

CHAPTER 1

INTRODUCTION: OVERVIEW OF THE CONSTITUTIONAL TREATY AND MAIN ELEMENTS OF THE TREATY

Finn Laursen

INTRODUCTION¹

The European Union (EU) has gone through a number of treaty reforms in recent years. The EU itself was formed by the Maastricht Treaty in 1992 (Laursen and Vanhoonacker, 1992, 1994). It combined the pre-existing European Communities (EC) in reformed versions, including plans for Economic and Monetary Union (EMU), with two new pillars: Common Foreign and Security Policy (CFSP); and Justice and Home Affairs (JHA) cooperation. Further reforms followed through the Amsterdam Treaty in 1997 (Laursen, 2002) and the Nice Treaty in 2001 (Laursen, 2006a). Soon after Nice, yet another reform was tried. From the beginning of 2002 a Convention on the Future of Europe worked to draft a new treaty. It was finalised in July 2003. An Intergovernmental Conference (IGC) then met from October 2003 until June 2004, when the Treaty establishing a Constitution for Europe, hereafter referred to as the Constitutional Treaty, was agreed upon. The Treaty subsequently ran into problems during the ratification process. The French and Dutch electorates rejected the Treaty in referenda on 29 May and 1 June 2005. Although a majority of the Member States actually ratified the Treaty, a meeting of the European Council in June 2007 decided to negotiate an alternative treaty, a Reform Treaty, thus abandoning the Constitutional Treaty.

THE POST-NICE AGENDA

As they left Nice in December 2000, when they had agreed upon the Treaty of Nice, the EU leaders called for “a deeper and wider debate about the future development of the European Union.” In a Declaration on the Future of the European Union they mentioned the following points for the agenda of that debate:

¹ This chapter relies on earlier writings by the author, especially Laursen 2003 and 2006b.

- How to establish and monitor a more precise delimitation of competencies between the European Union and the Member States, reflecting the principle of subsidiarity.
- The status of the Charter of Fundamental Rights of the European Union proclaimed in Nice as a political document but not legally binding.
- A simplification of the Treaties with a view to making them clearer and better understood without changing their meaning.
- The role of the national Parliaments in the European architecture (European Union, 2001, 88-89).

The Declaration also talked about “the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, to bring them closer to the citizens of the Member States.”

It was therefore decided that a new IGC should be convened in 2004 to discuss the above issues and possibly other issues relating to the efficiency and legitimacy of the EU. Candidate states that had concluded accession negotiations would participate in the IGC. Other candidate states would be invited as observers.

Nice was clearly not the end of the road. The nature of the EU was still very much on the agenda. What kind of Union is it? What kind of Union should it become? How could a much enlarged Union in the future be made both efficient and legitimate?

Germany’s Foreign Minister Joschka Fischer had made a speech in a personal capacity at Humboldt University in Berlin on 12 May 2000 in which he discussed the challenges faced by Europe and the question of the ‘finality’ of European integration. The EU had to enlarge towards the east and southeast. At the same time the EU should maintain or improve its capacity for action. There was a danger that an EU with 27 or 30 Member States would be hopelessly overloaded. So there was a “need for decisive, appropriate, institutional reform.” Aware of the difficulties he argued:

... there is a very simple answer: the transition from a union of states to full parliamentarisation as a European Federation, something Robert Schuman demanded 50 years ago. And that means nothing less than a European Parliament and a European government which really do exercise legislative and executive power within the Federation. This Federation will have to be based on a constituent treaty (Fischer, 2000).

Fischer suggested that the ‘Monnet method’ of gradual integration used so far would not be adequate for the future. A European constitution was needed to deal with political integration and democratisation of Europe. One possible approach to create a European federation would be the creation of a

smaller group of Member States, forming a ‘centre of gravity,’ to move forward. He finished: “This, ladies and gentlemen, is my personal vision for the future: from closer co-operation towards a European constituent treaty and the completion of Robert Schuman’s great idea of a European Federation. This could be the way ahead!”

The meeting of the European Council at Laeken in December 2001, during the Belgian Presidency, confirmed the idea of preparing IGC-2004 through a Convention, which had especially been promoted by the European Parliament. This convention method had been used with success to produce the Charter of Fundamental Rights in parallel with the Treaty of Nice negotiations (Feus, 2000).

In the Declaration of Laeken on the Future of the European Union the leaders claimed that the EU is a success story and asked a number of questions about the future development of the EU. The EU faced “twin challenges, one within and the other beyond its borders.” Internally the institutions should “become more democratic, more transparent and more efficient.” Internationally, “now that the Cold War is over and we are living in a globalised, yet highly fragmented world, Europe needs to shoulder its responsibilities in the governance of globalisation” (Belgium, EU Presidency, 2001).²

THE EUROPEAN CONVENTION

The Convention on the Future of Europe proposed by the Laeken Summit would have former French President Valéry Giscard d’Estaing as President and be composed of 15 representatives of the Heads of State or Government of the Member States (one from each Member State), 30 members of national Parliaments (two from each Member State), 16 members of the European Parliament and two Commission representatives. Candidate countries, including Bulgaria, Romania and Turkey, would also be involved without votes.³ This added up to a total of 105 *conventionnels*, as the members were called. With alternates, who could also take part in the meetings, there were more than 200 members. A Praesidium was composed of the President, two Vice-Presidents and some members drawn from the

² For an interesting account of the Laeken Summit, see Ludlow (2002), which includes the Laeken Declaration on the Future of the European Union as well as an Input Paper for the Tour of Capitals, dated 23 November 2001, as Annexes. The Laeken Declaration was well received by the press, but Ludlow found it “dull, prosaic and badly written.” But it “mirror[ed] Europe’s current confusion,” he said (73).

³ Since the Convention decided not to vote but to seek consensus this latter point was without importance.

Convention (see Table 1). The Praesidium also had a Secretariat headed by a British diplomat, John Kerr.

