18 Europe 2004 – *Le Grand Débat*

Setting the Agenda and Outlining the Options

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The Future of Europe was the theme of a conference organized in Brussels between the 15th and 16th of October 2001 by the European Commission and the European University Council under the umbrella of the Jean Monnet Project. Some two hundred Jean Monnet Professors and other delegates participated. The Conference was intended as a free-wheeling debate on the future of Europe, and as the title suggests the idea was to identify some of the options. It came just as the debate was being launched in the Member States and the candidate countries: in Malta the national event was set to take place on the 17th and 18th of the month.

The background is the IGC due to be held in 2004 to lead, it is thought, to reform of the Treaties post-Nice. The largest issue is whether the European Union should be unequivocally vested with some express legal personality, the nature of which is as yet undetermined, and whether a Constitution should be drafted for the 'Union'. Nice left over four points for debate, namely

(a) the delimitation of the powers of the Union and the Member States,
(b) the status of the Charter of Fundamental Rights,
(c) the simplification of the Treaties,
(d) the role of the national parliaments in the 'European Architecture'.

It is clear that the Member States felt at Nice that there was a priority to clarify and to simplify the treaties. The Commission speakers at the conference were adamant on this point. The Commission obviously feels very strongly that Member states and the Institutions should have clear lines drawn on their respective competences, that those competences should be clearly stated and delimited, and that citizens should be and feel that they are part of the European Project.

The Process

The summit at Laeken in Belgium in December 2001 (which will have taken place by the time this is published) will decide whether a blueprint for all this will come from the Council Secretariat or from a Convention in the sense and in the model of the gathering, or forum, constituted to produce the Charter of fundamental Rights, which experiment many see as having worked. Let it be said that at the conference there were those who warned against that model. Strong views were expressed, for example by Prof. J. Weiler, that the Charter was a document which would fail the scrutiny of a legal draftsman and was much coloured by the need to produce a document for 'the citizen' rather than a binding legal text. This although it is clear that the European Court will cite it, as it already has. Yet we wait to see exactly what the Court will make of it when a case arises which calls for strict interpretation and a possible conflict of sources. Whatever the argument of substance, the Commission seems very keen to use the 'Convention procedure' for arriving at proposals, and this will certainly involve the participation of the European Parliament, of national members of parliament from the Member States, probably two each, and will likely involve also 'representatives' from the candidate countries as well as representatives from the commission and possibly some academics. No final conclusion was reached on this at the Conference, and it will be for Laeken to decide on the procedure, but as I say there were serious misgivings on the part of several academics in general terms as to the suitability of the convention process, one merit of which was that it operated in the case of the Charter on the basis of consensus. This meant that all participants agreed on the text, which then all Member States agreed upon but, it was argued by some, that this result was at the cost of ambiguity and uncertainty. It is not clear that a Convention will lead to the sort of text which can then be used for Treaty amendment, at least directly.

A Constitutional Architecture?

From the discussion on process, the conference moved on to the 'Constitutional Architecture' of the Union. The point was made early on that we perhaps do not yet even have the vocabulary we need. The prevalent view seemed to emerge quite early that there was no foreseeable prospect (not in our lifetime, some said) of a super-state emerging. So, no federal state was in the offing, most agreed. However, it was acknowledged that the mix of federal and intergovernmental elements needs to be clarified somehow, even while avoiding statist terminology. The idea of a Constitution was not pushed hard, except that it was suggested by some that calling something like a basic document to be produced the Constitution of the Union

would give a message to the citizens of the Union. The main paper was presented by Professor Griller whose approach was conservative: avoid any reference to the '*finalité politique*' because there is no shared ultimate goal; rather, he suggested, the goal should be to remedy the deficiencies in the system: lack of clarity and transparency etc. Of course, on the face of it this is simply a call for more of the same approach of the last twenty years, 'incrementalism', but Professor Griller did speak of legal personality for the Union and amending the Treaty amendment rules, including that of unanimity, and he would give the European Parliament a say in treaty amendment. He advocated extended co-decision, would restrain the use of enhanced co-operation, and generally argued for deepening on such lines. It is not clear whether this is Joschka Fisher's idea of a 'Federation but not a super-state', but there are certainly many overtones thereof.

