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GUEST EDITORIAL: THE CONVENTION'S DRAFT TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

1. The Draft Treaty of the Convention as a new response to an old problem

The search for a European constitution is not a new phenomenon. When the Prussian King Friedrich II "the Great" (1712–1786) had a look at the "Project for Eternal Peace in Europe" developed by the French Abbé de Saint Pierre, he commented to Voltaire, his partner in many philosophical dialogues: "The idea is very useful, except for the fact that the consent of the European princes ('*Fürsten*') is lacking, and some other trifling issues." This time it was the European Council consisting of the Heads of State or Government of the fifteen Member States of the European Union – the princes of our time, so to speak – who proposed the idea of a constitutional reform in Europe, taking into account that the last reform of the Union's treaties in Nice brought about only minor improvements when looked at in the light of the planned enlargement of the EU. In contrast to that, the Draft of the Convention presents a first major step towards Europe's constitutional reform.

2. Some answers to basic questions of European integration

In my opinion the proposal which has been submitted is not perfect, but it offers a promising concept. At the very beginning, the Draft rightly emphasizes that the European Constitution serves the people of Europe and the Member States of the EU – in this order. It mentions fundamental values, which the Union and its Member States have in common: democracy, the rule of law, protection of human rights and solidarity. Besides describing these political values, the first part of the Draft also contains provisions on the economic constitution of the EU. For good reasons, the internal market as well as free competition and the fundamental freedoms are mentioned as pillars of the present and of the future Union. In this respect, it is worth noting that the Draft defines the economic system of the Union as a "social market economy", thus declaring this overall concept to be binding also in legal terms.

One important step forward achieved by the Draft consists in combining and uniting the different elements of the existing Union: the Treaties and the two pillars of intergovernmental cooperation in the fields of foreign policy and home affairs, although the latter have still not been fully integrated in terms of procedure and majority voting.

The draft also offers an acceptable model of delimiting the competences between the Union and its Member States. It contains a system of three different categories of Union competences (exclusive, shared, and supportive) with specific procedures of control protecting the principle of subsidiarity. In federal States such as Germany, violations of the rules on the delimitation of competences can be objected to not only by the Federal Parliament (*Bundestag*), but also by the regions (*Länder*) through the Federal Council (*Bundesrat*); this is explained in greater detail in two protocols attached to the Draft. In this respect, the Treaty does not just provide the political means to object, but also legal rights of action. One characteristic of the Draft is that it does not only – as was the case in the past – address the Member States at federal level, but also acknowledges the position of sub-entities within the Member States, which are endowed with autonomous political power.

The integration of the Charter of Fundamental Rights of the Union as Part II of the text will improve the protection of the individual's fundamental rights *vis-à-vis* the EU. In future, European citizens will be in a position to refer to a codified constitutional text instead of having to rely mainly on judge-made law. As a response to widespread concerns, the Draft contains detailed provisions that are intended to prevent any interpretation of the Charter in a way that expands the Union's competences. In this context it has to be stressed that the Charter's primary purpose is to protect the individual's rights and liberties *vis-à-vis* the institutions of the Union. The Member States are bound only when and as far as they are implementing Union law. For those Member States with a national constitutional court, this means that the provisions of the Draft will not affect the role of these constitutional courts. In principle, their position will not be weakened by the reform. Neither the last word of the ECJ in interpreting the Charter of Fundamental Rights nor the exclusive judicial control of the competences of the EU's institutions by the ECJ alters this result. Given their Union-wide reach, questions regarding the definitive interpretation of the Charter, as well as disputes over the observance of the rules on competences, must be dealt with on a common European level, and in a unified manner.

With respect to the Union's institutions, the Draft leads to several substantive modernizations. Unfortunately, some of the most important elements of the reform illustrated below will not come into effect before 2009.

The question of the appointment of a "European President" has long been a contentious point in the public debate between those favouring a more

centralized "federal" Europe and those seeing Europe's future in an ever-closer alliance between the Member States' governments. Both sides should be able to accept the solution the Draft suggests – a full time President of the European Council who is elected for a term of two and a half years, renewable once. This solution guarantees more continuity and stability for the Union than the present arrangement, with the presidency rotating every six months. However, two questions remain in this respect. First, how much weight will the word of the President of the Council have, and what will his position be among the Member States' Heads of State or Government? Second, who will be willing to accept this position, if the President of the Council cannot occupy a position in the Member States simultaneously? Besides these issues, there may be some tension between the President of the Council and the President of the Commission, but also between the President of the Council and the – also new – Union Minister for Foreign Affairs. This possibility arises especially with regard to the Union's foreign and security policy.

