

## CHAPTER 12

### DENMARK AND THE CONSTITUTIONAL TREATY: A DIFFICULT TWO-LEVEL GAME

Finn Laursen

#### INTRODUCTION<sup>1</sup>

The Convention was a new method of preparing an Intergovernmental Conference (IGC). First of all it meant wider participation and greater transparency. But the Member State governments had made sure that they would stay in relative control by specifying that final decisions about a new treaty would be made by an IGC. The IGC failed during the Italian Presidency through the second half of 2003 to produce a final agreement, but eventually succeeded in June 2004 during the Irish Presidency in agreeing on a draft treaty, which was then sent for ratification. The main issue causing the failure in December 2003 was the relative weight of small versus large Member States in the Union's institutional set-up, the Convention having proposed to abolish the cumbersome system of weights of votes in the Council adopted in Nice in December 2000 in favour of a system where a qualified majority vote (QMV) would simply be composed of a majority of Member States representing at least 60 per cent of the EU's population. Spain and Poland opposed this change since they would lose relative influence compared to the Nice formula, where they had nearly as many votes as Germany, despite having half the population of Germany. The scope of QMV was also an issue, with some Member States not being willing to accept the broad application of QMV proposed by the Convention. The UK in particular had so-called 'red lines,' insisting on unanimity in areas of foreign policy, taxation and social security.

The Danish government went into the IGC with relatively minor demands for changes, supporting the overall framework of the new so-called Constitutional Treaty. Denmark supported the proposal from the Convention concerning the new and simpler definition of QMV. But, although the government was relatively supportive of the entire Convention draft prior to the start of the IGC, domestic politics forced the government to change

---

<sup>1</sup> This paper partly relies on the author's article "Denmark and the Intergovernmental Conference: A Two-Level Game," in Per Carlsen and Hans Mouritzen (eds), *Danish Foreign Policy Yearbook 2004* (Copenhagen: Danish Institute for International Studies, 2004), 91-119, as well as the author's paper presented at EUSA Ninth Biennial International Conference, 31 March–2 April 2005, Austin, Texas. The author would like to thank Stine Hauge Nielsen and Berenice Lara Laursen for research assistance.

position on the composition of the Commission in favour of maintaining a Commissioner per Member State. Otherwise, during the IGC the main Danish objective was to maintain the Danish exemptions on the euro, defence policy and supranational Justice and Home Affairs (JHA) cooperation in the form of protocols to the Treaty. The fourth exemption on citizenship of the Union is without practical importance, especially after the Amsterdam Treaty, which specified that citizenship of the Union is a supplement to national citizenship. The government did want to get rid of the exemptions, but this would require 'yes' votes in referendums. One of the questions has been when such referendums would take place, an issue that was still being discussed in the spring of 2007. JHA became a special problem because the government wanted to maintain a relatively strict national immigration policy. A solution to this problem would be an opt-in policy in line with the British and Irish arrangements, in which Denmark would be able to opt-in on most JHA cooperation, but stay out of immigration policy.

#### THE POLITICS OF DANISH EU POLICY: A TWO-LEVEL GAME

Danish EU policy is driven by domestic politics. Any government in the Danish parliamentary system has to be sure to have the support of the Parliament, the *Folketing*, or at least not have a parliamentary majority against its policy. The Parliament has established a powerful European Affairs Committee that issues negotiation mandates to the government prior to important negotiations in the EU, whether in connection with day-to-day legislative decisions in the Council or 'history-making decisions' like treaty reforms negotiated in IGCs (Laursen, 1995, 2001). For some very important decisions a referendum may be necessary. A referendum applies to treaty reforms that involve further transfer of sovereignty to supranational institutions—thus, the Danish decision to accede to the European Communities (EC) in 1972 was confirmed by a referendum, and the ratification of the Single European Act (SEA) in 1986 was confirmed by a consultative referendum after it turned out that the Conservative-Liberal government did not have a majority in favour of the SEA in the *Folketing*. The Maastricht Treaty was first rejected by the Danish people in June 1992 but after negotiating the four exemptions or opt-outs, the Treaty with the exemptions was accepted by a second referendum in May 1993 (Laursen, 1994). The next new treaty, the Treaty of Amsterdam, was also confirmed by a referendum in May 1998 (Laursen, 2002). But in connection with the Treaty of Nice, it was decided that the Treaty did not include a transfer of sovereignty and thus it could be confirmed by a simple majority in the Parliament and a referendum did not take place (Laursen, 2006b). This

happened after the people had turned down the government's proposal to join the euro—one of the four opt-outs—in a November 2000 referendum (Laursen, 2003).

EU policy is controversial in Denmark and the public is sceptical about further integration. A government negotiating at the EU level must always be concerned about getting the outcome ratified back home. The government is thus caught in a two-level game. According to Robert Putnam:

The politics of many international negotiations can usefully be conceived as a two-level game. At the national level, domestic groups pursue their interests by pressuring the government to adopt favourable policies, and politicians seek power by constructing coalitions among these groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments (Putnam, 1988, 434).

Domestic demands in connection with EU treaty reforms are largely channelled through the parliamentary system in Denmark. In the current *Folketing* the two most left-wing parties, the Unity List and the Socialist People's Party, used to be EU-sceptical parties, but the Socialist People's Party has been moving towards a position that is less critical of the EU and in autumn 2004 it decided to support the Constitutional Treaty in the upcoming referendum. On the right side of the government, the Danish People's Party is also EU sceptical. The current Liberal-Conservative government depends on the parliamentary support of this party to survive politically, but when it comes to EU policy it can normally count on the support of the Social Democrats and Social Liberals, the leading opposition parties to the left of the government. These two parties supported the government lines in the Convention and IGC, although the Social Liberals did not support the government's decision to seek a change in the JHA exemption.

The government indicated early on that the Constitutional Treaty proposed by the European Convention would be sent to a referendum if confirmed by the IGC as happened in June 2004. It was first agreed that such a referendum would take place in September 2005 and an agreement was reached between five parties to support the Treaty—the Liberal Party, the Conservative People's Party, the Social Democrats, the Social Liberal Party and the Socialist People's Party.

Concerning the opt-outs there was a promise going back to 1993 that they can only be abolished through a referendum. For a government that would like to take part fully in the EU this creates a difficult situation. Would Danes say 'yes' to the Constitutional Treaty? Would they then later say 'yes' to abolishing the exemptions? Given the 'no' to the Maastricht Treaty in 1992 and the 'no' to the euro in 2000 this could not be taken for

granted. The government and the pro-integration opposition parties had to think seriously about how to convince Danes that further integration is a good thing for the country. This affected the Danish strategy in connection with the Convention and the IGC. Denmark remained a ‘minimalist’ state in the negotiations, yet the government and main opposition parties did move towards a more pro-union position by accepting the draft Constitutional Treaty.

Table 1: Danish Political Parties and Movements and the Constitutional Treaty\*

Party/Movement	Position on the Constitutional Treaty	Number of seats in the <i>Folketing</i> after 14 February election	Number of MEPs
Liberals ( <i>Venstre</i> )	Yes	52	3
Social Democrats ( <i>Socialdemokraterne</i> )	Yes	47	5
Danish People’s Party ( <i>Dansk Folkeparti</i> )	No	24	1
Conservative People’s Party ( <i>Det Konservative Folkeparti</i> )	Yes	18	1
Social Liberals ( <i>Det Radikale Venstre</i> )	Yes	17	1
Socialist People’s Party ( <i>Socialistisk Folkeparti</i> )	Yes	11	1
Unity List ( <i>Enhedslisten</i> )	No	6	0
June Movement ( <i>Juni Bevægelsen</i> )	No		1
People’s Movement Against the EU ( <i>Folkebevægelsen mod EU</i> )	No		1

\*Does not include two MPs from Greenland and two MPs from the Faeroe Islands.

Sources: www.ft.dk and Sørensen and Vestergaard, 2005.

## THE CONVENTION

When the negotiations of the Treaty of Nice concluded, the Heads of State or Government decided that a new IGC should be convened in 2004. This IGC started on 4 October 2003, earlier than originally expected.

