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The Convention as a Way of Bridging the EU's Democratic Deficit

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For the first time in the history of the European Union, it was decided in 1999 that a convention, rather than the usual Intergovernmental Conference (IGC), would be set up to deal with the Union's constitutional matters, namely the drafting of a Charter on Fundamental Rights. Also known as the Herzog Convention, after its German chairman, Roman Herzog, it brought together representatives of the institutions of the European Union as well as of national governments and parliaments. In December 2001, another convention with the same kind of make-up was mandated to draw up proposals for the revision of the treaties. Why was the "convention method" chosen? To what extent can it contribute to solving the Union's problem of democratic deficit? While the Herzog Convention was set up to carry out the dry task of assembling a list of fundamental rights, the subject matter itself carried it beyond these confines. A similar dynamic may be set in motion in the new Convention. This article addresses these and other issues, and in the last part focuses on the lessons that the Convention on the Future of the European Union can learn from the Herzog Convention.

Why a convention for the Charter of Fundamental Rights?

The Herzog Convention, which drew up the Charter of Fundamental Rights of the European Union, solemnly proclaimed at Nice on 7 December 2000,[1] *de facto* performed constituent functions and produced what was in material terms a "constitution".

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[1] *Official Journal of the European Union*, C 364, 18/12/2000.

De facto constituent functions

The Herzog Convention performed constituent functions because the mandate it received from the June 1999 Cologne European Council in the end forced it to go beyond mere compilation of a catalogue of existing rights. If anyone was thinking of a simple container, they failed to take account of the expansive force of the content: fundamental rights.

The document approved in Cologne was rather prudent in its wording, but clearly stated that the drafting of the new charter of fundamental rights was designed "to make their overriding importance and relevance more visible to the Union's citizens"[2], revealing the inevitably innovative nature of the task at hand. The identification and collection of existing fundamental rights was preparatory to a declaration which would sanction their constituent value and juridical significance.

Innovation was inevitable for three reasons. First, bringing all fundamental rights existing in the Union together into a single text would result in their recognition but, above all, it would highlight the constitutional nature of the Union. The fundamental rights would no longer be something "outside" the Union's legal order which simply had to be "respected" (Article 6 of the consolidated version of the Treaty on European Union, hereinafter TEU), but would be brought inside it, making the Union responsible for safeguarding them as "an indispensable prerequisite for her legitimacy".[3] Secondly, bringing the fundamental rights into a single *corpus* of law would emphasise their universality, indivisibility and systematic relatedness and determine a different and "creative" reading of them, whatever their origin. "Whenever a fundamental right is extrapolated from its context and inserted into a different one, its content will change, just as change will be inevitable in how it is balanced by other rights or constitutional interests".[4] Thirdly, the autonomous "sanction" stemming from a Charter of rights would, in itself, represent the highest form of constitutional sovereignty so far expressed by the Union – internationally (through reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms) and supranationally (through reference to the "constitutional traditions common to the Member States").[5]

[2] "European Council decision on the drawing up of a Charter of Fundamental Rights of the European Union", Annex IV to the Conclusions of the European Council in Cologne (3-4 June 1999).

[3] *Ibid*.

[4] M. Luciani, "Diritti sociali e integrazione europea", *Politica del diritto*, no. 3, 2000, p. 318 et seq.

[5] Article 6.2 TEU: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

Paradoxically, the Charter's necessarily innovative nature could be seen most clearly in the section in which the Cologne summit identified the sources from which the Convention was to derive its content. Above all – and it could not have been otherwise given the reference already present in Article 6.2 of the TEU [6] – it was to cover not only "the fundamental rights and freedoms as well as basic procedural rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms" mentioned above, but also – and again as mentioned above – the fundamental rights "derived from the constitutional traditions common to the Member States", amounting to a tacit admission of the drafters' powers to extract the Charter's content from the jurisprudence of the Court of Justice in Luxembourg. Moreover, the Charter was also to contain the "fundamental rights that pertain only to the Union's citizens" (through reference to the chapter on citizens rights, Articles 17-22 of the consolidated version of the Treaty establishing the European Community, hereinafter the TEC) and, by extension, the Charter also had to contain rights for "non citizens" residing or working in the EU. Finally, the Charter had to consider economic and social rights, "insofar as they do not merely establish objectives for action by the Union",[7] but are full-fledged juridical situations to be safeguarded.

