EU Reform

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Convention Spotlight

Different Ways – One Target

Convention Members present First Draft Constitutions

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Over the past fifty years the treaty structure underlying European integration has been successively developed, amended and revised. Today, it comprises numerous treaties with several hundred articles as well as the related protocols and declarations. Within the individual treaty chapters, policy areas and articles, the respective provisions have grown increasingly elaborate and are dealt with in different passages. Thus it has become ever more difficult to provide for political accountability in "Europe".

Simplifying the treaties has, therefore, rightly become one of the key tasks of the EU reform Convention. The legal basis is to be reshaped in such a way that the division of labour and assignment of responsibility between the Union and its Member States becomes again comprehensible. Following the end of the "listening phase" in July, the Praesidium of the Convention originally planned to examine the results of the working groups first before presenting a concrete proposal for a draft constitution. However, this strategy seems now no longer feasible since some "impatient" members of the Convention have already gone public with first draft texts after the summer break. Despite their different approaches, the papers presented by Elmar Brok and Andrew Duff have set a high standard for the future work of the Convention.

Constitutional Draft of the Brok Group (EPP)

Elmar Brok has chosen a grand legal-technical approach for the EPP, which, however, does not consider itself uniformly represented and bound by it: the entire text of the treaties is to be restructured into 200 articles, 5 rather extensive constitutional protocols, which combine the previous regulations on Community and Union policies, as well as more than another 30 individual protocols on different matters. The Charter of Fundamental Rights alone, which has been incorporated without a change, comprises 54 out of the 200 core articles. The other treaty articles have been re-arranged and partly changed in a way that considerably re-calibrates the current balance between Member States and EU institutions.

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It is especially worth mentioning that, in the future, the Council as "House of States" and the European Parliament (EP) as "House of Peoples" shall share responsibility for legislation on an equal footing. In addition, the sectoral councils of ministers will be abolished. The weighting of votes in the Council is to be replaced by a double majority of states and total population. The President of the Commission will be entitled to determine a hierarchy among the members of the Commission. After being elected by the European Parliament he will be confirmed by the Council. The Commission will represent the Union externally. Moreover, Brok proposes a catalogue of competencies, and a stricter enforcement of the principle of subsidiarity. As concerns future treaty amendments, they are regularly to be dealt with by a Convention and to be assented by the European Parliament.

Overall, Mr Brok has submitted a comprehensive and consistent constitutional text. Unfortunately, his proposal does not explicitly name the sources of the treaty formulations chosen. It is, therefore, difficult to identify where exactly the status quo has been changed and amended. If the relevant passages were indicated, it would have been much easier to use the draft as a basis for the Convention debate. Moreover, some passages, such as those on the ECJ (30 articles) or on the financial regulations (10 articles on 10 pages), are too detailed for a concise constitution concentrating on the essentials. Hence, one of the main advantages of a solution based on protocols of constitutional rank is not sufficiently exploited. It also remains open whether later adaptations of the protocols require a complete revision of the treaties. Already these questions show, however, how helpful concrete drafts can be for the Convention's further consultations.

Constitutional Draft by Andrew Duff (Liberals)

Andrew Duff has chosen a completely different approach. In merely 19 articles he summarises the core elements of a "Federal European Union" (CONV 234/02). Apart from its formal brevity, this model also contains some revolutionary material reform proposals. Following a proposal made by the President of the Convention, Giscard d'Estaing, a Congress consisting of members of the European Parliament and an equal number of national parliamentarians shall elect the President of the Commission. A vice-president in charge of foreign policy as well as thirteen other Commissioners will be nominated by Parliament. Along the lines of Brok's proposal, future constitutional reforms are to be transferred to a Convention. Four brief paragraphs in Duff's text describe the main competencies of the EU by policy areas. The legislative powers of the Union shall be restricted by a number of fundamental principles of governance. Another outstanding element of Duff's draft is that the EU is to be granted the right to set up armed forces. In addition, the commitment to collective, mutual defence is to be firmly established in a protocol, which shall come into effect once it has been signed by three

quarters of the Member States. With regard to the Charter of Fundamental Rights, Duff suggests to incorporate it in a constitutional protocol.

Measures of particular significance are dealt with by so-called "organic laws". Moreover, the status of "associated membership" is to be established for all states which, as non-members, take over only part of the Union's policies or, as current Member States, do abstain from ratifying this constitution. Andrew Duff's core constitution is supplemented by a subsidiarity treaty, which includes detailed chapters on single policy areas. This subsidiarity treaty would be subject to a simplified amendment procedure, and replace the current treaties. However, even if Duff's ambitious proposals for institutional and defence-policy reforms are taken into consideration, his draft will probably have little chance to be realised. This is mainly due to the vagueness of the order of competencies he sketches. Indeed, simplifying the amendment of specific policy provisions in a (second) subsidiarity treaty will probably only be feasible if the (first) basic treaty delivers a watertight definition of competence criteria.