The meeting of the European Council at Laeken in December 2001 accepted the idea of preparing IGC-2004 through a Convention (Belgium, EU Presidency, 2001). The Laeken Declaration even asked the question whether the EU needed a constitution thus supporting the turn towards a ‘constitutionalist’ discourse.

The Praesidium of the Convention included nine members drawn from the Convention. This group included representatives from the three countries which held the Presidency during the Convention, including Denmark, which held the Presidency through the second half of 2002. The Danish government appointed former government Minister and Commissioner Henning Christophersen for this position.

In the end the Convention produced a consensus draft. However, five members, including two Danes, Jens-Peter Bonde (MEP, June Movement) and Peter Skaarup (MP, Danish People's Party), refused to accept this draft. Instead they produced a minority report, which was also presented to the European Council in Thessaloniki on 20 June 2003 (CONV 773/03).

The proposed draft Constitutional Treaty would abolish the pillar structure of the Union, moving the remaining Justice and Home Affairs (JHA) policy areas (police and criminal justice) from intergovernmental cooperation to the 'supranational' Community method and also strengthening Common Foreign and Security Policy (CFSP), including defence policy, in various ways without making it supranational (European Convention, 2003). This put pressure on the respective Danish exemptions.

#### DANISH GOVERNMENTAL PREFERENCES

Prime Minister Anders Fogh Rasmussen dealt briefly with EU matters in his New Year speech on 1 January 2003. In this speech he said that during the second half of 2002 the Danish Presidency had solved the historical issue of enlargement. Denmark, he said, should now continue actively to develop the new Europe and take part fully in the EU. According to Fogh Rasmussen, it hurts Denmark's interests that the country is not taking part in parts of EU cooperation, and the country must therefore get rid of the exemptions. But this, of course, can only take place after one or more referendums. He said that the new EU treaty would probably require a referendum in Denmark. He thought it would be best for the Danish people to wait for the new treaty before deciding what to do about the Danish exemptions (Fogh Rasmussen, 2003a).

In a speech to the new Danish Institute for International Studies in Copenhagen on 15 January 2003 Fogh Rasmussen dealt at length with Denmark's EU policy at a time when the European Convention was moving into the last months of its deliberations. He dealt with geopolitics. After the fall of the Berlin Wall and conclusion of enlargement negotiations during the Danish Presidency, Denmark was in a new situation. Fogh Rasmussen noted that "Denmark has exchanged its position as a front-line state in the conflict between East and West for a place at the centre of the new co-operating Europe" (Fogh Rasmussen, 2003b). Inspired by the successful Presidency he

said that “the Government wishes to maintain [an] active line in Danish EU policy in the years to come.”

The Prime Minister’s vision was “a community of nation states” but, he added, “a strong community.” The EU “must have the political and economic strength to act at the international level, thus influencing the world with the ideas on which [it] is based.” Enlargement should “not lead to a dilution of the EU.”

Priority for the EU should be cross-border problems, first of all the internal market, trade policy, competition policy and control of state aid. To this he added, “We must become better at creating jobs in Europe. We must ensure a strong and stable common currency, the Euro.” Environmental policy should be developed and improved. The Common Agricultural Policy (CAP) should be reformed.

There was also a need to strengthen cooperation in new fields, including cooperation concerning refugees and immigrants and the fight against international crime and illegal immigration. On CFSP, however, he pointed out that Danes should be realistic. As he said, “The large countries will not give up their national sovereignty in foreign and security policy.” Nor, he said, should Danes be hypocritical about their preferences in this matter: “We know very well from our own debate that we also—as a small country—guard our national sovereignty.” CFSP would remain inter-governmental cooperation, but “we should endeavour to make foreign, security and defence policies as common as possible.” He saw it as being “in the interest of Denmark that in the coming years the EU develops a military capacity to carry out peace-making and humanitarian tasks on the European continent, for example in the Western Balkans.” At the same time, “we have a vital interest in close and strong co-operation between Europe and the USA.”

Coming to the Constitutional Treaty he referred to the work of the Convention so far as “positive and constructive.” Why then a Constitutional Treaty? It had to be a ‘treaty’ because “the EU must continue to be binding co-operation among states,” he said. And it had to be a ‘constitution,’ “because the time has come to make sure that we reflect a number of the traditional, fundamental, civil and democratic rights in the EU treaty in the manner known from national constitutions.”

The Prime Minister emphasised four areas: the Charter of Fundamental Rights should be incorporated into the Treaty; the Treaty should include clear and precise rules for transparency and democratic control; it should describe the division of labour between the EU and the Member States more clearly; and it should strengthen the role of national Parliaments.

Fogh Rasmussen also dealt with QMV. He argued that “the larger the number of Member States, the greater the need will be for taking as many decisions as possible by qualified majority.” QMV could also include

“selected parts of the tax area.” Thus, “we should, for example, introduce qualified majority when fixing minimum rates for indirect taxes. Personal income tax, by contrast, is an area where the EU has no business. Member States’ distribution policy is a national matter.”

On the subject of the European Parliament Fogh Rasmussen argued that it should be involved to a greater extent. Accordingly, “we should work to have the co-decision procedure extended to all areas where the Council takes decision on legislative issues by qualified majority. Specifically, this means first and foremost that the influence of the European Parliament on the agricultural policy will be enhanced.” The Parliament should also have “full influence on the entire expenditure area, including the agricultural expenses.” But “unanimity should continue to apply when the expenditure ceilings are to be changed.”

Fogh Rasmussen emphasised that the EU is not a state “and should not become a state.” He suggested three principles for institutional considerations: balance between large and small states; balance between the three key institutions, the European Parliament, the Commission and the Council; and effectiveness and transparency.

Concerning the election of the President of the Commission, he had a specific Danish proposal:

My proposal is that the election should take place in an electoral college consisting of a limited number of members representing national parliaments and the European Parliament, respectively. An appropriate composition of this electoral college could be half national parliamentarians, half members of the European Parliament. The right to nominate must rest with Member States’ governments. A certain number of countries—for example five—must act as nominators for a candidate. After the election in the electoral college, the appointment must be confirmed by qualified majority in the European Council. This procedure will insure that a new Commission President has the confidence of Member States.

With regard to the Presidency of the Council Fogh Rasmussen discussed three models: the existing model with rotation every six months; a solution based on group Presidencies; and what he referred to as the ‘grand solution,’ an elected President of the European Council. One of the problems with the existing model was that the time required for coordination increased as the EU moved from 15 to 25 members and more. Fogh Rasmussen admitted that he used to favour the group Presidency. But after the Danish Presidency, when it had become clear that coordination across Council formations is essential, he was now more sceptical. As he noted, “the very question of coordination across Council formations is the Achilles’ heel of the group presidency. I am afraid that a group presidency may be paralysed by internal quarrels over competence. And then it will not be able to function.”

The advantages of an elected President include continuity, clarity and balance in relation to the Commission, and a solution to the problem of workload. Two risks were mentioned, however: it could disturb the balance between large and small countries; and it could lead to an unfortunate conflict with the Commission. If the model of an elected President were to be adopted it had to include safeguards “ensuring that large and small countries are given real equal status.” On this the Prime Minister also had a proposal:

A possible element in such a construction could be, for example, the establishment of three ‘electoral groups’ comprising large, medium and small countries. The President of the European Council would then be taken in turns by these electoral groups. This procedure ensures equal representation between large and small countries.

The Prime Minister said that he would now contact the political parties in order to discuss concrete Danish proposals to the Convention.

He again called for a more active Danish EU policy. It was his ambition, he said, that:

that Denmark should play a more pro-active role in the EU. Far too often, the standard Danish reaction has been characterised by a sceptical attitude towards changes in the EU. We have, as point of departure, wished to keep things as they were. And in this respect, we have always sought to reduce the proposals of others by 10-20 per cent. This is not the way to achieve influence.

