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Conventions in Comparative Constitutional Law

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Conventions in Comparative Constitutional Law

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“Convention” is an ambiguous term, not only for lawyers, containing a wide variety of different meanings. Even when restricted to denote an assembly it may be used for all sorts of gatherings. In the context of constitutional law a convention is a very specific instrument, and the question is to what extent it is actually known in European constitutional law and whether the “Convention on the Future of Europe” as called forth by the Declaration of Laeken conforms to what is understood in constitutional law by “convention”.¹ Or did the Laeken Council pick up a term without any foundation in European constitutional law, rarely practiced and even less understood, the only precedents of which are supposed to be the American Federal Convention in Philadelphia in 1787 and the convention that drafted the European Charter on Fundamental Rights, as can be read time and again?²

As it is the privilege of the constitutional historian to make aware the evolution of legal institutions and to analyze their conferred meaning so that they will be available in political discourse, I shall examine the meaning of “convention” in constitutional history and comparative constitutional law in a first part, while a second part will place the Convention on the Future of the European Union according to its composition and commission into the context of constitutional conventions as understood in law.

¹ Laeken Declaration on the Future of the European Union, <http://european-convention.eu.int/enjeux.asp?lang=EN> (15 January 2003).

² Cf. “The Convention on the Future of Europe begins its work [Editorial]”, in: *European Law Review*, 27 (2002), 119; Beate Neuss, “Die Krise als Durchbruch. Die EU zwischen Vertragsreform und Verfassungsentwurf”, in: *Internationale Politik*, 57 (2002), 9-10; Waldemar Hummer, “Vom Grundrechte-Konvent zum Zukunfts-Konvent. Semantische und andere Ungereimtheiten bei der Beschickung des ‘Konvents zur Zukunft Europas’”, in: *Zeitschrift für Parlamentsfragen*, 33 (2002), esp. 325-328; Norbert K. Riedel, “Der Konvent zur Zukunft Europas. Die Erklärung von Laeken zur Zukunft der Europäischen Union”, in: *Zeitschrift für Rechtspolitik*, 35 (2002), esp. 242; also “The EU’s constitutional convention: The founding fathers, maybe”, in: *The Economist*, 23 February 2002, 33; Youri Devuyt, *The European Union at the Crossroads. The EU’s Institutional Evolution from the Schuman Plan to the European Convention*, 2nd ed., Brussels etc.: P.I.E.-Peter Lang, 2003, 34-35.

1. Conventions in Constitutional History and Law

Historically, conventions made their first appearance in constitutional law in the context of the English constitution. Until today the constitution of the United Kingdom comprises some long-established conventions as non-legal rules of the constitution,³ conventions as they are also known in some other countries as part of the constitution.⁴ More pertinent to the case at hand is, however, that “extraordinary assembly of parliament” in seventeenth-century England, which the *Encyclopédie* of Diderot and d’Alembert already mentioned in analyzing the different meanings of “convention”.⁵ The legal standing of this particular assembly was provided, several years after the *Encyclopédie*, by William Blackstone. In the course of its history England had twice experienced so-called Convention Parliaments, in 1660 and in 1688/89. They had been normal parliaments in all but in name, for in the absence of a monarch they had assembled without royal summons. Blackstone’s legal reasoning was compelling: “[I]n such a case as the palpable vacancy of a throne, it follows *ex necessitate rei*, that the form of the royal writs must be laid aside, otherwise no parliament can ever meet again [...] So that, notwithstanding these two capital exceptions, which were justifiable only on the principle of necessity, (and each of which, by the way, induced a revolution in the government) the rule laid down is in general certain, that the king, only, can convoke a parliament.”⁶

These two parliaments which had introduced substantial constitutional change in the country, had not been parliaments in a strictly legal sense, but only conventions which styled themselves parliaments or convention parliaments. Interestingly enough and in contrast to Blackstone, it was not the political reason – the necessity of a parliament in the absence of a monarch – but its constitutional aspect – major changes brought about in the constitution of the country – which proved to have a resounding impact almost a hundred years later.

³ Cf. Geoffrey Marshall, *Constitutional Conventions. The Rules and Forms of Political Accountability*, Oxford: Clarendon Press, 1984.

⁴ Cf. Andrew Heard, *Canadian Constitutional Conventions. The Marriage of Law and Politics*, Toronto: Oxford University Press, 1991.

⁵ *Encyclopédie, ou Dictionnaire raisonné des sciences, des arts et des métiers, par une société de gens de lettres*, ed. by Denis Diderot and Jean-Baptiste d’Alembert, IV, Paris : Briasson et al., 1754, 164, cf. the whole article, 161-164.

⁶ William Blackstone, *Commentaries on the Laws of England*, 4 vols., Oxford: Clarendon, 1765-69 (repr. Chicago-London: University of Chicago Press, 1979), I, 148.