The limitation of the Commission's voting members to fifteen seems very sensible in view of the decision-making ability of this central organ of the Community. This limitation is a step of crucial importance in the light of the forthcoming enlargement of the EU. However, some potential risks have to be mentioned. Additional Commissioners without a vote, as provided for in the Draft, will only compensate for the loss of a "real" Commissioner to some extent. In this respect, the main problem will be to put into practice the equal rotation system between the Member States provided in the Draft. One should be clear about the fact that the – certainly necessary – downsizing of the Commission will affect not only the smaller Member States, but also the larger ones. Moreover, insufficient representation of the larger Member States could have the effect of diminishing the political weight of the Commission itself among the institutions of the EU, and even more so in the relationship with the Member States.

The European Parliament is one of the winners of the planned reform. The principle of democracy will be intensified by the Draft, as becomes clear from the rules on the election of the President of the Commission, whose position will at the same time be strengthened by the Draft. Article 19(1) states that the European Parliament shall elect the President of the European Commission. However, the Parliament does not enjoy a right to make proposals for the position of the Commission's President. According to the Draft, the right to make proposals for this post rests with the European Council, which decides by qualified majority. Nevertheless, the right to make proposals has to be exercised "taking into account the elections to the European Parliament and after appropriate consultations". This solution has evident merits, as the Commission still plays a crucial role in the Union. As an independent organ of the EU, it must serve solely the interests of the Union; or, as Article 25(1)

puts it: the Commission "shall promote the general European interest". An exclusive right for the European Parliament to make proposals and to elect the Commission's President would not be consistent with this genuine role of the Commission within the institutional system of the Union, as the Commission is not a proper government dependent upon political majorities like the Member States' governments.

For similar reasons it seems appropriate that the European Parliament still does not have a right to make proposals for legislation, but merely the right to request the Commission to submit proposals. In this context, it is worth noting that if there had been an intention to provide the Parliament with a right to make proposals for legislation, the European Council would have had to be provided with a similar right, as the two institutions are jointly responsible for European legislation. Nevertheless, by making the co-decision procedure, or joint legislative procedure, the rule for enacting Union legislation the rights of the European Parliament in the course of the legislative process have been enhanced. In addition to that, the abolition of the distinction between expenditure necessarily resulting from the Treaty or from acts adopted in accordance therewith and all other expenditure strengthens the budgetary powers of the Parliament.

Notwithstanding all the difficulties, the creation of the position of a Union Minister for Foreign Affairs is a sound decision. Yet, from an idealistic point of view, the improvements in the field of foreign and security policy remain unsatisfactory. With the principle of unanimity still in effect, the strength of Europe's foreign policy will remain rather limited. Realistically, the claim for national sovereignty, especially in the field of foreign policy, seems difficult to overcome in the near future. The office of the Union Minister for Foreign Affairs and the proposed solution of a "double-hat"[1] both reflect the current situation with regard to the different positions on foreign policy existing in the Member States. At the moment a greater extent of common policy in this field does not seem achievable.

The distribution of voting powers in the Council was one of the most problematic issues. The differences in the size and population of the Union's Member States make it very difficult to assure an equal treatment of the citizens and the Member States of the Union. During the deliberations on the Draft, it was pointed out that 74% of Europe's people live in 6 large nations with more than 40 million inhabitants each, 19% live in 8 medium-sized nations with 8–16 million inhabitants, and the remaining 7% of the people live spread over 11 nations with less than 5 million inhabitants. The suggested

1. This term was used during the meetings of the Convention (cf. CONV 813/03) describing the fact that the new post of the Union Minister for Foreign Affairs combines the former office of the External Relations Commissioner with the former High Representative for the Common Foreign and Security Policy.

solution, according to which European laws will be adopted if a majority of the Member States, representing at least 60% of the population of the Union, vote in favour of the proposal, marks a noteworthy step in the process of European integration. If some Member States now raise concerns on this matter, arguing that their political weight would be reduced, it should be permitted to raise the question whether the reform of Nice did not grant these countries too high a share of the votes when compared with the proportion of their population.

