The Politics of the Constitutional Treaty: Elements of Four Analyses

Finn Laursen

[Chapter from Johan From and Nick Sitter (eds.), *Europe's Nascent State? Public Policy in the European Union. Essays in Honour of Kjell A. Eliasen.* Oslo: Gyldendal Akademisk, 2006]

Introduction

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 and 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, 2006). Starting in February 2002 a Convention on the Future of Europe prepared a Draft Treaty Establishing a Constitution for Europe, usually referred to a Constitutional Treaty. The draft was completed in the summer of 2003. An Intergovernmental Conference (IGC) then met from October 2003 until June 2004 finalising a new draft treaty on the basis of the draft from the Convention. The ratification process started afterwards, but on 29 May the French and 1 June 2005 the Dutch voters voted 'No' to ratification in referenda. At the time of writing (December 2005) the future of the treaty is uncertain even if a majority of the member states have ratified it.

Treaty reforms have been major events in the history of European integration (Moravcsik, 1998; Beach, 2005). Usually they have included both policy and institutional changes, although the Nice Treaty as well as the Constitutional Treaty mainly included institutional changes. Many treaty reforms have been linked with enlargements. So were the Nice and the Constitutional Treaties. On 1 May 2004 the EU went through the largest enlargement so far taking the membership to 25. It was deemed necessary to change the institutions to make such a much enlarged union work. In order to increase efficiency the idea was to introduce more qualified majority voting (QMV) in the Council of Ministers. In order to increase the legitimacy of the union it was deemed necessary to enhance the roles of the European and national parliaments. Other considerations entered of course and recent treaty reforms have been very controversial. Especially institutional issues – where questions of future power are decided – tend to become very sensitive politically.

The Post-Nice Agenda

The Treaty of Nice was supposed to have solved the issues connected with the Eastern enlargement in 2004. Yet, as they left Nice in December 2000 the leaders called for "a deeper and wider debate about the future development of the European Union." They went on to mention the following points for the agenda of that future debate:

1. How to establish and monitor a more precise delimitation of competencies between the European Union and the Member States, reflecting the principle of subsidiarity.
2. The status of the Charter of Fundamental Rights of the European Union proclaimed in Nice.
3. A simplification of the Treaties with a view to making them clearer and better understood without changing their meaning.

4. The role of the national Parliaments in the European architecture.

The Declaration also mentioned "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" (Declaration 23, in European Union, 2001, p. 88).

It was further decided in Nice that a new IGC would be convened in 2004 to discuss the above issues.

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?

The meeting of the European Council at Laeken in December 2001 decided that IGC-2004 should be prepared by a Convention. Such a method had been used with success to produce the Charter on Fundamental Rights in parallel with the Treaty of Nice negotiations. 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).

Analysis I: Why a new treaty?

Why then was it decided that the EU needed a new treaty so soon after the Treaty of Nice?

Looking at treaty reforms from the Single European Act (SEA) in the mid-1980s, over the Maastricht, Amsterdam and Nice Treaties in the 1990s to the Constitutional Treaty there are certain trends. Over time the use of QMV has been increased, usually linked with successive enlargements. Over time the policy scope has increased, although this was not really part of Nice and the Constitutional Treaty. Over time the EP has gradually become more involved in decision-making through various procedural changes, including co-decision in the Maastricht Treaty, which was to become the normal decision-making procedure according to the Constitutional Treaty.

Why has the EU gone so far? Scholars disagree on how far the EU has gone as well as the reasons for these advances in integration. On one hand we have intergovernmentalists, who argue that the member states are still very much in control, and who see the EU as an international regime created to assure the implementation of joint decisions. On the other hand, other scholars such as neo-functionalists, see built-in forces that take the process further and further – through spill-over processes, bargaining exchanges, actor socialization and learning processes (see for instance Lindberg and Scheingold, 1970). In a similar vein historical institutionalists see a certain path dependency where the states are no longer fully in control (Pierson, 1996).