Table 1: Praesidium Members

| | |
|--|--|
| President | Valéry Giscard d'Estaing |
| 2 Vice-Presidents | Giuliano Amato (Italy), Jean-Luc Dehaene (Belgium) |
| 3 Representatives of the Presidency | Ana Palacio (Spain), Gioglio Katiforis (Greece) and Henning Christophersen (Denmark) |
| 2 Representatives of the European Parliament | Ingo Mendez de Vigo (Spain) and Klaus Hänsch (Germany) |
| 2 Representatives from national Parliaments | Gisela Stuart (UK) and John Bruton (Ireland) |
| 1 Invitee from candidate countries | Alojz Peterle (Slovenia) |

Source: Duhammel, 2003, 41.

Countries not represented in the Praesidium included the following among the then 15 Member States: Austria, Finland, Luxembourg, Netherlands and Sweden. These countries, it has been suggested, felt left out, especially during the drafting process, and it may have contributed to their criticism of what came from the President and the Praesidium (Dauvergne, 2004, 170-173).

The novelty of the Convention method was the relatively large involvement of Members of national Parliaments (MPs) as well as many Members of the European Parliament (MEPs). It was an attempt to have a more open process and more debate during the process. The expectation was that more participation and openness would produce more legitimacy.

The European Convention started in the European Parliament building in Brussels on 28 February 2002. In his introductory speech Giscard d'Estaing told the members of the Convention:

We are not an Intergovernmental Conference because we have not been given a mandate by Governments to negotiate on their behalf the solutions we propose.

We are not a Parliament because we are not an institution elected by citizens to draft legislative texts. That role belongs to the European Parliament and to national Parliaments.

We are a Convention. What does that mean? A Convention is a group of men and women meeting for the sole purpose of preparing a joint proposal (Giscard d'Estaing, 2002, 12).

Whereas the Laeken Declaration had said that the Convention could either draw up different options or "recommendations if consensus is achieved," it was clear from Giscard's introductory speech that he preferred

the Convention to “achieve a broad consensus on a single proposal” which would “open the way towards a Constitution for Europe” (*ibid.*).

Table 2: Working Groups established by the Convention

| No. | Subject | Chairperson | Report |
|------|-------------------------------|------------------------|-----------------------------------|
| I | Subsidiarity | Inigo Méndez de Vigo | CONV 286/02, 23 September 2002 |
| II | Charter of Fundamental Rights | Antonio Vitorino | CONV 354/02, 22 October 2002 |
| III | Legal Personality | Giuliano Amato | CONV 305/02, 1 October 2002 |
| IV | National Parliaments | Gisela Stuart | CONV 353/02, 22 October 2002 |
| V | Complementary Competences | Henning Christophersen | CONV 375/1/02, 4 November 2002 |
| VI | Economic Governance | Klaus Hänsch | CONV 357/02, 21 October 2002 |
| VII | External Action | Jean-Luc Dehaene | CONV 459/02, 16 December 2002 |
| VIII | Defence | Michel Barnier | CONV 461/02, 16 December 2002 |
| IX | Simplification of Procedures | Giuliano Amato | CONV 424/02, 29 November 2002 |
| X | Freedom, Security and Justice | John Bruton | CONV 426/02, 2 December 2002 |
| XI | Social Europe | George Katiforis | CONV 516/03, 4 February 2003 |

Source: Norman, 2003, 61-62, and De Poncins, 2003, 51. The documents can be retrieved from the website of the Convention:

http://european-convention.eu.int/doc_wg.asp?lang=EN

The Convention went through three phases: (1) a listening phase during the first half of 2002; (2) an analysis phase from September 2002 until early 2003; and (3) a drafting phase during the remaining time in 2003. The listening phase gave everybody a chance to make short speeches and familiarise themselves with the issues. The analysis phase mostly worked through working groups, first 10, then later in the fall of 2002 an eleventh group on Social Europe was added (for list, see Table 2). We notice that no working group on institutions was established.

The actual drafting of treaty articles was mostly done by the Praesidium, sometimes Giscard d'Estaing himself, assisted by the Secretariat. A draft treaty outline was presented in October 2002, but the first draft of articles

concerning institutions was only put forward in April 2003, which left little time for discussion before the June deadline. Giscard had drafted those articles himself. After a heated debate in the Praesidium and some changes they were presented to the plenary session on 24 April 2003. A plenary discussion on institutions had taken place in January 2003 and an important Franco-German proposal was also put forward at the beginning of the year. But since no working group was established on institutions the Presidium was assured of much influence on institutional choices.

As mentioned, a first 'preliminary draft Constitutional Treaty' was presented at the plenary session on 28 October 2000. It has been referred to as a skeleton. It suggested a first part dealing with the constitutional structure, a second part on union policies and a third part with general and final provisions. The name, "Treaty establishing a Constitution for Europe" was already used now. Certain suggestions about what should go into specific articles were also presented (CONV 369/02).

On 11 December 2002 the Benelux countries presented a memorandum on the institutional framework. As small Member States they put emphasis on the role of the Commission which is "the institution that guarantees the common interest." The Commission President should be elected by the European Parliament. The Commission should eventually be reduced in numbers. This reduction should be based on the "principle of equal rotation." The legislative functions of the Union should be based on the Community method, with exclusive right of initiative for the Commission. The use of qualified majority voting (QMV) should be extended. The Parliament should become "a real legislative body," so the use of the co-decision procedure should also be extended. The Benelux countries saw needs for reform of the Council Presidency. But they did not favour the appointment of a President of the European Council from "outside the circle of its members and for a long period." It was suggested that the President of the Commission should chair the General Affairs Council and the High Representative of CFSP should chair the External Relations Council (CONV457/02).

On 16 January 2003 followed a controversial but in the end very influential Franco-German proposal. The proposal was put forward in the names of German Chancellor Gerhard Schröder and French President Jacques Chirac by the Foreign Ministers of the two countries, Joschka Fischer and Dominique de Villepin, who were by now both members of the Convention. The proposal tried to merge the French intergovernmentalist approach with the more federalist German approach. Some may argue that the French got more than the Germans. The document started with the European Council. Its Presidency should be made more stable. It was proposed that the European Council should elect a President for five years or two and a half years renewable by QMV. The Commission should be strengthened and its legitimacy assured by the European Parliament electing

its President by a qualified majority. However, the election should also be approved by the European Council. The European Parliament's legislative power should be strengthened. Each time the use of QMV is extended in the Council this should automatically be followed by extension of co-decision. Concerning the Union's external action the Franco-German proposal said that coherence implied that the functions of the High Representative of CFSP and the Commissioner responsible for external relations should be carried out by the same person, a European Minister of Foreign Affairs. National Parliaments should get involved in controlling the principle of subsidiarity (CONV 489/03).