More than a decade before the famous Philadelphia Convention of 1787 assembled, Americans had started to think about the Glorious Revolution in England and its convention parliament in 1688-89 and what had gone wrong with it during the course of the eighteenth century so that what had helped to secure English liberty could have become tyrannical from an American perspective, almost a hundred years later. Out of the numerous reflections on conventions, legislatures, and constitutions, the ideas pinned down by the town meeting of Concord, Massachusetts, on October 22, 1776, are particularly illuminating, as it resolved: "That the Supreme Legislative, either in their Proper Capacity, or in Joint Committee, are by no means a Body proper to form and Establish a Constitution; for Reasons following. first Because we Conceive that a Constitution in its Proper Idea intends a System of Principles Established to Secure the Subject in the Possession and enjoyment of their Rights and Privileges, against any Encroachments of the Governing Part—2d Because the Same Body that forms a Constitution have of Consequence a power to alter it. 3d—Because a Constitution alterable by the Supreme Legislative is no Security at all to the Subject against any Encroachment of the Governing part on any, or on all their Rights and privileges. Resolve 3d. That it appears to this Town highly necessary and Expedient that a Convention, or Congress be immediately Chosen, to form and establish a Constitution, by the Inhabitents of the Respective Towns in this State [...] Resolve 4th. that when the Convention, or Congress have formed a Constitution they adjourn for a Short time, and Publish their Proposed Constitution for the Inspection and Remarks of the Inhabitents of this State."⁷

The Concord Resolution is not only of major importance for its early definitions both of a modern constitution and of a convention, but also as a critique both of 1688-89 and of some conventions that had already taken place in several American states in 1776 as in Pennsylvania where, just a few weeks earlier, a convention had adopted the Pennsylvania constitution of 1776. More closely to the English example, in Pennsylvania it had been an elected convention which had drafted the constitution and, without submitting it to the people, in its own right had adopted it, while at the same time performing legislative functions.

⁷ *The Popular Sources of Political Authority. Documents on the Massachusetts Constitution of 1780*, ed. by Oscar and Mary Handlin, Cambridge, Mass.: Belknap Press, 1966, 152-153.

John Alexander Jameson in his classic *The Constitutional Convention* called this kind of convention a revolutionary convention,⁸ which in his view was in terms of law completely different from the most mature form of conventions, the constitutional convention, which also was the form the people of Concord seemed to have had in mind. The definition Judge Jameson gave of a constitutional convention a hundred and thirty years ago is sound theory still today. According to him, the constitutional convention differs from the revolutionary convention “not simply as having for its object the framing or amending of Constitutions, but as being within, rather than without, the pale of the fundamental law; as ancillary and subservient and not hostile and paramount to it. This species of Convention sustains an official relation to the state, considered as a political organization. It is charged with a definite, and not a discretionary and indeterminate, function. It always acts under a commission, for a purpose ascertained and limited by law or by custom. Its principal feature, as contradistinguished from the Revolutionary Convention, is, that at every step and moment of its existence, it is subaltern, – it is by the side and at the call of a government preëxisting and intended to survive it, for the purpose of administering to its special needs. It never supplants the existing organization. It never governs. Though called to look into and recommend improvements in the fundamental laws, it *enacts* neither them nor the statute law; and it performs no act of administration.”⁹

What Jameson described was how to make liberty, democracy, and the rule of law prevail in the inevitable process of changing the constitution. Instead of political upheaval the orderly process of a constitutional convention was to give direction to necessary changes, and there is virtually no American state which does not subscribe to this instrument for altering and amending its constitution, though increasingly as merely one possibility among several. Throughout history, including the most recent past, however, other options for the amending process have mostly been used, and on a national scale the convention method, though expressly stated in article V of the U.S. Constitution, was never taken up again after 1787. One of the reasons for the reluctance to make use of it seems to be the – exaggerated, as several authors argue – fear that a

⁸ John Alexander Jameson, *The Constitutional Convention; Its History, Powers, and Modes of Proceeding*, 3rd ed., Chicago: Callaghan and Company, 1873, 6-9, 129-130.

⁹ Jameson, *The Constitutional Convention*, 10.

constitutional convention may get out of control and "run away",¹⁰ and the Philadelphia convention of 1787, the pretended example for the Convention on the Future of the European Union, has often been described as a runaway convention.¹¹

After all, the Annapolis Convention of 1786 had suggested to call for a new convention in Philadelphia in 1787 "to take into Consideration the situation of the United States, to devise such further Provisions as shall appear to them necessary to render the Constitution of the Foederal Government adequate to the exigencies of the Union".¹² Congress adopted the suggestion and resolved that delegates be sent to Philadelphia "for the sole and express purpose of revising the Articles of Confederation".¹³ No doubt, the Philadelphia Convention had no mandate to draft a new constitution. Moreover, it also created its own rules for adopting its draft. Article VII of the proposed constitution decreed: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution." This was written in open contradiction to existing constitutional law which ruled out any alteration of the Articles of Confederation unless it be "agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State".¹⁴

Politically successful as the Philadelphia Convention was, in strict terms of existing constitutional law it was unconstitutional, a questionable model for the Convention on the Future of the European Union. The aura, or more appropriately, the mystification of the Philadelphia Convention, however, gave momentum to the term. But with regard to theory the example set by Massachusetts in 1779-80, after the failure of a previous attempt to establish a

¹⁰ Cf. Russell L. Caplan, *Constitutional Brinkmanship. Amending the Constitution by National Convention*, New York: Oxford University Press, 1988.

