In Search of the Lost Constitution:
The EU between Direct Democracy and the Permissive Consensus

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Following the negative results of the French and Dutch referendums on the Constitutional Treaty, the European Council has called for a "period of reflection" before reviewing the situation in 2006. This period may last several years, but steps should be taken now to respond to what has happened. The process by which a Convention would draft a Constitutional Treaty, which would then be ratified in many cases by referendum, was hoped to secure public consent to the basic rules and procedures of the European Union. The referendums highlighted different reasons why this has not worked: lack of information or understanding; contradicting or misplaced perceptions of what is at stake; perhaps an inherent unsuitability of referendums for issues of this scale and complexity. The next steps should aim to allow citizens to give their informed consent to the basic reasons, rules and procedures involved, and then to place their trust in representative democracy and other mechanisms of accountability. A new "permissive consensus" is more appropriate than pursuing "direct democracy" over details in a Union of half a billion people. Three lines of action suggest themselves. The first is to develop effective communications strategies and educational programmes. The second is to go ahead with a few changes foreseen as a demonstration exercise in the logic of European integration and a "model debate" to engage the public: these could be the transformation of the EU's provisions concerning Police and Judicial Cooperation in Criminal Matters, and the role of parliaments in the EU. Finally, the idea should be explored of seeking a reasoned popular mandate by some sort of European Declaration of Principles, adopted simultaneously in each Member State, which would serve as a mandate for detailed negotiations between governments and subsequent monitoring by national parliaments.

Introduction

To lose one ratification referendum is a misfortune which has occurred on two previous occasions in the European Union and has been reversed. To lose two, as has happened in 2005, starts to seem like carelessness, and may not be so easily dealt with.

The negative outcomes in France on 29 May 2005 and in The Netherlands on 1 June have frozen the process of ratification of the Treaty establishing a Constitution for Europe. The European Council on 16-17 June called for a period of reflection before reviewing the situation in the first half of 2006. There is already a widespread feeling, however, that the Constitutional Treaty is dead in its present form. The period of reflection will almost certainly last several years. What should be done in the meantime?

There will be voices urging a re-run of the failed referendums, although this would probably have to wait in all events until the current leaders have gone, which means 2007. Some may also try to use this to kill two birds with one stone. In August, Austrian Chancellor Schüssel – who will have to start formally picking up the pieces during the Austrian Presidency in the first half of 2006, and who has also, like President Chirac, promised that Turkish accession would be subject to a national referendum – seemed to suggest telling French and Dutch voters that the lesson has

been learnt and Turkey will not be let in, this being presumed to change enough minds to permit ratification.[1] This is not a good response. There is nothing in the Constitutional Treaty which concerns Turkish accession and, although negative attitudes to the possible accession of Turkey certainly affected public opinion, this was not the main reason for the No in either country.

What happens now matters greatly. What is done will have a strong impact on public opinion not only in France and The Netherlands but across the whole EU, especially in the several countries where planned referendums have been suspended. To put it bluntly, the credibility is at stake of the whole notion of citizens' participation in the decision-making processes of European integration. The first elections to the enlarged European Parliament in June 2004 saw a further drop in turnout to 45.7%. Now the populations of two founding members of the Union have said No to a major treaty change.

This article aims to contribute to reflection. It is argued that the EU needs to devise more effective campaigns to increase public understanding. In particular, one should select a few issues of high pan-European saliency where EU action can be demonstrated to provide "added value". Beyond this, more fundamental rethinking is called for regarding the possibility and desirability of direct participation by citizens in EU decisions. The article concludes that the main priority should rather be to consolidate a new "permissive consensus" by which citizens give their informed consent to the basic reasons and rules of the European game – and then place their trust (together with some reliable guarantees of accountability) in the mechanisms of representative democracy. A few recommendations are offered, finally, as to what this might mean in practice.