Andrew Moravcsik gave a rationalist inter-governmental explanation with emphasis on economic interests. He called his approach liberal intergovernmentalism. He studied national preference formation and interstate bargaining with emphasis on power elements such as threats of exclusion and threats of veto (Moravcsik, 1993). Later he added a third phase, institutional choice, where he explained the pooling and delegation of sovereignty, which has taken place in the European Communities, as a way to assure 'credible commitments' (Moravcsik, 1998).

Moravcsik´s explanation makes a lot of sense if we study the Treaty of Rome establishing the European Economic Community (EEC) and the Single European Act (SEA) outlining the single market programme. The EMU part of the Maastricht Treaty also fits in

reasonably well. These advances in European integration were very much responses to increasing economic interdependence.

But other parts of the Maastricht Treaty, the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) cooperation, do not fit in well with Moravcsik's explanation. Maastricht was negotiated after the end of the Cold War and German unification. Geopolitics, downgraded by Moravcsik, was an important reason for turning the Communities into a Political Union in the early 1990s (Laursen, 1992).

The main reason for recent treaty reforms, from Amsterdam to the Constitutional Treaty was the eastern enlargement which finally took place on 1 May 2004. We admit that there were economic interests in having the eastern enlargement. But some of the members of EU-15 had doubts about the economics of enlargement. The French knew that enlargement would put pressure on the Common Agricultural Policy (CAP) from which the country benefits. The Spanish, Portuguese and Greek governments knew that enlargement would mean greater competition for money from the structural funds. All in all, it is difficult to explain the eastern enlargement fully by economic factors using a rational model like Moravscik's.

A fuller explanation will have to look at how the increased interactions between the member states affected their interest, creating shared norms and ideas. Part of the process of treaty reforms in the 1990's was to put increased emphasis on the democratic nature of the EU, including the rule of law and respect for human rights. The Treaty of Amsterdam strengthened the treaty base for these rights and made respect for them a condition for membership. This process was crowned with the incorporation of the Charter of Fundamental Rights into the Constitutional Treaty.

Although national identities are strong in Europe the process of integration has created elements of a European identity. In the end it was because of this identity that the EU could not say no to the former Communist states in Central and Eastern Europe (Schimmelfennig, 2003). Rhetorical action of the driving states legitimized liberal-democratic norms. They shamed "the reticent majority into acquiescence with enlargement" (Schimmelfennig, 2004, p. 91).

The new responsibilities of the EU in the post-Cold War situation and enlargement forced the member states to look at the institutional issues. In the end Amsterdam, Nice and the Constitutional Treaty have been about getting a legitimate and efficient Union also after becoming a much wider Union.

On some of the specifics of the post-Maastricht treaty reforms Moravcsik's liberal intergovernmentalism can still help us understand the political process. The extended use of QMV only took place after hard-fought battles where domestic economic interests were decisive for national positions. Moravcsik's scheme seems most applicable to the question about increased use of QMV.

Concerning preferences in respect to re-weighting of votes during the Nice negotiations the most important variable was size. These issues were largely pitting the large against the small member states. The large states wanted a re-weighting in their favour. The small states resisted this.

Many large countries wanted to reduce the size of the Commission. Many small countries wanted to retain 'their' Commissioner. This issue re-emerged in the Convention and IGC 2003-04.

The questions concerning the Council and the Commission were fundamental questions about institutional design. What kind of considerations do actors make when they design institutions? Since institutions are about future decisions, actors are interested in increasing their influence and control. Weighting of votes are directly linked to influence. Control is linked to the 'blocking minority' which depends on the definition of a QMV. That is why the definition of a

QMV became one of the most difficult issues in Nice as well as during the negotiation of the Constitutional Treaty.

The Draft Treaty from the European Convention

The proposed Convention on the Future of Europe, which took the name of European Convention, would have former French President Valéry Giscard d'Estaing as chairman and be composed of 15 representatives of the Heads of State or Government (one from each member state), 30 members of national parliaments (two from each Member States), 16 members of the European Parliament and two Commission representatives. Candidate countries would also take part (without votes). A Praesidium was composed of the chairman, two vice-chairmen and nine members drawn from the Convention.