¹¹ Cf. David G. Smith, *The Convention and the Constitution. The Political Ideas of the Founding Fathers*, Lanham, MD: University Press of America, 1987, 21-26. Cf. also Joseph J. Ellis, *Founding Brothers. The Revolutionary Generation*, New York: Alfred A. Knopf, 2000, 8.

¹² *Documentary History of the Constitution of the United States, 1786-1870. Derived from the Records, Manuscripts, and Rolls Deposited in the Bureau of Rolls and Library of the Department of State*, 3 vols., Washington: Department of State, 1894-1900, I, 5.

¹³ *Documentary History of the Constitution of the United States*, I, 8. Cf. *1787: Drafting the U.S. Constitution*, ed. by Wilbourn E. Benton, I, College Station: Texas A & M University Press, 1986, 47-83; *Creating the Constitution*, ed. by John P. Kaminski and Richard Leffler, Acton, MA: Copley, 1999, 49-50, 61-63.

¹⁴ Articles of Confederation, art. XIII, in: *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States*, ed. by Francis Newton Thorpe, 7 vols., Washington: Government Printing Office, 1909, I, 15.

constitution, became more important. Approaching the design Jameson later described, the legislature called for the election of a convention to draft a constitution to be submitted to the people for consideration. It was this classic example, not the Philadelphia Convention, that in decades to come and with some subsequent sophistication found its way into American state constitutions. But even today, with the almost exclusive fixation on the national constitution and its history and the disregard of state constitutional development, the idea of a constitutional convention still seems to require explanation as to its “myths and realities” and its function as “a democratic remedy for problems in a democratic society”.¹⁵

What was debated in the United States and overshadowed by a domineering though unique event hardly offered itself as paradigm in Europe. It has been argued that the French Revolution in 1792 took up the name “Convention” in referring to American models.¹⁶ With the existing English, Pennsylvania, Massachusetts, and Philadelphia type of convention available to the French revolutionaries in 1792 as a model, their choice appears to be nothing but self-evident. Already in August 1791, an intense debate had taken place about how to alter and amend the constitution written during the preceding months and whether a convention was the appropriate means for this purpose. The proponents of a sovereign convention of the English or Pennsylvania type were met by those of a subaltern convention of the Massachusetts or Philadelphia type. Both failed to win their argument, because a majority believed that the constitution should be fixed and stable in order to clearly signify the termination of the revolution without, however, realizing that a constitution can only last, if the “democratic remedy” of a workable process for amending and revising it is provided.¹⁷

When the inevitable failure of the Constitution of 1791 came, the revolutionary convention of 1792 was the obvious result. In every sense it was the opposite of Jameson’s constitutional convention: It was paramount and unlimited, it

¹⁵ Paul J. Weber and Barbara A. Perry, *Unfounded Fears: Myths and Realities of a Constitutional Convention*, New York-Westport, CT-London: Greenwood Press, 1989, 106.

¹⁶ Cf. the introductory remarks by Jacques Godechot in his edition of *Les Constitutions de la France depuis 1789*, Paris: Flammarion, 1979, 69.

¹⁷ Cf. Horst Dippel, “La Constitution entre permanence et insurrection: L’idée d’une Convention nationale dans les débats d’août 1791”, in : *La Constitution dans la pensée politique. Actes du XIV^e colloque de l’A.F.H.I.P. (Bastia, 7-8 septembre 2000)*, ed. by Michel Ganzin, Aix-en-Provence: Presses Universitaires d’Aix-Marseille, 2001, 205-228.

governed, and it enacted laws, even though its constitution was submitted to the people. Even more important and of lasting consequence was its rule by terror, thus discrediting this kind of convention in Europe for generations to come. For a long time, the first convention in modern European constitutional history remained the only one. Wherever political change came abruptly or by revolutionary means with a new order resulting in deliberations on a new constitution, the preferred model was that of a constituent assembly, which may be understood as equivalent to a revolutionary convention, but which was never named so. Most of the constitutions they produced addressed the question of amendment and revision. But if we look at the European constitutions of the nineteenth and twentieth centuries, none of them is known to have provided the institution of a constitutional convention for the amending process.