The UK and Spain produced a joint text on institutions on 28 February 2003. These two countries also claimed to support a strong and independent Commission. Concerning the Commission President "The UK and Spain believe he or she should be appointed by a qualified majority in the European Council and subsequently approved by the European Parliament," i.e., the reverse order of the Franco-German proposal. Concerning the Presidency of the European Council, the UK and Spain proposed "that the Chair of the European Council should be a full-time post, to be appointed for a period to be significantly longer than the current six months." We notice the choice of the designation 'Chair,' and not President. The six-month rotating Presidencies of the Council of Ministers should also be modified. The suggestion was a two-year team Presidency of four Member States. Lastly, "the UK and Spain also propose the strengthening of the figure of the High Representative. He/she would become a real Minister of Foreign Affairs/External Representative of the Union who, *inter alia*, should chair the meetings of the Council of Ministers for External Relations and participate at the Commission's meetings where proposals concerning Union's external action are to be discussed." The Minister of Foreign Affairs or External Representative should also have a formal right of initiative for CFSP matters (CONV 591/03).

Outside the Convention the leaders of Spain, the UK and France had made various proposals concerning an elected President of the European Council. The idea became known as the ABC Plan for José Maria Aznar, Tony Blair and Jacques Chirac, all representing some of the larger Member States (Norman, 2003, 73).

On 28 March 2003 no less than 16 members of the Convention from different small states put forward a document on institutions. It emphasised key principles like maintaining and reinforcing the Community Method, preserving the institutional balance, no new institutions, the equality of the Member States and openness. QMV should be further extended "as the normal decision-making mechanism," and there should also be "further extension of the co-decision procedure in the legislative field." The group admitted the need for some reform of the Presidency system, but wanted to

retain rotation as “the predominant aspect of a new system.” The group supported “the appointment of a single person to the posts of High Representative and External Relations Commissioner (‘double-hatting’), with a single service.” The name Foreign Minister was not used. Clear lines of accountability should be established. The group saw “the need of strengthening the Commission’s democratic legitimacy through new arrangements for the election of its President.” This could be done through election by the European Parliament with confirmation by the European Council or through an ‘electoral council’ involving Members of the European Parliament (MEPs) and Members of national Parliaments (MPs) (CONV 646/03).

As we can see, the members of the Convention from the smaller Member States did not jump to accept the Franco-German proposal or the ABC idea. Indeed, the cleavage between the smaller and larger Member States that had dominated much of the Nice proceedings was still very much present in the Convention.

As mentioned earlier, the Praesidium put forward its first proposal on institutions on 23 April 2003 (CONV 691/03). Concerning the European Parliament, the Praesidium’s proposal did not include specific numbers of seats for the Member States:

The European Parliament shall be elected by universal suffrage of European citizens in free and secret ballot for a term of five years. Its members shall not exceed seven hundred in number. Representation of European citizens shall be degressively proportional, with a minimum threshold of four per Member State (Article 15 in CONV 691/03).

Concerning the European Council, Article 16a dealt with “The European Council Chair.” It stated that “The European Council shall elect its President, by qualified majority, for a term of two and a half years, renewable once.” We notice that both terms ‘Chair’ and ‘President’ were used.

In the Council of Ministers QMV would become normal practice, “Except where the Constitution provides otherwise, decisions of the Council shall be taken by qualified majority” (Article 17). Various Council formations were suggested, including a Legislative Council and a Foreign Affairs Council, the latter to be chaired by the Union’s Foreign Minister (Article 17a). Apart from the Foreign Affairs Council, the question of a Presidency for the Council formations was left to a future decision by consensus of the European Council.

The proposal gave a new definition of a qualified majority. It was now defined as: “When the European Council or the Council takes decisions by qualified majority, such a majority shall consist of the majority of Member

States, representing at least three fifths of the population of the Union” (Article 17b). This 50-60% rule was a great simplification compared with the cumbersome system of voting weights agreed to in Nice after extremely difficult negotiations (Laursen, 2006a).

Another issue that had been very contentious at Nice was the size of the European Commission. The Praesidium proposal was a reduced Commission of 15 Members plus Associate Commissioners from Member States not getting a full Commissioner (Article 18).

Concerning the President of the Commission, the Praesidium proposal took a step backwards compared with some of the existing proposals for the election of the President by the European Parliament. According to this proposal:

Taking into account the election to the European Parliament, the European Council, deciding by qualified majority, shall put forward to the European Parliament its proposed candidate for the Presidency of the Commission. This candidate shall be elected by the European Parliament by a majority of its members. If this candidate does not receive the required majority support, the European Council shall within one month put forward a new candidate, following the same procedure as before (Article 18a).

So the initiative would lay with the European Council, not the European Parliament. But the European Parliament would get a veto.

Finally, no surprise, the Praesidium proposed a double-hatted Foreign Minister for the Union, to be appointed by the European Council by qualified majority:

The Foreign Minister shall contribute by his proposals to the development of the common foreign policy, which he shall carry out as mandated by the Council. The same shall apply to common security and defence policy. The Foreign Minister shall be one of the Vice-Presidents of the Commission. He shall be responsible there for handling external relations and for co-ordinating other aspects of the Union’s external action. In exercising these responsibilities within the Commission, and only for these responsibilities, he shall be bound by Commission procedures (Article 19).

After further debates and amendments ‘consensus’ was reached on 13 June 2003 (CONV 724/03).

MAIN ELEMENTS OF THE DRAFT TREATY FROM THE CONVENTION

At the meeting of the European Council in Thessaloniki, Greece, 19-20 June 2003 Giscard d’Estaing presented the Draft Constitutional Treaty adopted by

the Convention on 13 June 2003. Finally on 10 July the Convention concluded its work, mainly dealing with Part III of the Treaty concerning the Union's policies. This final version of the Draft Treaty from the Convention was presented to the President of the European Council in Rome, 18 July 2003 (European Convention, 2003).

