REFORM OF THE EUROPEAN UNION:
FROM EUROPEAN UNION TO FEDERAL UNION*

Introduction.

Does reform of the institutional mechanisms and policies of the European Union depend on reform of the current European Treaties? Or does the EU instead have the capacity to evolve gradually as an effect of specific changes to the current system of governance, implemented by the national governments and existing EU institutions? An examination of the topic of EU reform has to start from these basic questions. The agreement reached on the creation of the Next Generation EU financial instrument, and on its funding through European debt, to be repaid gradually by 2058 through the introduction of new European taxes that will generate own resources for the European budget, seems to suggest that the EU does indeed have the capacity to evolve progressively towards the objective of forming a European government, without any need for Treaty revision. That said, there is no guarantee that advances brought by Next Generation EU and the common debt mechanism, as the EU's response to the pandemic crisis, will, upon expiry of these instruments, become permanent as opposed to contingent aspects of European governance, unless of course they are secured through reform of the Treaties. In fact, some states' willingness to accept these instruments was dependent precisely on their extraordinary and non-permanent nature. Moreover, it should be considered that these instruments remain open to challenge, given that they are not currently envisaged by the Treaties (see TFEU, Articles 125, 310 and 311). Taken together, the above considerations show that there is a need to embark on true constituent reform of the European Union.

Ways to Reform the European Union.

The current EU Treaty revision procedure (Art. 48 TEU) requires that all (27) member states sign a Treaty amendment agreement; for this agreement to come into force, they must unanimously ratify it in accordance with their constitutional requirements (either through their respective parliaments or, in some states, through a popular referendum). Reaching an agreement between the 27 member states is, however, notoriously difficult, on account of their divergent views concerning the objectives of the integration process. International law offers two ways to get around this difficulty. The first is to invoke the "rebus sic stantibus" clause as codified by the Vienna Convention on the Law of Treaties, and thus to allow those states wanting more substantial EU reform to agree, among themselves, a new treaty with different rules. This solution would circumvent the unanimity rule provided for by Art. 48 TEU and allow the conclusion of a new treaty with the agreement of a majority (to be

determined) of the states. Alternatively, a new treaty could simply contain a clause stating that it will come into effect only in those countries in which it has been ratified, by the national parliament or through a popular referendum. In fact, in the absence of a true European people — the Lisbon Treaty refers to citizens of the Union and not a European people —, it would be legally and politically impossible to oblige one or more states to adopt a new treaty when their parliament or population have voted against doing so.

In any case, a new treaty would overcome the problem of differentiated integration within today's European Union, as it would allow those states wishing to maintain the present level of integration, and to remain bound by the provisions of the current Treaties, to do so, while giving those wanting to advance towards a true federal union the possibility of signing up to the new treaty, which would contain additional provisions in this sense. Naturally, the nature of the relationship between the current European Union and the new federal union would have to be carefully set out, either in the new treaty itself or in a separate agreement.

Federal State or Federal Union.

The type of EU reform pursued would depend on the objectives that EU member states, political forces and citizens aim to achieve. It would be unrealistic to envisage creating a federal state able to take the place of the present nation-states, some of which are hundreds of years old, since this would mean endowing the institutions of the new state with all the competences currently in the nation-states' hands. If, however, we recognise that the nation-state is no longer equipped to perform all the functions it did in the nineteenth century, and to exercise absolute sovereignty in all its fields of activity, then the most realistic solution would be to create, by aggregation, a federal union of the existing nation-states (or of some of them), but without this implying the suppression of any of them. This would amount to a form of sovereignty sharing, necessary precisely because sovereignty nowadays can no longer be absolute, as it was in the nineteenth century. Basically, it would be split between the nation-states and a federal union endowed with "limited but real" powers.

Constituent Power.

This text is not the appropriate place for a theoretical analysis of constitutional doctrine or an examination of the different ways in which constituent power might be expressed through the founding act (call it a European Constitution or European Basic Law) of a new European Union. It is sufficient, here, to acknowledge the existence of a "contractualist" doctrine that interprets the "Constitution" or other founding act as a "social contract" through which a community of persons or of peoples decides to adopt a new "statute" that recognises their status as citizens of a new political organisation.

There are various junctures in the institutional life of the European Union that lend themselves to the exercising of this constituent power. It could be exercised: 1) at the end of the Conference on the Future of Europe, should a significant number of European citizens and organisations request that the

European Parliament draw up a plan for EU reform designed to broaden the Union's competences, and conclude a new constitutional treaty creating a federal union; 2) on the eve of one of the next rounds of European elections, should the main European political forces wish to give the incoming European Parliament, elected by the citizens, a constituent role, namely to draw up, during the legislature, a new draft treaty to be submitted to the national parliaments or to a pan-European referendum; or 3) when the EU's G7 members, due to their declining GDP, cease to rank among the world's seven most industrialised countries; indeed, when that time comes, only a new European federal union would meet the economic criteria for membership of this organisation.