A constitutional product

What the Convention produced was, in real terms, an act of constitutional standing because, by its very nature, the Charter falls under the reference parameters for the Union's constitutional guarantees (Article 6.2 of the TEU). The Charter was, in fact, constructed as a charter of principles rather than laws, setting individual rights into value categories ("dignity" in Articles 1-5; "freedoms" in Articles 6-19; "equality" in Articles 20-26; "solidarity" in Articles 27-38; "citizens' rights" in Articles 39-46; and "justice" in Articles 47-50). Thus as subjective positions arise, they find their correct interpretation in correlation with the objective values guiding them. These, in turn, enrich and clarify technical formulas, becoming parameters for future jurisprudence. In other words, the Charter literally closes the circle described in Article 6.2 of the TEU, guaranteeing as "general principles of Community law" the fundamental rights resulting from the "constitutional traditions common to the Member States".

The Charter naturally entered into the mechanism of Article 6 of the TEU, as it was jointly proclaimed by the European Parliament, the Council and the Commission. Even if it only performs a simple declarative function of "visibility" for existing fundamental rights in Europe, as a declaration of principles, Community jurisprudence cannot fail to take account of it, given the

[6] *Ibid*.
[7] "European Council decision on the drawing up ... ".

substantive, rather than formalist approach it always takes to fundamental rights – an approach which is highly visible in the "case law" formulation of Article 6 of the TEU.

Why use a Convention to revise the Treaties?

What led to the insertion of the "convention method" into the existing procedures for revising the Treaties (Article 48 of the TEU)? There are four answers to this question, but first a preliminary observation must be made on the way in which the Union is being constitutionalised.

The preliminary observation refers back once again to the June 1999 Cologne European Council. The summit marked two sharp turning points in Europe's constitutional order. First, the passage from an economic to a political Union and from rights serving the market to citizens' rights *tout court* introduced a substantial novelty into what had until then been a gradual "constitutionalisation" of the Union. For the first time in a formal act rather than by weight of accumulated jurisprudence, the starting point was not the market, but rights. "Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy",[8] thus the heads of state and government recalled the Union's obligation to respect fundamental rights. They also described the jurisprudence of the Court of Justice as confirming, not creating, this obligation, even if the Court was responsible for its "definition".

Secondly, Cologne marked a breakthrough with respect to the Union's past decision-making procedures. In fact, the body created by the summit brought together representatives of the European Parliament, national parliaments, the heads of state and government and the Commission. For the first time, if only in a consultative role (since the ultimate decisions on the Charter's juridical destiny were reserved for the European Council), a sensitive constitutional issue was entrusted to a body with mixed legitimation, national and Community.

This was a Copernican revolution in the Union's constitutional identity and in its relations with the member states, and it was put into effect by the European Council, that is, the body which "shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof" (Article 4 of the TEU). Because of the mechanisms of imitation and interaction typical of the Union's legal development, this could not fail to affect the procedure for revising the Treaties.

At the same time, the revision procedure laid down in Article 48 of the TEU was obsolete for at least four reasons:

a) The "internationalistic" gist and structure of the mechanism was decidedly insufficient. The formalistic approach had already been questioned with regard

[8] *Ibid*.

to the specific nature of the European Treaties, that is, treaties that give rise to institutions which in turn add to their own functions (Article 308, TEC). The Treaties can only be referred back to international law at their conventional moment of origin, when the order of which they immediately became structural elements was created. Hence, subsequent revisions can no longer be ascribed to international law. Even Article 48 of the TEU introduces elements alien to international law, such as qualified majority voting in the Council, the role of the European Parliament, and the need for ratification by all member states.