The Draft Constitutional Treaty from the Convention included a number of changes, some more novel than others. The following can be singled out:

1. The Union shall have *legal personality* (Article 6).
2. The Union shall recognise the rights, freedoms and principles set out in the Charter of *Fundamental Rights* (Article 7). The Charter was incorporated as Part II of the Treaty.
3. The limits of Union competences are governed by the *principle of conferral*. Competences not conferred upon the Union in the Constitution remain with the Member States (Article 9).
4. The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have *primacy* over the law of the Member States (Article 10). This actually was only new as an explicit stipulation in the Treaty. In reality the principle had been part of Community law since the beginning of the 1960s, thanks to decisions by the European Court of Justice (ECJ).
5. The Union shall have *exclusive competences* in the following areas: competition rules within the internal market; monetary policy (for the Member States which have adopted the euro); common commercial policy; customs union; the conservation of marine biological resources under the common fisheries policy; and the conclusion of a number of international agreements (Article 12).
6. The Union shall have *shared competences* in the following areas: internal market; area of freedom; security and justice; agriculture and fisheries (excluding the conservation of marine biological resources); transport and trans-European networks; energy; aspects of social policy; economic and social cohesion; environment; consumer protection; and common safety concerns in public health matters (Article 13).
7. The Union shall adopt measures to ensure *coordination of the economic policies* of the Member States (Article 14).
8. The Union may take *supporting, coordinating or complementary action* at the European level in these areas: industry; protection and improvement of human health; education; vocational training; youth and sport; culture; and civil protection (Article 16).

The Draft Constitution also included a so-called 'flexibility clause' which was largely a repetition of the existing Article 308 TEC (ex. 235): "If action by the Union should prove necessary ... to attain one of the objectives

set by this Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures” (Article 17).

The effort to create a so-called ‘catalogue of competences’ was not completely successful. But the proposed divisions added a certain degree of clarity.

The incorporation of the Charter of Individual Rights was considered by many observers to be an important step (e.g., Wind, 2005).

Concerning CFSP, the Draft Constitutional Treaty stated “The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy, which might lead to a common defence” (Article 15). This is what is already in the EU Treaty (Article 17 TEU, ex. J.7). We notice this competence is not mentioned among shared competences. Despite abolishing the pillar structure of the Union, CFSP remained apart from the rest. Later the Draft Constitutional Treaty had a section on specific provisions for implementing common foreign and security policy (Article 39). Normally, “decisions relating to the common foreign and security policy shall be adopted by the European Council and the Council of Ministers unanimously.” However, in some cases “the European Council may unanimously decide that the Council should act by qualified majority.” Specific provisions for implementing common defence policy on the other hand only included unanimity (Article 40). This too was in line with existing rules. But the Draft Constitutional Treaty did mention the possibility of closer cooperation as regards mutual defence—in accordance with Article 51 of the United Nations Charter, and in close cooperation with NATO. This was new. Nice specifically excluded defence from closer cooperation.

When it comes to the institutions, the final Draft Constitutional Treaty from the Convention set the upper limit of the membership of the European Parliament at 736, with a minimum of four per Member State (Article 19). The European Parliament was strengthened somewhat by having to elect the President of the European Commission, albeit on a proposal from the European Council (Article 26).

One of the most debated novelties was the proposal for a permanent European Council President. On this subject, the Draft Constitutional Treaty stated “The European Council shall elect its President, by qualified majority, for a term of two and a half years, renewable once” (Article 21).

In the Council of Ministers QMV would become normal practice. Thus, “Except where the Constitution provides otherwise, decisions of the Council shall be taken by qualified majority” (Article 22). Qualified majority voting

(QMV) was defined as “the majority of Member States, representing at least three fifths of the population of the Union” (Article 24).

The use of QMV would be extended. Unanimity would only apply if explicitly required in the Treaty. According to Olivier Duhamel, who was a member of the Convention, 27 existing legal bases for making decisions would be switched to QMV, including social security for migrating workers (Article III-21, ex-Article 42). So would a number of legal bases relating to JHA. At the same time the Draft Constitutional Treaty from the Convention left 57 cases of legal bases requiring unanimity, including some issues relating to taxation (Article III-62 and III-63, ex-Article 93), social security for workers from third countries (Article III-104(2), ex-Article 137(2)), and CFSP and defence policy (Duhamel, 2003, 133-34).

There would be various Council formations including a General Affairs Council, Legislative Council and Foreign Affairs Council. The Foreign Affairs Council would be chaired by the new EU Foreign Minister. The other formations would be chaired by representatives of Member States “on the basis of equal rotation for periods of at least a year.” Rotation should take into account “European political and geographical balance and diversity of Member States” (Article 23).

The Commission would retain the right of initiative in legislation. It would be reduced in size to 15 members, including the President and Foreign Minister. But there was provision for it to “call on the help of Associate Commissioners” (Article 25). This would allow all Member States to have either a Commissioner or an Associate Commissioner. This was the proposed solution to a very sensitive issue that had plagued the Nice Treaty negotiations, but not one that the small Member States were happy about.

The Foreign Minister was to be appointed by the European Council, with the agreement of the President of the Commission. And the Commission, “as a body, shall be responsible to the European Parliament.” As in the past, the EP could adopt a motion of censure, which would force the members of the Commission to resign.

The names of the legal acts of the Union would change. What is now called a ‘regulation’ would become a ‘European law.’ A ‘directive’ would become a ‘European framework law.’ Non-legislative acts of general application would become known as ‘European regulations’ (Article 32). European laws and framework laws would in the future also be used in the Area of Freedom, Security and Justice (Article 41). But they were excluded for CFSP, which remained intergovernmental (Article 39).

The Draft Constitutional Treaty from the Convention had a section on the Democratic Life of the Union. It noted that the Union is founded on the principle of representative democracy: “Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council and in the Council by their governments, themselves

accountable to national Parliaments, elected by their citizens” (Article 45). This suggests a double kind of legitimacy. The principle of participatory democracy was also mentioned. The Union institutions were encouraged to involve citizens and representative associations in their work. Under transparency the participation of civil society was also mentioned. And the draft made it clear that the Council shall meet in public “when it is discussing and adopting a legislative proposal” (Article 49). This would finally recognise the Council as a second chamber in the legislative process on par with the European Parliament. Co-decision between the Council and EP would become the norm.

