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GISCARD AND HIS FELLOWSHIP:
A DWARF'S EYE VIEW OF OUR
QUEST FOR A CONSTITUTIONAL
TREATY

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GISCARD AND HIS FELLOWSHIP: A DWARF'S EYE VIEW OF OUR QUEST FOR A CONSTITUTIONAL TREATY

Peter Serracino Inglott

The justification of the reference to Tolkien in the title of my talk is not just acknowledgement of a friendship from which I benefited a lot fifty years ago at Oxford; it is also that Tolkien's imaginary history has quite a few prophetic touches. Middle-Earth is the actual name by which Anglo-Saxons called Continental Europe. The Anglo-Saxons had devised the name from the term used to denote the dwelling-place of mortals as opposed to gods. Among the symptoms of the mortality of the Middle-Earthians or Continental Europeans there were, of course their never ending clannish quarrels; but there were also such facts as that the Kingdom of Gondor had been governed for a thousand years by bureaucrats; indeed Tolkien's story is set in motion when the need begins to be urgently felt for an authentic spiritual leader able to provide another style of governance.

More seriously there are two main suggestions I wished to convey by my title: first, a twinge of disappointment at the outcome of the Convention similar to that I felt at the excessive size as well as lack of charisma of the Elves, as they were represented in Jackson's film when Tolkien supposed them to be physically diminutive but spiritually clever. Secondly, I wished my title to be taken to imply only the faintest possible inkling of a parallelism between Giscard and Aragon II. The definite perception by the Government representative of the smallest of the European Union's acceding states at the Convention was that the product of our deliberations emerged almost exactly according to Giscard's holy recipe. Consensus was first and silently reached by all of us to sheepishly accept his personal, not to say idiosyncratic way of defining consensus. We all agreed that consensus was to be deemed

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in the bag just whenever he said so. I must admit that the degree of medieval-style fidelity and loyalty displayed by our Fellowship at Brussels went well beyond my own, perhaps not-quite-aptly-tuned, anticipations.

In the course of gearing myself, in talks with the Prime Minister of Malta, our Minister of Foreign Affairs and many other local and foreign experts on Europe, in eager readiness to participate in the Convention as the representative of the Maltese Government, I readily confess that I had come to form a relatively clear idea of what kind of Constitutional framework was likely to suit the European Union best. The name of the idea was: Network. The model of the European Union's Constitution could not suitably - it seemed to me, among many others, - be taken from that of any existing federal state on the one hand, nor from that of any existing international organization on the other. The nature of the European Union differed too much from that of either a Superstate or of a mere association of states. The Union's peculiarity and uniqueness consisted of its being a system made up of complex multi-level interconnections; an open fabric of lines of communication, of crisscrossing and overlapping channels of communication, trade and diplomacy. Of all the panoply of proposed constitutional models that I managed to study before the opening of the Convention and throughout its duration, models conceived by ideological purists/jurists or by self-styled pragmatists, real devotees of the piebald, it was that labelled 'Network Europe' that seemed to me the most promising: it alone appeared to correspond to the vision of Europe as it could and would be if the most successful of the tendencies manifested in the Union's past and present were projected into the future. The model of a Network, as I shall soon illustrate more concretely, differs from the traditional models of the State as an organism, or a machine, or a work of art, by being almost completely non-hierarchical in structure; and because of its quasi-flatness, it provides different and original modalities of realizing most of the basic principles of democratic governance. Such a novel kind of Constitution was moreover declared by all to be what was required by the different and original political entity that the European Union is.

So the Convention began. The first principle that was put up for discussion in the workshop naturally dubbed 'no. 1' was that of "subsidiarity". In the European context, the concept of subsidiarity had hitherto been interpreted in terms of a three-level pyramidal structure: region, state and Europe. The principle said: Nothing should be decided at a higher level if could be

decided effectively at a lower. I proposed at the workshop that the concept be redefined in terms of a network, instead of a pyramidal organisation. The principle would then say something like: Decisions are to be taken at the place where there is the greatest concentration of relevant information. The aim of subsidiarity would then be the maximal distribution of power and of function between all the participants in a system, in such a way that, through inbuilt controls, no single component could dominate decision-making. It is not difficult to give concrete examples of the application of the principle in practice and I will soon be doing it, but before that I want only to say very briefly what the reactions to my proposal were. Practically everybody applauded the idea of adding a horizontal dimension to the vertical in defining and applying subsidiarity; but, at the same time, there was a general consensus to avoid any suspicion of adding complexity to the system. Giscard's Fellowship felt that there were already going to be some quite thorny issues arising anyway; it would not do anyone much good to add complicating factors. I was personally invited not to be so unseemly, considering where I came from, as to upset any apple-cart. Complication was for the Fellowship, the name of the Devil, of Badness itself.

