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**“Coalition of the Willing”
and European Integration:
Different Speed? A Core Europe?**

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“COALITION OF THE WILLING” AND EUROPEAN INTEGRATION: DIFFERENT SPEED? A CORE EUROPE?

by

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I. Introduction:

The European Union is in a crisis. The French and the Dutch referendum, as much as the decision of *Tony Blair* and *Aleksander Kwasniewski* to freeze the process of ratification in Britain and Poland, seem to bring the process of making Europe more democratic, more efficient and more transparent for the citizen, to an early end. On 16 June the Heads of State or Government, taking account of these developments, decided for a period of reflection. One year ago, *Bertie Ahern*, the Prime Minister of Ireland, managed to deal with “crisis N° one” of December 2003, where the Brussels summit failed to agree upon the draft Treaty establishing a Constitution for Europe. There is no solution in sight now for “crisis N° two”, but we see our newspapers full of articles on the EU and its future – more public debate on Europe than we ever had before. And this is, clearly, what Europe needs most. Thank you for inviting me to take an active part in this debate.

When in 1994 *Wolfgang Schäuble* and *Karl Lamers* took up the concept of “Kerneuropa”¹ – core Europe – but also when in his Humboldt-speech of May 2000 *Joschka Fischer* envisaged a re-foundation of the Union by some Member States - an “avant-garde”,² nobody could think of such a solution without France and the Netherlands – and others possibly joining the “no”. My view was always that these models are part of political strategies putting pressure upon certain “unwilling” countries or governments, not more. Now, it is clear, that any kind of “exit-options” are excluded as solution for the present crisis. What we can – and should – reasonably discuss, are solutions which respect the specific nature of the European Union and its very basis: mutual trust and solidarity. The EU was established not only for sunny times, but also for finding ways through troubled waters. Yet, there is no solution of the “willing” against others. Whatever solution we may find needs the support of all the Member States, legally speaking – and also politically. The term “coalition of the willing” is awkward, therefore, and should not be used in the EU context. It also reminds of a situation in which, based

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¹ *Wolfgang Schäuble/Karl Lamers*, Überlegungen zur europäischen Politik. Positionspapier der CDU/CSU Bundestagsfraktion vom 1.9.1994, in: Blätter für deutsche und internationale Politik, Jg. 1994, S. 1271 ff.; most instructive the critical contribution of *Heinrich Schneider*, „Kerneuropa“. Ein aktuelles Schlagwort und seine Bedeutung, WI Working paper no. 54, 2004, http://epub.wu-wien.ac.at/dyn/virlib/wp/mediate/epub-wu-01_6d1.pdf?ID=epub-wu-01_6d1.

² *Joschka Fischer*, Vom Staatenverbund zur Föderation - Gedanken über die Finalität der europäischen Integration, FCE-Spezial 2/2000, www.whi-berlin.de/fischer.htm, para. 47; see also *Jacques Chirac*, Mit Deutschland und Frankreich eine “Avantgarde-Gruppe” bilden. Die Europa-Rede des französischen Staatspräsidenten Jacques Chirac vor dem Deutschen Bundestag in Berlin, FAZ N° 147, 28 June 2000, S. 10, 11.

on a strategy of lies and misleading information³ a coalition was formed for a flagrant breach of international law with thousands of people killed. The European Dream, as *Jeremy Rifkin* has put it in his famous book, is just the opposite of such policies.⁴ Thus, I would not use this expression for Member States who may decide to continue, in conformity with the law, more consequently than others the path of European integration. This should also be taken in mind while using this term, as the Swedish Prime Minister *Göran Persson* recently did, in the political debate.⁵

II. Options for the future of Europe

Most learned analysis and proposals for a „plan B“ published by academics so far did not discuss the case of a „no“ as the result of the French referendum. In any event: voluntary withdrawal from the Union is not a legal option under the existing primary law. Only with the entry into force of the Constitution this option would be given. It is not a political option either, since without France the European Union could not realistically subsist. Even more clearly excluded is, in the given circumstances, any solution like the „forced withdrawal“ or expulsion of a Member State which has not ratified.⁶

Yet, accepting that „no“, however, means that the Treaty of Nice will remain the basis for the future of the EU until a new treaty is negotiated and ratified. Notwithstanding recent proposals, it is doubtful, whether a simple Nice plus scenario, a “reduced” constitution, containing most of the institutional improvements in the first part of the Constitution, seems to be a way out of the crisis:⁷ Even if all the Member States agree, there is still a need for obligatory referenda in some Member States, e.g. in Ireland and most presumably in Denmark.⁸ This being agreed: options for further integration allowing the Union to act more effectively as it can at present, seem to be limited to three solutions ultimately:

