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EDITORIAL COMMENTS

What is going on at the European Convention?

After being launched in February 2002,[1] the work of the Convention got off to a slow start, with the first plenary session only on 21-22 March 2002. Some observations on the process may give some indication of what to expect in terms of results in a yearŠs time.

1. The new European Convention, although modelled on the previous one, which produced the Charter of Fundamental Rights of the European Union, has some different features. Its composition is more political. This is clearly visible as regards the representatives of the Member States; in the previous Convention, these were frequently academics, high-ranking judges or civil servants, whereas in the present Convention most of them are politicians. The German Government is the only one to have appointed an academic; all the other personal representatives of the executives are former ministers or members of the European Parliament or the European Commission. Political appointments may create problems if there is a change of majority in a given Member State following general elections. However, these more politically-oriented appointments must also be seen in relation to the fact that the task of this Convention is far from purely technical, although it implies a high level of technicality on European law matters as well. Taking the terms used in the Laeken Declaration, its task is no less than paving the way to the adoption of a European Constitution. This ambition is far wider than the previous common market objective of the EEC; now the question is that of a political organization of Europe: what do the Europeans want? How should this be organized?

Although the tone is manifestly different, the objective of obtaining a large **consensus** on a text is as strong now as it was for the Charter of Fundamental Rights. To some extent, one may consider that the experience of a convention is meaningless unless it produces a text winning the support of all the component parties of the Convention; such support, expressed by representatives of European and national parliaments, of the European

1. The inaugural session was on 28 Feb. 2002.

Commission and the governments of the Member States, gives legitimacy to the exercise. Moreover, in this case it would make it very difficult for the IGC, which will intervene at a later stage, to decide not to ratify a document proposed by a large majority of the Convention. In any other situation, if the Convention produces alternatives rather than a single draft, or if the final document were to be the expression of a slim majority, the IGC would necessarily be the occasion to reopen the negotiations with no better chance of success than if the Convention had never existed. It would be Nice all over again, and the Convention would then appear as nothing but an expensive and time-consuming workshop.

The Convention Chairman, Valéry Giscard d'Estaing seems to be highly conscious of this situation. He wants the Convention to be a success; he is investing all his political ability and stamina in order to serve this objective. Due to the number of participants in the Convention and the technicalities of the various questions to be discussed, it has proved necessary to adopt an internal regulation of the Convention – the previous Convention had worked without this. During the first weeks, after difficult discussions, a text was adopted; it is essentially a method of working, not the equivalent of the rules and regulations of a parliamentary assembly. It was agreed that no votes on the substance would take place, as voting has little significance in a body composed as the Convention is. Therefore, the Convention is condemned to find consensus solutions. Such consensus should emerge from recurrent to-and-fro of drafts between plenary sessions of the Convention and the Praesidium, where the four component parts of the Convention are represented. In order to obtain agreement from the governments of the member States, the Chairman does not hesitate to tour the European capital cities as an agent of the Convention.[2] It is clear that the more the future members of the IGC are informed of the progress in the work of the Convention, the more they are likely to support the final result.

In the same line of conduct, Chairman Giscard d'Estaing is anxious that the discussions remain those of the entire Convention and do not get divided up in various fora, as parliamentary committees may sometimes appear to be. For practical reasons, in order to have more elaborate interventions in the plenary sessions on a number of contentious questions, it was decided to create working groups. In each working group there is an effort to maintain the balance between the four components of the Convention, political affiliations and men and women. Presently, six working groups have been created;[3] others could

2. Giscard d'Estaing has even been to the United States, to deliver a speech at New York University Law School on 13 May 2002, on The European Convention, related issues on the future of Europe, European-American relations and global governance generally.

3. They deal respectively with: the principle of subsidiarity, the inclusion of the Charter of fundamental rights in the treaties, the legal personality of the European Union, the role of

be decided if a need appears.

2. Faced with a choice between a treaty and a social contract, Member States have made their decision by opting for a two-phase procedure. The Convention is similar to a constituent assembly: it is in charge of the elaboration of a draft constitution, but without the power to adopt it. The intergovernmental conference, if successful, will transform the draft into an international treaty which, once adopted by the Member States, will have to be ratified by them according to their respective constitutional requirements. A real step towards a constitutional approach would be to change the procedure of ratification and accept that a modification of the EU fundamental law might enter into force after ratification by a large majority, but not necessarily by all the Member States. A way out for the "minority" States would then also have to be thought of.