And, finally, he repeated his argument that the opt-outs are detrimental to Danish interests. He said that it was in the areas of the opt-outs “that there is the greatest need to expand the EU in the coming years.” Denmark should participate fully in the euro, defence cooperation and asylum and immigration policy—after a referendum, of course.

In an address to the College of Europe, Natolin, Poland, on 28 February 2003, Prime Minister Fogh Rasmussen repeated many of the proposals from his Copenhagen speech (Fogh Rasmussen, 2003c). He now referred to a recent Franco-German proposal which he found very interesting. However, he noted that it failed “to strike the right balance between large and small Member States.” In connection with the proposal for an elected President he now added that the system “would be combined with a system of changing national Presidencies of the sector Councils.” As well, he pointed out that “the Prime Minister of the country holding the rotating Presidency can then also act as deputy President of the European Council.” He now further discussed the idea of having “one single foreign policy representative,” and said “as foreign policy will remain a primarily intergovernmental matter, I think it only logical that the EU foreign policy representative should be



anchored in the Council.”

In May the Prime Minister received the prize as “The European of the Year” from the Danish European Movement. In his acceptance speech he again dealt with Danish EU policy in the context of the Convention. The Praesidium had now put forward a proposal that included the election of a President for the European Council. Denmark was ready to consider this proposal without prejudice, but the proposal was not sufficiently precise. Denmark had three demands: a solution should respect the balance between small and large Member States; there should be a reasonable division of labour among the President of the European Council, the President of the Commission and the proposed EU Foreign Minister; and finally no new bureaucracy should be created (Fogh Rasmussen, 2003d). He concluded by saying that Denmark has too often chosen an exit strategy from the European debate. Such an ‘ostrich policy’ has not served Denmark. He was happy that the government had now reached an agreement with the Social Democratic Party and the Social Liberal Party on Danish proposals to the Convention (Denmark, 2003a).

Foreign Minister Per Stig Møller also discussed the Convention in various speeches, although he did not add substantively to what the Prime Minister had said (Møller, 2003a, 2003b).

If we were to compare the official Danish positions at the beginning of 2003 with the traditional Danish positions in connection with earlier treaty reforms we notice a greater willingness to accept more QMV and co-decisions. The incorporation of the Charter of Fundamental Rights, which Denmark opposed in Nice in 2000, was now also accepted. Even the term ‘constitution’ was accepted. Apparently the dominating discourse of the Convention was having an impact in Denmark. It looks as if the Danish Prime Minister was trying to prepare the Danish public for the new treaty that was slowly taking shape.

#### DANISH PARLIAMENTARY CONTRIBUTIONS TO THE CONVENTION

In addition to the government’s representative, Henning Christophersen, the *Folketing* was represented by two members in the Convention. The leading opposition party, the Social Democratic Party, chose former Minister Henrik Dam Kristensen. Given the fact that the leading government party, the Liberal Party, was already represented by Christophersen the government offered its parliamentary seat to the EU-sceptical parties. Since these did not succeed in jointly nominating a member the government offered the place to the Danish People’s Party which chose its Vice-Chairman Peter Skaarup. Among the European Parliament’s (EP) 16 representatives there was one Dane, the EU-sceptical Jens-Peter Bonde from the June Movement. All

representatives had alternates which could take part in the meetings. The government's alternate was former Prime Minister Poul Schlütter (Conservative), and the *Folketing's* alternates were Per Dalgaard (Danish People's Party) and former Foreign Minister Niels Helveg Petersen (Social Liberal). Among the alternates from the European Parliament were two Danes, Lone Dybkjær (Social Liberal) and Helle Thorning-Schmidt (Social Democrat).

Tracing the contribution of these Danish representatives to the Convention will show that Henrik Dam Kristensen, Per Skaarup and Jens-Peter Bonde were particularly active with speeches on some of the main issues dealt with by the Convention. Since the contributions of Henning Christophersen mainly went through the Praesidium we know less about his contribution given the fact that the Praesidium met behind closed doors. Christophersen also chaired one of the Working Groups, the one dealing with complementary competences.<sup>2</sup> During the end game of the Convention the two government parties, the Liberals and Conservatives, also produced a joint position paper together with the Social Democrats and Social Liberals, published on 20 March 2003 (Denmark, 2003a). For space reasons we shall limit the following to comparing the contributions of Dam Kristensen and Skaarup, giving the two dominating Danish visions of the future of Europe, one conditionally in favour of the current process and one against further integration.

A reading of Dam Kristensen's speeches to the Convention gives a good idea of the Social Democratic vision of the EU at the beginning of the 21<sup>st</sup> century. The Social Democratic Party has come a long way since the mid-1980s when it opposed the SEA. Through the 1990s it has supported the treaty reforms of Maastricht, Amsterdam and Nice. It was actively involved in negotiating the Danish exemptions after the 'no' to Maastricht in 1992 and played a leading role in getting the Maastricht Treaty with the exemptions accepted by the Danish people in 1993. It led the government that negotiated the Amsterdam Treaty, where it worked actively to give the Treaty Danish imprints in areas like employment, environment and consumer protection. But the party still wants the Common Foreign and Security Policy (CFSP) to remain intergovernmental. As other Danish parties it puts emphasis on the role of national Parliaments, seeing the national avenue to legitimacy as the most important one. Only with some hesitation has it accepted increasing involvement by the European Parliament.

Indeed, the role of national Parliaments was the topic of Dam Kristensen's first speech to the Convention on 7 June 2002. In this speech,

---

<sup>2</sup> According to a study by a member of the Praesidium secretariat the members of the Praesidium were not supposed to represent national interests. But the Danish and Spanish members were said to have broken that rule by often expressing national views. See De Poncis, 2003, 27.

he argued that national Parliaments are the foundation of national democracy and have close contacts with the citizens. It is therefore important to involve national Parliaments more in EU decision-making. In particular, they could be more involved in controlling the application of subsidiarity (Dam Kristensen, 2002a).

Dam Kristensen also spoke in favour of developing CFSP. The EU has become a 'progressive force' in the battle for sustainable development at the global level. He noted that Danes face new challenges such as poverty, ethnic conflicts, violation of human rights, terrorism, etc., where the EU can make a decisive contribution. He emphasised the role of NATO and the UN and said that Danes had to find solutions so that the EU could speak with one voice. He pointed out that the appointment of the High Representative of CFSP in October 1999 had strengthened CFSP, but it was still unclear who is doing what, where and when (Dam Kristensen, 2002b).

After the successful conclusion of enlargement negotiations at the Copenhagen Summit in December 2002 Dam Kristensen again spoke about the development of CFSP. He now said that there was a need to use QMV as much as possible instead of unanimity. But this should not include areas where Member States' vital interests are involved. He also gave guarded support for a 'double-hatted' Foreign Minister of the EU. He would not exclude a model of some kind where a future Foreign Minister is a member of both the Commission and the Council. But the issue was also linked with the question of a President for the European Council (Dam Kristensen, 2002d).

Dam Kristensen dealt with issues of employment and taxation in November 2002. He expressed support for the Lisbon process and an open method of coordination. This method should become part of the new Constitutional Treaty. He especially related the question of taxation to some multinational companies not paying taxes. This decreases the possibilities of financing welfare. So EU cooperation is necessary. Also, he argued that if Denmark wants a greener Europe it must introduce environmental taxes. He favoured the introduction of QMV for environmental and company taxes to avoid damaging competition (Dam Kristensen, 2002c).

Social and labour market policies are also important in the Danish political context. According to Dam Kristensen social rights should be part of the Constitutional Treaty. The internal market should be supplemented with rules that counteract unfair competition and social dumping. Health, education and social services, however, should not become part of the internal market. The social dialogue at the European level should be developed further. Workers should be allowed to carry out cross-border actions of sympathy with trade union colleagues in other countries (Dam Kristensen, 2003a).

When the skeleton of the new treaty started to take shape towards the end

of 2002 Dam Kristensen commented that it was important that the goal now was “a union of European states that retain their national identity.” This meant that the EU was not becoming a state (Dam Kristensen, 2002d).