A draft protocol on the role of national Parliaments would give these the possibility of sending ‘reasoned opinions’ to the Presidents of the European Parliament, the Council and the Commission (European Convention, 2003, 269-72). A protocol on the application of the principles of subsidiarity and proportionality would give national Parliaments a special role in supervising the compliance with subsidiarity: “When reasoned opinions on a Commission proposal’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the Member States’ national Parliaments and their chambers, the Commission shall review its proposal” (*ibid.*, 273-77). The stipulation mentions votes, because chambers of a bicameral parliamentary system would have one vote each, but the national Parliament of Member States with a unicameral parliamentary system shall have two votes.

MAIN CHANGES ADOPTED BY THE IGC 2003-04⁴

The IGC started on 4 October 2003 in Rome during the Italian Presidency. It was clear at the outset of the IGC that some Member States were not ready to accept the draft from the Convention. The proposed new definition of a QMV—at least 50% of the states, representing at least 60% of the EU population—was not acceptable to the Spanish and Polish governments. They wanted to retain the formula of the Treaty of Nice, which gave them more formal influence (Norman, 2005; Milton and Keller-Noëllet, 2005).

Some countries had problems with the extended use of QMV. In particular the British had some so-called ‘red lines,’ i.e., non-negotiable items. These focused upon Common Foreign and Security Policy (CFSP), taxation, budget sources and financial frameworks, social security and

⁴ We shall deal with the IGC in greater detail in Laursen, “The IGC 2003-04: How Constrained by Rhetorical Action? How Intergovernmental?” in this volume. On the Italian Presidency, see also the chapter by Bindi, and on the Irish Presidency, see also the chapter by Dür and Mateo in this volume.

criminal justice. The British also wanted further clarification concerning the incorporation of the Charter of Fundamental Rights.

The question of the composition and size of the Commission was still an issue. Most small Member States wanted to retain a voting Commissioner from their country in the future.

The French and German governments were among the few that had no problems with the proposed Constitutional Treaty. They were pressing the other states for a speedy conclusion of the negotiations. In general the original six Member States of the European Communities were the most favourable towards the Convention's proposal. The new Member States from Central and Eastern Europe (CEECs) largely sided with other small Member States like Austria, Finland and Portugal insisting on retaining a voting member of the Commission in the future.

The summit in Brussels in December 2003, which the Italian Presidency had hoped would conclude the negotiations, failed to reach an agreement. After the failure in Brussels in December 2003 it was up to the Irish Presidency to try to rescue the negotiations during the first six months of 2004.

In March 2004 the IGC was re-started. The change of government in Spain after the elections on 14 March was one of the factors that increased the chances of success. The election followed shortly after the terrorist bombing attack in Madrid on 11 March. The meeting of the European Council on 25-26 March confirmed that the 25 European leaders would work to reach a compromise no later than the June European Council scheduled for 17 June 2004.

The Irish Presidency succeeded getting an agreement at the summit in Brussels, 17-18 June 2004. This followed shortly after the elections to the European Parliament, in which the turnout had been extremely low.

On 16 June the Presidency presented two documents to the IGC. One contained a set of texts which the Presidency considered would find consensus in the framework of the final agreement (CIG 81/04). The other contained proposals on outstanding issues (CIG 82/04).

The document with compromise proposals from the Presidency included a definition of the QMV of 55% of the states representing 65% of the population thus increasing both elements by 5%. A blocking minority should further include at least four states. This meant that three big states, such as Germany, France and the UK, would not be able to block a decision supported by all the other Member States. The minimum number of seats in the European Parliament was raised to six. The Commission would have one member per Member State until 2014 when it would be reduced to 18 members.

The final solution on QMV reached in Brussels on 18 June 2004 was at least 55% of the states, comprising at least 15 of them, and representing at

least 65% of the EU population. The further stipulation about the blocking minority of at least four Member States was retained (CIG 84/04, 7). This applies to decisions based on a proposal from the Commission. In cases of decisions not based on proposals from the Commission, e.g., some decisions within CFSP, JHA and EMU, “the qualified majority shall be defined as 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union” (Council of the European Union, 2004). According to a protocol the new QMV would enter into force from 2009.

The small states eventually accepted a compromise on the size of the Commission. From 2014 the Commission will be reduced to two-thirds the number of Member States and equal rotation will be introduced, “unless the European Council, acting unanimously, decides to alter this figure” (CIG 84/04, 4).

The total membership of the European Parliament was increased from 736 to 750. The minimum number of seats in the European Parliament was set at six. The maximum was set at 96, meaning three less for Germany, which currently has 99.

The British ‘red lines’ were to a large extent accepted by the IGC. Some areas where the draft from the Convention had foreseen QMV were moved back to unanimity. (This included own resources, multi-annual financial framework, indirect taxation and company taxation.) The British threat of veto was credible. The Irish Presidency was very inventive in finding language that would reassure those fearing to be outvoted on important issues. In one case this included the ‘emergency brake’ of sending an issue to the European Council or further negotiations to try to reach consensus (social security for migrant workers). In another case an ‘emergency brake’ was coupled with the explicit mentioning of closer cooperation as a possibility in case no consensus could be found (judicial cooperation in criminal matters). In the end this made the Constitutional Treaty adopted by the IGC a more complex document than the one adopted by the Convention.

THE RATIFICATION PROCESS

After signature of the Constitutional Treaty in Rome on 29 October 2004 the Treaty was opened for ratification. In the past most Member States have normally ratified a new EC/EU Treaty by a parliamentary vote. This time there was a rush to hold referendums. Eventually 10 Member States planned a referendum. In the past only Denmark and Ireland had usually ratified a new EC/EU Treaty by referendum, twice with ‘no’ votes as a result. Denmark voted ‘no’ to the Maastricht Treaty in 1992 (Laursen, 1994) and Ireland voted ‘no’ to the Nice Treaty in 2001. In both cases the government

succeed in getting a ‘yes’ vote in a second referendum a year later. But the Danish and Irish experiences clearly show how risky referendums are.

It was this rush to have the Constitutional Treaty ratified by referendum that eventually undid the Treaty. Table 3 shows that the Constitutional Treaty was ratified by 18 Member States, two of these applying referenda, namely Spain and Luxembourg, by June 2007. Of the 18 three had not deposited their instrument of ratification to the Italian government by the time of the meeting of the European Council on 21-22 June 2007, when it was decided to abandon the Constitutional Treaty, and instead negotiate a new so-called Reform Treaty.

