

Governing the Wider Europe

Key Elements of a Successful European Constitution

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Europe is creating a constitution. Such a fundamental document offers the chance to make efficiency and transparency not just lofty goals written down somewhere, but to make these principles ready for active service. To see how utterly necessary this is, one need look no further than the rubble of foreign policies left by individual national approaches to the conflict in Iraq. The road to European unity stands before two possible alternatives in its development: either the shock will forcibly speed Europeans' learning, and this will lead to true progress in integration, or the virus of mistrust will continue to spread, attacking Europe from within. To go beyond Europe's concentration on economic integration, strategic thinking and insight are necessary because only by working together will we be able to influence larger political challenges. The European Convention for constitutional reform of the European Union must rise to this responsibility.

If the Convention and the intergovernmental conference that follow are able to give a comprehensive answer to questions about their future constitutional order, then it will have been a historic success. Reaching this success includes naming the goals and values that the Union rests on, as well as the division of labor among the member states, Union and EU institutions that is agreed upon based on these goals and values. If a coherent, comprehensive draft constitution should nevertheless fail, then any number of alternatives to integration behind the curtains of international relations lurk: the return of nationalism, the erosion of the Union, the end of solidarity in a common project. A look at Europe's history shows that the well of crises and catastrophes is bottomless. The Europeans would be well advised to provide the cultural service of creating a constitutional order.

The European Convention cannot allow itself to dissipate its energy on the fine print. Dotted the i's and crossed the t's can hide the big picture. The task of the Convention and its presidium is, rather, to address the major questions and mold them into a coherent text. In this task, a successful European constitution must be aligned with five key points. Europe's future fundamental document must incorporate the constitutional traditions of the member states; it must make the list of the EU's tasks clearer; it must ensure leadership; it must guarantee an enlarged Europe's continued ability to act; and it must allow for further developments in the constitutional community.

1. Taking Constitutional Traditions into Account

The current process of reform should bring the European project closer to Europe's citizens, and make their identification with the political Europe possible. Today's wild tangle of regulations, treaties and protocols should be newly and comprehensibly arranged. The constitutions of the member states anchor relations between citizens and governments, but such a basic connection is not yet recognizable in the EU's treaties. A European constitution should facilitate citizens' identification with the political Europe. That will only be attainable if the constitutional treaty is written so that it is compatible with the common, national constitutional traditions in Europe. The following components are essential:

Fundamental Values

All of the constitutions of the EU's member states, including Britain's "unwritten" constitution, grant a central role to legally binding fundamental and civil rights. These rights are the prerequisite for modern, citizen-centered governance and thus should play a similarly prominent role at the EU level. The Charter of Fundamental Rights, prepared by the first European convention in 2000, has already laid the foundation of a value-based Union. The Charter should now be made legally binding, and it should be included in its entirety in a particularly prominent part of the constitution, rather than simply attached in the form of a protocol as an integral element. This also means that citizens should have the right, as individuals, to bring suits, so that the Charter can become tangible as an integrating legal protection.

Division of Powers

Since the French revolution, control and limitation of state power have been firmly anchored in almost all European political systems by means of balanced interaction among the executive, legislative and judicial branches of government. States that have not put this structural element of Western democracy into practice are not eligible for membership in the European Union. The European constitution must thus take up the fundamental principle of the separation of powers by establishing mechanisms for mutual checks on how the European institutions exercise their powers. This will close gaps in the chain of legitimacy of European political decisions and in the measures for oversight of those decisions. Although the EU is a political system *sui generis*, the application of the separation of powers is the decisive standard for the Union's reforms in its division of tasks, legislation and implementation.

According to this principle, the executive and legislative functions of the Council should be separated in order to improve the efficiency of decision-making processes, the EU's ability to consistently implement political goals that it has decided on, and the general applicability of political responsibility. Thus, in the future the Council should exercise its legislative role as a chamber of states, for which a rotating presidency can be retained. In the operational areas of policy that are not (yet) a part of community law, the member states should work together through steering committees. These operational steering committees should be jointly led by representatives of the member states and of the Commission. All legislative decisions of the chamber of states, especially those taken by qualified majority, should, as a point of principle, be subject to co-decision by the European Parliament and judicial review by the European Court of Justice. These procedures do not yet apply to all decisions, particularly those applying to the treaty articles dealing with the common space of freedom, security and law. All executive measures implementing community law, which today are largely taken through the workings of commissions and committees, should be delegated by the legislators in a transparent and understandable process.

