

Europe and the Constitution of Liberty

Otto Graf Lambsdorff

In his 1965 book “E Pluribus Unum” the American historian Forrest McDonald wrote: “...they were giants in the earth in those days, and they spoke in the name of the nation, and the people followed them.” The “giants”, McDonald spoke of were the fathers of the US-Constitution. Names like Benjamin Franklin, George Washington, or James Madison come to mind. It takes great and impartial minds to successfully undertake such an enormous task as to write a new constitution. In our own German history we have the fathers of the 1949 “basic law”, such as Theodor Heuss, Carlo Schmidt or Konrad Adenauer. Each of them was a person of high intellectual standing, profound expertise and a sense that in constitutional matters a long-term view must prevail over the short-term view and party politics.

The question who should write a constitution is as old as the idea of constitutionalism itself. There was – since the days of the Roman republic – always a consensus, that constitution-makers and policy-makers should be separated. Those who already have a vested interest in politics should not be the rule-makers of politics. This certainly is a wise maxim. I really wonder whether in a distant future some historian will describe the members of the new European Convention under former French president Giscard d’Estaing as “giants”, but one thing can be said already. These members do not stand outside the political process and its vested interests. Most of them by far will be people who come from the “establishment” of the European Union. Most of them will find that the real issue – whether we need more integration and centralisation or not – is no issue at all. There seems to be a general agreement that integration and centralisation are to be re-enforced.

As far as I can see, the only genuinely opposing views come from the small group of European parliamentarians of the extreme right. That scepticism comes only from this camp, makes things even worse. Not only does it discredit even well-founded scepticism, but also the opposition from the extreme right in itself pushes the discussion in the wrong direction. The worst of all possible alternatives to the present course of the EU would be a return to nationalism and to something like the pre-war order of things. With all that said, it seems to be clear that the only way to move the proceedings of the Convention in the proper direction is to accelerate the pressure from the outside. Public opinion has to be the driving force in the process.

Hence the voice of liberal constitutionalism has to find its competent and outspoken proponents in the public discourse. In British parliamentary tradition the classical method to propagate opposing views in a clear manner is to install a “shadow cabinet”. Hence the proper answer to the European Convention should be a “shadow convention”. This is, of course, what I expect the European Constitutional Group to be – a kind of “shadow convention”.

This is no easy task. A legal framework that limits political decision making in such a way that individual freedom can unfold itself to the maximum that is compatible with the existence of a civilised legal order, is hard to formulate and even harder to put into reality – even for independent and competent experts like those assembled in the European Constitutional Group.

There is no doubt that a society in which individual choice prevails over collective choice is more successful – both economically and culturally – than a society that sets different priorities. The fathers of the European unification process had something like this in mind. The Treaty of Rome, at least, put forth the vision of a Europe of freedom and competition. The “four freedoms” – of persons, goods, services and capital – made individual choice the core issue of the unification process.

Over the years, however, political choice became more and more dominant over individual choice. Today’s European Union is staunchly protectionist to the outside world. Heavy subsidies like the Common Agricultural Policy and the Regional Funds hamper the free market in very important areas. Regulation is spreading. Already today the biggest share of all laws and regulations which affect our lives come from Brussels. In the 50's, when the European project was still in its infant state, one would have probably idealistically welcomed this flood of rules and regulations as an engine of integration. Today, however, we should think any enthusiasm about this misplaced. Over-regulation does not promote, but rather discredits the process of unification.

People now rather think: A law is not automatically good, only because it comes from the European Union. During the last years there was hardly a single major European project (one can think of the “Euro”), which did not have to be pushed through the legislative processes against a silent majority of the citizens. In some countries we already see anti-European parties emerging successfully. In Germany taboos about the past have so far prevented this silent opposition to become virulent that way.

All this raises many complex questions about the democratic culture of the European union. The European Union is today usually seen by the citizens as bureaucratic, undemocratic and completely out of touch with the true wishes and interests of the citizens. To be true, such a critique is often more than unfair, because many of achievements of the EU are already taken too much for granted. Also in many areas the EU has been an engine of liberal and market-oriented reform, for instance in the electricity sector. In the debate there is not room for ideologically motivated black and white rhetoric.

Nevertheless: On the whole, there is reason to believe that it is not so much the individual policies that cause the problems, but rather the constitutional framework. Therefore one should – despite all the scepticism that is appropriate – be happy that with the summoning of the new Convention, the EU has at last recognised the problem. This at least took them nine years, since the European Constitutional Group had already published its first draft of a European Constitution in 1993.