Consequently, when the Cologne summit attributed constituent powers to a body composed of a mix of all "actors" created by the Treaties, this led to a procedure based on an internal constitutional logic and only nominally referable to international law. More than the *trompe l'oeil* sequence of Article 48 of the TEU, the true key to the balance of power within the Union lies in this combination of various institutional sources of legitimation, all of equally decisive importance in a constituent phase, in which the normal dialectic of the institutions is however tempered by their unity of purpose.

The Herzog Convention's procedures indicated that the various components of the Convention represented in the drafting committee were clearly visible in the organisational scheme laid down by the October 1999 Tampere Council, along with the national and political groupings. In fact, the Convention worked like a melting-pot in that each member participated on equal footing. This seems to confirm the view that modern constitutionalism is no longer marked by a division of powers, but rather by a variety of sources of legitimation in an integrated system of powers.

A truly institutional dialectic developed between the Convention and the two European courts, the Court of Justice in Luxembourg and the Strasbourg Court, as well as with public opinion. The decision to opt for the complete and immediate transparency of debate and documents was an expression of this dialectic, which distinguishes a constitutional procedure from a diplomatic one. b) The emergence in Cologne and later in Nice of a Union based on rights and no longer on the market, in which the concept of citizenship is central, made it inconceivable to continue with revisions "granted" in an intergovernmental context, as largely provided for by Article 48 of the TEU. The participation of members of parliament as a direct expression of popular sovereignty could – with some difficulty – be overlooked during the building of community economic institutions, but it could no longer be neglected when a constitutional order was being set up in which citizens' fundamental rights were the "indispensable prerequisite": citizens are entitled to full involvement by parliament (see Article 52.1 of the Charter).

The dual European citizenship as expressed in Article 17 of the TEC ("citizenship of the Union shall complement and not replace national citizenship") implies the contribution of both the European Parliament and the national parliaments in adopting constitutional measures. Even in this regard, a

single body bringing together members of the European and national parliaments was the only formula capable of filling the democratic deficit in the existing revision procedure.

c) It is now quite clear that in constitutional revision processes which affect the overall organisation of the Union, the member states and their local governments, the whole European parliamentary system must be brought into play, rather than requiring no more than an opinion from the European Parliament and ratification by the national parliaments when all has already been said and done. The Treaty of Amsterdam (Article 251 of TEC) granted the European Parliament a co-decision legislative role which has led to a full bicameral European legislative power. The "Protocol on the role of national parliaments in the European Union" annexed to the same treaty called upon national parliaments to go beyond the phase of simple exchanges of information and reports. They should have active and direct powers of intervention in constitutional revision procedures.

The "convention method" has shown that the European parliamentary system can work as a whole, generating interaction between the specific characteristics of the European Parliament and the national parliaments. There have been no attempts by the European Parliament to encroach on the territory of the latter, nor have the latter been tempted to push for re-nationalisation. Summing up, it can reasonably be argued that the Herzog Convention represented a successful case of implementation of an interparliamentary method of constitutional revision – 42 of the 62 Convention members were parliamentarians – in contrast with the traditional intergovernmental method.

d) As a full-fledged member of the Convention, the Commission's representative played a role that turned out to be extraordinarily effective, using his/her powers of proposal and amendment and acting as a natural go-between with the European Council.

The hitherto untried relationship with the members of national parliaments was also especially productive, showing that the Commission has more of a vocation as a governing authority for the Union's general legal structure than in the more restricted context of Community government. Here, too, the Convention's functional structure turned out to be much more efficient and transparent than the procedure set down in Article 48 of the TEU.

Democratic deficit

Does the "convention method" automatically solve the Union's problem of democratic deficit? Certainly, introducing an interparliamentary body with powers of proposal into the revision procedure, which will then conclude with an Intergovernmental Conference as under Article 48 of the TEU, has an extraordinarily democratic impact. It means that, in the first phase, the power to establish the wording and draw up the briefing papers is in the hands of the

national parliaments which have the final say over the Treaties through the ratification process. The members of the European Parliament and the national parliaments thus play a dual role, in preparing the legislation and in approving it, as in the classic parliamentary method.