The novelty of the Convention method was the relatively large involvement of MPs from the member states as well as many MEPs. The Convention was further much more open compared to traditional IGCs.

At the meeting of the European Council in Thessaloniki, Greece, 19-20 June 2003 Giscard d'Estaing presented a Draft Constitution which had been agreed by consensus on 13 June (CONV 724/03). Finally on 10 July the Convention concluded its work, mainly dealing with the Part III of the treaty dealing with policies. This final version of the Convention draft was presented to the President of the European Council in Rome, 18 July (European Convention, 2003).

The draft constitutional treaty includes a number of changes as well as some codifications of existing practices. The following are among the most important:

1. The Union shall have *legal personality* (Art. 6).
2. The Union shall recognise the rights, freedoms and principles set out in the Charter of *Fundamental Rights* included as Part II in the treaty (Art. 7).
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 (Art. 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 (Art. 10).
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 for the conclusion of a number of international agreements (Art. 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 (Art. 13).
7. The Union shall adopt measures to ensure *coordination of the economic and employment policies* of the Member States (Art. 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 (Art. 16).

Concerning CFSP the Draft Convention said "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" (Art. 15). We notice this competence is not mentioned among shared competences. Despite abolishing the pillar structure of the Union, CFSP remained apart from the rest. Indeed, the Draft Constitutional Treaty had a section on specific provisions for implementing common foreign and security policy (Art. 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 (art. 40). This was in line with existing rules. But the Draft Convention 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 (Art. 40(7)). This was new. Nice specifically excluded defence from closer cooperation.

Concerning institutions the EP was to be strengthened by having to elect the President of the European Commission, albeit on a proposal from the European Council.

One of the most debated novelties was the proposal for a permanent European Council Chair: "The European Council shall elect its President, by qualified majority, for a term of two and a half years, renewable once" (Art. 21).

In the Council of Ministers QMV was to be normal practice: "Except where the Constitution provides otherwise, decisions of the Council shall be taken by qualified majority" (Art. 22). Interestingly, it was further proposed that "such a majority shall consist of the majority of Member States, representing at least three fifths of the population of the Union" (Art. 24). This 50-60% rule was referred to as a double majority. It would abolish the cumbersome system of weights adopted in Nice.

A Union Foreign Minister was to be appointed by the European Council, with the agreement of the President of the Commission (Art. 27).

The Commission would be limited to 15 members, including the President and Foreign Minister. A system of equal rotation would be introduced. Non-voting Commissioners would be appointed from the other member states (Art. 25(3). This was the proposed solution of how to get a smaller Commission, an issue that remained unresolved in Nice.

Analysis II: How the Convention framed the issues and constrained the choices

The use of the Convention method raises some important questions. How did the greater openness and greater involvement of parliamentarians affect the outcome from the Convention? Did deliberation create legitimacy for some solutions not accepted by the Nice Treaty negotiators? Did the better arguments win?

The convention came relative soon after the Nice IGC, yet it found different solutions to the question of voting weights and definition of QMV in the Council of Ministers and it also came up with a solution concerning the size and composition of the Commission. The Charter of Individual Rights that could not be incorporated in the treaty in Nice was now incorporated. Many policy areas were moved from unanimity to QMV and co-decision was extended to new issues, going beyond what had been possible in Amsterdam and Nice. So surprisingly the Convention did find solution to a number of Amsterdam and Nice 'left-overs', less than three years after Nice.

Although the IGC that followed the Convention did not accept all the changes it seems fair to say that it accepted most of the changes proposed by the Convention. As such one can

argue that the Convention framed many of the issues in a novel fashion and that this created constraints on the governments when they took fully over during the IGC.

However, it is worth noticing that the governments got increasingly involved in the Convention by sending their foreign ministers during the third, so-called proposal stage. And the Convention's President held meetings with some leading government leaders towards the end. No doubt the Convention anticipated the IGC.

It therefore seems best to view the Convention as a mix of deliberation and bargaining, more of the former at the initial 'listening' stage, more of the latter during the last stage, the 'proposal' stage. But a full understanding of the Convention also requires a study of the leadership exercised by the Praesidium and its president.