Table 1

Reasons Given for Voting No in the French and Dutch Referendums, 2005
(Percentages of respondents indicating this as one of their reasons for a negative vote)

Reason	France	Netherlands
Negative employment effects	31	7
Weak economic situation in country	26	5
Economically speaking, the draft is too liberal	19	5
I am against the Bolkestein directive	2	---
Not enough social Europe	16	2
Not democratic enough	3	5
Too complex	12	5
Too technocratic/juridical/too much regulation	2	6
I do not see what is positive in this text	4	6
Loss of national sovereignty	5	19
Loss of Dutch identity	---	3
I do not want a political union/federal State/"United States" of Europe	2	5
I am against Europe/European construction/European integration	4	8
The draft goes too far/ advances too quickly	3	6
This Constitution is imposed on us	---	5
Europe is evolving too fast	---	5
I do not trust Brussels	---	4
The draft does not go far enough	1	---
Opposition to further enlargement	3	6
Does not want Turkey in the European Union	6	3
Europe is too expensive	---	13
There is nothing on human rights or on animal rights	---	2
Lack of information	5	32
The "Yes" campaign was not convincing enough	---	5
Influenced by the "No" campaign	---	2
Opposes president/national government/certain political parties	18	14
The Netherlands must first settle its own problems	---	4
Other	21	7
[DK/NA]	3	2

Source: compiled from data in Flash Barometer EB 171, The European Constitution: Post-referendum survey in France. June 2005; and Flash Barometer EB 172, The European Constitution: Post-referendum survey in The Netherlands. June 2005.

Why did they vote No?

All sorts of reasons lay behind the negative votes (see Table 1). A few had nothing to do with Europe. Several had little to do directly with the Treaty but were certainly about Europe. Interestingly, the main concerns were quite different in the two countries.

Many Dutch objected to the process, merging a perception of inadequate information with sensitivities about national sovereignty and identity, as well as a feeling of being pushed around. The main issue was the felt lack of meaningful participation, in the referendum itself and in Europe generally.

Many French, on the other hand, were afraid of the outcome, seeing the Treaty as an excessively liberal threat to employment which would undermine the (French) social model. The main issue was, at least in the minds of the Non-sayers, one of policy choice.

The following sections reflect on these two dimensions of the problem, not in order to look more closely at specific circumstances in The Netherlands and France, but to contribute to thinking about how best one can reframe the issues next time round.

Information and interest

In The Netherlands a lack of information was the single reason most often given for voting against the Treaty. For many Dutch, this seems to have become a source of active resentment at not being taken seriously. People had not been consulted over the introduction of the Euro or the enlargement of the Union. They were now being asked to give their approval to a long and complex document without knowing either what this would change in the present situation or what the consequences would be of not adopting it. More material concerns, notably the fact (well-publicised in the coincident debates on the EU's Financial Perspective) that the Dutch are now the highest net contributors per capita to the EU budget, only made things worse by creating the feeling that they are also paying too much for whatever it is they don't know about.

Even where the referendum results were positive, there were grounds for concern. In Spain (as in France) the lack of information also seems to have been an important factor, especially among younger people, but more in shaping decisions whether or not to vote. There was indeed a low turnout (42%) in the Spanish referendum in February, while in Luxembourg, where voting is obligatory, the Yes vote was only 57% in the referendum held in July.

A common first response to this situation is to lament the failure of public campaigns in improving awareness and understanding. In other words, it is assumed that it is not only desirable but possible for most citizens to be able to make an informed decision about the content of a Constitutional Treaty. And it is also assumed, more of less explicitly, that if citizens did understand, they would be in

favour. The main point in all events is that there has been a failure in communications.

It is obviously true that the importance of improving public interest and understanding regarding European integration – especially if one chooses to hold referendums about it – is not new. It has been high on the formal agenda ever since the Danish No in June 1992 first brought home the demise of the old "permissive consensus". Yet little seems to have been achieved. The Nice summit in December 2000 adopted a Declaration calling for

"*a deeper and wider debate about the future of the European Union. In 2001, the Swedish and Belgian Presidencies, in cooperation with the Commission and involving the European Parliament, will encourage wide-ranging discussions with all interested parties: representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc.*"

Each Member State and candidate country was encouraged to carry out a national campaign. Efforts were certainly made. Yet one year was inevitably too short a time – even if adequate resources and commitment had been devoted in all countries – to bring about any broad and deep change in popular understanding of the workings and rationale of the EU.