Nevertheless, conventions now and then made their brief appearance. In March 1848, the Federal Assembly of the German Confederacy reacted to the revolutionary upheavals with a call for a committee of seventeen “men of public confidence” (“Männer des allgemeinen Vertrauens”) to revise the Constitution of the German Confederacy. According to Jameson’s definition, this committee, which handed over its draft by the end of April 1848,¹⁸ may have easily passed for a constitutional convention, but, obviously, it was never named so. Not until a hundred years later, a constitutional convention made its first official appearance in German history with the *Verfassungskonvent von Herrenchiemsee*. In reality, it was a committee of experts, called together by the West German Prime Ministers from August 10 to 23, 1948, to prepare the work for the *Parlamentarische Rat* (Parliamentary Council) which was to meet from September 1, 1948 on, to draft the West German constitution (*Grundgesetz*). Regarding their commission it was substantially inferior to that of the Committee of Seventeen, and contemporaries had the impression that with regard to the meaning of constitutional convention the label *Verfassungskonvent* was “hardly a fitting name”,¹⁹ whereas the *Parlamentarische Rat* – a curious name by any standard for a constitution-making body – had a much more convincing claim to

¹⁸ Cf. Horst Dippel, “Das Paulskirchenparlament 1848/49: Verfassungskonvent oder Konstituierende Nationalversammlung?”, in: *Jahrbuch des öffentlichen Rechts der Gegenwart*, N.F. 48 (2000), esp. 11-15.

¹⁹ Hermann von Mangoldt, “Zum Beruf unserer Zeit für die Verfassungsgebung. Grundsätzliches zu den Bonner Verfassungsarbeiten”, in: *Die öffentliche Verwaltung*, 1 (1948), 52; cf. Horst Säger, “Verfassungskonvent 1948”. In: *Die öffentliche Verwaltung*, 51 (1998), 784-792.

the name “convention”.²⁰ Italy had just made the opposite experience with the *Costituente* (1946-47) that had been modeled less along the classic example of the French Constituent Assembly of 1789-91 and adopted at least some of the features of a constitutional convention, though without adopting its name.²¹

In concluding this brief historical survey it can be stated that a constitutional convention is no established institution in European constitutional law. No constitution of the actual fifteen member states of the European Union knows this instrument for altering or amending its constitution. In spite of some vague intellectual appeal of constitutional conventions in the past, they had practically no impact on European constitutional law. What we have, however, here as in other parts of the world, are conventions as deliberative, mostly cross-party bodies unknown to the existing constitutional law. They may deal with constitutional issues, such as the Scottish constitutional conventions of the 1920s, the 1940s, and, more recently of 1989-91.²² Another example is Australia, which in recent decades experienced two conventions, the last of which in 1998.²³ More recently, on March 31, 2003, a first “Convention on Federalism” took place in Germany.²⁴

In contrast to these constitutional conventions operating outside the established constitutional law and normally without direct impact on existing constitutions, Argentina owes its present constitution of 1994 to a body around former presidents Menem and Alfonsín, which styled itself “Constitutional Convention” and decreed: “The prescribed Constitutional text, sanctioned by the

²⁰ I am grateful to Professor Dieter Mahncke for this suggestion.

²¹ Cf. recently Carlo Ghisalberti, *Storia costituzionale d'Italia 1848/1994*, 18th ed., Rome and Bari: Laterza, 2002, esp. 405-416; id., “Alle origine della costituzione repubblicana (1943-1946)”, in: *Verfassungsgebung, partitocrazia und Verfassungswandel in Italien vom Ende des II. Weltkrieges bis heute*, ed. by Hartmut Ullrich, Frankfurt: Peter Lang, 2001, 41-56; Pietro Scoppola, “La costituzione nella storia dell'Italia unita”, in: *Dalla costituente alla costituzione. Convegno in occasione del cinquantenario della costituzione repubblicana (Roma, 18-20 dicembre 1997)* (*Atti dei convegni Lincei*, 146), Rome: Accademia nazionale dei Lincei, 1998, esp. 25-33.

²² Cf. James Mitchell, *Constitutional Conventions and the Scottish National Movement: Origins, Agendas and Outcomes* (*Strathclyde Papers on Government and Politics*, 78), Glasgow: Department of Government, University of Strathclyde, 1991.

²³ Cf. Heather McRae and Anne Mullins, *Australian Constitutional Convention 1973-1985: A Guide to the Archives*, Melbourne: Centre for Comparative Constitutional Studies, 1998; Steve Vizard, *Two Weeks in Lilliput. Bear-baiting and backbiting at the Constitutional Convention*, Ringwood, Victoria: Penguin, 1998.

²⁴ Cf. *Frankfurter Allgemeine Zeitung*, 1 April 2003, 7.

Constitutional Convention, replaces the one existing until now.”²⁵ The Constitution itself, however, does not know the institution of constitutional conventions for revising or amending it.

