control of the greatest part of the economic legislation.

The fear that the European institutions are destined to turn into a super-state is as old as the Community itself. Perhaps nobody expressed it better than Wilhelm Röpke; writing in 1958, he saw in the Community institutions the way towards generalised economic and political planning – a European Saint-Simonism – which would have been even more dangerous than planning at the national level (Röpke, 1958, chapter 5). Undoubtedly the Community, and now the Union, have always had two ‘souls’: one liberal, the other *dirigiste*. This reflects in the EC Treaty, which contains several Articles which leave plenty of room for heavy state intervention in the economy. If one considers that the Treaty was written at the high point of intellectual and political support for planning, this is hardly surprising. As is well known, the Treaty of Union was written from a point of view much more favourable to the free market. However, it is easy to see that the two ‘souls’ are very well present even in this Treaty, as is shown by the ‘Social Charter’, which corresponds to a *dirigiste* ideology. In predicting that a European federal union ‘will be established in the 1990s’, Buchanan predicts also that it will not transform itself into a centralised state. The reason is twofold: first, the romantic myth of the benevolent and omniscient state that

came to influence public perception of politics in application to the existence of separately sovereign nation-states of modern Europe ... has been substantially displaced in the public consciousness of the 1990s, and there are no longer philosophers around who promote its revival. Nowhere in the world, East or West, do we find, in the 1990s, the naive faith in collectivist nostrums that characterised both intellectual and public attitudes for most of the 19th and 20th centuries.

(Buchanan, 1990: 18)

Therefore a European state could not be expected to command the same loyalties as nation-states in the last two centuries; the second, 'Cultural, linguistic, and ethnic homogeneity' will continue to exist in Europe, and this will oppose the possibility of the federal union's transforming itself into a nation-state (Buchanan, 1990: 17-18).

I believe that Buchanan's position is largely in conflict with the evidence at our disposal. Let me consider the first point. There are few doubts, of course, that the 'naive faith in collectivist nostrums' has faded away. But it was hardly faith in collectivism which was responsible for the progressive centralisation of states – be they federal or not – in the nineteenth and twentieth centuries. The tendency towards centralisation is much older than any popularly shared faith in collectivism. De Tocqueville was already able to write in 1835 that

In the course of the last half-century Europe has endured many revolutions and counter-revolutions, which have agitated it in opposite directions; but all these perturbations resemble one another in one respect: they have all shaken or destroyed the secondary powers of government. The local privileges which the French did not abolish in the countries they conquered have finally succumbed to the policy of the princes who conquered the French. Those princes rejected all the innovations of the French Revolution *except centralisation*; that is the only principle they consented to receive from such a source.¹⁷

(Tocqueville, 1835: 322)

We have to be careful in distinguishing between faith in collectivism and faith in the benevolent state. There is hardly any evidence that among the public at large this second faith has faded away. Even more relevant for our discussion is the fact that the public seems to prefer a benevolent European state to a benevolent national state. If we look at the *Eurobarometer* of June 1990 this statement is largely justified: 64 per cent of the interviewees considered the 'Community Charter of Social Rights' as 'a good thing', and only 4 per cent 'a bad thing' (75 per cent and 3 per cent in Holland, 60 per cent and 5 per cent in Germany, 67 per cent and 8 per cent in England, respectively). Some 92 per cent were in favour of EC regulations in health and safety work; 80 per cent were in favour of EC regulations on minimum income, 81 per cent were for worker participation, and 85 per cent were for job-related training, to quote just a few items (*Eurobarometer*, 1990, note 33).¹⁸ The trend seems to continue without any major alteration.

As far as the second point is concerned, one cannot help but concur that attempts to develop a fully centralised European state will be hindered by Europe's variety. Here rest the main hopes of anti-federalists as well as of liberal federalists. The argument, however, should not be overstressed. The history of the making of nation-states shows that the centralistic states emerged from ethnic, cultural, and linguistic differences which were extremely strong (see Weber, 1976, in particular, chapter 7).

And, of course, differences have a tendency to be reduced as economic and cultural exchanges increase.

ANOTHER WAY TOWARDS A EUROPEAN CONSTITUTION

If the arguments I have presented in the previous pages are sound, then I think that the most likely conclusion which we should reach is that if a European constitution is implemented, it will be ‘federal’ much more in the sense of Delors than in the sense of de Rougemont, Buchanan or Bernholz. The preferences of the majority of European citizens and of European politicians point very clearly in this direction. Given the unpredictability (practical, if not ontological) of the events of human history, there is not much difference between such a prediction and a prophecy. This has its consolations, of course, and leaves some (at least psychological) room for intellectuals to speculate about different possible worlds. Let me therefore return to the more ideological problem of what would be the right constitutional framing for Europe from a liberal point of view.

I believe that we have to start from historical and current evidence concerning the difference between the role of the political and bureaucratic bodies of the Community/Union, on the one hand, and the activity of the Court of Justice, on the other.