The European Convention which worked in 2002 and 2003 was an innovation in broadening the set of actors involved in preparing treaty changes. It should also, it was hoped, increase public interest. Yet the various efforts at consultation were described later even by one Convention official as "a 'gallant' failure, which pleased the lobbies but failed to get through to the general public".[2] Indeed, according to a Eurobarometer survey in June 2003, only 45% of respondents across Europe had even heard of the Convention.

Once the Intergovernmental Conference eventually agreed a text in 2004, referendums were promised in nearly half the Member States, even where they were not mandatory, thus hopefully putting a further seal of democratic approval on a text which would serve as the basic law of the enlarged Union in the coming decades. The first results have spoken for themselves.

There is certainly much more that could have been done to make the Treaty comprehensible. The last thing that needed to be done was again to hand out the whole text (even at football matches in the Spanish case). Eurobarometer in fact openly criticised the Spanish efforts.

"*The Spanish experience appears to expose certain errors or erroneous campaign strategies. Information is, according to the data, a key element in mobilising voters, and in this case it has not been communicated in a valid or efficient manner by the parties and official institutions…[It] shows that in order to mobilise citizens there is a need for sustainable effort in informing and encouraging debate on the Constitution.*"[3]

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It is easy to feel that there has been a lack of serious efforts to engage the public in anything resembling serious debate about European integration over the last few years, especially when one considers the importance of the changes taking place in Europe. It cannot be a matter of funding. It is sometimes suggested that national governments may have mixed incentives. They should have the duty as well as the interest to explain why they have negotiated (and parliaments agreed to) the present arrangements. "Brussels", however, is much too useful as a scapegoat for difficult policies to risk being lost through too much popular understanding as to how decisions are actually taken.

Yet things are not so simple. It is not obvious how governments could do better in short-term publicity campaigns. Greater public understanding of the nature and operation of the EU can only come about as a result of sustained efforts through educational systems, social and economic organisations and so on – and efforts which try to explain not just a particular Treaty, but the broader issues of European integration which may make it possible to understand roughly what is going on and why.

More broadly, information is simply not enough. There is a deeper challenge of provoking public interest. Indeed the European Council of June 2005 emphasised precisely this apparent lack of popular "interest", rather than of information, understanding or support.

"*This period of reflection will be used to enable a broad debate to take place in each of our countries, involving citizens, civil society, social partners, national parliaments and political parties. This debate, designed to generate interest, which is already under way in many Member States, must be intensified and broadened.*" (emphasis added)

European affairs do seem to be specifically disadvantaged when it comes to public interest. It is not possible simply to argue that the low turnouts in European elections (or in the Spanish referendum) are part of a broader disillusion and apathy about politics. It is true that the lower levels of youth participation in all political processes compared to older citizens is a broader phenomenon. It is also true that there is necessarily a connection between European and national levels. Since people vote almost exclusively for national (or regional) political parties in European elections, turnout must partly reflect perceptions of the national political actors. Thus, in the Eurobarometer survey on the 2004 European elections, only 50% of respondents across EU 25 gave a positive response to the question "Do you feel close to any one of the political parties?" The fact that turnout was in general so much lower in the newer Member States seems to be reflected in the fact that the average positive response in EU 15 was 53% and in the ten new Member States only 33%.[4] Yet overall there is a notably higher level of non-participation in European voting. Turnout in the 2004 European elections was lower than turnout in the latest national elections in every single country of the 25 except Luxembourg.[5] Eurobarometer itself noted that the low 2004 participation reflected a conscious decision by citizens to abstain in the European elections as compared to national elections.[6] Why is this so? Some argue that

"*… this is not – as the deliberative critique implies – because they believe that their participation is ineffective or that institutions like the EP are unimportant. Institutions are not the problem. One is forced to conclude that it is because they do not care. Why are they apathetic? The most plausible reason for such apathy is that the scope*

Table 2

Reasons Given for Failing to Vote in the 2004 European Elections

If you do not go to vote, this will be because:	% Yes
You believe your vote will not change anything	58
You believe the EP does not sufficiently deal with problems that concern you	55
You do not sufficiently know the role of the European Parliament	52
Your do not feel you are sufficiently represented by the Members of the EP	52
You believe that you are not sufficiently informed to go to vote	51
You are not interested in the European elections	42
You are not interested in politics, by elections in general	39
You are not interested in European affairs	34
You believe that the European Parliament does not have enough power	34
You believe that you will be held up, due to travelling, work, health etc.	31
You never vote	23
You are against Europe, the EU, the European construction	21
You are not registered on the electoral lists	20