Constitutional Projects in the History of European Integration.

The process of European integration has, on two occasions, seen the drafting of projects, subsequently abandoned, that would have led to decisive steps towards the creation of a federal union.

a) The Ad Hoc Assembly's Project.

The first of these aborted constitutional attempts was the "European Political Community" (EPC) project drawn up in 1953 by the so-called Ad Hoc Assembly, mandated by the governments of Europe's six founding member states and set up within the framework of the ECSC. This project was drafted on the basis of Article 38 of the Treaty establishing the European Defence Community (EDC). It envisaged a bicameral parliamentary system in which the first house would be a people's chamber elected by universal suffrage, and the second a senate appointed by the national parliaments. The draft treaty provided for a European executive council (along the lines of the High Authority of the ECSC), responsible for Community governance. Since this body was meant to consist of a president elected by the senate and members elected by the president, the member states would not be involved in its appointment. A council of national ministers (representatives of the member states) was also envisaged, to ensure harmonisation of the action of the European government with that of the national governments. However, as a result of the French National Assembly's failure to ratify the EDC Treaty in 1954, this project never got off the ground.

b) Spinelli's Project.

The draft treaty drawn up on the initiative and under the driving influence of Altiero Spinelli, and approved by the European Parliament in February 1984, constituted the second attempt to give the European Union a constitutional basis (even though Altiero Spinelli, with political realism, avoided calling his project "constitutional"). Yet, despite his cautious language, his 1984 draft treaty contained a number of key innovations that can indeed be defined "constitutional" in the classic sense of the term: 1) clearer separation of powers between, on the one hand, an executive/government (the European Commission) and, on the other, the two legislative chambers using majority voting (i.e., the European Parliament and the Council of the Union, with the latter, after a transitional 10-year period, to largely switch to qualified majority voting); 2) clear political accountability of the Commission to the European Parliament; 3) differentiation between "organic law" and ordinary policy-

related legislation; 4) the establishment of an autonomous European fiscal capacity; 5) the introduction of fundamental rights, and of sanctions against member states that violate them (at this point there was still no European Charter of Fundamental Rights); and 6) application of the qualified majority principle (a majority of member states representing two thirds of the population) as a requirement for the entry into force of the treaty. Altiero Spinelli's attempt to furnish the Union with a constitutional text failed in favour of more limited treaty reform, namely the Single European Act, which contained none of the innovative elements of his draft treaty. Nonetheless, two thirds of the innovative provisions of the Spinelli project were progressively introduced in subsequent treaties, although not the most important rules concerning the majority principle for the entry into force of the treaties, an autonomous European fiscal capacity, and the hierarchy of legislation.

Generally speaking, it can be said that these two "constitutional" projects, to a large extent, preserve the roles still fulfilled by the main institutions of today's EU, including the European Council, if not their specific competences, as well as the roles of the member states in the institutional architecture of the European Union.

Key Conditions Necessary for the Creation of a Federal Union.

Were the European Union to launch a constituent phase (see above) with a view to forming a new European federal union, it would first have to define the conditions and competences that would need to be enshrined in the new founding treaty.

1. The first necessary condition would be the drafting and approval of a constitutional text that, by means of a constituent process allowing its validation by European citizens and/or their representatives through popular or parliamentary ratification, would give the new entity political and legal legitimacy. Although the following two terms are interchangeable, since they share the same meaning and content, "Basic Law" (already used by the Federal Republic of Germany to avoid confusion with the Weimar Constitution) should be used in preference to "Constitution". This would serve to avoid controversy, in the context of a possible popular referendum, over the question of whether or not the new European "Constitution" would be superior to the existing national constitutions. The answer to this question, of course, is that the new Basic Law would have priority over the national constitutions only in those fields of activity in which it has attributed competences (and therefore sovereignty) to the European Union, but would not affect the provisions of the national constitutions in any other sphere.

2. The second necessary condition would be the establishment of a true European government accountable to a new European parliament and endowed with executive functions in the areas of EU competence (i.e., with limited but real powers). Some believe that the new European government should be an offshoot of the current European Commission, albeit with a different composition from that of the latter, which is one commissioner per member state, and with different competences. For its part, the European Commission, in a report on the European Union, has already indicated its willingness to be replaced should a true European government be formed. The essential point is

that the members of the future European government, be they chosen by the single president of the "new EU" (possibly elected directly by the European citizens) or by the national governments, should be directly accountable to the new parliament (composed of a people's chamber and a chamber of states) and subject to a vote of confidence by the same. If the members of the new European government were appointed directly by the single president of the new union, he/she would not necessarily have to ensure that all nationalities were "represented", and could therefore potentially choose more than one citizen from one member state and no citizens from another. The new treaty would have to specify whether the new European government is to have a right of legislative initiative or whether this is instead to be entrusted to the new two-chamber parliament. The two constitutional projects drafted to date, which we have examined above, essentially provide that legislative initiative should be accorded to both the executive body (government) and the parliamentary body.