Other Latin American countries adopted the institution, though most of them under the designation “Asamblea Nacional Constituyente”. But meaning and function differ from one country to the next, Nicaragua being the only one where the “Asamblea Nacional Constituyente” really is a ruling French-type Constituent Assembly, elected for drafting and adopting a new constitution and replacing an existing National Assembly.²⁶ For drafting a new constitution Costa Rica also prescribes an “Asamblea Nacional Constituyente”, but this time, as in the other Latin American cases, it is more properly a constitutional convention acting beside an existing legislature,²⁷ just as in Guatemala whose constitution mandates specific stipulations and articles only to be revised by a convention styled “Asamblea Nacional Constituyente”, while others may be changed by the legislature, and some are not to be altered at all.²⁸

Comparable to most North American state constitutions, Latin American constitutions hardly give us any clue as to the legal definition of their conventions, whether called Constituent Assembly or Constitutional Convention. However, the Constitution of Colombia, which acknowledges three ways of changing the constitution, specifies in case an Asamblea Constituyente is chosen: “A partir de la elección quedará en suspenso la facultad ordinaria del Congreso para reformar la Constitución durante el término señalado para que la Asamblea cumpla sus funciones.” And it adds: “La Asamblea adoptará su propio reglamento.”²⁹ Of all current Latin American constitutions only those of Uruguay and of Paraguay properly call this body “Constitutional Convention”, with the Paraguayan Constitution being most precise: The number of its members shall not exceed those of both houses of Congress, and the Convention has also the right to sanction the new constitution. Most interesting is article 291, an almost *verbatim* quotation from Jameson’s definition: “La

²⁵ Constitution of Argentina of 1994, Transitional Provisions, art. 17, as in: *Constitutions of the Countries of the World*, ed. by Gisbert H. Flanz, 20 Binders, Dobbs Ferry, N.Y.: Oceana Publications, 1971–.

²⁶ Constitution of Nicaragua of 1995 (tit. X, art. 193).

²⁷ Constitution of Costa Rica of 1949 (art. 196, as amended by Law 4123, May 31, 1968).

²⁸ Constitution of Guatemala of 1985 as amended by Legislative Accord No. 18-93 of 1993 (art. 278-281). Cf. also the constitution of Venezuela of 1999 (tit. VIII, ch. III, art. 343-350).

²⁹ Constitution of Colombia of 1991 (art. 376, cf. art. 374-379).

Convención Nacional Constituyente es independiente de los poderes constituidos. Se limitará, durante el tiempo que duren sus deliberaciones, a sus labores de reforma, con exclusión de cualquier otra tarea. No se arrogará las atribuciones de los poderes del Estado, no podrá sustituir a quienes se hallen ejercicio de ellos, ni acortar o ampliar su mandato.”³⁰

A similar understanding of constitutional conventions is to be found in the Constitution of the Marshall Islands, which states that a Constitutional Conventions “shall be organized and shall proceed according to its own internal rules”, and adds: “It shall be beyond the authority of a Constitutional Convention to consider or adopt amendments that are unrelated to or inconsistent with the proposals presented to it by the [legislature] or by referendum.”³¹ The last example is the constitution of the Philippines, which, again, is silent as to the legal status of the Convention.³²

In concluding this survey it may be summarized that in practice as well as in theory constitutional conventions are a major American contribution to constitutional law, which never took root in European constitutional law. Outside of Europe, they are, however, widely known in the Americas and in the American influenced Pacific area where they continue to constitute an established institution. In its most classic form, as supported in constitutional theory, a constitutional convention is an elected body acting under the commission of and beside an existing legislative body for the sole and express purpose of drafting or revising a constitution afterwards to be presented to the people for their approval or rejection.

2. The European Convention in the Context of Comparative Constitutional Law

In view of these results, the question remains why the Laeken Declaration took up the name “convention”, so uncommon in European constitutional law? A deliberate link with the Philadelphia Convention seems as unwise as improbable, and the remarks Valérie Giscard d’Estaing made in his “Henry

³⁰ Constitution of Paraguay of 1992 (tit. IV, art. 289, 291). Cf. Constitution of Uruguay of 1967 as amended to 1996 (sec. XIX, ch. III, art. 331).

³¹ Constitution of the Republic of the Marshall Islands of 1979 (art. XII, sec. 4).

³² Constitution of the Republic of the Philippines of 1986 (art. XVII).

Kissinger Lecture” at the Library of Congress on February 11, 2003, tend to indicate that he preferred not to bring the two conventions into too narrow a relationship.³³ As there is no indication of the impact of any other model described, the only remaining reference that comes to mind is that to the convention which drafted the Charter of Fundamental Rights of the European Union.

Before agreeing on this model, we should remember the history of that particular convention. When the European Council decided to establish it at the conferences in Cologne (3-4 June 1999) and Tampere (15-16 October 1999), it obviously did not know how to name it, which comes as no surprise in view of the fact that constitutional conventions are unknown in European constitutional history and law. In the English version it was said that “a draft of such a Charter of Fundamental Rights of the European Union should be elaborated by a *body* composed of representatives of the Heads of State and Government and of the President of the Commission as well as of members of the European Parliament and national parliaments”.³⁴ The French version took recourse to the word “enceinte”. In Spanish and Italian it read “órgano”, quite similar to the Swedish “organ”, whereas the Danish preferred “udvalg”. The Portuguese translation speaks of “instância”, while in German it says “Gremium”. The Dutch translation could not even settle on a single term and alternately used “vergadering” and “forum”. This linguistic overview may be sufficient proof that the word “convention” appears not to have been available.