Source: Flash Eurobarometer 161. European elections 2004 barometer. Vol.1

of EU regulatory activity tends to be inversely correlated with the importance of issues in the minds of European voters. Of the five most salient issues in European societies today – health care, education, law and order, pension and social security policy, and taxes – none is primarily an EU competence."[7]

It is true that only 30% of respondents in France and 26% in The Netherlands said that their non-participation in the 2005 referendums was due to a belief that their vote would not change anything. These, however, were rather specific procedures with visible results in which individual votes clearly would matter. At a broader level, it is not at all so clear (from the Eurobarometer data, at least) that this feeling is unimportant. The survey published in July 2005 indicates that an average of 53% feel that their voice "does not count" in the EU.[8] The main reason given for failing to vote in the 2004 European elections was precisely the belief that participation would be ineffective (see Table 2). This was, however, very closely followed by a feeling that the issues involved were not of primary concern and it remains true that Europe is not widely associated (rightly or wrongly) with the issues of most immediate concern to citizens.

There may be something of a dilemma in this respect. Unless there is interest, little effort will be made to understand what is at stake. Unless something important is felt to be at stake, there will be little interest. As Eurobarometer argued, "by insisting on the issues at stake in the European elections and their consequences on daily life, it should be possible to increase participation in elections."[9] Yet caution is required. As the French case has shown, the real issues at stake may not be clear, and there may be disagreements within and between countries about the very nature of the exercise.

Stakes and choices

In France, the main reasons for voting against the Constitutional Treaty concerned the economic situation, employment and social rights (see Table 1). Europe seemed to be moving further away from protection, social and commercial, at the same time that it was enlarging beyond the European horizon as seen from France. The "European social model", quite apart from the "Community preference", was at stake.

The first response here may be to lament the apparent lack of understanding among citizens as to the realities of the EU. If there were threats to French employment and social benefits in 2005 (and there certainly were), they had nothing to do with the Constitutional Treaty, which primarily proposed to change procedures. There is virtually nothing new in the text concerning substantive policies in economic or social affairs. If anything, the text goes further in the direction of social rights with its recognition of the Workers' right to information and consultation within the undertaking and the Right of collective bargaining and action, in the Charter of Fundamental Rights which became the second part of the Treaty.

The next reaction may be to point to the striking way in which national debates have highlighted different aspects of the Treaty. Not only would countries fasten on different parts of the text. A public message which would tend to increase support in some countries – such as to insist in Spain or Belgium that that the constitution was a major step towards political union – would produce completely the opposite reaction in more Eurosceptic countries such as the UK.[10] And what the French (and others) perceived as excessive liberalism could be seen in the UK (and elsewhere) as retaining too many aspects of old-style protection rather than looking to a more competitive future.

All this then became associated with wrangling over the EU's Financial Perspective. This had the negative effect of seeming to reduce the debate in public eyes to fights over national self-interest. It also had the potentially positive consequence of forcing open discussion as to what the European budget was actually supposed to achieve. This leads to some serious reflections and concerns. Many French were voting about what they saw as the results of European integration (whether or not they were actually due to European action or inaction). This is quite understandable. Many of the recent public campaigns to "sell" Europe emphasise the material benefits which are promised to derive from European integration. Yet this is not what the referendum should have been about.

One of the main aims of the recent exercise has been to obtain broader consent among the peoples of Europe to the basic reasons for which the Union exists and the basic rules by which the Union does things. This is what constitutions are about, not substantive outcomes. Such settlements are necessary precisely because there are differences in preference as to outcomes. "[I]ndividuals may 'agree to disagree' on distributive issues, because they agree on some higher order choice rule."[11] That kind of genuine constitutional agreement still needs to be achieved.