- Application of the rules on enhanced cooperation: But the reach of this option is very limited, it could not be used for areas where the Union has no competence such as for basic social policies, the lacking „volet social“ of Europe. The existing rules on enhanced cooperation have never been applied so far, and in no way would their application solve the institutional problems of democratic deficit, of efficiency and the lack of accountable representation in the enlarged Union.
- Informal agreements between the Member States and, as the case may be, among the institutions⁹ regarding the legislative and budgetary procedures, the respect of the Charter of fundamental rights, the role of a foreign minister, the citizen’s initiative, the

³ See *Thomas Kirchner*, Protokoll eines vorsätzlichen Krieges. Dichtung und Wahrheit. Ein bislang geheimes britisches Regierungsdokument belegt, wie Tony Blair und George Bush die Öffentlichkeit bewusst täuschten, *Süddeutsche Zeitung* 8 June 2005, http://www.sueddeutsche.de/sz/2005-06-08/politik/artikel/sz-2005-06-08-011-kirchner_irak-a.kirchner_irak/.

⁴ *Jeremy Rifkin*, *The European Dream: How Europe's Vision of the Future Is Quietly Eclipsing the American Dream*, 2004.

⁵ See: Auch Persson für Senkung der Agrarausgaben, *FAZ* 22 June 2005, p. 1.

⁶ See in general already: *Udo di Fabio*, *The European Constitutional Treaty: An Analysis*, in: *German Law Journal* (2004), 945 (956), http://www.germanlawjournal.com/pdf/Vol05No08/PDF_Vol_05_No_08_945-956_EU_DiFabio.pdf. : „The talk that a rejection of the Constitutional Treaty would lead to the respective state's exclusion from the Union is nonsense.“

⁷ See for a similar proposal a paper of the Center for Applied Policy Research - CAP, *Ein Vertrag zur Reform des Vertrags von Nizza*, http://www.cap.lmu.de/download/2005/2005_Vertrag.pdf.

⁸ See *Andreas Maurer*, *Ratifikationsverfahren zum EU-Verfassungsvertrag*, Diskussionspapier, Mai 2005, SWP Berlin, p. 78, http://www.swp-berlin.org/common/get_document.php?id=1135.

⁹ See also *Maurer*, above, p. 73-75.

enhanced role of national parliaments including the early warning system.¹⁰ But would such „informal application“ of the Constitution, as *Bruno de Witte* puts it,¹¹ respect the „no“ of the French and the Dutch people? Would it make the European Union more democratic, efficient, transparent?

- The same applies to agreements between Member States not to use their veto-power, to apply the rules of double majority. Some steps can be taken, indeed, without the Constitution: Progress with regard to the European Defence Agency or the establishment of a European Foreign Service has already been made regardless of the ratification of the Constitution.¹² But would not with this approach the essentials of the Constitution, mentioning the citizens as a source of its legitimacy, better definition of competencies, new definition of legal acts of the Union, legally binding fundamental rights including social rights, and the – though limited – simplification of the Treaties, just be forgotten? Everything should be done, therefore, to bring the Constitution into force! But how?
- Third option: Negotiation and ratification by all Member States of a Protocol which would allow opt outs for those Member States which have difficulties with some new EU-powers such as home affairs and justice, or which would include for those who so decide, new powers of the Union in the area of social policy, employment, taxation or even foreign and security policy. The problem was recently identified by the recent Brussels summit, stressing the need to “fight unemployment and social exclusion more effectively, to promote sustainable economic growth, to respond to the challenges of globalisation, to safeguard internal and external security, and to protect the environment”.¹³ Protocols dealing with such matters, among other things, would give the Union the social touch which the French socialists may have missed, without forcing other States, like the UK to be part of this „Europe sociale“.

Such a „voice“ strategy, as opposed to any „exit-option“ could accommodate most of the difficulties existing with the Constitution in many Member States, while negotiations on the Constitution in itself would not be re-opened. Yet, it would probably not help the Dutch people who voted „no“ for specific other reasons – if!