On 15 May 2003 when the Praesidium had put forward its proposal on institutions Dam Kristensen responded by rejecting the proposal for a Commission with only 15 voting members. According to him, the proposal did not deal with the question of balance between large and small Member States, and therefore the proposal should be dropped and the Union should stick to the Nice Treaty. The President of the Commission should be elected by an electoral council composed of members of national Parliaments and the European Parliament. Dam Kristensen found the proposal for weighting of votes in the Council favoured the large Member States too much. It was a bad proposal which would upset the balance between small and large Member States (Dam Kristensen, 2003b).

The contributions by Peter Skaarup from the Danish People’s Party represented a radically different vision of the EU, one based solidly on nation-states and not accepting ‘more Union.’ In his first speech to the Convention in April 2002 Skaarup said that the EU should be a practical cooperation dictated by real needs. It should never become an objective in itself to transfer competences to the EU. The EU should only deal with cross-border problems. According to Skaarup, there should be no efforts to develop a common European identity. Democracy can only exist nationally in a common linguistic space (Skaarup, 2002a).

Skaarup was in favour of increasing the influence of national Parliaments because national parliamentarians are in closer contact with the voters than European parliamentarians. The EP and the Commission do not know the concerns of the citizens, and based on this the powers of the EP should be limited—the EP possibly even abolished (Skaarup, 2002b).

Concerning the EU’s international role, Skaarup said that no one would die for the EU. Most people are willing to die for their country, but the EU is based on commercial cooperation and management and no one will die for that. The EU’s miserable performance in ex-Yugoslavia had shown that the European big powers had different historically-determined interests. NATO, which had been created to protect the independence of nation-states, is the most important source of security in Europe. Looking at threat scenarios Skaarup claimed that the most serious threat to Europe today comes from immigration, especially from Muslim countries. The question, he said, was should Europe be the continent of cathedrals or mosques? (Skaarup, 2002c).

Skaarup called for simplification and a clear division of competences (Skaarup, 2002f). He was against talking about a constitution or giving EU status as a juridical person or introducing citizenship of the Union on par with national citizenship. These developments implied a federal state, a United States of Europe, and only a minority of Danes would support such a

development (Skaarup, 2002d).

In January 2003 Skaarup commented on the proposal from the Praesidium concerning the division of powers between EU institutions. The whole proposal was about creating a federal state, more federalism and more centralism. Federalists like Andrew Duff and Joschka Fischer had had too much influence, Skaarup claimed. There was nothing in the proposal on the role of national Parliaments. Skaarup was strongly against electing a European President, and he was also against moving more decisions to QMV (Skaarup, 2003a).

In a speech to the Danish People's Party's Constitution Conference on 31 May 2003 Skaarup said that the party was not against the EU as such. European integration had been reasonable until 1992. But then it became an effort to establish a federal state, with common currency, flag, national anthem, Parliament, etc. This was reducing the influence of small states. Plus, he claimed that the proposed Constitutional Treaty would move 26 areas from unanimity to QMV. He therefore argued that Danish ratification of the Constitutional Treaty would require a change of the Danish Constitution, which can only take place by using the difficult procedure of Section 88 of the Constitution (adoption by two consecutive Parliaments with an election in between and a referendum at the end, where a majority of those taking part, and at least 40 per cent of the electorate, must vote in favour) (Skaarup, 2003b).

#### DANISH RESPONSES TO THE DRAFT CONSTITUTIONAL TREATY FROM THE CONVENTION

On 20 June 2003, the day the first draft Constitutional Treaty was presented to the European Council in Thessaloniki, Greece, Foreign Minister Per Stig Møller evaluated the proposal in a newspaper article. He said that the Constitutional Treaty would not expand the functional scope of the EU by bringing in new policy areas, but it would strengthen CFSP and JHA cooperation. The new treaty was logically constructed, and it succeeded in describing the fundamental principles in less than 60 articles. It was a clear treaty, containing a clear division of labour between the Union and the Member States. It would lead to more openness by opening the Council meetings dealing with legislation. National Parliaments would get a bigger role, and citizens' rights would be better protected. Institutionally the Union would become more efficient. QMV would become the normal rule, voting rules would be simplified, and the European Council would get an elected chairman. The 15 voting members of the Commission would rotate with small and large Member States being treated equally. CFSP would be strengthened by becoming more binding and the Union would get a Foreign

Minister. (Denmark had preferred another title, since ‘Minister’ presupposes a state, but the job was more important than the title.) Defence policy would be strengthened and the possibility of closer cooperation in the area would be introduced. JHA would be considerably strengthened by using the Community method (Møller, 2003c).

But the strengthening of JHA cooperation would make the Danish exemption in this area more serious. By abolishing the pillar structure of the Union and applying supranational cooperation for all JHA, Denmark would be excluded from it all—including police and criminal justice cooperation which had stayed intergovernmental when the Amsterdam Treaty had moved other JHA areas to the first pillar. Denmark would therefore have to find some solution for the Danish exemptions at the IGC (Møller, 2003c).

When the Convention concluded the Social Democrats also welcomed the result. According to their perspective, the new arrangement would create a better, more open and democratic EU. Emphasis was put on sustainable development, social market economy, full employment, equality between men and women, eradication of poverty and protection of human rights. At the same time it was emphasised that the Union was not moving towards the United States of Europe. It was simply increased cooperation among nation-states (Dam Kristensen, 2003c).

The Social Liberal Party also supported the draft Constitutional Treaty but, as expected, the Danish People’s Party was against the Treaty. The Unity List was also opposed to the Treaty, but the Socialist People’s Party decided to wait and see the final Treaty when it came from the IGC. From the government’s perspective, it would be important to get the support of the Socialist People’s Party because such support would make it easier to get a ‘yes’ vote in a referendum.

#### THE DANISH OPT-OUTS AND THE CONVENTION DRAFT

In August 2003 the Foreign Ministry issued a 40-page report on the draft Constitutional Treaty and the exemptions or opt-outs (Ministry of Foreign Affairs, 2003). It confirmed what the Foreign Minister already wrote in June that the exemptions would become even more extensive and problematic.

The report dealt with all four exemptions, but quickly said that there were no changes with respect to citizenship of the Union. The draft retains the language from the Amsterdam Treaty that Union citizenship is a supplement to national citizenship and does not replace it (*ibid.*, 2)

Concerning EMU the Constitutional Treaty would reinforce the separate cooperation between the participants in the euro. The Danish exemption would therefore be more felt in the future (*ibid.*, 4).

The most decisive changes would take place in the JHA area, where all

cooperation would become supranational. This included the third pillar areas of police and criminal justice cooperation that had remained inter-governmental in the Amsterdam Treaty. The Danish exemption would therefore become extended to these areas. Through criminal justice measures in sector policies the Danish exemption might spread to other policy areas, making it all extremely complicated for Denmark and its partners. The report went into great detail about the existing legislation in the different JHA areas. Overall the conclusion was clear, the Constitutional Treaty would make Denmark's JHA exemption much more felt in several ways. Denmark might for instance have to leave EUROPOL and EUROJUST, third pillar agencies that would become supranational (*ibid.*, 5-19).

Concerning the defence policy exemption the report noted the various stipulations of the draft Constitutional Treaty, including structural cooperation to increase the Union's military capabilities, the creation of a European Armaments, Research and Military Capabilities Agency, and closer cooperation with regard to mutual defence cooperation. Again, the Danish exemption would be felt more in the future (*ibid.*, 20-22).

The new solidarity clause requiring the Member States to "act jointly in a spirit of solidarity if a Member State is the victim of terrorist attack or natural or man-made disaster" could also affect the Danish defence exemption because it calls on the mobilisation of all instruments "including the military resources made available by the Member States" (Articles I-42 and III-231). So the combination of the JHA and defence policy exemptions could exclude Denmark from much of the EU's anti-terror activities in the future (*ibid.*, 22-25).