Constitutions, as Helen Wallace has pointed out, "if they are to function successfully, need to be founded on some set of shared values and to express commitment to some form of collective identity."[12] And, as Fritz Scharpf has argued:

> One of the main aims has been to obtain broader consent to the basic reasons for which the Union exists and the basic rules by which the Union does things. This is what constitutions are about, not substantive outcomes. Such settlements are necessary precisely because there are differences in preference as to outcomes. That kind of genuine constitutional agreement still needs to be achieved.

"*it is only where solidarity on the basis of collective identity can be presumed to exist in principle among all concerned that a minority can be asked to respect majority decisions despite disagreement over important issues. These prerequisites for the unitary legitimation of majority decisions are not met at any level above that of the nation-state; they do not exist in the European Union, and it will become more and more difficult to create them as the expansion of the Union increases the ethnic, cultural and economic heterogeneity of its Member States and thus reduces the possibility of forming an identity.*"[13]

A collective identity does not have to be ethno-culturally based – and it would be dangerous in the European context to pursue such a vision. A European "demos" could, as Weiler has proposed, be understood in civic terms as "a coming together on the basis of shared values, a shared understanding of rights and societal duties and shared rational, intellectual culture which transcend ethno-national differences".[14]

But how far is it realistic or appropriate to try to identify values which are uniquely European? A rather extreme example of such attempts was given in 2004 by Dominique Strauss-Kahn, Chairman of the Round Table "A sustainable project for the Europe of tomorrow" set up at the initiative of Romano Prodi. The report proclaims that "Political Europe is legitimate because Europeans have a common model of society". This model, based on human rights, culture, sustainable development and multilateralism, is said to be not only common but "specific to Europe".[15] This is surely pushing things a bit.

Rather than relying on the discourse of shared *values*, the key may lie, as Stefan Collignon has recently suggested, in common *evaluations*:

"*In order to make coherent collective choices, there has to be collective agreement on the values of potential pay-offs from a chosen policy. Without this epistemic dimension, policy options would be incommensurable…Full epistemic consensus does not necessarily imply agreement on the evaluative choices or the distribution of rewards, but simply that there is an accepted standard to evaluate them.*"[16]

The recent arguments over Iraq, the Constitutional Treaty or the Financial Perspective can easily create the impression that such basic consensus is uneven, to say the least.

The French referendum focused primarily on concerns about employment and social policy. In this respect, it appears that groups of countries have rather different models reflecting deeply-rooted divergences in terms of social structure and national preferences. At least three different models are usually identified, based on Esping-Andersen's "three worlds of welfare capitalism".[17] These reflect structural differences which correspond to "fundamentally differing social philosophies which can be roughly equated with the social philosophies and the post-war dominance of 'liberal', 'Christian democratic' and 'social democratic' political parties."[18] They can be associated very roughly with different sets of countries – Anglo-Saxon, continental and Nordic. Some have argued that there is also a distinctive "southern" model, and others also that central and eastern Europe may present another distinct set of features.

Many therefore believe, like Fritz Scharpf, that "uniform European social policy is not politically feasible or even desirable". "[U]niform European solutions would mobilize fierce opposition in countries where they would require major changes in the structures and core functions of existing welfare state institutions".[19] We may try to cooperate, to learn from each other, and to promote some general convergence, through the kind of non-binding mechanisms known as the open method of coordination. We could make use of framework directives to provide appropriate counterparts to market regulation. We will not adopt uniform policies at European level.

This presents a real dilemma. As was made clear from the French case, social policies are among the issues of greatest immediate concern to citizens. They are also those which still respond to the kind of Left-Right cleavages underlying most political party systems, and could therefore seem likely candidates to be used to generate public interest along recognisable lines. Yet they may be precisely issues which are not the subject of meaningful choice at EU level. To present them – or let them be seen – as such, may create unnecessary frustration as well as confusion.

> For many people, what has happened is simply further evidence where none was needed that referendums are inappropriate for issues of this scale and complexity.

For many people, what has happened is simply further evidence where none was needed that referendums are inappropriate for issues of this scale and complexity. If it is unrealistic to assume that a reasonable number of people will be able to make informed yes/no choices about all significant elements in a text, quite apart from the challenge of aggregation of all these elements of evaluation, such a text is in this view unsuitable for approval by referendum.