III. A new discourse on the European Union

The perspective of new negotiations on Protocols to the Treaty with a view to accommodate specific problems of the diverse Member States having difficulties with the Constitution in its present form would, at least, give the public an opportunity to become familiar more seriously and deeply with the Constitution and to discuss its merits and defaults. Such a debate seems to be more than necessary for allowing the citizens of the Union to understand what the European Union is about. On the other hand, as the national campaigns in France and in the Netherlands for and against the ratification have shown, more time for such a de-

¹⁰ See for a detailed analysis of possible areas for informal application of elements of the Constitution: *Sebastian Kurpas*, What could be saved from the European Constitution if Ratification fails? CEPS Policy Brief No. 70/May 2005, http://www.unizar.es/euroconstitucion/library/working%20papers/Kurpas_May%202005.pdf.

¹¹ *Bruno de Witte*, The Process of Ratification of the Constitutional Treaty and the Crisis Options: A Legal Perspective, EUI Working Paper Law No. 2004/16, <http://cadmus.iue.it/dspace/retrieve/1993/law04-16.pdf>, p. 10.

¹² See also *Maurer* (note 8), p. 74.

¹³ See the Declaration by the Heads of State or Government under: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/85325.pdf.

bate is needed, indeed. A debate which concentrates on the Constitution of Europe – regardless of the changing political situation in each Member State, but also on what the European Union is for, what purposes it shall finally serve in the common interest and what can be done at national level. Such discussions may have an impact on the design and organisation of the Constitution of Europe and are more meaningful than those only on „yes“ or „no“ for a given text. This is, as *Martin Nettesheim* recently put it, a “Constitutional Moment”¹⁴ or better: the prolongation of the work of the European Convention as part of a “Constitutional Process” mobilising the public for an explicit and reflexive process of constitutionalisation.¹⁵

Last week the Heads of State or Government met in Brussels to discuss the next steps. This was not the meeting mentioned by Declaration N° 30 on the ratification of the Treaty establishing a Constitution for Europe, since the two years after the signature of the Treaty simply have not passed and not four fifths of the Member States have ratified it yet. Neither have one fifth finally not decided to do so. The Brussels summit simply stressed “the need ... to reflect together on this situation” – and postponed the topic until the first half of 2006. This period of reflection is a chance for and not the end of the ongoing process of European constitutionalisation.

Indeed, as *Ludger Kühnhardt* states in the *Neue Zürcher Zeitung* of 8 June 2005:¹⁶ After ten Member States with 224 Million citizens having already decided to ratify, two Member States with 78 Million citizens are against, the remaining states with 156 Million people should have the opportunity to make up their mind. Let us consider the following three points:

- Should 30 Million citizens saying „no“ block the constitutional process of Europe all together? And this in conditions where about half of the „no“-votes in France are for internal political reasons only,¹⁷ while finally the „yes“-votes to the Constitution in France almost double the real „no“-votes on the issue?
- Are the French „no“-voters aware, as *Vlad Constantinesco* put it,¹⁸ that their „no“ does not remedy at all the problems people in France have with the EU - and elsewhere?

¹⁴ See the conference report by *Reinhard Müller*, *Das Europa der Willigen*, FAZ 21 June 2005, p. 12.

¹⁵ *Neil Walker*, *After the Constitutional Moment*, <http://www.ecln.net/elements/conferences/booklisbon/walker.pdf>, p. 38.

¹⁶ *Ludger Kühnhardt*, *Im Spektrum der Meinungen. Auswege für die EU aus der Sackgasse. Vertrauen in die wachsende Kraft des Konstitutionalismus*, NZZ 8 June 2005, <http://www.nzz.ch/dossiers/EU-Verfassung/zukunft/2005/06/08/al/articleCVQWO.html>; see also - more critical: *Ulrich Haltern*, *Die EU ist in keiner Sackgasse*, NZZ 10 June 2005, p. 6.

¹⁷ Laut dem "Eurobarometer" sind die No- und Nee-Voten zur EU-Verfassung in Frankreich und den Niederlanden nur zu geringen Teilen auf eine Gegnerschaft zur EU-Erweiterung und zu einem Tuerkei-Beitritt zurueckzufuehren. In Frankreich ueberwog die Angst um Arbeitsplaetze und die Wahrnehmung der EU-Verfassung als unsozial, in den Niederlanden spielte die Angst vor dem Wegfall nationaler Souveraenitaet die Hauptrolle, vgl. <http://www.euobserver.com/?sid=9&aid=19430>: „Enlargement played small role in constitution no votes“, 27.06.2005 - 17:34 CET | By Honor Mahony EUOBSERVER / BRUSSELS – „The eurobarometer polls show that in the Netherlands the main reason for voting no was lack of information (32%) followed by a fear of a loss of national sovereignty (19%) and opposition to the government (14%). Asked about the consequences of their vote, two thirds of Dutch citizens (66%) thought that the "no" victory would allow for a renegotiation of the constitution in order to better defend the interests of the Netherlands. In France, the main reason given for rejecting the treaty was fear that it would have a negative effect on employment (31%), the second reason was that people felt that the economic situation in France was bad (26%) followed by the belief that the constitution was too economically liberal. Over six out of ten French people (62%) thought that the no vote would mean the constitution would be renegotiated to be more social. France rejected the constitution with a 55 percent no vote on 29 May while 61.9 percent of Dutch voters rejected it three days later.“