With regard to this Babel of languages, it is hardly surprising that on the first working meeting of the “Body” on 1 February 2000, item two on the agenda read: “Name of the Body”.³⁵ The subsequent record of the meeting laconically states: “The question of the name of the body (item 2 on the agenda) was settled, with the approval by a large majority of the term “Convention”.³⁶ It was

³³ Cf. the few remarks on the Philadelphia Convention by Valérie Giscard d’Estaing in his “Henry Kissinger Lecture” at the Library of Congress, Washington, D.C., 11 February 2003, <http://european-convention.eu.int/docs/speeches/7072.pdf> (13 February 2003).

³⁴ <http://ue.eu.int/df/default.asp?lang=en> (9 March 2003) (own emphasis, HD). The website also leads to the different languages subsequently referred to.

³⁵ <http://ue.eu.int/df/default.asp?lang=en> (9 March 2003).

³⁶ <http://ue.eu.int/dfdocs/EN/04134/En.pdf> (12 March 2003)

the Convention itself which thus assumed this name, and when it published its final draft, it presented itself as “[t]he body, known as ‘the Convention’ [...]”.³⁷

The European Parliament eagerly took up the new designation,³⁸ and vehemently called for a European convention to suggest further constitutional changes. In its resolution on the Treaty of Nice and the future of the European Union, it “recommend[ed] the establishment of a Convention (to start work at the beginning of 2002), with a similar remit and configuration to the Convention which drew up the Charter of Fundamental Rights, comprising members of the national parliaments, the European Parliament, the Commission and the governments, the task of which would be to submit to the IGC a constitutional proposal based on the outcome of an extensive public debate and intended to serve as a basis for the IGC's work”.³⁹ It was, therefore, left to Pat Cox, President of the European Parliament, on the occasion of the solemn opening of the Convention on the Future of Europe (28 February 2002) to welcome the European Convention “to the place where the idea of this Convention was born”.⁴⁰

It was the Herzog commission's usurpation of the popular term “convention” for itself, despite the lack of an authoritative definition in European constitutional law, which helped to establish it in European politics, although neither the makeup of the Herzog commission nor the provisions for submitting and adopting or rejecting its draft corresponded to the prevailing understanding of a

³⁷ Council of the EU (ed.), *Charter of Fundamental Rights of the European Union. Explanations relating to the complete text of the Charter. December 2000*, Luxembourg: Office for Official Publications of the European Communities, 2001, 5.

³⁸ Cf. the speeches by Nicole Fontaine President of the European Parliament at the Special Meeting of the European Council in Feira on 19 June 2000 (http://www.europarl.eu.int/summits/fei-pres_en.htm; 9 March 2003) and at the opening of the European Council in Biarritz on 13 October 2000. (http://www.europarl.eu.int/summits/biar-pres_en.htm; 9 March 2003).

³⁹ http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=DOCPV&APP=PV2&LANGUE=EN&S DOCTA=4&TXTLST=1&POS=1&Type_Doc=RESOL&TPV=PROV&DATE=310501&PrgPrev=TYPEF@A5|PRG@QUERY|APP@PV2|FILE@BIBLIO01|NUMERO@168|YEAR@01|PLAGE@1&TYPEF=A5&NUMB=1&DATEF=010531 (9 March 2003). Already before the European Council meeting at Nice, the European Parliament as also the German government had suggested that the convention model might be applicable for the reforms of the Union to be achieved until 2004, cf. Gunter Pleuger, “Die institutionelle Reform der Europäischen Union: Perspektiven auf dem Weg nach Nizza”, in: Walter Hallstein-Institut für Europäisches Verfassungsrecht (ed.), *Die Reform der europäischen Institutionen*, Baden-Baden: Nomos, 2002, 127, 130.

⁴⁰ <http://www.europarl.eu.int/president/speeches/en/sp0004.htm> (9 March 2003). Cf. Cécile Barbier, *La Convention européenne. Genèse et premiers résultats (Courrier hebdomadaire, n° 1776-1777)*, Brussels: Centre de recherche et d'information socio-politiques, 2002, 11-13; Daniel Göler, *Die neue europäische Verfassungsdebatte. Entwicklungsstand und Optionen für den Konvent*, Bonn: Europa Union Verlag, 2002, 71-77.

constitutional convention. Viewed in this light, the Laeken Declaration can hardly lay claim to having expressed a breathtaking vision of a new Europe sanctioned by instituting what in other contexts might be considered as a “democratic remedy for a democratic society”. Driven instead, especially after the failures at Nice, by the attempt to acknowledge what appeared to be inevitable, it adopted the request for an institution outside the Intergovernmental Conferences, which, *faut de mieux*, it called convention, thus taking up a household name without meaning and substance in European constitutional law and already disfigured by the Convention on the Charter of Fundamental Rights. For the European Heads of State and Government, however, the name could be considered as an ideal precondition for meeting public demands, while at the same time reducing the risk of undermining the position of the Intergovernmental Conference.