Only a few reforms affect the Union's judiciary. As already planned in Nice, this will be structured in three tiers. Besides the European Court of Justice and the Court of First Instance – the latter will be renamed the High Court – there will be specialized courts with jurisdiction in specific areas. With respect to the legal protection of the individual, the third part of the Treaty contains pragmatic improvements. For example, Article III-270(4) provides the individual with a right to institute proceedings against a regulatory act "which is of direct concern to him or her and does not entail implementing measures". However, one may regret that the Draft does not introduce a fundamental rights complaint for the individual. Such a cause of action might have been conceived in a way that it would serve only as an *ultima ratio*. Procedural safeguards could also have been included to ensure that the European courts do not get overloaded with these constitutional claims.[2]

The chapter on the legal acts of the Union noticeably enhances the democratic and constitutional structure of the Union. In accordance with their legal and real relevance, legislative acts are entitled "European laws" and "European framework laws". The draft treaty abandons the previous terminology, including the terms "directive" and "regulation", which was shaped by administrative law and is difficult to understand for Europe's citizens. Article 32(2) restricts the authorities' powers in accordance with the rule of law by stating that the European Institutions shall refrain from adopting acts not provided for by the Constitutional Treaty.

The right to withdraw from the European Union, which does not explicitly exist at present, is one of the critical points of the Draft. The future Member States, who particularly asked for this provision, may be reminded that their joining the Union will definitely cause stronger ties than any conventional international agreement. Furthermore, an optional right to withdraw bears the risk of abuse for purposes of domestic policy.

2. The Freiburg Draft of a European Constitutional Treaty, which has been compiled under my auspices, contains such a fundamental rights complaint in Art. 65(6). The Freiburg Draft can be found on the Internet on the pages of the European Convention under register.consilium.eu.int/pdf/en/03/cv00/cv00495en03.pdf and on the pages of the Europa-Institut Freiburg under www.europa-institut.de/.

3. Evaluation of the Draft Treaty: Not a perfect, but a promising and pragmatic reform concept

Naturally, any evaluation of the Draft Treaty depends on the expectations associated with it. Many years of experience have shown that European integration proved to be successful whenever pragmatic steps were taken. There have been many high-flying plans for a European constitution over the last centuries. Under the title "Idee Europa, Entwürfe zum 'Ewigen Frieden"' ("The Idea of Europe, Concepts for an 'Eternal Peace"') these have been compiled to make an impressive exhibition which could be seen in Berlin this summer. However, these concepts have one feature in common: nearly all of them failed. Among these unsuccessful plans was the constitutional reform promoted by the European Parliament under the guidance of Altiero Spinelli about 20 years ago.[3] Nevertheless, all these activities helped to produce a political climate, within which plans for a European constitution no longer met with brusque rejection. Additionally, an increasing harmonization of the national constitutional laws over the last years has laid the foundations for a European constitution.[4] Last but not least, the fact that this time it was the Heads of State or Government of the Member States who initiated the working out of the Draft increases its chances of success. By proposing a European Convention, they chose a new path to European constitutional reform; a path that had already been successful when drafting the Charter of Fundamental Rights. It was not mere idealistic enthusiasm for the idea of Europe, but the realistic assessment of the poor outcome of the Intergovernmental Conference in Nice – the traditional forum for treaty reforms – that led to the creation of the European Convention.

Although the European Convention is not a real constituent assembly – according to Article 48 TEU it is up to the Intergovernmental Conference to adopt alterations of the Treaty – it fulfilled essential functions on the way towards a European Constitution. The draft has been worked out in a very transparent and open discussion. The public has taken an active part in this process by bringing in statements, proposals or even draft texts. Both academics and politicians have contributed to the debate by designing their own proposals for a European Constitution.[5] Europe's citizens have at least

3. This plan is documented in Schwarze and Bieber (Eds.), *Eine Verfassung für Europa* (Baden-Baden, 1984).

4. For greater details see Schwarze (Ed.), *Die Entstehung einer europäischen Verfassungsordnung* (Baden-Baden, 2000); English edition: *The Birth of a European Constitutional Order* (Baden-Baden, 2001).

5. This is not the place for an exhaustive list of all proposals, however; such a list can be found on the homepage of the "Centrum für angewandte Politikforschung" under www.eu-reform.de. Among the important proposals are Dashwood et al., "Draft Constitutional Treaty

been able to follow all the debates via Internet and discuss several proposals in special forums.

With the concept of a "constitutional treaty"[6] Europe follows its own specific route. Out of different national constitutional concepts the Convention has formed a synthesis that represents a felicitous mixture of innovation and a sense of reality. The two terms "constitutional" and "treaty" precisely characterize the nature of the planned constitutional reform. On the one hand it is intended to establish a basic legal order, i.e. a constitution. On the other, its implementation will depend upon the mutual agreement of the Member States in terms of an international treaty.