This problem was indeed reflected, even if symbolically, in what happened this time in Portugal. The Portuguese Constitution states that "Each referendum shall deal with a single subject; the questions shall be formulated in objective terms, and clearly and precisely and so as to permit an answer of yes or no…".[20] The Government tried to come up with a compromise between asking for general approval of the whole text and looking for specific agreement to details, by proposing the following wording for the referendum initially scheduled for April 2005: "Do you agree with the Charter of Fundamental Rights, the rule of qualified majority voting and the new institutional framework of the EU, as defined by the European Constitution?" In December 2004, however, the Portuguese Constitutional Court ruled that this formulation did not respect the requirements of clarity and susceptibility to a Yes/No answer. That referendum was subsequently postponed.

Looking at the French referendum and surrounding debates, one could get the impression that there was no common understanding of the implications of the document to be approved; the issues concerning most of those who voted were not significantly altered by anything in that document; and many of those issues are not in fact real European choices at all.

What to do about it?

The negative referendum results and the low turnout in Spain, coming on top of the low turnout at the last European elections, are disheartening for all those who have hoped for a more participatory Union. There appears to be a very low level of information, interest and understanding. It is shocking to read in the Eurobarometer released in July 2005 that an average of 51% of people say that they know only a bit about the EU, and another 19% that they know little or nothing. In other words, a full 70% of the population feel that they are unable to make any informed choices about the European Union. This was the first referendum held in The Netherlands, the first chance for people to express their feelings about Europe – and feelings they were in most cases, more than informed judgements – and the majority reaction was "Nee".

Yet one should not exaggerate Europe's political legitimacy problem, nor try to make too clear a distinction between EU and national levels in this respect. As noted above, for example, non-participation in European elections is partly related to a feeling of distance from national political parties; and most citizens are aware that it is the national governments, parliaments and peoples who have agreed to the current system. Many citizens may not love the Union but, with the occasional exception of farmers, people do not protest in the streets nor threaten disobedience. On the contrary, they seem to obey rules of European origin just as much or as little as they do domestic ones. So long as the Member States are perceived by citizens as being ultimately in charge, the system as a whole is likely to receive more or less the same degree of loyalty as do national authorities. Conversely, if EU affairs are not felt to be of direct importance, then the EU institutions can get away with quite a lot of popular non-credibility.

Moreover, it is not necessary for a majority of citizens to understand the treaties and the decision-making processes in detail, nor for there to be direct participation by citizens in political processes, in order for the EU system to be considered reasonably democratic – if appropriate standards are applied. EU action is subject to exceptional checks and balances among multi-level institutions. Democratic oversight is provided directly by the European Parliament and indirectly by elected national officials in the Council. Non-majoritarian institutions exist in the EU in much the same areas as they do at national level, and are increasingly recognised as providing necessary and legitimate elements of democratic governance, including the role of redressing biases in national representative practices.[21] So, if it isn't broken, why set out to fix it?

In this kind of perspective, the referendums – and the whole idea of trying to involve citizens more directly in detailed decisions and deliberations at European level – have not only proved to be at best a partial success. They could even be a mistake with potentially dangerous consequences not only for ratification of treaties but also for the broader evolution of popular perceptions of the Union. By trying to achieve something which is not possible as well as not necessary – the informed *direct* participation of citizens in the *detail* of EU decision-making – while implying that European democracy depends on the result, the inevitable result may be to create an impression of illegitimacy even where this is not warranted.

This is in no way meant as an argument against promoting citizens' participation in EU affairs (and in all other public spheres). It is a plea to think about how one could *empower citizens to give their informed consent to the basic reasons, rules and procedures involved* – which is what I mean by a new kind of "permissive consensus" – instead of pursuing a dream of "direct democracy" over details in a Union of half a billion people.

> **Something should and can be done now as a sort of demonstration exercise in the logic of European integration.**

What might this mean in practice? In order to think about possible next steps, one may use the following as starting points.