Rights of Participation

In most of the member states, parliamentary representation of citizens is a central element of democracy. Most European states include provisions for direct civic participation at either the national or regional level. The European constitution must also provide for more effective participation of citizens via the European Parliament than is presently the case. Although they are a central pillar of democracy in Europe, elections for the European

Parliament are not presently taken seriously as opportunities for effective formation or control of European politics.

The meaning of the act of voting must thus be strengthened and made visible. For this reason, the European Parliament should have the right to elect the president of the Commission. The agreements necessary to select common candidates and programs would emphasize the parliamentary character of the system and assist the formation of transnational parties. Furthermore, the European character of the parliamentary elections could be made clearer by allocating some of the seats from pan-European electoral lists and the introduction of cross-border districts. In addition, the national parliaments should be regularly and punctually informed about European legislative plans, so that they can appropriately monitor the activities of their governments in the Council. The provisions in the two protocols on subsidiarity and the role of national parliaments point in the right direction. However, provisions such as those for intervention in the legislative process or for the right of the Committee of Regions to bring suits should be written directly into the appropriate articles of the constitution and not pushed out into protocols. The protocol approach neither meets the importance of these provisions nor provides for an understandable constitutional structure.

2. Making the List of Tasks Clearer

The European constitution must clearly and understandably define the basic principles, goals and tasks of the Union. Furthermore, the division of tasks between the European and national levels, as well as among the organs of the EU must be unambiguously laid out. This is even more important at the European level, as the EU is perpetually being accused of centralizing and arrogating responsibilities to itself. Fundamental definitions of goals and competencies create clarity and certainty. They are indispensable prerequisites for the Union's transparency, acceptance and political capability.

Definition of Goals

The successes of European integration—securing peace and stability, lasting economic prosperity, introducing the euro successfully and opening borders between member states—are, as a rule, quickly taken for granted. Within a very short span of time after their introduction, they are considered self-evident by Europe's citizens. Questions of the reasons for and the proper amount of integration are thus constant companions of European unification. The constitution must answer these questions. A clear definition of the values and basic principles of the EU makes it possible for the community to focus on common goals and how they can be communicated to the Union's citizens. Such a clarification would not only consolidate the internal community of values, it would enable consistent representation of these shared values in the outside world. For this reason, the difficult wrestling among members of the Convention about the constitution's introductory clauses is an essential undertaking, whose end product must be a list of goals and values that can be imparted to all of Europe's citizens.

Division of Tasks

In every political system, a clear definition of goals is the central prerequisite for the disposition of the necessary responsibilities and powers. The demarcation of responsibilities between the level of the Union and the level of the member states must balance the tensions between centrifugal and centripetal forces. The regulations must allow the Union to concentrate on common tasks, commensurately and with appropriate attention to subsidiarity, and they must leave tasks with substantial content to the member states. At the same time, the demarcation of competences should not unnecessarily limit the Union's room for maneuver or its ability to develop dynamically. The Union must be placed in a position where it can react appropriately to new challenges in the future. In this area, the greatest difficulty will be presented by the key position held by the Principle of Conferred Powers. The proposed list of tasks according to category, in the first part of the constitution, does not present any substantial improvement on the status quo, if the part of the constitution that comprehensively lists and defines their means of implementation is not supported by a simpler procedure for change. The list of tasks, already known from the community's glossy brochures, would simply be carried over into the constitution, without necessarily changing the legal substance and *de facto* clarifying its opaqueness. The assignment and demarcation of responsibilities in the first part of the constitution must be so clear and explicit that in the prospective third part no terribly rigid or difficult process of constitutional amendment will be necessary to change policies from its second part.

Allocation of Responsibilities

Only when there is clarity about which tasks belong on the European level can decisions be made about the horizontal allocation of responsibilities, within the political system of the EU. Only thus can the responsibility for political successes and failures be clearly assigned. For legislation, the European Parliament, as a chamber of citizens, and the Council, as a chamber of states, should primarily be jointly responsible. For majority decisions from the Council, co-decision by the European Parliament should be established as the standard procedure. Necessary deviations from this procedure should be clearly limited and justified. Above all, the key provisions of the legislative process and the implementation of laws should be clearly discernible by definition and not set aside in a later part of a EU constitution, much less in a protocol.