Further Proposals

Apart from these two options from the ranks of the European Parliament, other reflections on this topic have contributed to the debate. Without having submitted a draft text, the alternate representative of the German Federal Government, State Secretary Gunter Pleuger, referred to some important aspects of a possible division of the treaties in the Convention's working group on "legal personality" (see Document WG III-WD 11). Thus, a facilitated procedure to change the second part ("constitutional law") has been proposed, which is based on the model already applied in the sphere of community law when it comes to decisions requiring ratification (e.g. decisions related to the system of own resources). On this basis, numerous detailed regulations could be shifted into a second treaty text as long as the framework in the fundamental treaty defines the limits sufficiently precise.

Here might be an interesting point of departure for tying in the proposal of the Brok group: Those titles and policy area definitions of the TEC and TEU which ought to be shifted into the second part ought to be adopted via "constitutional laws" rather than being included in several protocols. Such constitutional laws could be modified according to the model set by Art. 269 TEC. Union acts (regulations), framework laws (directives) and decisions would then have to be measured against, and controlled according to the substance of these higher-ranking norms. However, in order to keep the "constitutional" acquis as concise and clear as possible, the Convention ought to clarify to what extent the matters concerned can be transferred to secondary law or statutes. In addition, a systematic categorisation of tasks in the first part of the future

constitutional treaty would be necessary. This would, firstly, create transparency and, secondly, draw the line against unwanted tendencies towards centralisation.

Consequences for the work of the Convention

The proposals presented here as well as earlier constitutional drafts (EUI, Florence; C•A•P, Munich) have in common that, ultimately, they intend to dissolve the pillar structure, equip the European Union with a legal personality, render the Charter of Fundamental Rights a legally binding element of primary law, and establish the principle that Member States are responsible for all matters that are not explicitly provided for in the constitutional texts. Moreover, the Convention as an instrument of reform finds its way into the treaties. At the same time, the different approaches show three basic problems of simplifying the treaty structures:

- Firstly, the question of how to delimit competencies needs to be clarified. The principle of specific conferment of powers is still taboo even though it has, to date, hardly been able to effectively restrict the extension of EC activities. Without a clear categorisation in the basic treaty and excluding large parts of the detail regulations, however, transparency of the system cannot be improved.
- Secondly, dividing the treaties into two parts needs to be combined with a simplified procedure to amend the second part. Only then can the Union improve its capacity to adapt to new challenges. To date, this proposal has not found a majority since many Member States - but also, for example, the German *Laender* - are afraid to lose control over the allocation of competencies as "masters of the treaties". Yet some progress seems to be possible in this respect after even a group of British Conservatives chaired by Lord Brittan went so far as to propose that the detailed regulations established in the second part may be changed without ratification after unanimous agreement of the Member States.
- The third crunch is the maintenance of balance between Council, Parliament and Commission on the one hand, and between the Union and the Member States on the other. A strengthening of merely supranational elements, such as for example the election of the President of the Commission by Parliament, seems hardly more feasible given the fact that an intergovernmental conference will take the ultimate decision. Proposals such as the election of the President of the European Council must, in consequence, be considered not only as an intergovernmental alternative but as a complementary proposal of an inherent systemic logic.

Which conclusions for its work can the Convention draw from these proposals, termed by the authors themselves as "an example" or "basis for discussion"? All drafts up to now illustrate that the Convention might very well quickly agree on a common basic structure of a constitution. Far more difficult is the question of how then to materialise

and shape the individual main chapters in a constitutional logic and in accordance with the constitutional traditions of the Member States. The working groups will soon present first proposals on individual subject areas. At the end of October, the Praesidium will present a coherent structure as a framework which will allow to attribute to the individual categories the results of the working groups to date. This will render the still unsolved problems clearly visible.

Despite the tight schedule, targeted small working groups on those open questions ought to be established with a narrow timeframe. Giving due consideration to the then existing draft constitutions, they would have to present concrete proposals for texts or, if need be, options of how to design the disputed elements of the draft constitution. This mainly concerns decisions, which entail a substantial change in the power balance among the EU Member States, between the EU Member States and the EU, or within the EU institutions. The results of these working steps must, finally, be combined into a more advanced draft for the third and last stage of the Convention. At the end of this stage of decisions an ambitious, clearly structured and readable draft constitution ought to be available which can hardly be rejected by the heads of state and government if they do not want to call into question the European project as such.