It is widely recognized that the decisions issued by the political and bureaucratic bodies are mostly characterized by two basic features: first, they are the result of a compromise of national interests; and second, they are strongly – and increasingly – driven by a *dirigiste* view of the economy. These features are remarkably insignificant in the decisions taken by the Court of Justice. As a matter of fact, the greatest and most influential part of its decisions ruled against national interests, and was a prohibition of any unjust conduct – defined as a violation of the Treaties. For firms and individuals the judgements of the Court have been by far the most effective way of preserving the four freedoms of the EC Treaty and, in consequence, of implementing a free market in Europe. Especially since the *Dassonville* judgement and the *Rewe-Zentral* judgement – better known as the ‘Cassis de Dijon’ judgement,¹⁹ – the court has increasingly discountenanced the direct or indirect attempts of the national governments to protect their markets, firms and interests.

Such outcomes are not the result of chance, of course. They were basically the result of the traditional judicial practice followed by the Court which considers the two opposed parties as being equal before the law. This allowed individual rights and free-market principles to prevail over wide *and* strong interests. You could scarcely expect a majoritarian democratic process to produce equivalent or better outcomes.²⁰

Naturally, the difference between the decisions of the Commission and the Council, on the one hand, and the judgements of the Court, on the other, should not be overstressed. The decisions of the Commission and the Council, are themselves a fundamental source of the law that the Court of Justice is bound to enforce, and the Treaties, as I suggested above, impose many limitations on the exercising of the four freedoms. But, from a liberal point of view, the overall superiority that the

jurisprudential way of creating a united Europe has had over the political and bureaucratic way as represented by the Council and the Commission seems to be reasonably clear.

If this evaluation is sound, then arguments can be produced in favour of a way of creating a European union which would distinguish itself from the mainstream. It consists in putting at the core of the process of 'unification' the development of a European Common Law protecting the civil as well as the economic rights of the citizens. This European law should not be invented from scratch, but should evolve from the existing jurisprudence and from a reform of the EEC Treaty and the EU Treaty, which should in turn be transformed into a full charter of rights in the liberal sense. The existing political institutions should be reformed in order to guarantee effective implementation of the system of rules created by the jurisprudence of the present Court of Justice, and of other judicial bodies which would have to be created.²¹

Probably this central role given to the law and to the judiciary is compatible with different forms of political institutions. But it is likely that it would be incompatible both with a pure confederal framework and with a centralised state. In the first case the incompatibility is more or less theoretical, given that a European common Law would impose a limitation on the sovereignty of nations (or, more concretely, on the powers of their parliaments). In the second case, evidence from the past shows that the centralisation of political power is in contrast to a strong role for the judiciary and to a system of law which is not derived from legislation.

To put the law and the judiciary at the core of the constitutional process of Europe would also be consistent with its constitutional history. While the American Constitution was the result of a deliberate attempt to establish a political order guaranteeing peace and individual rights in the absence – after revolution – of any absolute sovereign power to be tamed, the European constitutions were the result of a very long political and intellectual process of limitation of the power of the absolute monarchs. In the abstract terms of contractarian theory, the establishment of the American Constitution was a process very similar to a *pactum unionis*, while the constitutional history of Europe corresponded rather to the concept of a *pactum subiectionis* – of a 'new' pact between the subjects/citizens and the monarch.²² The law and the judiciary played a major role in this process.

The substantial weakness of the Community's political powers allowed the judiciary to rise and acquire importance, within the process of European union. Having in mind liberal values and ends, and having evaluated the evidence available, I think that one should consider this as a fortunate coincidence. Consequently, its preservation and improvement should be considered as the essential element of a liberal constitution for Europe.²³

NOTES

- 1 Translated as: 'in contrast to international treaties of the classical variety, the treaties of the Community confer on private persons rights that national jurisdictions have the duty to safeguard' (Massenet, 1990: 11).
- 2 Court of Justice of the European Communities, *Reports*, Flaminio Costa vs. ENEL, 15 July 1964, p. 593.
- 3 Court of Justice of the European Communities, *Reports*, Geitling vs. High Authority, 15 July 1960, p. 438.
- 4 The British Parliament (*European Community Act*, 1972) followed a way intended to preserve its sovereignty, but prescribed that judges respect the principles ruled by the Court of Justice – including therefore the primacy of Community law.
- 5 De Rougemont (1991) wrote extensively about federalism as decentralisation and as a protection of the rights of minorities.
- 6 See also the following passage written in 1954:

Nella vita delle nazioni di solito l'errore di non saper cogliere l'attimo fuggente è irreparabile. La necessità di unificare l'Europa è evidente. Gli stati esistenti sono polvere senza sostanza. Nessuno di essi è in grado di sopportare il costo di una difesa autonoma. ... Le esitazioni e le discordie degli stati italiani della fine del quattrocento costarono agli italiani la perdita dell'indipendenza lungo tre secoli; ed il tempo della decisione, allora, durò forse pochi mesi.