The right to initiate legislation should rest with the Commission. If particular aspects of the policy area or national sensibilities require, exceptions are conceivable, and the right to initiate legislation should be given to the member states for a limited period of time. Oversight of legislation should be exercised by the European Parliament and the European Court of Justice. Executive decisions in the area of community law should be taken by the Commission. Steering committees under common chairmanship of the member states and the Commission should take up the tasks in the (currently) primarily intergovernmental policy fields of economic and political coordination; the common foreign, security and defense policy; as well as certain aspects of justice and home affairs.

3. Providing for Leadership

To live up to the common goals defined in the constitution, the wider Europe of 25 or more member states must be put in a position to work efficiently. The Union's ability to take action will significantly depend on the ability of the reformed system of EU institutions to lead politically. The decisive element will be to what extent political leaders will be able to define strategic targets, to negotiate the decisions needed for implementation among the member states and to convey these decisions into concrete policies. These functions, according to the treaties, take place within the power triangle of Council, Commission and Parliament. The European Court of Justice and the Court of Auditors serve as additional oversight bodies. Among these, the European Council is taking on an increasingly central role. The Council is giving the Union the push necessary for its development and determining the coordinates of the political goals. The European Council has long threatened to go beyond its function of setting guidelines and become the center of power in the EU—a supervisory board that allows any room for maneuver by the board of directors, in the form of the Commission, or the stockholders, in a parliamentary general meeting. The EU's institutional structure thus needs a new balance among the Union's top bodies that is more even and accepted by the citizenry.

Balance of Powers

A new balance of powers at the top levels of the EU institutions must equally live up to both the community and intergovernmental threads of the EU's legitimacy, as a combination of states and of citizens. As a starting point, the president of the Commission should no longer be appointed by the heads of state and government and merely confirmed by the European Parliament; instead, the president should be directly elected by the European Parliament. Electing the Commission's president would enliven the Commission and its president with new legitimacy and the basis for power. The role of the Brussels administration as the catalyst of common interests and the motor of integration would be similarly enlivened. To retain the institutional balance and the political feasibility of such an improvement of the Commission's basis for power, this reform must be accompanied by a reform of the EU's intergovernmental structures.

The present system of a rotating presidency will not live up to the demands of an enlarged EU. The chairmanship of the European Council, which must return to concentrating more carefully on its function of setting strategic guidelines, should in the future be taken up by a full-time president who is elected for a longer term of office. This president should be elected by the heads of state and government, with election requiring both a majority of the number of states and of population. The president could move the process of finding a consensus among the heads of state and government forward, maintaining political dynamism and preventing stagnation. Thus a new balance would be established between the Council and the Commission, while simultaneously strengthening the European Parliament and boosting both the supranational and the intergovernmental legitimacy of the European Union.

Limitation of Powers

The constitutional provisions must define basic principles for the efficient and divided exercise of power. The functions of both presidents must be clearly enumerated, if competition and lost efficiency are to be avoided. This applies above all to the newly defined role of a president of the European Council. In external relations, this president should speak for the Union at the highest international levels, thereby supporting the European Council in defining the principles and guidelines of the common foreign and

security policy (CFSP), including its security and defense dimensions (ESDP). A politician at the head of the European Council, who is committed to European interests, could advance consensus among the heads of state and government most prominently in hard security questions, which the member states still understand as core elements of national sovereignty.

The establishment of a president who has external policy responsibilities complements additional unavoidable pressures for integration in the CFSP/ESDP field. The lessons of the Iraq crisis make clear the need for a substantial reform of the corresponding parts of the Union treaties. Even if the primary legal norms in a future EU constitution are not enough in themselves to guarantee the Union's ability to act in a similar crisis situation, the experiences of recent decades show that substantial additional development of the instruments, means and institutional structures advances the development of a common will for action.