¹⁸ *Vlad Constantinesco*, *Non, où est la victoire?*, *Dernières Nouvelles d'Alsace* du 5 juin 2005.

- What are the steps to be taken by our political leaders, so, with a view to bring the process of ratification to a positive end? We should not hurry up too much. Indeed, a number of important governments are in difficulties for internal reasons: *Blair, Chirac, Schröder, Berlusconi, Balkenende*, to name only some. Is this situation favourable for a project such as the European Union?

As *Peter Häberle* recently stated, it is time for “plan D” instead of any “plan B”¹⁹: Dialogue, debate and democracy should prevail the forthcoming months. This could be an important impetus for developing of a broad European public – which partly already exists.²⁰ With a lot of patience, therefore, openness and determination, the following steps should be considered by the European governments during the coming months, and be discussed by the European public:

1. First advice: Listen again: Governments should not get nervous and take premature decisions. As *Bertie Ahern* said on the 2nd of June in Berlin:²¹

„We should now listen over the coming weeks to what the voters of France and The Netherlands have said to us. We should listen to what we have heard from elsewhere in the Union, where nine Member States have already ratified the Constitution. We should listen to each other. We should listen to our people. If we do so, I have no doubt that we will find the collective wisdom and resolve to chart the best course ahead.“

2. Explain the project: Governments should not only listen, but explain what the real merits of the Constitution are. The idea of *Martin Schulz* to set up fora for citizens and the civil society, in which national governments and parliaments as well as the European Parliament and the Commission take part, could have a positive impact on this reflection period. The same applies for the idea of the Polish President *Aleksander Kwasniewski* to ask the citizens in a Europe-wide public opinion poll, what idea of a future Europe they have in mind. Such exercises would be even more important and helpful for the German people, who have not much participated in the political process of decision-making in Germany. It does not seem sufficient, again, to leave the matter to the Bundesverfassungsgericht.²² The citizens of those countries who have a referendum are, at least, better informed about the Constitution than people in Member States with parliamentary procedures like Germany. Yet, the debate and the referendums in countries with referendums will rise awareness also of the citizens in other countries for the European joint venture. It is not too late for such a reflection, all the more the Treaty establishing a Constitution for Europe signals clearly in what kind of process we are: It is a process of contracting upon a consolidation and the further development of the European treaties which are the constitution of the European Union already.²³ What is at issue, therefore, is not to make a new, but to have a better Constitution for

¹⁹ *Peter Häberle*, Juristische und politische Konsequenzen des doppelten Neins von Frankreich und Holland zur EU-Verfassung, Vortrag in Berlin im Juni 2005, forthcoming under <http://www.whi-berlin.de>.

²⁰ See for example *Daniel Thym*, The Barroso Drama – Pöttering and Schulz Take Over, *European Constitutional Law Review*, 1 (2005), 203.

²¹ See above, note **Error! Bookmark not defined.**

²² See the case brought by the member of the German Bundestag, *Gauweiler*, before the Constitutional Court, <http://www.sueddeutsche.de/deutschland/artikel/990/54936/>.

²³ See for further explanation: *Ingolf Pernice*, The European Constitution, in: Sinclair House Debates 16, Europe’s Constitution - a framework for the future of the Union, 2001, p. 18-37, and: Multilevel Constitutionalism in the European Union, 27 *European Law Review* (2002), p. 511-529.

Europe. And in the process of ratification of this new Treaty – what I call a renewal of the „European social contract“ – a broad debate of the citizens is crucial. This would help to overcome the basic problem of the European Convention: the conventional method seemed to be the best way to bring the European Union closer to its citizens.²⁴ But still, it apparently “imposed” by the governments and therefore did not attract public interest. Now, in a public debate, the European governments and the European institutions, but also school-teachers, scholars and political leaders should present the advantages of the Constitution and discuss it with the people in an open and constructive manner.