While the question now has been recognised, the answers may not be too promising yet. Some are fairly misleading. What shall we think of the former French Prime Minister Lionel Jospin announcing that the sovereignty of the national state should be the prime objective in Europe, while at the same time almost every policy field, including social policy, should be transferred to the European level of government? This is a case of anti-centralist rhetoric and centralist practice, I guess. What shall we think of our Federal Chancellor Gerhard Schroeder, who advocates a fully grown Federal State – despite a German constitutional court ruling against this – and at the same time wants to see re-nationalisations? Here we have centralist rhetoric and anti-centralist practice. Do we want to have an out-rightly imperial Europe, one that is equal to the hegemonic super-power USA? Romano Prodis’ quest for a single European foreign and defence policy points in that direction.

On the whole, these are not good times for constitution-making, anyway. The main concern of both, decision makers and the press, is not to find the proper rules to guarantee the freedom of the individual anymore. It is rather social-engineering of all sorts. In contrast to the “giants”, who wrote the US-constitution, they tend to prefer “animal rights” or the “precautionary-principle” over, “life, liberty, and the pursuit of happiness”. In such a climate of opinion one should be cautious with grand designs. I have some sympathy with our former Federal Chancellor Helmut Schmidt, who recently warned of overdrawn hopes to achieve some sort of “finality” in the discussion. The extension of the EU to former member states of the COMECON and other problems, he argued, would ensure that we will continue to live under provisional arrangements. Not a written constitution of the type that usually constitutes mature nation states, but the solution of concrete structural and institutional problems were the true future agenda for Europe. Maybe, our former chancellor has a point. Maybe, the convention neither has to nor will pronounce the last word on constitutional issues in Europe. Still, the basic institutional problems have to be dealt with.

In the heads of some German politicians the image of a European Union spooks around, which extends the federalism of the German Federal Republic up to Brussels. Some of them even go so far that they want to give the authority to tax to the European Union level. I would rather tend to think that German federalism cannot serve as a good example for Europe, but rather as a warning. In Germany the federal government has the power to tax and spend. The states – “Länder”, as we call them – hardly have any powers of their own to tax and to legislate, but they spoil federal legislation by their participation in the federal legislation process via the Federal Council. The powers between federal government and the “Länder” are not clearly separated, but confusedly mixed. All this makes German federalism undemocratic and non-transparent to the voter. To make it worse, the re-distributive system connected with all that drives out one necessary precondition for a competitive economy, which is the competition between the policies of the “Länder”. Germany has a very non-competitive type of federalism. In fact, it is just centralism in disguise.

This is what we have to avoid in Europe under all circumstances. The EU and its institutions have been built as top down structures, which suited the elites at the top, but are no longer in tune with public opinion. Hence decentralisation is the most urgent task that the Convention ought to deal with, but probably won't do. The problem is, that the popular demand for less centralisation competes with another popular demand, namely the demand to eliminate the “deficit” in democracy. This is usually interpreted as a request to strengthen the European Parliament in a way that it would resemble one of the national parliaments in scope of power. This, of course, would make the parliament potentially the most driving centralist force of them all. Still it would do so in remote distance from the people of the EU.

After all, what makes Europe so special, is her cultural and social diversity. One of the advantages the “giants” in America had, was that at least with some justification they could “speak for the nation”, whereas in Europe today this can only be said of the national parliaments at best. Hence, the democratisation of Europe ought not just follow the centralist line. Of course, the powers of the European Parliament to control the European bureaucracy could and should be strengthened, for example by granting the control over the whole budget. However, one should be careful not to give to it a genuine power to tax or to initiate legislation. The powers of all institutions and levels of government should be limited strictly.

For that purpose the principle of subsidiarity was written into the Maastricht and Amsterdam Treaties. It was rightly assumed that the EU needs simpler and more intelligible procedures.

It should not act unless it can provide hard evidence that it can better deliver what people want than less distant units of government. However, so far the principle of subsidiarity has not proven to be more than a placebo for those who are against too much centralisation. It is too vaguely defined. It has not stopped the general trend of centralisation, because the institutional framework created by these and other Treaties included incentives for centralisation – mainly by making it convenient for the national governments to shift away inconvenient responsibilities into nowhere.