In internal relations, the president should organize, lead and organize the follow-up activities for meetings of the heads of state and government, and also serve as the speaker of the European Council. The president of the European Council and the president of the Commission should share responsibility for coordinating the work of the Council. The Commission and its president would retain responsibility for initiating legislation and the implementation measures in all fields of community policy.

Responsibility

A Commission president elected by the European Parliament and a president of the European Council appointed by the heads of state and government, each with clearly defined areas of responsibility, would bring greater clarity to the EU's leadership structure and improve the governability of a Europe with 25 or more members. Above all, political decisions and the responsibility for success and failure will be easier to assign. Unmistakable attribution of responsibility, which reflects the real relationship of power and division of tasks between the member states and the Union, will reduce the widespread practice in daily politics of ascribing the guilt for problems to others while claiming credit European political successes. Current overlapping areas of power and insufficiently defined roles, by contrast, tend to pander to this behavior.

4. Securing the Ability to Act

A European Union that is able to act requires not only political leadership but also efficient decision-making and implementation. The EU is often reproached for not being able to react adequately to all manner of crises. Inability to act quickly and according to circumstances threatens to cost the EU its authority and legitimacy in the eyes of its citizens. An important touchstone for a common European constitution is the creation of clear and concise mechanisms that allow declarations of political intent to be put into practice. It is crucial that the new constitution introduce procedures that simplify decisions and simultaneously improve the ability to implement and finance these decisions.

Ability to Steer Policy

In an enlarged EU, dynamism and adaptability must be retained in a context of changing external and internal frameworks. Steering political reality requires rapid reactions based on clearly defined procedures. Furthermore, like every political system the EU must overcome conflicts among political and financial interests. The difference comes in the level of consensus that is required, and in the EU it is particularly high. So, for example, fundamental reform of agricultural policy would be possible with a qualified majority in the Council. However, because the basic decisions are made in the negotiations about the financial details, the principle of unanimity comes into play for the necessary package solution. In additional aspects of tax, economic, home affairs, justice, foreign and security policy, the principle of unanimity is an inherent bottleneck in the formation of effective Union policy against particular national interests. For this reason, the extension of qualified majority voting will once again be a key measure for improving the Union's ability to act. Qualified majority voting should be anchored in the new constitution as the standard procedure in the Council. Exceptions where unanimity will still be required should be carefully justified and subject to temporal limits. Such an approach would create transparency on the basis of proper procedures while guaranteeing that unanimity is only required in exceptional cases.

Effective Implementation

Only if decisions are also actually implemented can one speak of an effective Union. In the future, the member states will continue to have the responsibility for putting European laws into practice. Clarity is, however, needed about when the need for uniform implementation requires that the Commission take decisions about implementation and who is responsible for oversight of implementation. It is thus important to secure transparent and democratic oversight also for the implementation of legal acts. Along with the legal framework, regulations are foreseeable that guarantee effective implementation of the decisions. Every non-legislative decision should also include a clear assignment of possible executive responsibilities, depending on whether the matter is taken up by the community method or the intergovernmental method. This means that in every decision there must be a clear itemization of who is responsible for its implementation, who has oversight responsibilities and what time frame is expected. Furthermore, the constitution should, as a general rule, provide for oversight of implementation processes in all legislative areas by the European Parliament and the European Court of Justice. In the areas that do not yet fall under the purview of the community method (parts of political-economic coordination, CFSP/ESDP and cooperation in justice and home affairs), responsibility for implementing decisions should lie with the Council, which in cooperation with the Commission must provide for coherent policies.

Effectiveness

Every decision is only as good as the resources at hand to put it into practice. For this reason, the EU's constitution must ensure that the financial resources necessary to implement them accompany the Union's legal actions. Naturally, the member states' obligations and prerogatives to implement EU measures should not be disturbed. Nevertheless, decisions that require actions from an institution at the EU level must be provided with the appropriate financial and personnel resources. This is especially true when, for reasons of institutional coherence, the authority for implementation is given to the Commission or the Council. Only a sufficient financial constitution will provide the EU with the sustainable ability to act. In budget processes, this implies that the European Parliament and the Council should be established as budgetary parties with equal rights

and that procedures should be designed from the beginning to limit the opportunities for budgetary blockades in an enlarged Union.