It was the French and Dutch ‘no’ votes in referenda, 29 May and 1 June 2005 respectively, which led to the fall of the Treaty. Six Member States, which had planned a referendum, cancelled or postponed these plans afterwards. The UK did so on 6 June 2005. Some other Member States did so after the decision by the European Council on 17 June 2005 to call for a reflection period (Council of the European Union, 2005).

President of the European Council, Luxembourg’s Prime Minister Jean-Claude Juncker, stated on 17 June 2005:

We think that the Constitutional Treaty is the right answer to many questions posed by people in Europe. We feel, therefore, that the ratification process must continue. This Treaty is the best one, which means that its renegotiation cannot even be envisaged. Secondly, we have taken note with regret—with a heavy heart as I said the other day—of the French and Dutch rejection of the draft Constitutional Treaty. The questions and issues raised during the debates in the Netherlands and France, and in other countries too, and the fears expressed, mean that we cannot continue as if nothing had happened. This leads us to think that a period for reflection, clarification and discussion is called for both in the countries which have ratified the Treaty and in those which have still to do so (Juncker, 2005).

Table 3: Ratification Results

| Member State | Results and Dates | Deposition with the Italian Government |
|--------------|---|--|
| Lithuania | Parliamentary vote: 84 to 4 in favour, 3 abstentions, 11 November 2004 | 17 December 2004 |
| Hungary | Parliamentary vote: 323 to 12 in favour, 8 abstentions, 20 December 2004 | 30 December 2004 |
| Slovenia | Parliamentary vote: 79 to 4 in favour, 0 abstentions, 1 February 2005 | 9 May 2005 |
| Italy | Parliamentary votes: <i>Camera dei Deputati</i> : 436 to 28 in favour, 5 | 25 May 2005 |

| | | |
|------------|---|-------------------|
| | abstentions, 20 February 2005 <i>Senato della Repubblica</i> : 217 to 16 in favour, 0 abstentions, 6 April 2005 | |
| Spain | Consultative referendum: 76.73% to 17.24% in favour, 6.03% blanks, 42.32% participation, 20 February 2005 Parliamentary votes: <i>Congresso de los Diputados</i> : 311 to 19 in favour, 0 abstentions, 28 April 2005 <i>Senado</i> : 225 to 6 in favour, 1 abstention | 15 June 2005 |
| Austria | Parliamentary votes: <i>Nationalrat</i> : approved with show of hands with 1 against, 11 May 2005 <i>Bundesrat</i> : approved by show of hands with 3 against, 25 May 2005 | 15 June 2005 |
| Greece | Parliamentary vote: 268 to 17 in favour, 15 abstentions, 19 April 2005 | 28 July 2005 |
| Malta | Parliamentary vote: Agreed without a division, 6 July 2005 | 2 August 2005 |
| Cyprus | Parliamentary vote: 30 to 19 in favour, 1 abstention, 30 June 2005 | 6 October 2005 |
| Latvia | Parliamentary vote: 71 to 5 in favour, 6 abstentions, 2 June 2005 | 3 January 2006 |
| Luxembourg | Consultative referendum: 56.52% to 43.48% in favour, 87.77% participation, 10 July 2005 Parliamentary vote: 57 to 1 in favour, no abstentions, 25 October 2005 | 30 January 2006 |
| Belgium | Parliamentary votes: <i>Senaat/Sénat</i> : 54 to 9 in favour, 1 abstention, 28 April 2005 <i>Kamer/Chambre</i> : 118 to 18 in favour, 1 abstention, 19 May 2005 <i>Parlement Bruxellois/Brussels Hoofdstedelijk Parlement</i> : 70 to 10 in favour, 0 abstentions, 17 June 2005 <i>Parlement der Deutschsprachigen Gemeinschaft</i> : 21 to 2 in favour, no abstentions, 20 June 2005 <i>Parlement wallon</i> : 55 to 2 in favour, 0 abstentions, 29 June 2005 <i>Parlement de la Communauté française</i> : 79 to 0 in favour, no abstentions, 19 July 2005 <i>Vlaams Parlement</i> : 84 to 29 in favour, 1 abstention, 8 February 2006 | 13 June 2006 |
| Estonia | Parliamentary vote: 73 to 1 in favour, no abstentions, 9 May 2006 | 26 September 2006 |
| Bulgaria | Qua membership 1 January 2007: Provisions of Treaty of Accession 2005 | Not required |
| Romania | Qua membership 1 January 2007: Provisions of Treaty of Accession 2005 | Not required |

| | | |
|----------------|--|--|
| Slovakia | Parliamentary vote: 116 to 27 in favour, 4 abstentions, 11 May 2005 | |
| Germany | Parliamentary votes: <i>Bundestag</i> : 569 to 23 in favour, 2 abstentions, 12 May 2005 <i>Bundesrat</i> : 66 to 0 in favour, 3 abstentions, 27 May 2005 | |
| Finland | Parliamentary vote: 125 to 39 in favour, 4 abstentions, 5 December 2006 | |
| France | <i>Rejected by referendum</i> : 54.68% to 45.32% against, 69.34% participation, 29 May 2005 | |
| Netherlands | <i>Rejected by consultative referendum</i> : 61.54% to 38.46% against, 63.30% participation, 1 June 2005 | |
| Czech Republic | Plans to hold a referendum in June 2006 were postponed after the French and Dutch 'no' votes | |
| Denmark | Plans to hold a referendum on 27 September 2005 were cancelled after the French and Dutch 'no' votes | |
| Ireland | A referendum scheduled for October 2005 was postponed after the French and Dutch 'no' votes | |
| Poland | Plans to hold a referendum on 9 October 2005 were suspended | |
| Portugal | Plans to hold a referendum on 9 October 2005 were suspended | |
| Sweden | The government never submitted a bill to Parliament for approval of the Constitutional Treaty | |
| United Kingdom | Plans to hold a referendum in 2006 were cancelled on 6 June 2005 after the French and Dutch 'no' votes | |

Sources: The following websites:

http://en.wikipedia.org/wiki/Treaty_establishing_a_Constitution_for_Europe;

<http://www.cosac.eu/en/info/ratification/ratification/>

<http://www.euractiv.com/en/future-eu/ratification-eu-constitution-state-play-member-states/article-130616>.