I should add that while at first I had no feeling of being at all exceptional at the Convention simply because I was a university professor and not a politician, the situation changed half-way through the saga. Then the academics among the conventioners began to be rapidly and serially replaced by Ministers of Foreign Affairs; Villepin soon accompanied Joschka Fischer; Papandreou, Anna de Palacios, and so on. Not very surprisingly, rather than discuss the modulation of the principle of subsidiarity, the Ministers of Foreign Affairs were more interested in resuming their usual bartering and counter-trading style of negotiation. It became unmistakable from this point onwards that the Convention was no longer very appreciative of its own innovative nature. In the Convention, there had been participating, on a fairly equal footing, representatives of governments, of national parliaments, of the European Parliament of the Commissioner and of the Regions, as well as observers on behalf of Civil Society. It was the perfect example of a Network. Some of the bolder spirits among the conventioners began to moot such ideas as that the Convention should periodically be reconvened. It might function perhaps as a kind of Constituent Assembly to revise the Constitution periodically, and/or to elect the President of the Commission. Such proposals were just shouted down; sheer horror, it seems,

seized the Convention at the mere mention of "new Institution". Thus, allegorically speaking, the European Union's quest for innovatory brilliance in Constitution-making committed harakiri. Nevertheless, the tendency towards a network structure and away from the hierarchical appeared to be so inbuilt in the natural dynamics of the Union that it continued, unconfessedly, to operate.

A Network is made up of essentially three kinds of component: nodes, limits, modes of transmission.

There will be different kinds of node in any network. Interconnecting nodes are essential and clearly some of the institutions of the European Union have to be of this kind. The Constitution-because of its non-acknowledgement of any ideal model-does not declare that the function of some of its key innovations is that of being interconnecting nodes in the network, but that is their real function. Thus, for instance, the real role of the minister of external affairs, the agreement to establish whose post has been rightly presented as one of the proudest achievements of the convention, has been ushered into existence precisely to be an interconnecting node between the two great authoritative bodies of the Union, that is the Council and the Commission. To give a second instance, comitology has been described by the most highly reputed expert on European Constitutionalism, Professor Weiler, as by far the most important development in the recent evolution of the governance of the Union. It has merited only the scantiest of attention in the draft Constitution produced by the Convention. Yet comitology illustrates the vital importance of the interconnecting nodes. Originally set up by the Council in assertion of its authority over and above the Commission, because the system could not function in practice except in symbiosis with the Commission, comitology has become one of the most effective means for joint Council and Commission regulation of the common life of the Union as a whole.

Besides Nodes, the second essential constituent of a Network consists of the Limits which establish its topology, what in the computer world are called Firewalls. Of course, boundaries have always been considered essential features of States. But in the case of Europe, it is recognized that the question of its limits is much more complex than even the already very vexed matter of territorial boundaries. It is generally acknowledged that Europe is not the name of a merely geographic entity. Rather, it denotes

the area in which a unique civilization, made up of several cultures, has historically flourished. In fact, this civilization, far from being typical only of the geographical area usually denominated Europe, originated around the Mediterranean basin parts of which are assigned by physical geographers to the Continents of Africa and Asia. European civilisation is generally recognized to be built on two foundations. The first is the Greco-Roman philosophical and juridical humanistic heritage common to both the North and the South, South-East sides of the Mediterranean. The second foundation consists of the prophetic kind of religion based on the belief that God communicates with mankind mainly through language and not through mystical silence. Prophetic religion came to Europe from the South-East of the Mediterranean. If it is accepted as seems reasonable that Europe is the name of this civilization, then it means that it has essentially open frontiers. Notoriously, however, the Convention, although harassed by conflicting feelings about reference to religion in the Constitution, did not take the issue of what constitutes its identity and the implications of the matter at all seriously. Clear evidence of this lack of seriousness with regard to the limits is provided by the very perfunctory treatment of such issues as entitlement to citizenship, immigration and refugees. For instance, the philosopher, Sir Michael Dummett has written, "It should be obvious that if there is to be control of immigration from outside the European Union into countries that are members of it, and scrutiny of claims for admission and the grant of refugee status, these ought both to be administered by authorities of the Union, rather than by those of individual member states" (p.149). He adds that "The principle of free movement within Europe can hardly be workable unless there is a unified system supervising movement into it." Yet this obvious necessity has not received clear-cut recognition in the draft Constitution. This failure can be explained by the fact that while the large majority of both Conventioneers and of the workshop which discussed competences were in favour of the Constitution categorizing them i.e. saying, for instance that matters closely involving national identity should be competences of the States while matters of a commercial nature should be Union competences, President Giscard and the presidium decided to adopt a patently minority view that the European Constitution should have a catalogue of competences as the German Federal Constitution has. They ignored the argument that fixity of competences was the right thing in the German Constitution, but that flexibility was the desideratum in the European Constitution. At any rate, for whatever reason, no ideal limits of the European Network ended up being envisaged in the draft Constitution

in spite of their rather grimly haunting presence in the minds of the Conventioneers throughout the duration of the Convention as was evident from the resurfacing of concern about the matter at odd intervals.