5. Providing for Further Development

A decisive factor in the European constitution's durability will be its ability to bring dynamism and stability into harmony over the long term. On one hand, the EU must define a clearly outlined basic consensus, and on the other it must allow renewal and institutional adaptations to changing conditions.

Flexibility

In an enlarged Union, the further development of European integration in key areas such as social policy, internal and external security threatens to break down from a lack of will in the member states or from the constraint of unanimity. The introduction of qualified majority voting as a general procedure for taking decisions in these fields is not likely. There is no consensus for a change either in the Convention or in the member governments. Flexible mechanisms for cooperation in these areas above all should allow further development of the Union. These mechanisms would first be developed by the member states that are willing and able to cooperate. Since the treaty of Amsterdam, the instrument of "enhanced cooperation" has been available, but because of numerous restrictions on its application it has not been adequately put into practice.

Nevertheless, some of these limitations fell with the entry into force of the treaty of Nice. The Convention should definitely make a place in the constitution for this instrument for differentiation. Given the possible fields for its application and the required number of participants, the long list of restrictive conditions for its application should be reduced, particularly in the field of external relations. This is the only way that the instrument's potential effectiveness can be properly used and that enhanced cooperation can come into use as a credible alternative to blockade policies by individual states. Under no circumstances, however, should it be used for the long-term exclusion of states that do not participate in an enhanced cooperation from its beginning.

Adaptability

The application and implementation of common policies are not the only areas that require flexibility. Convention President Giscard d'Estaing is working for a constitution that can stand for the next 50 years, but adaptation will always be necessary. With today's arduous procedure for treaty changes, adaptations could not take place in an EU with 25 members, to say nothing of a Union with 28 or more members. Initially, the intended division between a constitutional framework and detailed provisions in different fields of policy should be used to provide for a simplified procedure to change at least the second part. This procedure should not require unanimity or ratification by all member states. Specifically designated majorities should be sufficient in the ratification procedure, as long as the definition and limitation of the categories is made clear enough in the first part. For the constitutive clauses in the first part of constitution, current experience shows the Convention as the best forum for preparing future constitutional reforms, before these are presented to the European Parliament and the member states for ratification. Without such a divided process of revision, one of the most important sources of efficiency in constitutional jurisprudence would be squandered.

Entry into Force

One of the core tasks of the Convention is the consolidation and simplification of the historically developed legal legacy of European integration into one document that incorporates fundamental values and limits, goals and responsibilities, as well as processes and institutions. This challenge is not merely an editorial or technical task; it is rather the task of making visible the constitutional quality of integration that has already been achieved. With visibility, the foundation for rounding out a transparent system of European government with its own legal body will have been laid. The European Convention has the unique opportunity to develop, in an open process, a conception of the Union more understandable than the “European pillars,” à la Maastricht. Initially, efforts must be made to ensure that the constitution can enter into force after it is developed and approved by the Convention and accepted by the heads of state and government. Even while the constitution is still in the draft stages, it must be decided that for the states who assent to the constitution will not let the process founder if particular member states do not ratify it. The constitution should enter into force once a set number of states, representing a pre-determined number of citizens, ratify it. If individual states, or their citizens, repeatedly reject the constitution, they would have to address the question of Union membership in a referendum.

Consequences for the Convention’s Work

There is widespread agreement about the framework of the future basic law: a constitutional treaty with at least two parts. If within this framework, the Convention succeeds in going beyond the current pillar structure and the multiplicity of treaties and communities subsumed by the European Union and in giving the Union a unified legal character, a great deal of transparency would be accomplished. In this aspect, one can be confident about the current state of the Convention’s work. However, to simultaneously improve the European Union’s ability to act and to develop in the future, brave challenges must be made to key parts of the current treaty clauses. Simply continuing present practices can not build a wider Europe of 28 or more member states. If citizens are to be won over for a future-oriented and successful Europe, the Convention cannot present a consensus package without any power. It must create a coherent whole, one whose stringency obliges the intergovernmental conference to accept it with as few changes as possible. If, on the other hand, the Convention is unable to reach a consensus, the whole project of integration is at risk—EU states drifting apart would change from a worst-case scenario to a realistic option. Only an ambitious result can make the EU into a vital community of success, ready for future challenges. The Convention and Europe’s citizens must keep these alternatives clearly in mind.