It was the special importance of the JHA exemption that got the government to seek political support for a change in that exemption. On 10 October a parliamentary majority supported the government's proposal to seek a change in this exemption during the IGC so that the Danish people in a future referendum could change it to an arrangement whereby Denmark can decide about participation on a case-by-case basis, like the model applied by the United Kingdom and Ireland, known as an opt-in model. This would allow Denmark to decide to take part in supranational JHA cooperation in an ad hoc manner (Denmark, Folketing, 2003).

#### THE GOVERNMENT'S NEGOTIATION MANDATE TO THE IGC

As the IGC started on 4 October 2003 domestic politics forced the government to change policy and demand one Commissioner per Member State, as other small Member States had long been demanding. Indeed, these states, including especially Finland, criticised the Danes for not supporting the interests of the smaller states sufficiently. Also opinion polls indicated

that a majority of the Danes considered it important for the country to retain a voting Commissioner.

The Danish negotiating mandate was worked out between the government and *Folketing* in September 2003 and largely confirmed on 10 October in connection with a debate in the Parliament. It was kept in rather general terms. It stated that the EU is the framework for future European cooperation, but that a simpler and better EU is needed. The Convention draft was a good basis. It contained a clearer description of the division of labour, would create more openness, involve national Parliaments further and incorporate the Charter of Fundamental Rights. The EU faces new challenges such as refugees, cross-border criminality and international terrorism, and the EU must become a global leader in dealing with these issues. For this reason not all CFSP decisions should be based on unanimity. The EU should also strengthen defence cooperation and develop a military capacity. Denmark was also open to accepting closer cooperation in the area of defence (Denmark, 2003b).

Concerning institutions the Danish negotiating mandate saw the proposal from the Convention draft as a reasonable compromise between the larger and smaller states. Thus there was Danish support for an elected Chairman of the European Council. Denmark was against a special legislative Council. On the new voting proposal the Danish position was cryptic. The Nice rules were seen as unnecessarily complicated. There was support for increased influence of the European Parliament, including agricultural policy. Denmark wanted a strong, effective and well-functioning Commission and could still—in September—support a division into voting and non-voting members as long as there was equal rotation between small and large Member States. There was also support for a ‘double-hatted’ Foreign Minister.

If we were to compare the negotiation mandate of 2003 with Denmark’s negotiating position at earlier IGCs it would appear clearly that the country was moving quite a bit. The broad representation in the Convention gave the Convention draft certain legitimacy. The deliberative process affected preferences. Frank Schimmelfennig’s “rhetorical entrapment” might be a useful way to look at what happened to Denmark in the process (Schimmelfennig, 2003). But it could also be seen as a small dependent state realising that it has to follow the stream. The costs of exit would be high. The Constitutional Treaty could then be seen as the latest event in a path-dependent trajectory (Pierson, 1996).

In a speech to a hearing arranged by the European Affairs Committee of the *Folketing* on 3 November the Foreign Minister, Per Stig Møller, dealt with the Danish efforts at the IGC (Møller, 2003d). He talked about some progress. Thus, for example, he mentioned that the idea of a special legislative Council, opposed by Denmark, was now opposed by so many



Member States that it looked as if it would not survive the IGC. Concerning the Presidency of the Council, he noted that agreement was emerging on a system of three countries sharing the Presidency for 18 months, thus creating a group Presidency.

Otherwise, Denmark supported the creation of two new coordinating functions—the elected Chairman of the European Council and EU Foreign Minister. But Denmark firmly believed that the Chairman of the European Council should be a *Chairman*, not a President! And the Foreign Minister should be based in the Council, with a coupling to the Commission. Denmark had now also put forward a proposal that all Member States should have a voting Commissioner. As Møller explained, having a Commissioner had great symbolic meaning in the Member States. Indeed, the referendum debate in Denmark was already being anticipated, and symbols could be expected to become an important part of the debate.

On the controversial redefinition of QMV proposed by the Convention, Denmark could support the proposal but preferred a system of QMV based on equal weighting of the number of states and size of population. It could be 60 per cent, but it could also be 50 per cent. On the extension of QMV the government largely supported the proposal from the Convention. If EU-25 is to function efficiently there must be an extended use of QMV. But Denmark still supported unanimity for one area, namely social security for migrating workers, viz. Article III-21 in the draft Constitutional Treaty (current Article 42 TEC). This affects central aspects of the welfare systems of the Member States.

On non-institutional issues Denmark followed the Italian Presidency's call for self-discipline. Denmark was for instance supporting the so-called '*passerelle*' in Article I-24(4), which stipulates that for areas requiring special legislative procedure or unanimity the "European Council can adopt, on its own initiative and by unanimity" a decision allowing for the application of the ordinary legislative procedure or qualified majority. In both cases the national Parliaments would have to be informed. This '*passerelle*' would make it possible to avoid IGCs for technical questions in the future and thus give the EU some flexibility, the Foreign Minister explained.

Møller finished by saying that should the IGC fail to produce an agreement, it would be the loss of a "window of opportunity" for a new treaty.

#### THE DANISH OPT-OUTS AND THE IGC

As mentioned earlier the main issue for Denmark during the IGC was to secure the Danish opt-outs in the form of protocols to the new treaty. This

problem had largely already been solved during the Italian Presidency.

Given the difficulty of getting a new treaty accepted in Denmark if it did not maintain the Danish opt-outs, the Danish government was in a strong bargaining position. Seen from a two-level bargaining perspective the Danish rejections of Maastricht in 1992 and the euro in 2000 meant that Denmark had a small domestic win-set. But, “a small domestic win-set can be an advantage” (Putnam, 1998, 440, see also Schelling, 1960, 28). Seen from the perspective of the bargaining theory of liberal inter-governmentalism Denmark’s threat of veto was credible (Moravcsik, 1998, 63). Therefore, Denmark’s EU partners had an interest in finding a solution that was amenable to Denmark.

The problems of the Danish opt-outs were largely solved by a draft protocol in one of the documents put forward by the Italian Presidency on 25 November 2003 for the Naples Ministerial Conclave 28-29 November (CIG 52/03).

The final draft adopted by the IGC in June 2004 contains four protocols dealing with the Danish exemptions. Protocols 14 and 15 confirm the Danish opt-out from the euro. Protocol 20 deals with JHA and defence policy (Council of the European Union, 2004, Vol. II). The opt-outs are confirmed, but an annex to the protocol opens up the possibility of Denmark introducing an *opt-in* solution with respect to the Area of Freedom, Security and Justice (AFSJ). This can be done when new measures are proposed. Thus:

Denmark may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Chapter IV of Title III of Part III of the Constitution, that it wishes to take part in the adoption and application of any such proposed measure, whereupon Denmark shall be entitled to do so (Article 3 of Annex, Protocol 20).

But there is also the possibility of joining later:

Denmark may at any time after the adoption of a measure pursuant to Chapter IV of Title III of Part III of the Constitution notify its intention to the Council and the Commission that it wishes to accept that measure (Article 4 of Annex, Protocol 20).

In cases when Denmark decides to opt-in, Section 20 of the Danish Constitution would apply (Ministry of Justice, 2004). So it would require a five-sixths majority in the *Folketing* or it must be confirmed by a referendum.

Finally, Protocol No. 26 confirms that “Denmark may maintain the existing legislation on the acquisition of second homes.” This legislation limits the ownership of summer houses along the Danish coasts to Danish citizens.

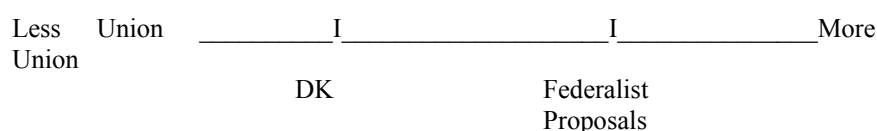
To complete the story, in Declaration 39 concerning the Protocol on the position of Denmark, “Denmark declares that it will not use its voting right to prevent the adoption of the provisions which are not applicable to Denmark.” Furthermore, “Denmark declares that Danish participation in actions or legal acts pursuant to Articles I-43 [solidarity clause] and III-329 [implementation of solidarity clause] will take place in accordance with Part I [AFSJ opt-out] and Part II [defence opt-out] of the Protocol on the position of Denmark.”