3. The third condition is that the European government be rendered accountable to the new two-chamber parliament (composed of a people's chamber and a chamber of states). The question that arises here is whether or not to maintain a structure like the current Council of Ministers (and, even more so, the current European Council) as a legislative body, and one along the lines of the European Council, which is the main organ responsible for imparting direction to the Union and for establishing its political priorities. The two constitutional projects we have already mentioned both provided for the maintenance of an intergovernmental political structure (complementing a bicameral parliament in the case of the EPC project). One possibility, as suggested by Spinelli — although his solution would obviously need to be tweaked as appropriate —, would be to keep an "intergovernmental" structure in place for a transitional period before switching to a single, bicameral parliament. Crucially, once the decision has been taken to replace the current Council of Ministers, and also the European Council, both of which are composed of a representative from each member state and often decide unanimously or by consensus, it would have to be expressly stipulated that the new chamber of states is to have equal numbers of members from each state, while the lower house will be composed in proportion to the population, and that both houses are to use majority voting systems. This formula — the Great Compromise reached in Philadelphia — was deemed acceptable for the American Constitution, and would be equally suitable for a new federal union of European states, regardless of the fact that many of them (unlike the American states) have a centuries-long history. The crucial thing is that the members of the new lower house must be elected by European citizens voting for candidates belonging to transnational lists — this requirement should initially apply to a proportion of the seats, to be progressively increased —, and thus for genuinely European parties with genuinely European programmes, rather than, as we see today, parties with generically European programmes that amount, in reality, to extensions of their national programmes. It would therefore be necessary to avoid a system allowing members of the new lower chamber vote on a substantially national basis, as today's MEPs quite frequently do (as in the case, for example, of French MEPs voting *en bloc* for agricultural policy resolutions that coincide with a French national interest).

4. The fourth condition would be to make provision, in the Basic Law, for a new, and more permanent, system for dividing competences between the federal union and its member states that, above all, abolishes the member states' exclusive power to attribute competences to the federal union (in other words, strips them of their current power to be "masters" of the Treaties). This change would be legitimised through formal approval — popular or by the national parliaments — of the new Basic Law. At the same time, this new system of division of competences should give the federal union "strategic autonomy" that would allow it to exercise its own competences in the fields of both foreign and domestic policy. In foreign policy, the federal union would need an autonomous defence capability to lend credibility to its decisions (dispatch of peacekeeping missions, intervention forces, etc.), although it would not be able to assume responsibility for the whole of its military capability for some considerable time, meaning that the member states would still play an essential military role. In internal politics, the federal union would exercise strategic autonomy in a number of fields: currency (through the international role of the euro), economy/finance (through Europe's autonomous fiscal capacity), internal security (in the fight against terrorism and organised crime), the global market (through Europe's ability to compete, starting with the digital agenda and artificial intelligence), and relations with neighbouring countries (through development of the "proximity policy" started by Prodi) and with Africa. These relations fall within the field of Europe's external action and could be strengthened, in accordance with the federal approach, through the assumption, by the European government, of a role of initiative and representation, and through majority decisions taken by the two legislative chambers.

5. The fifth condition (alluded to in the fourth) would be to equip the new union with a federal budget financed with true own resources and, in particular, an autonomous fiscal capacity enabling it to impose direct European taxes on union businesses and citizens. Indeed, Art. 311 TFEU, which currently states that "the Union shall provide itself with the means necessary to attain its objectives", is interpreted in different ways: some argue that it authorises the imposition of European taxes, while others (see the 2016 Monti report) believe that the EU cannot directly impose European taxes. Given the timetable agreed between the Council of Ministers and the European Parliament, we will soon see whether the EU proves able to independently procure new own resources through the imposition of European taxes such as the proposed web tax, carbon tax or corporate tax. The key point is that a new federal union would have to be given autonomous capacity to directly levy European taxes on businesses and citizens (like those levied in the past by the ECSC's High Authority on coal and steel producers), without there being any need for prior harmonisation of national taxes, and therefore for involvement of the national budgets.

6. Finally, and this is the sixth condition necessary for the creation of a true federal union, there would have to be a revision of the provisions of the current Treaties on the defence of the EU's fundamental values and on the rule of law. The Lisbon Treaty has been interpreted differently by those who consider defence of national identity the overriding priority, as opposed to those who, instead, attach paramount importance to respect for the rule of law and the

principle of loyal cooperation between European institutions and member states. The Court of Justice has already confirmed the need to respect the autonomy of an independent judiciary as well as a free press, which must not be subject to censorship by any political power. It is therefore necessary to review the current provisions that make it impossible, on account of a procedure that requires unanimity, to effectively sanction violations of the rule of law. In other organisations such as the UN and the Council of Europe, it is possible to suspend a member state that violates the rule of law. A provision to this effect should be included in the Basic Law of a future European federal union.

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