The process of elaboration of a European Constitution or a constitutional treaty has the purpose of making more easily understandable the structures and powers that already exist, rather than substantially transforming those structures or essentially increasing those powers. This is quite clear from what has already been done in the Convention. The first sessions were devoted to listening to what the members had to say, whilst the vice-president in charge of the relations with civil society, Mr Dehaene, organized meetings and hearings of NGOs. Then came the time for more positive elaboration.

The question of **competences** came first. On the basis of a report by Mr Lamassoure, the committee on constitutional affairs of the European Parliament has expressed quite precise views[4] which should help the Convention to clarify

its position. The main ideas which emerge are that what is at stake is less the extension of EC/EU competences or their repatriation to Member States, and more the need for more clarity and transparency. The only area where there seems to be some sort of agreement on an extension of competences is that of foreign policy – the eurobarometer indicates the same trend. The majority is not in favour of catalogues of competences, although the German members of the Convention remain keen on such a solution. The classic way of characterizing competences is in three categories: those of the member States, those of the Union and those shared between the Union and the member States. Among the latter, again three categories can be distinguished: (1) situations where the Union adopts the general rules, (2) situations where the Union's

national parliaments, complementary competences, economic cooperation and single currency (economic governance).

4. Rapport sur la délimitation des compétences entre l'Union européenne et les Etats membres (2001/2024 (INI)), Commission des affaires constitutionnelles. Rapporteur: Alain Lamassoure.

intervention complements national interventions, and (3) situations where the intervention of the Union is limited to the coordination of national initiatives. It seems advisable not to define the competences of Member States, but to make clear that any competence which is not attributed to the Union remains with the Member States. The real difficulty is to clarify the wording of the objectives of the Union and the delimitation of the existing competences as they result from a multitude of additions introduced at various periods in the life of the Communities and in the case law of the European Courts. A majority of opinions seems to be in favour of a certain form of flexibility, which means that Article 308 EC or its equivalent should be kept.

A subsequent problem is that of the distinction between legislative and executive activities. No one denies that implementation of EC law is a competence of the Member States, except when it is provided otherwise in the treaty. However any reflection on competences, including competences of execution, leads to a reflection on the clarification of the distinction between legislative powers and executive powers in the Union, to be linked with that on the hierarchy of norms and legal instruments.

Another question to be considered is that of the **subsidiarity principle**. Again no one denies that non-exclusive competences of the Union have to be exerted in compliance with the principle of subsidiarity. The question is not so much one of the substance of the principle, quite clearly defined in the Treaty (Art. 5(2) EC), as of its control, either political or judicial. The question is certainly being examined by the working group, placed under the chairmanship of a representative of the European Parliament, Mr Inigo Méndez de Vigo, which should report in September 2002. One can imagine that the respect of the subsidiarity principle, and perhaps the proportionality principle, might be effected through a new channel. When the Convention has achieved its task of elaborating a draft constitutional treaty, it could carry on existing with some sort of constitutional responsibility, such as the modification of provisions of structural importance but which, for reason of clarification, would no longer appear in the constitutional treaty itself, but could take the form of some sort of "lois organiques". A permanent committee of the Convention could be in charge of advising on the compatibility of any draft legislation with the principle of proportionality. The opinion expressed at the end of the legislative procedure and at the request of entities to be defined - in first instance, the Member States – would be purely advisory and would not prevent subsequent judicial review. One advantage of a permanent committee of the Convention is that it would include representatives of the four components of the Convention, including national parliaments. A number of other suggestions have been made, such as review by a constitutional court the details of how this might operate have remained rather vague, however.

3. Obviously, the Convention will have to consider the tricky question of the **institutions**. It is worth noting that no working group is presently planned on such a central topic. The idea of the Chairman of the Convention might be that the configuration of the institutions should be the result of the choices made on other matters. He has also insisted on the fact that the Union should have a face. Who could play such a pre-eminent role? Any idea of direct election of either the President of the Commission or any other sort of president raises more problems that it solves. One may think that a middle stream solution will have to be elaborated, strengthening the authority of the executive, an executive with a head, which should have the confidence of both the Council and the European Parliament. But will it be an avatar or manifestation of the Commission or something totally different? Would it ring the death knell of the institutional triangle and the Community method?

4. The members of the Convention will be faced with many other questions too, including that of maintaining the pillar structure, that of the legal personality of the European Union, and that of the status of the Charter of fundamental rights. These issues are unavoidable in the current debate, as well as having been mentioned in Declaration 23 of the Nice Treaty and the Laeken Declaration. Whatever difficulties the Convention encounters in its deliberations, the spectre of Nice imposes the obligation of finding a consensus.[5]

5. Strictly speaking, independence of the central bank is required as of entry into the third stage.