

Igniting the Spirits*

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Preamble¹

POWER FROM THE PEOPLE

‘The Cypriot Minister for Foreign Affairs, George Iacavou, asked in Luxembourg to maintain in the European Constitution project the quotation of the Greek historian Thucydides which had been crossed out in the last document of the Irish Presidency. According to AFP, Hellenists affirmed that the sentence (“our Constitution... is called a democracy because the power is in the hands not of a minority, but of the greatest number”) was badly translated and also that Thucydides was a disputed personality’.²

Let us note that the translation was already modified by the Convention. The first version evoked ‘the whole people’, the ‘ultimate’, ‘the greatest number’.

Until the last minute, the Preamble had been discussed. In the Convention, Robert Badinter, former president of the French constitutional Council, had already co-signed, on 3 June 2003, with the author of these lines and Pervenche Berès, a proposal for an amendment to the Preamble to remove the quotation of Thucydides. It did not seem suitable to us to place the Union under the auspices of the founder of realistic geopolitics, a kind of Kissinger of ancient Greece. Others say that they oppose this quotation because it refers to the power of the people, not that of States. The quotation finally disappeared during the Brussels summit on 17 and 18 June 2004. As we see, no word of the Preamble is left aside.

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¹ All references in the text are to the Convention’s Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution’s provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

² Bulletin quotidien Europe, No. 8726, 16 June 2004.

QUESTION OF STYLE

Not all of the six paragraphs of the Preamble nourished the debate with the same vivacity. If we leave aside the paragraph on inheritance, people above all scoffed at the style: ‘habitants, venus par vagues successives depuis les premiers âges de l’humanité’ (inhabitants arriving in successive waves since the first ages of mankind); ‘L’Europe désormais réunie entend poursuivre cette trajectoire de civilisation’ (reunited Europe intends to continue this path of civilization); ‘reponsabilités à l’égard des générations futures et de la Terre’ (responsibilities towards future generations and the Earth). President Giscard did not listen to the members of the Convention, but the future Academician was sensitive to his immortal electors. Following the consultation of the Académie française, one was satisfied with ‘premiers âges’ (earliest times), which could not be those of the mineral or animal world; the word ‘trajectoire’ disappeared in the French version to become ‘voie’, and ‘la Terre’ became ‘la Planète’.³ The last paragraph of auto-congratulation was also made a mockery of, but it was not changed. Giscard wanted the Convention to be thanked.

THE DUALITY : EUROPEAN CITIZENS AND NATIONAL STATES

Beyond the thanks, the last paragraph, while saying that Convention ‘prepared this Constitution on behalf of the citizens and States of Europe’, has the merit to correct the claim that we are dealing with a treaty. The duality is restated in Article 1 of the Constitution. This articulates the concept of a ‘federation of States’ as advanced by Jacques Delors. This expression is the least of all evils. The Union is a supranational political community, which is made up of States that are not to disappear. Its legitimacy is double. It is direct and autonomous, drawn from the European citizens. It is indirect and derived, by the States that co-operate in it. The motto of the Union, also enshrined in the Preamble, expresses this duality fairly well: ‘United in its diversity’.

THE QUARREL ON RELIGION

A thorough scientific study would certainly show us that the Preamble was the most publicly discussed and commented-upon part of the whole European Constitution, not only in the Convention itself, but also in public. What a paradox! This text was not written after reflections of an *ad hoc* working group, as were most of the other Articles. It was not even written after a plenary discussion by the Convention. Valéry Giscard d’Estaing wrote it alone. The majority

³ Note of the editors: not all of these changes are reflected in the English version.

of the commentators agree that the Preamble is not legally binding. And in spite of that and in spite of the personal redaction, it has ignited the spirits more than the whole text.

This anomaly is due to the religious quarrel. Two camps were formed from the beginning, and they did not cease to confront each other. The first wanted above all a reference to the Christian religion; the second held above all that it should not be mentioned. The motivations of both camps are varied. Did they simply want recognition of an historical obviousness, the contribution of Christendom to the European civilization, or did they want to place the European policies under the supervision of the catholic values imposed by the Vatican? And, in the other camp, did they just want to prevent the exclusion of Moslems and agnostics, or did they want to impose a strict design of secularity? While hearing the vehemence of certain speakers, one could believe that it is the European Constitution, which will decide, finally, the question of the existence of God!

The incredible strength of the arguments reveals two things. Firstly, that in many countries antagonism between clerical and laic opponents has been persistent and remains virulent. Secondly, that many citizens and groups who wanted to be involved in the creation of the European Constitution, but who could not easily grasp the strictly institutional subjects or the definition of the policies in the third part, seized the object of 'religion'. That one, for them, is illustrative and readily understandable.