- The Constitutional Treaty in its present form is dead. There seems little prospect of successfully re-running the referendums in France or The Netherlands with the same text. Even if this were to happen, it currently seems probable that the treaty would be rejected in the UK and perhaps elsewhere too, since it seems unlikely that people would accept that the same treaty should now be ratified without referendums where referendums were promised this time. Something has to change.
- Referendums will take place again in the future. Whatever one's judgement about the suitability of referendums for such issues, it would be unrealistic to propose that no referendums should be held over EU reforms. Quite apart from national traditions, in a few Member States there is a constitutional obligation to hold a binding referendum if constitutional amendment is required. And politically, after all that has happened, there will be strong pressure in many countries to hold referendums on further changes.
- People expect responses to what has happened which convince them they are taken seriously. Something should and can be done now as a sort of demonstration exercise in the logic of European integration. Quite apart from the fact that referendums will not go away, people will not forget the failure or suspension of referendums in 2005. In order to create a new permissive consensus, some steps have to be taken at this stage to build that higher-order consensus, and to restore a minimum degree of *trust*.

This is important now in order to ease the so-called (and probably exaggerated) "constitutional crisis". Looking ahead, it may well seem appropriate in a few years to attempt again an overall simplification/constitutionalisation of the

Union's treaty bases, as well as of its institutions and procedures. The challenge is to ensure that – by that time – interested citizens will feel that they can support such a move, not necessarily on the basis of detailed understanding of the relevant text, but at least in terms of positive responses to two implicit questions: a) do you *trust* those who negotiated it and, above all, those who are to execute it? and b) do you give your general *consent* to the fundamental rules and procedures involved?

This also entails making clear not only that the referendum concerns rules and procedures rather than substantive outcomes, but also indicating the scope of the substantive spheres which are potentially subject to those rules. This does not necessarily mean presenting a simple "catalogue of competences" and it certainly does not mean trying to move towards any simple division of powers. On the contrary, it requires explaining the basic rationale of European multi-level governance, and trying to present as simple as possible a picture of what is and is not affected.

All this needs to be well prepared, starting now. Three lines of action suggest themselves.

Communications strategies and educational programmes

The first, uncontroversial and also undervalued, is to invest much more time, resources and political attention in communications strategies and basic educational programmes about European integration. It will be worth it in the long run, not only to help ensure the stability and effectiveness of the Union and its policies, but also as a contribution to the overall development of democratic governance in Europe. Since it is through the national (and regional) prism that most people perceive Europe, the burden of this effort lies with national (and regional) actors.

Tangible changes and model debates

The second is to go ahead with a small number of the changes foreseen in the Constitutional Treaty. The idea here is emphatically not to engage in stealthy cherry-picking – that is, secretively slipping through a few favoured changes in the context of, say, an accession treaty with Croatia. On the contrary, the aim would be precisely the opposite, namely to use consideration of these changes as a sort of "model debate" intended deliberately to engage the public. Two candidates suggest themselves, each having the potential to illustrate a different side of the general question, and both having the advantage of depending much less on an overall "package" agreement than, say, the reduction of the number of Commissioners (even though such a reduction would in fact be technically possible on the basis of the Nice Protocol.)

One could demonstrate a logic of collective action in substantive policy areas. This would mean proposing treaty amendments in an area which is of high priority and salience, and where the amendments can most clearly be debated publicly as options for collective problem-solving in the spirit of subsidiarity. Proposals for change could clearly take the form of arguments to show that existing structures and practices are dysfunctional for the achievement of shared objectives, and are so to an extent that outweighs the sovereignty/subsidiarity costs of joint action. An obvious candidate is the possible transformation of the EU's current provisions concerning Police and Judicial Cooperation in Criminal Matters.[22] Another might concern the specific role of parliaments in European governance. This could take the form of a loose package including two main elements: on the one hand, the strengthened role foreseen for national parliaments in controlling respect for subsidiarity, through the right to give a subsidiarity-opinion on legislative proposals; and on the other, the change foreseen concerning the role of the European Parliament in overseeing, together with the Council, the Commission's powers of adapting and applying legislation. This issue would have the further benefit of involving an active participation in the debate on the part of all parliaments and political parties.

Basic principles and detailed agreements

The third line of action would in effect broaden this last idea, and responds to a basic Euro-constitutionalist question of today: how can one realistically reconcile the idea of European peoples' giving their consent to basic reasons and rules, with the continuing need for European states to reach formal agreements over detailed content and procedures? Could one not seek a reasoned popular mandate of appropriate level by some sort of pan-European Declaration of Principles, which would serve as a framework for subsequent changes?