The Laeken Declaration carried the deformation of the convention from the perspective of established constitutional theory even further than the commission for the preceding convention had dared to. European political realities forbade any reference to the resolution of the Annapolis Convention of 1786, which provided a phrasing so appropriate to the situation that only minor changes would have been needed to use it for calling the European Convention “to take into Consideration the situation of the [European Union], to devise such further Provisions as shall appear to them necessary to render the [European Treaties] adequate to the exigencies of the Union”. The similarity of purpose might then have led to stipulate that members for the Convention should be elected in the same way and places as the members of the European Parliament are elected, “to consider the key issues arising for the Union’s future development”,⁴¹ and, finally, to place its results before the public.⁴²

All this might have happened and thus have helped to establish a convention as known in law. Instead, a “European Convention” was called into being, the legal precedents for which were substituted by a political decision animated by the attempt to usurp an institution in constitutional law and to transform it beyond

⁴¹ So in Laeken Declaration.

⁴² As a typical example of an American state convention, cf. Constitution of Illinois of 1848, art. XII, sec. 1, in: *The Federal and State Constitutions*, ed. by Thorpe, II, 1006.

recognition. This deformation affected all three aspects of a convention: the setting up, the commission, and the submission of its results.

As far as the setting up of the Convention is concerned, the European Convention,⁴³ according to the Laeken Declaration, was not instituted as an elected body; instead it exclusively comprised members delegated by the European Heads of State or Government (28), the European Commission (2), the national parliaments (56), and the European Parliament (16).⁴⁴ None of these members had any popular mandate for what he or she was doing in the European Convention, nor was any form of accountability provided for. Moreover, in contrast to any constitutional convention, including the Convention on the EU Charter of Fundamental Rights, the European Convention had no right to “choose its own officers”.⁴⁵ The European Council appointed its chairman and the two vice-chairmen, thus deliberately weakening the Convention and causing more than just initial friction and irritation. These chairpersons, together with nine additional members, constituted the Praesidium, an institution as unknown to the Convention on the EU Charter of Fundamental Rights as to any other constitutional convention. This Praesidium, with a two-thirds majority of its members delegated by the national governments and the European Commission and on eight of which the Convention had no influence whatsoever,⁴⁶ were responsible for giving direction to the deliberations of the Convention while at the same time embodying the influence of the European Heads of State and Government on its debates and their final results.

In commissioning the Convention, the Laeken Declaration had already taken measures to ensure the desired results. Other than the European Council in Cologne, it had strictly terminated the duration of the Convention,⁴⁷ whereas normally a constitutional convention terminates its proceedings when the draft is

⁴³ For a matter of fact presentation, cf. Barbier, *Convention européenne*, 18-26; Göler, *Neue europäische Verfassungsdebatte*, 77-95.

⁴⁴ The Australian Constitutional Convention of 1998 comprised both, elected and appointed members, in equal numbers.

⁴⁵ Constitution of the State of New York of 1894, art. XIV, § 2, in: *The Federal and State Constitutions*, ed. by Thorpe, V, 2736.

⁴⁶ For critical remarks on this point, cf. Jürgen Meyer, in: *Frankfurter Rundschau*, 19 May 2003, 7. Cf. also Göler, *Neue europäische Verfassungsdebatte*, 75-77.

⁴⁷ <http://ue.eu.int/df/default.asp?lang=en> (9 March 2003), <http://european-convention.eu.int/enjeux.asp?lang=EN> (15 January 2003).

written.⁴⁸ To be sure, the Convention had the right to adopt its rules of procedure, but the Laeken Declaration had insisted on several strict orders with which it had to comply. They had been disguised as “working methods”, but what the Tampere European Council had understood under this heading really had been working methods. Now it clearly established that the “Council will be kept informed”. The Convention Chairman was instructed regularly to “give an oral progress report” at the Council meetings for the sole purpose of “enabling Heads of State or Government to give their views at the same time”.⁴⁹ This institutionalized outside influence and pressure left an unmistakable imprint on the “convention spirit”, which Giscard d’Estaing had envisioned as creating a “melting-pot” of ideas “in which, month by month, a common approach is worked out”.⁵⁰

As far as the submission of the results of the European Convention is concerned, the Laeken Council not only had deliberately refrained from mandating the Convention to present a final document. Instead it had limited its task to “try[ing] to identify the various possible responses”, thus removing from it the competence to write the final draft, a right even the Convention on the EU Charter of Fundamental Rights still had had.⁵¹ No constitutional convention is known in law with a comparably restricted mandate. This applies also to the “Draft Treaty establishing a Constitution for Europe” submitted by the President of the Convention to the European Council when meeting in Thessaloniki on 20 June 2003.⁵² In established constitutional law it says: “[T]he Constitution that may be agreed upon by such Convention shall be submitted to the people for their ratification or rejection.”⁵³ What was so self-evident to the people of

⁴⁸ Cf., however, the Uruguayan Constitution, which limits a Constitutional Convention to one year: Constitution of Uruguay of 1967 as amended to 1996, sec. XIX, ch. III, art. 331.

⁴⁹ <http://european-convention.eu.int/enjeux.asp?lang=EN> (15 January 2003).