3. Taking account of the citizen’s concerns: Re-opening the negotiation on the Constitution, eventually even by a new Constitutional Convention, does not seem a realistic option. But the large number of protocols already attached to the Treaty show that it is possible to deal with special problems to be identified for one or the other Member State this way.²⁵ Opting out of some for such policies, and agreement among a group of Member States upon additional – new - policies – as it was done with the Social Protocol attached to the Treaty of Maastricht – would allow for the flexibility and dynamics having permitted the progress of integration already in the past.²⁶
4. A Europe-wide referendum: Should such a process not lead to a Europe-wide referendum, with all the citizens of the Union participating and giving their view at one and the same day? This was brought into the debate again recently by the Austrian Prime-Minister *Schüssel*, and the idea seems to get some support also in the public debate.²⁷ A decision on such a joint referendum on the Constitution including the new protocols would give the debate and the ratification process a new impetus. It would allow France and the Netherlands to get their peoples involved again, with due respect for the „no“ in the first phase, and it would permit *Tony Blair* to get the British people involved in a new context. Should the Luxembourg people say „yes“ these days, it does not seem to be disregarding their decision even when they would be asked to participate to the joint referendum under the new conditions.

IV. Conclusions: Multilevel constitutionalism in action

The intense public debate on the future of the European Union is exactly what Europe needs. And it includes, above all, questions of substance:

- Yes, the EU must develop its social dimension: secure employment, social welfare, cohesion.

²⁴ Declaration of Laeken, to be found under: http://europa.eu.int/constitution/futurum/documents/offtext/doc151201_en.htm.

²⁵ See for an analysis of earlier „ratification problems“: *Jo Shaw*, What Happens If The Constitutional Treaty Is Not Ratified?, Forthcoming in I. Pernice and Jiri Zemanek (eds.), *The Treaty on a Constitution for Europe: Perspectives after the IGC*, Nomos, Baden-Baden, 2005, also under: <http://www.eugrundwet.nl/IMG/pdf/Shaw.pdf>.

²⁶ See for a thorough analysis: *Daniel Thym*, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, Nomos, Baden-Baden, 2004.

²⁷ See *Kühnhardt*, supra, note 16. See for a Europe-wide referendum with further references already: *Ingolf Pernice*, Referendum sur la Constitution pour l’Europe: Conditions, risques et implications, contribution to the international Conference, organised by the Centre d’Etudes juridiques européennes de Genève, on « Les principes fondamentaux de la Constitution européenne », the 3-5 March 2005, see - http://www.unige.ch/droit/ceje/article.php3?id_rubrique=34&id_article=201. The publication of the contributions to the Conférence is in preparation by the organizer *Christine Kaddous*, Geneva.

- Yes, the EU must become more competitive on global markets, needs education, innovation, efficiency.
- Yes, we must give the EU institutions and instruments to achieve this, and provide for more democratic legitimacy and control:

The three issues go hand in hand. In the light of multilevel constitutionalism, only the citizens of the Union can decide upon progress in the process of integration. They decide directly, by referendum, or indirectly, represented by their elected governments and parliaments. Such decisions need time, people need to become familiar with the fact that this Union is not developing towards a „super-state“, but that it is a helpful tool not only for dealing with common internal problems in common more effectively, but also to defend our values and interests towards the outside world. More differentiation, flexibility and dynamics are perfectly compatible with the idea of a Constitution for Europe – which in any event is different from the traditional, state-related, concepts of constitution: It is fragmented, complementary, and integrates autonomous national constitutions in a non-hierarchical, supra-national system.

Splitting Europe into a core-group with a Constitution and a group of second-class members is a threat, but it is not a solution for a Union based on voluntary membership, on solidarity and mutual trust. And it is based – as a Community of law – on the recognition of the binding force of law in a common legal system. What does the French Prime Minister *de Villepin* intend, when he now speaks of a closer union of France and Germany?²⁸ Are the Benelux the model he has in mind? Such a project, either, would not help the Union and its Constitution, indeed. „Coalitions of the Willing“ always imply some arrogance, distinction, separation. What the Union needs is intellectual leadership, communication, understanding and constructive ideas for a Union with all Member States, based on solidarity, cohesion and the respect of the law. At this moment, we need meaningful, serious and open discourse on our common future.

²⁸ See: Villepin fordert deutsch-französische Union, FAZ 9 June 2005, p. 7.