Figure 1 suggests a possible way to depict the changing win-sets during the treaty reform process. Given a sceptical domestic constituency the Danish win-set was very small. Too much more ‘union’ (or federalism) would make a proposal un-ratifiable in Denmark. During the Convention the government tried to limit the federalist imprints on the treaty internationally, while preparing the domestic constituency for more union, and defending the need for more QMV after enlargement. Finally, during the IGC Denmark successfully dealt with the specific Danish problem of opt-outs.

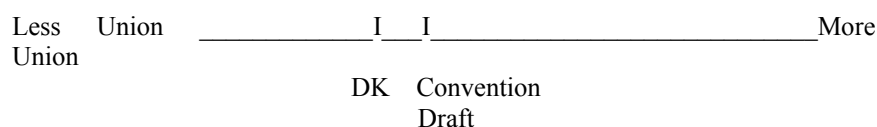
Whether Situation C of Figure 1 held after the French and Dutch referendum ‘no’ votes is a good question. As we shall see later the popular support for the Treaty fell in June 2005 increasing the risk of involuntary defection at the time of a referendum. In any case the government decided to postpone the referendum scheduled for September that year.

Figure 1: Successive Win-Sets during the Making of the Constitutional Treaty

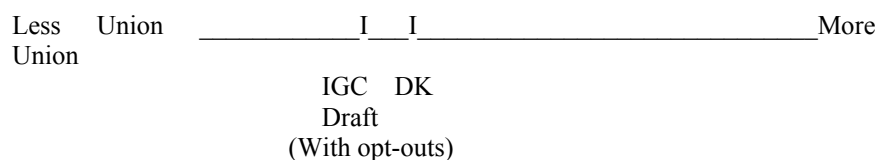
A. Prior to the Convention



B. After the Convention



C. After the IGC



## MINISTRY OF JUSTICE REPORT

That the Constitutional Treaty would fall under Section 20 of the Danish Constitution was confirmed in a report from the Ministry of Justice on 22 November 2004 (Ministry of Justice, 2004). The report had been worked out in cooperation with the lawyers in the Prime Minister's Office and in the Ministry of Foreign Affairs.

The central question concerning Section 20 of the Danish Constitution is whether there is a transfer of sovereignty in some specific policy area(s). To answer this question the Constitutional Treaty was compared with the existing treaties. Increasing the use of QMV in the Council or introducing more co-decision for the European Parliament or changing the composition of the Commission are not considered to fall under Section 20. For this reason Denmark had been able to ratify the Treaty of Nice without a referendum (Laursen, 2006b).

The answer about the Constitutional Treaty given by the lawyers was that there were some articles in the Treaty that fell under Section 20. The following were in that category:

- Article I-51, protection of personal data;
- Article III-125(2), measures concerning passports, identity cards, residence permits and other such documents;
- Article III-127, diplomatic and consular protection;
- Article III-160, administrative measures with regard to capital movements and payments;
- Article III-364, ECJ jurisdiction, intellectual property rights; and
- Article III-278, public health.

It was also probable that Article III-254 concerning space policy fell under Section 20.

Given Denmark's opt-out from supranational Justice and Home Affairs cooperation (Protocol 20) the communitarisation of the Area of Freedom, Security and Justice (AFSJ) would not require the application of Section 20 of the Danish Constitution. Nor would the changes in the Common Foreign and Security Policy (CFSP) included in the Treaty require the application of Section 20. CFSP basically stayed intergovernmental. So there was no transfer of sovereignty.

The solidarity provision in Article I-43 was discussed. To the extent it involves military means it will be covered by the Danish Defence opt-out as made explicit in Declaration 39, attached to Protocol 20. So Section 20 of the Danish Constitution would not apply.

For the following policy areas it was concluded that Section 20 did not

apply:

Article III-136, social security;  
 Article III-176, intellectual property rights;  
 Article III-321, humanitarian aid;  
 Article III-256, energy policy;  
 Article III-281, tourism;  
 Article III-282, sport; and  
 Article III-284, civil protection.

The explicit reference to the primacy of Union Law (Article I-6) was no problem in relation to the Danish Constitution since this principle already existed in Community law when Denmark joined in 1973.

The EU's adherence to the European Convention on Human Rights (Article I-9), the lawyers concluded, would require application of Section 20 of the Danish Constitution since it could directly affect citizens in Denmark. Strangely enough, the incorporation of the Charter on Fundamental Rights would not require application of Section 20. According to the Constitutional Treaty the Charter does not extend the competences of the EU.

The flexibility clause in Article I-18—basically the old Article 308 TEC—would require the application of Section 20 because the Constitutional Treaty extended the use of the clause beyond the Common Market in connection with the abolition of the pillar structure.

The so-called '*passerelle*'—Article IV-444—was deemed not to require the application of Section 20.

In conclusion then, the lawyers in the Ministry of Justice succeeded in finding about a dozen provisions in the Treaty that would or might require the application of Section 20 of the Danish Constitution. This was important, but by this time the political decision to have a referendum had already been made. So the lawyers confirmed a political decision. Seen from a political perspective it is interesting that the big political innovations of the Treaty, including important institutional changes, did not require a referendum, but some relatively minor extensions of the functional scope of the Union did.

#### THE FIVE-PARTY AGREEMENT

In two-level games a government can, on the one hand, try to influence the outcome of international negotiations. Denmark did this by successfully getting the Danish opt-outs into the draft Constitutional Treaty. This could be seen as what Andrew Moravcsik has termed "COG Collusion" (Moravcsik, 1993, 26). On the other hand a government can try to increase the domestic win-set through what Moravcsik calls "cutting slack" (*ibid.*,

28). Such strategies increase the chances of ratification. The Danish government started this process by actively defending the Constitutional Treaty as necessary because of enlargement. This strategy used rhetoric.

But a government can also use the strategy of forming domestic alliances. In November 2004 the two government parties (Liberal and Conservative) and three leading opposition parties (Social Democrats, Social Liberal Party and Socialist People's Party) reached an agreement to support the Constitutional Treaty in a referendum—the 'Five-Party Agreement.' The agreement further included the provision that possible referendums about the Danish opt-outs would not take place at the same time but later (Five-Party Agreement, 2004).

The five parties emphasised various positive aspects of the Constitutional Treaty, including increased effectiveness, a clearer division of competences, clearer goals and values, and greater openness. At the same time it was emphasised that it was an agreement among independent states and that it would be possible to leave the Union.

Given the possibility of transferring some policies from unanimity to QMV in the future through so-called '*passerelle*' provisions the Five-Party Agreement went into some details about areas where Denmark would like to see such a move and areas where Denmark would resist such a move. Areas where Denmark would like to see QMV in the future included: minimum rates for environmental taxes (Article III-234(2)); minimum rates for energy taxes (Article III-256(3)); action to combat various forms of discrimination (Article III-124(1)); and decisions regarding the EU's multi-annual financial framework (Article III-55(4)). On the other hand Denmark welcomed unanimity for areas of social and labour market policy in Article III-219, i.e., social security and social protection of workers, termination of an employment contract, representation and collective defence of the interests of workers and employers as well as conditions of employment for third-country nationals. The exemptions from QMV in trade policy (including culture, audiovisual policy, social matters, education and health) were also welcomed. Here too the five parties agreed on a mutual veto right should QMV be proposed. In the area of taxation the five parties could support QMV for the establishment and harmonisation of minimum rates for indirect taxes (Article III-171) and cooperation on direct and indirect tax fraud and evasion as well as administrative cooperation (Articles III-171 and III-173), but they were happy about unanimity for direct personal taxes (Article III-173) and harmonisation of indirect taxes, apart from minimum harmonisation (Article III-171). In the latter cases each party would be able to veto Danish support for QMV. Finally the parties welcomed the emergency brake for social security for migrant workers (Article III-136).

The Five-Party Agreement left the Unity List on the left side and the Danish People's Party on the right side opposing the Constitutional Treaty.