Again quite evidently the civilizational and the territorial identities of Europe cannot be simply and sharply separated. The geographic aspects of Europe appear to be very singularly neglected in the Constitution. A whole saga would be narrated about the initial, blatant omission of reference to territorial as distinct from economic and social cohesion from the draft text prepared by the Secretariat. Its later inclusion left it still in a condition of dangerously vague definition. The question as to what constitutes an island has also been left not quite answered. But apart from these ambiguities which may be counted unimportant except to a few eccentric segments of the European population such as Maltese and Cypriots, there is a general absence in the Constitutional text of geographical awareness. This mental attitude, very little attentive to special considerations, betrayed in the text actually contrasts sharply with the mental attitude implicit in the interventions of the Conventioneers. For instance, the most striking geographical characteristic of Europe is undoubtedly its peninsularity - both as a characteristic of Europe as a whole and as abundantly present all along the coasts of Europe. The length of these, incidentally, is more than four times that of the United States of America but hitherto the coastal zones of Europe have been considered marginal, because the most prosperous regions used to be at the heart of the land area, such as the Ruhr.

The importance of these areas has now radically changed. They are the interface between Europe and non-Europe. They are the shop-windows of Europe vis-à-vis the rest of the world. They are of crucial environmental importance especially in the perspective of climate change and exposed to high risks in terms of pollution by oil-spills and other ecological disasters. Offshore minerals have become sometimes decisive economic factors. With the rise in significance of the tertiary services sector, even above that of heavy industry, recreational and tourist activities would appear to have made it imperative that importance be given to the external façade of Europe. Yet, there is hardly any reflection of this in the Constitutional text. It is true that after the topic was agitated by the Maltese members of the Convention, two articles under a specific title were inserted into the text about the immediate neighbourhood of the Union. Naturally there is widespread concern about the frontier areas of Europe to the East. The

still highly undemocratic character of a number of former parts of the Soviet Union, geographically undoubtedly European makes them not apt, at present and for the foreseeable future, for membership of the Union. The European image of this Eastern frontier has been compared to that of the Western frontier in the American cinema tradition i.e. as a line that is to be pushed backwards indefinitely, at least until the Ocean is reached. There cannot be the same image in the case of the Southern geographical frontier of Europe since that is immediately the sea. I am only making the point that the Constitution still shows hardly any signs of recognition that there is also a Europe of the Seas as well as a terrestrial Europe. The parts of the Ocean over which the European nations have sovereign rights do not deserve the scornful inattention reserved for them in the Constitution. Of all the uses of the sea, it is only fishing that is described as falling under European competence. New approaches are needed most notably in the Mediterranean for the sea to be managed as a Common Heritage of all states in the area. Such a development would also be the surest path to peace and security as well as sustainable development in the region. It would also be a positive step towards the construction of a real Euro-Mediterranean space capable of giving the process of globalization a more humane turn than it is at present taking. From our dwarf's eye point of view the seas seem to be rising threateningly while Giscard and his fellowship remained oblivious of it, with their feet and mind set firmly on dry land.

The third constitutional element of a Network is efficient means of Transmission.

Habermas and others have shown that the best criterion with which to judge the quality of democratic life is the operativeness of its systems of communication. Perhaps the question that all of us who were enrolled in the Fellowship of Giscard should have been asking ourselves all through the duration of the Convention was: How will our proposals affect ease of communication, in all senses of the word, throughout the length and breadth of Europe? But since we had not collectively formulated to ourselves the model of Network Europe, it hardly occurred to us to look at our handiwork, or that presented to us, in this light. Yet with the liberal assumptions underlying all that is laid down in the Constitution with regard to the economy, the main thrust of the Constitutional provisions is to promote growth through the diffusion of knowledge of best practices in the different states. Yet again the point is

far less clearly made by us than when it had been enunciated initially at the Lisbon Council. The Network model of Europe seems then to have been much more cogently present in the minds of the heads of Government and ministers of the states than it had survived in the minds of the Conventioneers. A greater perspicacity about the Network model could have been a considerable aid towards a more coherent and appealing presentation of Europe as mid-wife to the knowledge society, of learning as the foundation of sustainable prosperity. At the beginning of the Convention Giscard urged upon our Fellowship the language of precise lyricism once advocated by Cezanne in painting. I am regretfully certain that we Conventioneers will not receive the Nobel prize for literature for our draft of the Constitution.

Finally, I would like to emphasize that the leaf-notes of the Network Europe can only be individual human beings. It is for them, as was repeated almost ad nauseam in the context of the Convention, that the Constitution was written. The Euro-Sceptics rightly present in small numbers even at the Convention (et ego in Arcadia) suggested that the wretchedness of the literary style of the Convention was but the reflection of the paltry existence of a European Demos. The ground of this taunt is however their constantly entertained mistaken premise that the Europhiles were concocting a Constitution for a Superstate. The truth is that like the Eurosceptics we do not believe that there is a European People. What there is, is a European family of nations. Hence, the pity is, in my opinion, that our draft Constitution has been structured too much on the model of Constitutions of Nation States or Federal States. I am sure the creative artist capable of carving the Constitution into the desired but unattained literary form would have emerged had Giscard and His Fellowship, including myself and other diminutive would-be climbers on the shoulders of giants, been capable of a consistent conceptualisation of the unique political entity that the European Union already is but must increasingly become. For all its defects, I sincerely hope that the Irish presidency will succeed in getting it approved. I am sure that it will be soon after improved.

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