Giscard first wrote:

'Drawing inspiration from the cultural, religious and humanist inheritance of Europe, which, nourished first by the civilizations of Greece and Rome, characterized by spiritual impulse always present in its heritage and later by the philosophical currents of Enlightenment, has embedded within the life of society its perception of the central role of the human person and his inviolable and inalienable rights, and of respect for law'.

The Convention got rid of Athens, Rome and the Enlightenment – an attempt to calm the Christian revendication, keeping only a global formula. 'Drawing inspiration from the cultural, religious and humanist inheritance of Europe, the value of which, still present in its heritage, has embedded within the life of the society the central role ...' The text is not a model of intelligibility, even less so in English. It has nevertheless the merit to mention the diversity of the sources of the European spirit. In its last document⁴ before the final European Council of Brussels on 17 and 18 June 2004, the Irish Presidency suggested a very mi-

⁴ CIG 81/04 – Presid 23.

nor modification. The formula became: ‘the cultural, religious and humanist inheritance of Europe, *from which have developed the universal values* of the inalienable and inalienable rights of the human person ...’

Only one other modification should be mentioned. Instead of just speaking of ‘the reunited Europe’, the final text says ‘Europe, reunited after bitter experiences’. Three words to recall that the European project is an answer to totalitarianism.

LEGAL VALUE

One has fought much on the words, not on their status. Has the Preamble only a political importance, or has it a legal value? This, curiously, has not been discussed. We know that the doctrine considers that the Preamble of the Treaty of Rome has no binding legal value. ‘It can be seen as the background of the Treaty, the ideological framework. Therefore it can be used as an argument in the interpretation of the provisions of the Treaty’.⁵

The question of the legal value or status of preambles of constitutions is far from achieving unanimity. George Vedel, for example, stated in his *Manuel élémentaire de droit constitutionnel*,⁶ that ‘the Preamble, text voted by the Constituant ... subjected to referendum, is an integral part of the Constitution and has, at least, a legal value equal to it’. This reasoning can be perfectly applied to the Preamble of the European Constitution. The strength of the disputes on the absence of a reference to God or the Christian religion reinforces the plea. How can one not recognise any legal authenticity to a text that has been the object of very sharp debates, of repeated insistences, of baited negotiations, in the Convention as well as in the IGC, and, let us not doubt it, in the arguments to come at the time of the ratification, by referendum or in the Parliaments?

In addition, the history of fifth French Republic attests that the legal validity of a preamble can evolve. In 1958, at the time of the preparation of the Constitution, it was specifically stated that Acts of Parliament could not be tested against the Preamble and that the Preamble had only the value of political declaration. That the Declaration of the Rights of Man and of the Citizen of 1789, to which the Preamble refers, thus would not constitute a part of French substantive law. But thirteen years later, the constitutional Council decided the opposite. ‘Considering the Constitution, and in particular its Preamble’ (*Vu la Constitution, et notamment son Préambule*) it wrote in the opening words of

⁵ Stephen Neetens, University of Louvain 2003.

⁶ Paris, Sirey 1949, p. 326.

its decision of 16 July 1971. There, France achieved its constitutional revolution.

Will the European Union follow the same path? Let us remark that the context differs. For the French constitution, the step was decisive. The constitutional dispositions, the 92 articles of the text, comprise almost no human rights, except for the principles of equality, of personal freedom and of the independence of the judiciary. Other principal civil and political rights appear only in the Declaration of 1789 and social rights in the Preamble of the Constitution of 1946. The Preamble of 1958 refers to both fundamental texts. By giving it constitutional value, the constitutional Council incorporated in the French Constitution the charter of fundamental rights that it lacked.

It is quite different for the European Constitution. The Charter of Fundamental Rights of the Union forms its second part. The Preamble says nothing or almost nothing that is not elsewhere, at least not anything legal. Equality, freedom, and respect of human rights can also be found in Article I-2, which deals with the values of the Union. Other considerations reappear in Article I-3, on the objectives. Remaining is the phrase of ‘the peoples of Europe united ever more closely’, a compromise between adherents and critics of the ‘ever closer’ formula which is present in the preamble of the Treaty of Rome. It does not appear in any other disposition of the Constitution; it is only in the Preamble. For some, this will be an additional reason not to give it legal value; others will underline that that is precisely why it should be granted that status.

EUROPEAN VALUES

Except for this detail, the Preamble only introduces; it does not add anything nor cuts anything off. To judge it, one should wonder how one would have written it. Then, writers will be critical, and the citizens will be lenient. The essential is said – Civilisation, Humanism, Equality, Freedom, Reason. Human person, inviolable Rights, respect for Law. Culture, Education, Social progress. Peace, Justice, Solidarity throughout the world. Common destiny. Responsibility. All these words mean something. Together they draw Europe.

QUESTION FOR FUTURE SCHOLARSHIP

Will the European Constitution, framed on behalf of the European citizens, and its ratification, in many states by referendum, redeem the current lack of democratic legitimacy of the Union?