Surprisingly the small Christian Democrat Party also decided to oppose the Treaty. This latter party, however, did not reach the two per cent threshold of required votes in the parliamentary election in January 2005 so it is not represented in the Parliament today.

The main value of the Five-Party Agreement for the government was the commitment from the Socialist People's Party to support the Treaty. This support was confirmed by an internal referendum among party members in December 2004.

It was decided that the Danish referendum on the Constitutional Treaty would take place on 27 September 2005. Opinion polls in early 2005 showed majority support for the Treaty. The Eurobarometer published in January 2005 had 44% of Danes in favour and 26% opposed to the Constitutional Treaty (European Commission, 2005). Optimists also referred to the fact that the EU-sceptical groups—the June Movement and the People's Movement against the EU—lost votes in the election to the European Parliament in June 2004. Could it be that the mood of the country was changing?

When the French and Dutch voted 'no' in their respective referenda the popular support for the Treaty fell in Denmark, at least for a certain period. In a poll carried out by Gallup in cooperation with *Berlingske Tidende* 26 April-18 May 2005—i.e., *before* the French referendum—45% of Danes said that would vote 'yes,' and 11% said they were most likely to vote 'yes,' 25% said they would vote 'no,' and 7% said they would likely vote 'no.' In a similar poll conducted during the period 31 May-2 June—i.e., *after* the French referendum—only 34% said that they would vote 'yes,' with 10% likely to vote 'yes,' but 38% now saying that they would vote 'no,' with 6% likely to vote 'no' (Opinion Polls, 2006).

Support for the Constitutional Treaty recuperated somewhat after the shock of the referenda in France and the Netherlands wore off. In the Standard Eurobarometer published in December 2006, based on fieldwork in September and October 2006, support for the Constitutional Treaty in Denmark was 51% with 35% against the Treaty (European Commission 2006).

#### REFLECTION PERIOD

At its 16-17 June meeting, the European Council decided to call a 'reflection period.' The Danish Prime Minister announced on 17 June that the Danish referendum scheduled for 27 September 2005 would be postponed. By then the Parliamentary Bill concerning the Constitutional Treaty put forward by the government on 31 March 2005 had already gone through a first reading on 19 April and a second reading on 9 June (COSAC, 2006).

In August the Prime Minister met with the political parties and non-

governmental organisations (NGOs) engaged in the Danish EU debate. It was decided that the European Affairs Committee of the *Folketing* should coordinate the various activities during the reflection period. Once again civil society was invited to debate the issues, and the government made money available for various activities (Federspiel, 2006).

A number of activities were organised and the general EU debate continued. But in reality the government was rather passively waiting on developments elsewhere in the EU. Meeting with the Diplomatic Corps in Copenhagen on 12 January 2007, Prime Minister Anders Fogh Rasmussen said:

My government and a very broad majority of the Danish parliament believe that the Constitutional Treaty is an excellent basis for the future cooperation in the EU. It should be the natural point of departure for the negotiations ahead on a new EU Treaty.

The Constitutional Treaty addresses the main challenges Europe faces. Most importantly it contains provisions for more effective and democratic decision making. These provisions are necessary if we are to enable the enlarged EU to deliver the results that the European citizens are expecting.

At the same time, however, we have to respect the outcome of the referenda in France and the Netherlands. And frankly speaking we cannot expect the French and Dutch governments to present the same text to their electorates again.

It will not be easy to find a solution to the question of the future of the Constitutional Treaty. But I am confident that the German presidency will be able to bring the matter forward (Fogh Rasmussen, 2007).

So the government seemed to expect that a new EU treaty would be negotiated, although not necessarily a new Constitutional Treaty. But the government did not make specific proposals. The self-proclaimed proactive government was waiting.

#### CONCLUDING REMARKS

Through the 1990s the Danish political elite moved from seeing the original EC as a common market to seeing the EU as a political project. This shift was clear in the referendum debate about the Amsterdam Treaty in May 1998. What we have seen in connection with the draft Constitutional Treaty is a further move in the Danish positions and discourse about the EU. The government parties and the Social Democrats and Social Liberals have accepted much of the 'constitutionalist' (some would say 'federalist') discourse that has been part of the European Convention. At the same time they have been busy claiming that they are opposed to European federalism, usually associating federalism with a centralised system.



By emphasising that the Constitutional Treaty did not create a federal union, the government and pro-integration opposition parties were anticipating the referendum debate, in which the euro-sceptical parties—the Danish People’s Party and the Unity List, as well as the People’s Movement against the EU and the June Movement—could be expected to claim that the Treaty would create a federal union. Much of this debate would have been about symbols: a President, a Foreign Minister, a flag, an anthem. Scare scenarios of the Danish nation disappearing into a European super-state could once again have been sold to a Danish public wary of what comes from the south.

Selling the Treaty would therefore have required a determined effort not only by the government but also by the Social Democrats, the Social Liberals and the Socialist People’s Party. These parties were gearing up for such a campaign, but the French and Dutch ‘no’ postponed the battle, or should the outcome now be a new mini-reform, maybe a new treaty can be ratified by the *Folketing* the way the Treaty of Nice was, without a referendum.

Getting a new EU treaty accepted in Denmark has to be a major concern of any Danish government. The 2<sup>nd</sup> of June 1992 was a shocking surprise. It required a major national and international effort to get the Maastricht Treaty ratified with opt-outs in 1993. The strategy chosen in 1996-97 during the negotiations of the Amsterdam Treaty was a very active one, seeking Danish imprints in the Treaty so that it could be sold to the Danish public. The strategy succeeded. In 2000 the government was again very active in the Treaty of Nice negotiations. But this time the purpose was to limit changes to institutional ones that would not require a referendum. That strategy also succeeded.

The Constitutional Treaty is also mainly about institutional changes, and at one point the Foreign Minister actually said that it did not expand the functional scope of the Union. Given the legal interpretation that allowed the former government to avoid a referendum about the Treaty of Nice, a referendum could arguably have been avoided again. But the Ministry of Justice decided in November 2004 that the Constitutional Treaty *did* involve a transfer of sovereignty to the Union and, therefore, Section 20 of the Danish Constitution applied.

Even without the legal interpretation from the Ministry of Justice all the constitutional discourse surrounding the draft Constitutional Treaty would have made it difficult to sell the argument that no referendum was needed. The government therefore chose to accept the draft from the Convention and concentrate its energy during the IGC on retaining the Danish opt-outs in the new treaty. This way the new treaty could be adopted without abolishing the Danish opt-outs. The flip side of that strategy was a relatively low profile in the IGC on other issues. Denmark took a rather intergovernmentalist position

on many issues and had its 'red lines' concerning increased use of QMV. Luckily for the government it could largely hide behind the UK on many of these issues.