In an excellent analysis Magnette and Nicolaïdis have discussed 'the constitutional ethos' as well as the 'forceful leadership' of the Convention, which reduced interstate bargaining. 'Social norms' made it difficult to appeal to national interests especially for issue areas where preferences were less intense. This included questions relating to the EU legal order. The idea of 'simplification' was supported by both federalists and intergovernmentalists. This contributed to early agreement on the abolition of the pillar structure, the legal personality of the Union, the status of the Charter, typology of competences and related issues. This even extended to the generalisation of QMV in the Council and co-decision with the European Parliament (Magnette and Nicolaïdis, 2004).

During the Convention the traditional cleavages of IGCs did emerge, federalist vs. intergovernmentalist, small vs. large and, to a lesser extent, left vs. right. On the controversial institutional issues the Convention did not establish a Working Group during the second so-called study stage. On these issues the proposals were drafted by the Praesidium, often Giscard himself. Some of these proposals were inspired by a joint Franco-German proposal from January 2003. Deliberation affected solution to these issues very little. Praesidium leadership did. At the same time the amount of bargaining did increase during the Convention. But when Giscard 'took notice' of consensus on 13 June 2003 not everybody was satisfied.

The IGC 2003-04: Enter the Member States

The IGC started on 4 October 2003 in Rome during the Italian Presidency. The big question then was, to what extent would the member states reopen the consensus or compromises found during the Convention? Would they mess it up? Or would the IGC be able to agree on the draft Constitutional Treaty from the Convention without too many changes?

Although a declaration passed in Rome said that the IGC should finish before the elections to the European Parliament in June 2004 the Italians hoped to finish before Christmas, despite known disagreements on some of the issues (Fuller, 2003).

When the IGC opened it was clear that some member states were not ready to accept the draft from the Convention. The proposed new definition of a QMV, viz. 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 (*Agence Europe,* 3 October 2003).

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 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 largely sided with other small member states like Austria, Finland and Portugal insisting on retaining a voting member of the Commission in the future.

Prior to a ministerial conclave in Naples 28-29 November 2003 the Presidency put forward proposals on 25 November (CIG 52/03 and CIG 52/1/03). One of the issues discussed in Naples was whether the preamble should include a reference to Christianity. The proposal was supported by Poland and some other Catholic countries and Christian Democratic political parties, but opposed by France, the Nordic countries and some Socialist and Liberal political parties (Charlemagne, 2003). Another issue discussed was defence. Real progress was made on this issue in Naples. This included structured cooperation and a mutual defence clause. The former should be based on objective parameters and the latter should not prejudice the specific character of the security and defence policy of certain member states and be compatible with NATO. This meant convergence between the four countries, France, Germany, Belgium and Luxembourg, which had had a defence summit in Brussels on 29 April, and the other member states. The three big countries, Germany, France and the UK also had a meeting on 20 September, where defence had been on the agenda (Tréan, 2003; Evans-Pritchard and Connoly, 2003).

Compatibility with NATO was especially stressed by Poland. On mutual defence Ireland and other non-aligned member states wanted a voluntary commitment. Italian Foreign Minister Franco Frattini welcomed the fact that "Europe is coming together around a common vision of defence founded on military capabilities and complementarity to NATO" (*Agence Europe*, 2 December 2003). Afterwards the Italian Presidency produced a new text on 'permanent structured cooperation' and 'closer cooperation on mutual defence' (CIG 57/03, 2 December 2003 and CIG 57/1/03 REV 1, 5 December 2003).

On December 9 the Presidency published its proposals to the IGC meeting of Heads of State or Government, 12-13 December in Brussels. One document, CIG 60/03 Add 1, contained concrete proposals on a number of issues. The Presidency considered that it had taken into account the different views of the delegations and that this document constituted a balanced package. The other document, CIG 60/03 ADD 2, addressed the more sensitive political issues. They should constitute the focus of the discussions on 12-13 December. The sensitive issues were: the preamble (question of reference to Christianity), composition of the Commission (reduction or one member per member state?), definition of QMV (double majority or the Nice formula) and scope of QMV (taxation, etc.) as well as minimum threshold for seats in the European Parliament (should the proposed minimum of four seats be increased to five or six?).