With regard to the substantive results, the draft makes real progress, despite some points which may still be criticized – such as the Union's competence to coordinate economic and employment policies, the changeover from the principle of unanimity to the principle of majority, or certain other questions of structural importance. In this respect, one can generally agree with the (self-) evaluation of the Convention's President Giscard d'Estaing: "not perfect, yet unexpected". It has to be kept in mind that many constitutions were more or less imposed by extraordinary historical events. In normal, peaceful times arguments to introduce a new constitution have to rely mainly on their rational persuasiveness, and proponents are therefore in a difficult position, especially if the new constitution is not only created for a single State, but for a supranational organization like the Union. Nevertheless, the abolition of the border between Western and Eastern Europe, laying the ground for a potential enlargement of the Union, has indeed created a certain pressure for constitutional reform in Europe.

The Convention did not lose sight of political realities and correctly concentrated on the central tasks: a better delimitation of competences between the European Union and the Member States, the simplification of the Treaties, the integration of the Charter of Fundamental Rights, and the involvement of the national parliaments in the architecture of Europe. The Treaty is still a very voluminous and complex work that only legal experts may completely understand. However, it has to be admitted that more simplifications might have

of the European Union, 28 EL Rev. (2003), 3; Badinter, "A European Constitution" (CONV 317/02); Duff, "A Model Constitution for a Federal Union of Europe" (CONV 234/02); Brok, "Constitution of the European Union" (CONV 325/02). For a detailed evaluation of these proposals see Häberle, "Die Herausforderungen des europäischen Juristen vor den Aufgaben unserer Verfassungs-Zukunft: 16 Entwürfe auf dem Prüfstand", (2003) DÖV, 429.

6. This term had been proposed as the Draft's title by the Convention's President Valéry Giscard d'Estaing in his introductory speech to the Convention on 28 Feb. 2002. The later agreement on the title "Treaty establishing a Constitution" did not alter the characteristic of the planned reform, which combines contractual elements with the aim of the introduction of a basic legal order.

challenged the overall acceptance. A certain degree of detail was necessary in order to arrive at a political consensus within the Convention.

Regarding the later ratification of the Constitutional Treaty I may add some remarks concerning the procedure in my own country, the Federal Republic of Germany, once the Draft has been accepted in the Intergovernmental Conference. I must admit that I do not belong to the admirers of the idea of a referendum. The draft is too complex and therefore does not present a question to be answered with "yes" or "no" in the form of a referendum. In my opinion, a European constitution would achieve its legitimacy better by its convincing content and by its continuous acceptance in practical politics and by the people. By the way, in Germany a referendum on the Constitutional Treaty would presuppose an amendment of the constitution, since the German Basic Law (*Grundgesetz*) does not make provision for this form of direct democracy. It is highly doubtful whether this matter is suited to being a test case for a modification of the position of German constitutional law in this respect. According to Article 23 of the German Basic Law in its existing form, the adoption of the European Constitutional Treaty requires a two-thirds majority in both the Federal Parliament (*Bundestag*) and the Federal Council (*Bundesrat*). This provision offers a sensible solution that is in my view sufficient to meet the demands of democratic legitimation.

In view of the destiny of all the visionary but failed constitutional drafts in the past, I come to the conclusion that the concept of pragmatism offers the best chances for realization, even in situations when there is a need for fundamental reforms such as at present. The Draft Treaty presents a sound and realistic foundation for a European Constitution and therefore should not be fundamentally called into question by the Intergovernmental Conference. It is necessary to keep in mind that a European Constitution cannot be the copy of a single national constitutional order regardless of how highly the national provisions have to be appreciated. Instead, it is inevitable that the European Constitution will be a synthesis of different national perceptions. Facing the distinctive compromise formed by the Draft Treaty, it seems obvious that challenges to individual aspects of any importance will negatively affect the achieved overall consensus.

Therefore, I come to a positive conclusion. The European Union certainly already possesses some kind of a constitutional order at present. But the Draft Treaty of the European Convention structures this order more clearly and makes it more comprehensible. Additionally, it contains fundamental, consensually achieved reforms, which help to prepare the Union for the

forthcoming enlargement. Thus, the Draft Treaty establishing a Constitution for Europe offers a pragmatic solution for the necessary constitutional reform.

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