(Einaudi, 1956: 89)

(In the life of a nation usually the mistake of not knowing when to grasp the fleeting moment is irreparable. The necessity of unifying Europe is evident. The existing states are powder without substance. None of them are able to support the costs of their own defence. ... The hesitation and the dissension of the Italian states at the end of the fifteenth century cost the Italians the loss of their independence for three centuries; and the, the time of decision lasted maybe a few months.)

- 7 The situation is not the same and the precedent is not convincing. Far from having behind them a long history of independence, the American States had just rid themselves ... of a colonial regime; they were in search of a formula according to which their future living together could be organised and even that would not take place on its own or immediately ... America was a new country that gave itself institutions of its own choice, without having to replace existing institutions nor look for an understanding with other countries.

From this judgement Schuman concluded:

It will not do to fuse states, to create a super-state. Our European States are an historical reality; it would be psychologically impossible to make them disappear. Their diversity is indeed a happy fact, and we do not want to level or equalise them.

(Schuman, 1963: 24)

- 8 I do not mean derivative regularities, i.e. regularities which derive from the union of more fundamental laws and some specific conditions, but regularities which cannot be further explained. The laws of human nature – if any – would be in this sense fundamental laws beyond possible change. Of course the problem here is *not* ontological. The relevant point is that the laws cannot be changed at will.
- 9 'Standards of Justice' is not very clear indeed.
- 10 It is to be remarked that figures do not reveal a constant progress over the years toward more pro-European preferences. Except for England, there were more people in favour of the United States of Europe in 1970 than in 1987.
- 11 This technical, ideologically neutral aspect of federalism was stressed by Bruno Leoni (1958). See also Leoni (1962). This means that Aaron Wildavsky's (1990) claim that 'if there is anything essential to a vibrant federal system, it is competition' is either false or more or less tautological.
- 12 Bernholz's proposal gives the right to secede not just to the member states, but also to transnational regions of ten million or more of inhabitants from the nation-states.

- 13 These barriers will be far less effective for capital and firms, of course. But this could be insufficient to prevent majorities from creating a favourable legal and fiscal environment for capital and firms, and still imposing 'confiscatory' taxation upon minorities. This possibility would be independent from any collusion between states for avoiding competition. On this last point see Benson (1990). Benson shows also that the states use the federal offices to reduce the impact of competition. In particular, the deduction of state and local taxes from federal taxes means that the cross-state variation in taxes is substantially diminished.
- 14 Today the situation is clear. Either we re-establish the organisation of 'Europe on the dogma of unlimited national sovereignty and, sooner or later, the same causes involving the same effects, we shall again be led to confront one another in irresolvable conflicts, and finally in decline; or we shall have to establish our future ... on new foundations'.
- 15 Probably the most relevant analysis of these matters is given by Michael Doyle (1983).
- 16 'political union must precede economic union. That is a fundamental condition. It is absolutely necessary to disabuse public opinion of the dangerous illusion according to which economic union can prepare the way for political union.'
- 17 The italics are mine.
- 18 See *Eurobarometer*, 1990, note 33. See in particular the Appendix to volume I, pp, 19-22. These data seem to contrast with a more specific poll concerning alternative 'National or joint Community decision-making?'. Here a much lower support is given to the EC versus national decision-making. For example, 37 per cent of the interviewees are in favour of EC decision-making about workers' representation, add 49 per cent in favour of national decision-making (cf. *ibid.*: p. A23). A reasonable explanation is that in expressing their support for the Social Charter the citizens expressed more their preferences for welfare than their preferences for the Community in itself.
- 19 Court of Justice of the European Communities, *Reports*, Procureur du Roi vs. Benoît and Gustave Dassonville, 11 July 1974, and Rewe-Zentral AG vs. Bundesmonopolverwaltung für Branntwein, 20 February 1979, respectively. Contrary to widespread opinion, the 'Cassis de Dijon' sentence did not establish mutual recognition as a principle replacing harmonisation. It was, instead, a device for preventing the 'acquis communautaire' from being verified, in view of the fact that harmonisation – explicitly contained in the EEC Treaty – will take a long time to be accomplished.
- 20 I have examined the problem of the democratic status of the Community institutions from a liberal point of view in Petroni (1990).
- 21 This is exactly the contrary of the position of the former EC Commissioner Peter Sutherland, who claimed that 'Je le reconnais bien volontiers: le droit n'est que l'instrument d'une politique' (Sutherland, 1988: 15). (I freely admit it: the law is only the instrument of politics.)
- 22 On this distinction and its relevance for contemporary Contractarian theory see Petroni (1984: 850-63).
- 23 A detailed project for a liberal Europe was presented by a group of intellectuals in 1993, named the European Constitutional Group. The writer is a member of this group. In this project great attention was given to the problem of how to prevent the judiciary of EU from expanding its competencies in such a way as to represent in itself a drive towards unwanted (or unnecessary) centralisation of power. On these matters see also the special issue of *Biblioteca della libertà*, 'La via dell'Europa passa da Maastricht?', XXX (1995): 129.

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