⁵⁰ Introductory speech by the President V. Giscard d’Estaing to the Convention on the Future of Europe, Document SN 1565/02 (p. 13).

⁵¹ “This body should present a draft document in advance of the European Council in December 2000. The European Council will propose to the European Parliament and the Commission that, together with the Council, they should solemnly proclaim on the basis of the draft document a European Charter of Fundamental Rights” (Conclusions of the European Council in Cologne, <http://ue.eu.int/df/default.asp?lang=en> [9 March 2003]).

⁵² CONV 820/03.

⁵³ Constitution of California of 1879, art. XVIII, sec. 2, in: *The Federal and State Constitutions*, ed. by Thorpe, I, 446. For the same stipulation in today’s phrasing, cf. Constitution of Idaho of 2002, art. XX, sec. 4, in: *Constitutions of the United States: National and State*, publ. for the Legislative Drafting Research Fund of Columbia University, ed. by Shirley S. Abrahamson et al., Binder 2, Dobbs Ferry: Oceana Publications, 2002, ID 50. Cf. also

California in the nineteenth century as it is today to those of Idaho, the Laeken Declaration viewed completely differently. The legal substance of the Convention's final document, if it was to be achieved at all, was from the beginning deliberately minimized. The Laeken Council had made it clear that it would view such a document only as a set of "recommendations". The same Heads of State or Government which had so emphatically called for a "debate to be broadly based and involve all citizens",⁵⁴ insisted on the completely non-binding character of the final document as produced by the European Convention, leaving the Council supreme: "Together with the outcome of national debates on the future of the Union, the final document will provide a starting point for discussions in the Intergovernmental Conference, which will take the ultimate decisions."⁵⁵ Neither in constitutional theory nor in existing constitutional law is a comparable procedure known.

Even more than in regard to form or structure, the European Convention failed to meet the idea of a convention as established in constitutional law in terms of substance. It was no institution of the people. It was called for by the European Heads of State and Government, during its existence it was at their mercy, and it is they who will decide on its results. If we choose to call such a body "convention", we may do so. In this case, however, we should not only be aware that any such body is a far cry from what is commonly understood by "convention" in constitutional law, but also that it was its particular set up which largely predisposed its results.

1. As it was the Heads of State and Government who exerted their influence on the deliberations via the Praesidium, it was obvious that national interests would prevail over a European perspective. The structure easily prevented the integrationists from gaining momentum.

2. The prevailing national interest assured that the principle of unanimity would not be abandoned. In the final result, as exemplified by the constitution treaty to be adopted, the procedure requires every member state to agree instead of allowing for more flexible forms open to the pursuance of bolder solutions.

the Constitution of the State of New York of 1894, art. XIV, § 2, in: *The Federal and State Constitutions*, ed. by Thorpe, V, 2736.

⁵⁴ <http://european-convention.eu.int/enjeux.asp?lang=EN> (15 January 2003).

⁵⁵ <http://european-convention.eu.int/enjeux.asp?lang=EN> (15 January 2003).

3. The enduring national interest manifested itself in the European Convention as the equivalent of the big states' dominance. It is symptomatic for the results of the Convention that, due to its structure and predisposition, it failed to achieve that "great compromise" between big and small states which constituted the resounding success of the Philadelphia convention.

4. The decision of the Intergovernmental Conference to set up a Convention in full transparency with its debates open to the public, but at the same time making sure that the people will have no direct voice in it, contributed to a situation in which the Convention and its results are interpreted quite differently in the individual countries, which will allow the national governments to influence the national debate to a large extent.

In conclusion, judged by its setting up, commission, and submission procedure, the European Convention of 2002-03 was clearly out of step with what is generally understood by a constitutional convention in constitutional law, in constitutional theory, and in constitutional history. This raises the question whether the example of the European Convention may help to establish in Europe a new and formerly unknown type of constitutional convention, thus allowing for advancing constitutional theory. Any affirmative response to this question will have to argue that the European Convention worked on principles which bear a significance beyond the individual case. Nothing in the Laeken Declaration or in the work of the Convention is apt to support such a suggestion. On the contrary, both failed to confer any special legitimization to the Convention, which was exclusively established to produce those results the IGC had failed to deliver. In order to assure that these results would prove to be acceptable for the European Heads of State and Government, they tailored the Convention to meet their specific goals, thus denying it the possibility of developing a legitimacy of its own. The Convention on the Future of the European Union, politically important as it undoubtedly was, has been little more than a makeshift body created to produce the results for which it was established. It was neither created as a visionary institution to introduce a constitutional convention in its own right into European constitutional law with all the implications which this might have had, nor did the Convention ever aspire to assume such an elevated role. *Realpolitik* was the order of the day, but this is a term in politics and not in law.

RESEARCH PAPERS IN LAW

1. Dominik Hanf et Tristan Baumé, “Vers une clarification de la répartition des compétences entre l'Union et ses Etats Membres? Une analyse du projet d'articles du Présidium de la Convention”, 2003.
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