Yet, despite many well-founded doubts about issues of "concrete politics", it is evident that, in the case of the Convention on the Future of Europe, especially if the constitutional revision produces a complete constitutional text, full and direct popular legitimation can only come from an EU-wide referendum to be held at the same time as the European parliamentary elections in 2004. A negative outcome in any country would naturally mean that the MEPs elected there would forfeit their seats.

Another issue is the Convention's decision-making procedure. The Herzog Convention never held a vote, but proceeded by consensus. The process, defined by the Tampere summit, involved debate and amendment, the results of which ended up in a "drafting committee" with broad powers that "took account" of the equilibria and compromise amendments that emerged during the debate. This was possible because, formally speaking, the basis for the Herzog Convention's work was recognition and systematic comparison of all proposals and this, ultimately, was what legitimised the drafting committee's decisions. It also made it possible to overcome the serious problem of how to apply majority voting in such a heterogeneous body.

But it should also be observed that the notion of "convention" is in line with the general emergence today of polycentric and multi-faceted forms of political and institutional organisation – "in other words, institutions and combinations of institutions whose procedures for expression and decision-making are not based on representation but on debate between conflicting positions, where the issue is not the formation of a majority for or against, but negotiation and arbitration".[9] Rather than proceeding by majority decision, the procedure by discussion of the EU's constitutional convention-forum will allow for the presentation, within a coherent general plan, of alternative solutions on controversial individual points with straw polls to establish the proportions of support.

A third major problem concerns the convening of the Intergovernmental Conference in early 2004 or even the second half of 2003, when Italy holds the EU's rotating presidency. This assumes that the IGC will be rather brief, because of the imminent European elections and the appointment of a new Commission. It is also obvious, however, that this kind of scheduling would make it impossible for the Convention to complete all the requirements laid down under Article 48 of the TEU.

On the other hand, it is the IGC that is legitimated to make the definitive choice between the various alternatives on individual points. But this must be

[9] M. Morisi, Preface to F. Morata, *L'Unione europea* (Rome: Edizioni Lavoro, 1999), p. IX et seq.

considered in relation to the points made by the European Parliament regarding the Herzog Convention in a resolution approved on 16 March 2000: "any amendment to the Charter (adopted by the IGC) must be subject to the procedure adopted in relation to its original formulation" and "the Convention remains the sole body competent for the wording of the Charter until its proclamation".[10] These points should certainly not be left by the wayside in the new Convention.

Lessons from the Herzog Convention

The most striking and virtuous legacy of the Herzog Convention is the revolution it brought about in method. The Herzog Convention, which we can call Convention I, convincingly showed that it is feasible to move from the traditional intergovernmental diplomatic method to a parliamentary method (the parliamentary component was prevalent on that occasion and is again now).

The Laeken summit, held in December 2001, took this lesson to heart. The revolutionary method will allow the Union's institutional process to break its formal ties with the old concept based on international treaties and to become fully constitutional in nature. The decision-making procedure, including the unprecedented transparency given to the Convention's work through real-time information technology, is in itself an anticipation of the juridical quality of the result being aimed for.

But, while the experience of Convention I has provided decisive indications as to method, it would be a mistake if the Convention of the Future of Europe (Convention II) were to neglect other equally valid and precious lessons. It is important to recall, even if schematically, five other essential lessons.

The first is epitomised by two German monosyllables: *als ob*, as if. This was a tactic introduced by Chairman Herzog when Convention I got mired down in debate on what juridical value the Charter should be assigned. Let's work 'as if' we were to write a juridical text, he suggested, and then we can take it from there. This lesson will be useful for Convention II as well. In some quarters, people are saying the new Convention must go no further than drawing up indicative options or recommendations for the subsequent IGC, not least because the Convention's chairman, former French President Valery Giscard d'Estaing, has been musing about a long three-phase procedure: "listen, analyse, propose".