There was no Plan B in 2005. But the Commission suggested a Plan D, for dialogue and debate (Commission, 2005)—as if more debate would solve the problems.

REFLECTION PERIOD AND ABANDONMENT

The reflection period, which was originally to last for one year, lasted two years. In June 2006 the European Council was still not ready to act. The reflection period had been useful it was claimed, but “further work, building on what has been achieved since last June, is needed before decisions on the future of the Constitutional Treaty can be taken” the European Council said.

What this really meant was that the Council was waiting for the results of the French presidential election in the spring of 2007. It was also decided that the German Presidency, during the first semester of 2007, would present a report “based on extensive consultation with the Member States.” The purpose of the report was to give “an assessment of the state of discussion with regard to the Constitutional Treaty and explore possible future developments” (Council of the European Union, 2006).

By the time of the June 2007 meeting of the European Council France had a new President, Nicolas Sarkozy. The German Presidency worked very actively to put the reform process back on track. But in the process the Constitutional Treaty had to be abandoned. The European Council agreed to convene a new IGC before the end of July 2007. It should carry out its work in accordance with a detailed mandate set out as an annex to the Presidency Conclusions from the meeting on 21-22 June 2007. It stated that “The IGC will complete its work as quickly as possible, and in any case before the end of 2007, so as to allow sufficient time to ratify the resulting Treaty before the European Parliament elections in June 2009” (Council of the European Union, 2007).

According to the IGC mandate, “The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called ‘Constitution’ is abandoned.” Instead the Treaty on the European Union (TEU) and the Treaty establishing the European Community (TEC), the latter re-named Treaty on the Functioning of the Union, will be amended by integrating the innovations from the IGC 2004. The new Treaties

will not have a constitutional character. The terminology used throughout the Treaties will reflect this change: the term ‘Constitution’ will not be used, the ‘Union Minister for Foreign Affairs’ will be called High Representative of the Union for Foreign Affairs and Security Policy and the denominations ‘law’ and ‘framework law’ will be abandoned.... Likewise, there will be no article in the amended Treaties mentioning the symbols of the EU such as the flag, the anthem or the motto (Council of the European Union, 2007, Annex 1).

It looks as if the constitutionalist rhetoric had backfired. At least that was the premise of the analysis leading the Heads of State or Government to drop the Constitutional Treaty in June 2007. We shall reflect more on this in the concluding chapter.

BIBLIOGRAPHY

- Beach, Derek (2005), *The Dynamics of European Integration: Why and When EU Institutions Matter*, Basingstoke: Palgrave Macmillan.
- Beach, Derek and Colette Mazzucelli (eds) (2007), *Leadership in the Big Bangs of European Integration*, Basingstoke: Palgrave Macmillan.
- Belgium, EU Presidency (2001), “The Future of the EU: Declaration of Laeken,”
<http://www.eu2001.be/Main/Frameset.asp?reference=0101&lang=en&sess=1068439877&>.
- CIG, documents from the IGC 2003-04, http://europa.eu/scadplus/cig2004/index_en.htm.
- CIG 81/04: IGC 2003, Meeting of Heads of State or Government, Brussels, 17-18 June 2004, texts on which a consensus is likely to be reached,
<http://www.consilium.europa.eu/igcpdf/en/04/cg00/cg00081.en04.pdf>.
- CIG 82/04, IGC 2003, Meeting of Heads of State or Government, Brussels, 17-18 June 2004, proposals for approaches on outstanding issues,
<http://www.consilium.europa.eu/igcpdf/en/04/cg00/cg00082.en04.pdf>.
- CIG 85/04, IGC 2003, Meeting of Heads of State or Government, Brussels, 17-18 June 2004, final agreement, <http://www.consilium.europa.eu/igcpdf/en/04/cg00/cg00085.en04.pdf>.
- Commission of the European Communities (2005), Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, “The Commission’s contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate,” COM (2005) 494 final,
http://ec.europa.eu/commission_barroso/wallstrom/pdf/communication_planD_en.pdf.
- CONV, documents from the European Convention,
http://european-convention.eu.int/doc_register.asp?lang=EN&Content=DOC.
- CONV 369/02, Preliminary Draft Constitutional Treaty, 28 October 2002,
<http://register.consilium.eu.int/pdf/en/02/cv00/00369en2.pdf>.
- CONV 457/02, Contribution by Louis Michel, Gijs de Vries and Jacques Santer, “Memorandum of the Benelux: a balanced Institutional framework for an enlarged, more effective and more transparent Union,” 11 December 2002,
<http://register.consilium.eu.int/pdf/en/02/cv00/00457en2.pdf>.
- CONV 489/03, Contribution submitted by Mr Dominique de Villepin and Mr Joschka Fischer, « Contribution franco-allemande à la Convention européenne sur l’architecture institutionnelle de l’Union,» 16 January 2003,
<http://register.consilium.eu.int/pdf/en/03/cv00/cv00489en03.pdf>.
- CONV 591/03, Contribution by Mrs Ana Palacio and Mr. Peter Hain, “The Union institutions,” 28 February 2003,
<http://register.consilium.eu.int/pdf/en/03/cv00/cv00591en03.pdf>.
- CONV 646/03, Contribution submitted by Mr Michael Attalides et al., “Reforming the Institutions: Principles and Premises,” 28 March 2003,
<http://register.consilium.eu.int/pdf/en/03/cv00/cv00646en03.pdf>.
- CONV 691/03, Institutions – draft articles for Title IV of Part I of the Constitution, 23 April 2003,
<http://register.consilium.eu.int/pdf/en/03/cv00/cv00691en03.pdf>.
- CONV 724/03, “Draft Constitution, Volume I – Revised text of Part One,” Brussels, 26 May 2003, <http://register.consilium.eu.int/pdf/en/03/cv00/cv00724en03.pdf>.
- CONV 770/03, Part I, Title IV (Institutions) – revised text, 2 June 2003,
<http://register.consilium.eu.int/pdf/en/03/cv00/cv00770en03.pdf>.
- CONV 797/03, Revised text of Part One, 10 June 2003,
<http://register.consilium.eu.int/pdf/en/03/cv00/cv00797en03.pdf>.