Before we blame those in “Brussels”, we should first have a closer look to the politicians in our own countries. Usually a clear distribution and division of powers between the tiers of governance is what experts recommend these days. I agree that we should pursue this idea as energetically as we can, but I am a little bit sceptical whether we will come very far with it. There are only a few cases where powers can be assigned clearly. Foreign trade and tariffs quite clearly belong to the European level. Taxation should be reserved to the lower tiers. All redistributive powers should be assigned to the lowest possible level.

Especially here the new architecture for the enlarged continent-wide Union must allow for people to interpret their political values and principles in ways which respect their own local, regional and national contexts. That means, no European Welfare state and the end of the Common Agricultural Policy as was agreed during the last Ministerial Conference of the WTO in Doha. But here we may already get into some trouble. There may be overlapping powers. For instance, the Declaration of Nice included human rights which could give the EU power to regulate certain aspects of social policy. Also, some policy areas cannot be so easily assigned to a specific tier of governance. Environmental policy, I believe, should be generally considered a local affair, but there are of course global problems, which might better be dealt with by the EU. This demands case-by-case decisions according to the subsidiarity principle. That means that there are still possibilities silently to transfer powers inch by inch. The process of irregular centralisation can not be effectively halted this way.

This is why I believe in a different approach. The real problem of centralism is that it facilitates discrimination. One section may find a way to live at the expense of others. Also one section may impose its values upon others. In that sense centralisation creates a problem of minority rights. The obvious solution for this would be the strengthening of minority rights. Of course, I do not mean so-called positive rights - in that case the subsidy of regional special interest. Rather I mean negative rights, that is rights to defend one's own autonomy.

When we speak of the deficit in democracy we do not necessarily have to speak about the European Parliament. Would not, for instance, a transfer of veto powers from the executive branch in the Council of Ministers to the national parliaments strengthen both, democracy and subsidiarity? Should we not insist that the unanimity clause in the Council ought to be retained instead of being eroded step by step?

Also, I think, a guaranteed right to leave the EU – a right to secession – could be a safeguard for the defence of minority rights. This may sound provocative to some people, but I am quite sure that the impulse from such an exit-clause would ensure that the EU would act more carefully. The right to secession would rather serve to minimise the danger of actual secession.

I am very optimistic that the European Constitutional Group will pursue that line of thought with many more detailed proposals. Europe must no longer spend its time looking backward to two world wars but instead put in place a new system of governance for the 21st century based on the fact that democracies and market economies have been established at local, re-

gional and national levels across almost all the continent and people want to take charge of their own lives.

This is vital to Europe's future, because Europe's leaders and institutions are bringing the European ideal into disrepute by making the Union into a virtual space where rhetoric is cheap and policy promises are not costed or followed up. It is, for example, no good talking about a common defence or security policy unless governments are prepared to spend more and make maximum use of NATO.

All institutions in the EU, including the European Parliament, have to undergo a culture change. They have to do a much better job in explaining why measures need be taken by the EU, demonstrating what the costs and benefits are and how they will bring greater security into peoples' lives.

There is one hope that the Convention will come up with solid proposals for genuine decentralisation, genuine subsidiarity and genuine competitive federalism, and that hope is the fact, that all the member states at the end will have to agree. This, however, is a very slim hope, because we all have seen that a mixture of threats and generous offers can influence every national government in the wrong direction. At worst one can have so many referenda on the issue until the convenient result turns up. We have seen it with Denmark and her votes on the Maastricht Treaty, which were repeated so often until the Danes agreed to join.

This is why ventures such as the European Constitutional Group are so important. They have to remind the Convention during the whole proceedings about the direction that should be taken. If the Convention does not in itself produce "giants in the earth" like America did more than 200 years ago, the European Constitutional Group has to provide an intellectually fertile ground for growth.

As a true enlightenment liberal I am very optimistic about the capability of mankind to raise herself to new intellectual heights. Therefore I believe that in every dwarf there is a potential giant. Let us all combine to encourage them to let the "inner giant" out. If that can be achieved, the prospects for Europe are good.

European Constitutional Group

c/o Frankfurter Institut –
Stiftung Marktwirtschaft und Politik
Charlottenstraße 60
10117 Berlin

Tel.: ++49 / (0)30 / 20 60 57-0
Fax: ++49 / (0)30 / 20 60 57-57
email: institut@frankfurter-institut.de