## BIBLIOGRAPHY

- Belgium, EU Presidency (2001), "The Future of the EU: Declaration of Laeken," at [www.eu2001.be](http://www.eu2001.be).
- CIG 52/03 Add 1: "Addendum to the Presidency Note. IGC 2003 – Naples Ministerial Conclave: Presidency Proposal," Brussels, 25 November 2003.
- CONV 528/03: The European Convention, "Draft of Articles 1 to 16 of the Constitutional Treaty," Brussels, 6 February 2003.
- CONV 724/03: The European Convention, "Draft Constitution, Volume I – Revised text of Part One," Brussels, 26 May 2003.
- CONV 773/03: Bidrag fra David Heathcoat-Amory, Irene Belohorska, Jan Zahradil, Jens-Peter Bonde, Peter Skaarup, medlemmer af konventet, og Esko Seppanen, John Gormley, Per Dalggaard, William Abitbol, suppleanter til konventet: "Rapport fra et mindretal – Demokratiernes Europa," 30 May 2003.
- COSAC (2006), "Ratification of the Constitutional Treaty in EU-25," latest update 7 December 2006, at <http://www.cosac.eu/en/info/ratification/ratification/>.
- Council of the European Union (2004 I), *Draft Treaty establishing a Constitution for Europe as approved by the Intergovernmental Conference on 18 June 2004. Treaties*, Vol. I, July.
- (2004 II), *Draft Treaty establishing a Constitution for Europe as approved by the Intergovernmental Conference on 18 June 2004. Protocols. Declarations*, Vol. II, July.
- Dam Kristensen, Henrik (2002a), Tale i Konventet d. 7. juni: Om de nationale parlamenters rolle i den europæiske arkitektur.
- (2002b), Tale i Konventet d. 11. juli (FUSP).
- (2002c), Tale i Konventet d. 7. november (arbejdsløshed og skat).
- (2002d), Tale i Konventet d. 20. december (FUSP).
- (2003a), Tale i Konventet d. 6. februar (social politik).
- (2003b), Tale i Konventet d. 15. maj (institutioner).
- (2003c), "Vi får et bedre, åbent og mere demokratisk EU," Pressemeldelse. Socialdemokraterne.
- De Poncis, Étienne (2003), *Vers une Constitution européenne. Textecommenté du projet de traité constitutionnel établi par la Convention européenne*, Paris: Éditions 10/18.
- Denmark (2003a), "Dansk europapolitisk udspil," 20 March.
- (2003b), "Regeringskonferencen 2003 – Regeringens forhandlingsgrundlag September 2003," 12 September.
- Denmark, Folketing (2003), "Forfatningstraktatens betydning for de danske forbehold," Infonote tilgået Folketingets Europaudvalg, 28 October.
- European Commission (2005), "The Future Constitutional Treaty. First Results," *Special Eurobarometer* 214, January.
- (2006), "Public Opinion in the European Union," *Standard Eurobarometer* 66, December.
- European Convention (2003), *Draft Treaty Establishing a Constitution for Europe*, Luxembourg: Office for Official Publications of the European Communities.
- Federspiel, Ulrik (2006), "The International Situation and Danish Foreign Policy 2005," in Nanna Hvidt and Hans Mouritzen (eds), *Danish Foreign Policy Yearbook 2006*, Copenhagen: Danish Institute for International Studies, 13-33.
- Five-Party Agreement (2004), "Politisk aftale mellem Regeringen (Venstre og Det Konservative Folkeparti), Socialdemokraterne, Socialistisk Folkeparti og Det Radikale Venstre om Danmark i det udvidede EU," 2 November, at [www.um.dk](http://www.um.dk).
- Fogh Rasmussen, Anders (2003a), Statsminister Anders Fogh Rasmussens Nytårstale 2003.
- (2003b), "Danish EU Policy after the Presidency," Speech by Prime Minister Anders Fogh Rasmussen at the Institute for International Studies, 15 January.
- (2003c), "Europe after the enlargement," Address by Prime Minister Anders Fogh

- Rasmussen, College of Europe, Natolin, 28 February.
- (2003d), Statsminister Anders Fogh Rasmussens tale ved overrækkelse af Europabevægelsens pris som "Årets Europæer," den 3. maj.
- (2007), "Address by Prime Minister Anders Fogh Rasmussen at the Meeting with the Diplomatic Corps in Copenhagen on January 12," at <http://www.stm.dk/Index/dokumenter.asp?o=6&n=0&d=2764&s=2&str=stor>.
- Laursen, Finn (1994), "Denmark and the Ratification of the Maastricht Treaty," in Finn Laursen and Sohie Vanhoonacker (eds), *The Ratification of the Maastricht Treaty*, Dordrecht: Nijhoff; Maastricht: EIPA, 61-86.
- (1995), "Parliamentary Bodies Specializing in European Union Affairs: Denmark and the Europe Committee of the Folketing," in Finn Laursen and Spyros Pappas (eds), *The Changing Role of Parliaments in the European Union*, Maastricht: European Institute of Public Administration, 43-54.
- (2001), "The Danish Folketing and its European Affairs Committee: Strong Players in the National Policy Cycle," in Andreas Maurer and Wolfgang Wessels (eds.), *National Parliaments on their Ways to Europe: Losers or Latecomers?* Baden-Baden: Nomos Verlagsgesellschaft, 99-115.
- (2002), "Denmark: The Battle for a Better Treaty," in Finn Laursen (ed.), *The Amsterdam Treaty: National Preference Formation, Interstate Bargaining and Outcome*, Odense: Odense University Press, 71-91.
- (2003), "The Danish 'No' to the Euro and its Implications: Towards more Variable Geometry?," *CFES Working Paper* (Odense), No. 9/2003.
- (2006), "Denmark: The Battle to Avoid a Referendum," in Finn Laursen (ed.), *The Treaty of Nice: Actor Preferences. Bargaining and Institutional Choice*, Leiden: Martinus Nijhoff Publishers, 57-81.
- Ministry of Foreign Affairs (2003), "Notat: Konventstraktaten og forbeholdene," J. nr.: JT.EU 400 A JUR 11.1, 11 August.
- (2004), "Redegørelse til Folketinget: Traktat om en forfatning for Europa som undertegnet i Rom 29. oktober 2004," Copenhagen, November, at [www.um.dk](http://www.um.dk).
- Ministry of Justice (2004), "Redegørelse for visse forfatningsretlige spørgsmål i forbindelse med Danmarks ratifikation af traktat om en forfatning for Europa," Copenhagen, 22 November, at [www.jm.dk](http://www.jm.dk), [http://www.eu-oplysningen.dk/upload/application/pdf/7a0c197d/redegoerelse\\_jm.pdf](http://www.eu-oplysningen.dk/upload/application/pdf/7a0c197d/redegoerelse_jm.pdf).
- Moravcsik, Andrew (1993), "Integrating International and Domestic Theories of International Bargaining," in Peter B. Evans, Harold K. Jacobson and Robert D. Putnam (eds), *Double-Edged Diplomacy: International Bargaining and Domestic Politics*, Berkeley: University of California Press, 3-42.
- (1998), *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, Ithaca, NY: Cornell University Press.
- Møller, Per Stig (2003a), Danmark – 30 år i EU – Hvad vil vi nu? Tale af udenrigsminister Per Stig Møller på Københavns Handelshøjskole den 10. april.
- (2003b), "Det nye Europa og dets plads i verden," Tale af udenrigsminister Per Stig Møller ved Kommissionens Europakonference den 9. maj 2003 på Kolle Kolle.
- (2003c), "Danmark og det nye Europa," *Kronik i Politiken*, 20. juni.
- (2003d), Udenrigsministerens tale ved høring arrangeret af Folketingets Europaudvalg den 3. november 2003 om regeringskonferencen.
- 'Opinion Polls' (2006), *Danish Foreign Policy Yearbook 2006*, Copenhagen: Danish Institute for International Studies, 205-218.
- Pierson, Paul (1996), "The Path to European Integration: A Historical Institutional Analysis," *Comparative Political Studies*, Vol. 29, No. 1, 123-163.
- Putnam, Robert D. (1988), "Diplomacy and domestic politics: the logic of two-level games," *International Organization*, Vol. 42, No. 3 (Summer), 427-460.
- Schelling, Thomas C. (1960), *The Strategy of Conflict*, London: Oxford University Press.

- Schimmelfennig, Frank (2003), *The EU, NATO and the Integration of Europe: Rules and Rhetoric*, Cambridge: Cambridge University Press.
- Skaarup, Peter (2002a), Tale i Konventet d. 15.-16. april: Europa: hvad er formålet? EU's opgaver.
- (2002b), Tale i Konventet d. 7. juni: Om de nationale parlamenters rolle i den europæiske arkitektur.
- (2002c), Tale i Konventet d. 11.-12. juli: Om EU's eksterne handlemuligheder.
- (2003a), Tale i Konventet d. 20.-21. januar: Bemærkninger til EU-konventets præsidiiums oplæg til magtfordelingen mellem EU-institutionerne.
- (2003b), Tale ved Dansk Folkepartis grundlovskonference d. 31. maj.
- Sørensen, Catharina and Anne Mette Vestergaard (2005), "A Perilous Democratic Exercise: The Referendum on the Constitutional Treaty in Denmark," *DIIS Brief* (March, update 20 May), at <<http://www.diis.dk/sw10098.asp>>.