- CONV 820/03, Draft Treaty establishing a Constitution for Europe, 20 June 2003, <http://register.consilium.eu.int/pdf/en/03/cv00/cv00820en03.pdf>.
- CONV 850/03, Draft Treaty establishing a Constitution for Europe, 18 July 2003, <http://register.consilium.eu.int/pdf/en/03/cv00/cv00850en03.pdf>.
- Council the European Union (2000), “Presidency Conclusions. Nice European Council Meeting 7, 8 and 9 December,” http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00400-r1.%20ann.en0.htm.
- Council of the European Union (2004a), *Draft Treaty Establishing a Constitution for Europe as approved by the Intergovernmental Conference on 18 June 2004*, Volume I. Luxembourg: Office for Official Publications of the European Communities.
- Council of the European Union (2004b), *Draft Treaty Establishing a Constitution for Europe as approved by the Intergovernmental Conference on 18 June 2004. Protocols. Declarations*, Vol. II, Luxembourg: Office for Official Publications of the European Communities.
- Council of the European Union (2005), “Declaration by the Heads of State or Government of the Member States of the European Union on the ratification of the Treaty establishing a Constitution for Europe (European Council, 16 and 17 June 2005),” *Bulletin EU 6-2005*, <http://europa.eu/bulletin/en/200506/i1030.htm>.
- Council of the European Union (2006), Brussels European Council 15/16 June 2006, Presidency Conclusions, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/90111.pdf.
- Council of the European Union (2007), Brussels European Council 21/22 June 2007, Presidency Conclusions, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf.
- Dauvergne, Alain (2004), *L'Europe en otage? Histoire secrète de la Convention*, Préface de Jacques Delors. Paris: Éditions Saint-Simon.
- De Poncins, Étienne (2003), *Vers une Constitution européenne. Texte commenté du projet de traité constitutionnel établi par la Convention européenne*, Paris: Éditions 10/18.
- Duhamel, Olivier (2003), *Pour l'Europe. Le texte integral de la Constitution expliqué et commenté*, Paris: Éditions du Seuil.
- EurActiv (2005), “Referenda on EU Constitution – state of play in the member states,” <http://www.euractiv.com/Article?temuri=tcm:29-130616-16&type=Overview>.
- European Convention (2003), *Draft Treaty Establishing a Constitution for Europe*, 18 July, Luxembourg: Office for Official Publications of the European Communities.
- European Union (2001), *Treaty of Nice*, Luxembourg: Office for Official Publications of the European Communities. Also in *Official Journal C80* (10.03.2001), <http://www.europa.eu.int/eur-lex/en/treaties/index.html>.
- Feus, Kim (2000), *An EU Charter of Fundamental Rights: Text and commentaries*, London: Federal Trust for Education and Research.
- Fischer, Joschka (2000), “From Confederacy to Federation: Thoughts on the Finality of European Integration,” Speech at Humboldt University in Berlin, 12 May, www.jeanmonnetprogram.org/papers/00/joschka_fischer_en.rtf.
- Giscard d’Estaing, Valéry (2002), « Introductory speech to the Convention on the Future of Europe, » <http://european-convention.eu.int/docs/speeches/1.pdf>.
- (2003), *La Constitution pour l'Europe*, Paris: Fondation Robert Schuman/Éditions Albin Michel, S.A.
- Juncker, Jean Claude (2005), Press Release: “Jean-Claude Juncker states that there will be a period for reflection and discussion but the process to ratify the Constitutional Treaty will continue with no renegotiation,” 17 June <http://www.eu2005.lu/en/actualites/communiqués/2005/06/16jclj-ratif/index.html>.

- König, Thomas and Simon Hug (eds) (2006), *Policy-making Processes and the European Constitution: A comparative study of member states and accession countries*, London: Routledge.
- Laursen, Finn (ed.) (2002a), *The Amsterdam Treaty: National Preference Formation, Interstate Bargaining and Outcome*, Odense: Odense University Press.
- (2002b), "La Convention sur l'avenir de l'Europe: Vers un traité constitutionnel?" *L'Europe en formation*, No. 1, pp. 29-40.
- (2003), "The Convention's Draft Constitutional Treaty: Towards a more federal EU?" *L'Europe en formation*, No. 2, pp. 59-76.
- (2004), "Enter the Member states: an Analysis and Evaluation of the Intergovernmental Conference 2003-2004," *L'Europe en formation*, No. 4, pp. 31-52.
- (ed.) (2006a), *The Treaty of Nice: Actor Preferences. Bargaining and Institutional Choice*, Leiden, Nijhoff.
- (2006b), "The Politics of the Constitutional Treaty: Elements of Four Analyses," in Johan From and Nick Sitter (eds), *Europe's Nascent State? Public Policy in the European Union. Essays in Honour of Kjell A. Eliassen*, Oslo: Gyldendal Akademisk, pp. 37-59.
- Laursen, Finn and Sophie Vanhoonacker (eds) (1992), *The Intergovernmental Conference on Political Union: Institutional Reforms, New Policies and International Identity of the European Community*, Dordrecht: Martinus Nijhoff.
- Laursen, Finn and Sophie Vanhoonacker (eds) (1994), *The Ratification of the Maastricht Treaty: Issues, Debates and Future Implications*, Dordrecht: Martinus Nijhoff.
- Ludlow, Peter (2002), *The Laeken Council*, Brussels: EuroComment.
- Marhold, Hartmut (ed.) (2002), *Le nouveau débat sur l'Europe. Textes réunis et commentés*, Nice: Presses d'Europe.
- Milton, Guy and Jacques Keller-Noëllet with Agnieszka Bartol-Saurel (2005), *The European Constitution. Its origins, negotiation and meaning*, London: John Harper Publishing.
- Norman, Peter (2003), *The Accidental Constitution: The Story of the European Convention*, Brussels: EuroComment.
- (2005), *The Accidental Constitution: The Making of Europe's Constitutional Treaty*, New and Revised Edition, Brussels: EuroComment.
- Wind, Marlene (2005), *Den europæiske forfatningskamp – før, under og efter 2 x nej*, Copenhagen: Forlaget Thomson.