This would essentially mean picking up the idea of separating a "Constitution", consisting of a short statement of principles, from the set of detailed rules contained in the treaties, but with some fundamental differences. The declaration of principles proposed as a first stage should not pose as a Constitution in anything resembling the national sense. It should be a declaration approved by non-binding referendum on the same day in every country which would, while not being legally binding under international law, provide mutually-agreed political guidelines within which negotiations should take place. The detailed rules would then be agreed in a second stage.

In contrast to recent proposals for a short text with this aim, which would be limited to most of the first Part of the Constitutional Treaty but include the main institutional innovations, such a Declaration would aim at higher-order principles, and try also to give reasons. And it would include an explicit recognition of the right of national governments to negotiate within the framework agreed, as well as the responsibility of national parliaments in particular to check

> In order to create a new permissive consensus, some steps have to be taken at this stage to build that higher-order consensus, and to restore a minimum degree of *trust*.

from the national perspective that the principles are respected.

There is no rush to re-run the referendums nor to rewrite the Treaties. The Union can survive without a President of the European Council or a new voting system. Time is required to settle down and move on. At the same time, however, a political response must be seen to be given fairly quickly after what has happened in the failed referendums, and serious proposals for the next stage need to be prepared now in order to prevent a really deep crisis from happening later. ::

NOTES

*   The author would like to thank the other editors, Thomas Christiansen and Simon Duke for helpful comments.

[1]   *EUobserver* 16 August 2005.

[2]   Quoted in Peter Norman, *The Accidental Constitution*. (Brussels: Eurocomment, 2003) p.50.

[3]   Flash Barometer EB168, *The European Constitution: post-Referendum Spain*, March 2005 pp. 31, 32.

[4]   Flash Eurobarometer 162, *Post European Elections 2004 survey*. July 2004.

[5]   International IDEA, *Elections in the European Union – A Comparative Overview*. The UK Electoral Commission, European Parliamentary Elections Seminar, Cardiff, July 2004.

[6]   Flash Eurobarometer 162, *Post European Elections 2004 survey*. July 2004.

[7]   Andrew Moravscik, "The European Constitutional Compromise and the neofunctionalist legacy", *Journal of European Public Policy* 12:2 (2005): 349-386. p. 374.

[8]   Eurobarometer 63, July 2005.

[9]   Flash Eurobarometer 162, *Post European Elections 2004 survey*. July 2004.

[10]   Charlemagne, "The great debate begins. Arguments over the EU constitution remain largely national", *Economist*, 10 February 2005.

[11]   Stefan Collignon, *The European Republic. Reflections on the Political Economy of a Future Constitution*. (London: The Federal Trust, 2003) pp. 67,28.

[12]   Helen Wallace, "Deepening and Widening: Problems of Legitimacy for the EC" in Soledad García (ed.) *European Identity and the Search for Legitimacy* (London & New York: Pinter, 1993): 95-105 pp.100-101.

[13]   Fritz W. Scharpf, "Democratic Policy in Europe", *European Law Journal* 2:2 (1996): 136-155. p. 137.

[14]   J.H.H. Weiler with Ulrich R. Haltern and Franz C. Mayer, "European Democracy and Its Critique", *West European Politics* 18:3 (1995): 4-39 p.19.

[15]   *Building a Political Europe. 50 Proposals for the Europe of Tomorrow. Summary and Synthesis*, April 2004. http://www.eiropainfo.lv/files/petijumi DSK_Report_Summary_EN.doc.

[16]   Collignon, *The European Republic* p.25.

[17]   Gosta Esping-Andersen, *Three Worlds of Welfare Capitalism*. (New York: OUP, 1990).

[18]   Fritz W. Scharpf, "The European Social Model: Coping with the Challenges of Diversity", *Journal of Common Market Studies* 40:4 (2002): 645-70 p.651.

[19]   ibid. pp.666, 651.

[20]   Article 115(6).

[21]   Moravscik, "The European Constitutional Compromise" pp.371-373.

[22]   See Edward Best, "After the French and Dutch referendums: What is to be done?", *Intereconomics* 40:4 (2005) pp.180-185.