On the question of listing respective competencies, while one would have thought this would clarify some very difficult areas in European Law, such as which powers are exclusive, some speakers thought that there should not be such a listing. The general view was that there could be some clarification but that the evolutionary approach should be retained. Of course the backdrop is that all member states would have to agree on the list. Bruno de Witte in fact proposed dividing competencies into exclusive, 'complementary' (as in education, culture etc., where the role of the Community is, at the highest, only to co-ordinate national policies, and 'shared' (the vast majority of competences). The exclusive powers would be named: there are only two (international trade in goods, and the protection of marine resources). He proposed the inclusion of a new 'Article 5 bis,' which would cover the issue but with the emphasis on clarification of the existing position.

Again here the gist is that while it is agreed that the Treaties are of constitutional effect, the Union construct is atypical and that federal constitutional models do not necessarily assist, so what is required mainly is for the gaps or deficiencies in terms of legal certainty to be filled by minimalist drafting changes.

Let it be said that while the suggestions for reform of the Treaties made at this first academic conference can be described as modest, this does not exclude ambitious proposals from being made by a Convention in theory. However, I doubt that they will be, at this stage. While there seems to be general agreement that there must be further clarity in view of enlargement in particular, I derived the sense that most of the delegates feel that the legal order of the Community and Union can well cope with the demands of enlargement without radical constitutionalization. However, as I say, there are those who think otherwise, who are concerned at the retention of unanimity in certain areas on the ground that it may prove impossible to secure unanimity on, for example, proposals for Treaty amendments in the future (leading to sclerosis, or widespread use of enhanced co-operation).

On the whole, it is perhaps fair to state that the general feeling was that both the Union and the Member States contribute to a system of multi-level governance in which power and action capacities are shared rather than divided and that this should not change. This would not necessarily be the Fischer model, but could involve further 'federalization' of the model of governance in Europe. If the essential issue is whether the Union should be based on a system of shared or of divided sovereignty, then the bias seems in favour of the former. The member states would remain at the heart of the Union. National Parliaments would be brought into the model in an unprecedented, but as yet undetermined, way.

What this leaves is to determine, or at least clarify, what is to be done at Union level, how it is to be done, and how the institutions can be made more democratic and more representative. Nor was the creation of new institutions or bodies excluded.

There was full support at the conference for the inclusion of national parliaments in the decision-making processes of the Union, but no clear vision as to how this might happen. One suggestion worthy of note was that a 'Subsidiarity Committee' might be set up involving national parliamentarians, one of whose tasks would be to examine European law for observance of subsidiarity (and proportionality). Added to national parliamentary scrutiny procedures, which in some Member States need to be strengthened in any case, it seems to me that this would be a powerful tool for national control of the exercise of power by the Institutions.

The Status of the Charter of Fundamental Freedoms

As to the Charter and the question of its legal effect and possible incorporation into a basic constitution, again no clear line in favour emerged. Most of the speakers were hesitant. Indeed there was general hesitancy about rocking the boat too much; about raising too starkly the albeit mostly theoretical points of conflict. Indeed, the tendency was to regard the possibility of conflict as hypothetical. Professor MacCrudden pointed out that while we now have a Charter of Fundamental Rights, it is not clear whether this is to signify a real shift in the nature of the Union.

A strong thread of thought expressed by many was that while the Commission is emphasizing the use of the 'Community method' (commission proposal, co-decision, European Court of Justice) wherever possible, ostensibly at least (some said) for simplicity's sake, the reality is that its paper on European governance of July 2001 itself points out the use which is being made and could further be made of other mechanisms of co-operation, that is of soft law and soft procedure, such as the 'open method of co-operation' being used in a

number of sensitive areas, including Justice and Home affairs, with its emphasis on guidelines, national plans, peer review and exchange of experience and so on.

This has been an attempt to do justice to the papers presented at the Conference and to the discussion which took place there, while informing and stimulating readers totake the debate further in this country. Readers are urged to study these issues further by referring to the various web sites covering the Future of Europe debate and the related European Governance (and its contribution to global governance) debate. In particular, readers can visit:

www.europa.eu.int/futurum
www.europa.eu.int/comm/governance
www.jeanmonnetprogram.org/papers

What is clear, as Peter Ludlow has put it, is that whatever the outcome in 2004, the IGC will be the closest thing to a constitutional conference that there has been in the EU's 50-year history. It is vital that in such a process there be the widest public debate across Europe.

Note: At the time of submission of this piece for publication, the Laeken summit had just taken place putting into place the mechanism for the Convention, much on the lines foreseen at the Conference. Work will now start in earnest in March of 2002.