Yet now, as Convention II starts its work, it would be a good idea if it concentrated on building a text. As the European Parliament has stated, the resulting coherent text should then be sustained by a very ample consensus to be verified by straw polls. On the other hand, there is already a first basic text,

[10] "European Parliament resolution on the drafting of a European Union Charter of Fundamental Rights", A5-0064/2000.

with amendments and additions, on which work can begin, prepared by the European University Institute in Florence.[11]

The second lesson from Convention I suggests the wisdom of taking account of the very particular juridical environment characterising the Union, in which innovations are often met with suspicion by some member states. This can be dealt with by accepting a ruse which would reverse Giuseppe Tomasi di Lampedusa's maxim in *Il Gattopardo*: "In order for anything to change, everything, or almost everything has to stay as it was". In fact, Convention I seemed to have been set up for a non-creative task: simply to collect, order and find a "common denominator for assembly" of the fundamental rights.[12] Yet no jurist would now refuse to acknowledge the innovative capacity inherent in that Convention's "recognition" of rights, its exclusions and inclusions, and the exchanges set in motion by virtue of contiguity. If anything, many jurists are now concerned about the Charter's expansive thrust, the coordination it sets in motion and the guarantees it asserts, despite its incomplete juridical status.

Yet this "gentle law" approach, to use Gustavo Zagrebelski's words,[13] is the most advisable for Convention II. To achieve the best results, it has to start at the lowest level and reap the fruit of the movement for constitutional codification and normative and institutional consolidation.[14] Only by starting from this platform will an ambitious and consensual constitutional revision be possible.

This is also true for the extremely thorny issue of how powers should be divided between the Union, the member states and the constitutionally recognised regions: powers and responsibilities are at present interwoven in a knotty and virtually inextricable mass. Drawing up an impossible, static list of competences is not the way to solve the problem. Rather, dynamic criteria of prevalence and cooperation will have to be identified in the existing Community legal system, normative instruments and guarantees for rights categorised; in other words, visibility and value will have to be given to the juridical mechanisms able to indicate, case by case, which of the various political actors is the "correct" one for a certain competence, according to the principles of subsidiarity, proportionality and adequacy.

The third lesson is that institutions and norms should be classified in terms of principles of constitutional order. This allowed Convention I to avoid the pitfalls of the old classification of rights into civil, social, political and

[11] In response to a request from the Council and the Commission, the Institute produced a critical synthesis of the present treaties, separating the "constitutional" norms and principles from the apparatus of "ordinary" norms concerning the Union's various policies; European University Institute, *A Basic Treaty for the European Union* (Report 15 May 2000), European Union, Florence, 2000.

[12] A. Bourlot, V. E. Parsi, "Il "racconto" della cittadinanza europea nella Carta dei diritti fondamentali", *Cittadinanza e identità costituzionale europea* (Bologna: il Mulino, 2001) p. 105 et seq.

[13] G. Zagrebelsky, *Il diritto mite* (Turin: Einaudi, 1992).

[14] M. .A. Cabiddu, "Costituzione europea e Carta dei diritti fondamentali", *Profili della Costituzione economica europea* (Bologna: il Mulino, 2001) p. 177 et seq.

economic. The list of European rights has become lighter, more historical and more comprehensible by distinguishing them on the basis of the principles of dignity, freedoms, equality, citizenship, justice and solidarity.

This model should be followed in the drafting of the European constitution. It will necessarily be a constitution which orders processes: that is, a constitution which will have to solve, above all, the important problem of the circularity of decision-making in the institutional pluralism of the Union and the member states. Then, it will also have to solve, with a view to the imminent enlargement, the problem of reconciling a single institutional framework (Council, European Parliament, Commission, Court of Justice) with the diverse forms of enhanced cooperation that will arise among the member states, in law or in fact.

Launching this "process-based constitution" will necessarily call for the new Convention to create a reference framework of constitutional principles. As in Convention I, this framework will make it possible to insert institutional reorganisation measures into the system of constitutional principles by extracting from and innovating with respect to the existing legal systems in the Union and the member states.

In the new constitutional project, there will be three kinds of principles:

- Principles which impose values, those dictated by the Charter of Fundamental Rights and required to guide public action and regulation (while respecting dignity, freedoms, equality, citizens rights, justice and solidarity);
- Principles of a general organisational nature, which must guide procedures and the construction of institutions according to the criteria of pluralism (and hence also of national and local identities), subsidiarity, proportionality, adequacy, open coordination and sustainability;
- Principles of a specific organisational nature for sectoral policies which, purged of detailed rules, must outline the essential, constitutional physiognomy of cooperation between the Union and national and local governments in the various fields of public European action.

This is the interwoven set of principles which, as in Convention I, can give a solid definition to the system without making it too rigid through the introduction of mechanisms to handle excessive detail. Above all, it will offer those charged with taking the final decisions at the IGC in 2004 sufficient flexibility to overcome the inevitable, last-minute disagreements without changing the essence of the whole.

The fourth lesson to be learned from Convention I is to focus on citizenship as the founding nucleus for any future constitutional set-up. To use Alessandro Pizzorusso's words,[15] the "European constitutional heritage" shows that integration through rights proceeds more quickly than institutional

[15] A. Pizzorusso, *Il patrimonio costituzionale europeo* (Bologna: il Mulino, 2002).

politics, above all when, as Convention I did with its catalogue of rights, the entire jurisprudence formed around the rights is incorporated. In essence, Convention I envisaged citizens "armed" with their rights and guarantees. Now it is important that Convention II take over this internal dynamism of European citizenship and push it forward, beyond the point reached by the Charter.

Basically, the Charter gave original expression to the Union's identity. The rights it includes have acquired a distinct status compared with the same rights safeguarded in other fora.[16] With the Charter, European citizenship has been imbued with substance and context. The Charter has also confirmed the role of European citizenship as a meta-institutional bridge linking the Union of European states with the Union of European peoples. The new Convention should plug into this value of a "strengthened" citizenship without ever losing sight of its centrality and, hence, construct the Union's legal order from below, as an institutional process and organisation of citizenship.

The fifth lesson to be drawn from the Herzog Convention is to navigate using the "European social model" as a compass. The Charter's preamble, which balances the enjoyment of rights against "responsibilities and duties with regard to other persons, to the human community and to future generations", has given definitive form to an idea of Europe as a "civil power".

Now, in pace with the European construction, Convention II must take another tack. Convention I led "from the market to rights", but now the problem is to construct a "government for the European economy" which will achieve growth while respecting the constraints of social cohesion and fundamental rights enshrined in the principle of solidarity. The opposite path must be taken, "from rights to the market"; the Convention must be ready to prepare the ground for an overall political decision on how the Union should be organised in economic and social terms. In brief, because of the interdependence of the juridical, economic and political orders, it is the political constitution that must give birth to an economic constitution.

The degree to which principles of social cohesion, solidarity and workers' rights are introduced into this economic constitution against the determinism of the market will be a measure of the level of constitutional civilisation achieved by the Union's new constitutional order.[17]

Conclusions

Thus, there are five messages, warnings or lessons to be learned. But they should not simply be passed on like batons in a relay race; rather, they should

[16] M. Cartabia, "Allargamento e diritti fondamentali dell'Unione europea. Dimensione politica e dimensione individuale", *Dall'Europa a Quindici alla Grande Europa. La sfida istituzionale* (Bologna: il Mulino, 2001) p. 123 et seq.
[17] Cabiddu, "Costituzione europea e Carta ...".

be like bells that make us prick up our ears, for the success of the new Convention depends on its being accompanied by the European Parliament and the national parliaments, by the force of European public opinion, by a movement aware of what is at stake.

It is increasingly evident that the European constitutional order stands out as the juridical order of the process of European integration. This process is progressively creating a union of constitutions rather than a union of states. The "convention model" fits perfectly with this constitutional trend and underlines its modernity. As has been correctly noted, "within the context of a scheme for Community integration on a number of levels, this procedure represents a third way between integration guided externally by the Member States and the self-integration of the Community institutions. Because of the flexibility introduced by various criteria and levels of representation, the idea of constituent bodies with plural sources of legitimation could be adopted as a winning model in all cases of strong conflict within the Union".[18]

[18] C. Dell'Acqua, "Il diritto costituzionale nel sistema europeo a più livelli", *Osservatorio Costituzionale Luiss* no. 15, 2001, p. 12.