The Failure of the Brussels summit in December 2003

But the summit in Brussels in December 2003, which the Italian Presidency had hoped would conclude the negotiations, failed to reach an agreement (*El Pais*, 14 December 2003). Afterwards the mood was sombre. Some blamed the poor handling of the summit by the Italian Prime Minister Silvio Berlusconi. Others blamed Spain and Poland for their intransigence on the definition of a QMV. But meeting the press afterwards most heads of state or government said that it had been a collective failure.

However, both the German Chancellor Gerhard Schröder and French President Jacques Chirac now talked about the possibility of a smaller group of member states going ahead if the 25 could not agree. If the IGC were to fail definitely in 2004, said Chancellor Schröder, "Then two-speed Europe would be the logical consequence. We do not want this, but we are prepared to do so." President Chirac referred to his speech to the German *Bundestag* in 2000, where he had talked about the possibility of a 'pioneer group.' "I continue to think that it is a good solution, because it will give impulsion and set an example. I think this will allow Europe to go faster, further and better", he said (Quoted from *Agence Europe*, 15 December 2003).

Schröder also linked the situation with the forthcoming financial perspective for 2007-13, saying that Germany would insist on expenditure no greater than 1% of GDP. Shortly after the failure in Brussels the six net-contributors to the EC budget, Germany, France, United Kingdom, Sweden, Austria and the Netherlands issued a letter where they all suggested limiting EU expenditures to 1% of GDP instead of the then existing limit of 1.27% (Yamoz, 2003). Since the second largest budget item is constituted by the structural funds such a limitation could hurt Spain and Poland, among others.

The Irish Presidency

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. The Irish set out slowly and carefully. They consulted with all member states to seek an agreement to restart the negotiations. The Irish stressed that a restart would presuppose a political willingness to find a compromise.

During 2003 there had been separate meetings of the Big Three, France, Germany and the UK. They had, as mentioned, dealt with defence issues in Berlin in September. They had also sent a delegation to Iran which neither included the Italian Presidency nor the EU's High Representative for CFSP, Javier Solana. The three held another meeting on 18 February 2004. When the meeting was announced the Italian foreign minister Franco Fratini expressed the fear of a *directoire*: "There can be no directorate, no divisive nucleus that risks putting European integration in danger." Earlier the British Foreign Secretary Jack Straw had told a French newspaper that "associating the UK with the Franco-German motor seems logical" (Barber, 2004; Dempsey, 2004) Fear of a *directoire* also existed in Spain and Poland.

The possibility of an avant-garde or pioneer group remained on the agenda. But one of this possibility's early advocates, German Foreign Minister Joschka Fisher, now concluded that this would not be a very good solution. In an interview with a German newspaper he said: "A small Europe would be too small in the strategic dimension to deal with the new threats and challenges of terrorism and globalization." Europe had to "command a continental weight" (*Financial Times*, March 1, 2004).

In March 2004 the IGC was restarted (*EU Constitution Project Newsletter*, April 2004). The change of government in Spain after the elections on 14 March was one of the factors that increased the chances of success (*Financial Times*, March 16, 2004). The election followed shortly after the terrorist bombing attack in Madrid on 11 March (*Financial Times***,** March 15, 2004). 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 (*Financial Times*, 27-28 March, 2004).

As expected the new Socialist government under Rodriguez Zapatero moved Spain to a more pro-EU line. He appointed the EU's representative to the Middle East, Miguel Angel Moratinos, as Foreign Minister (Aldecoa Luzarraga, 2004, p. 9). Spain now indicated a willingness to accept the double majority proposed by the Convention, although the exact percentages might

have to be changed. This isolated Poland on this issue. So the Poles also indicated a willingness to compromise (*Financial Times*, March 19, 2004).

So the mood changed in March. Quentin Peel saw three factors. The first was shame: "Failure to agree last time proved much more damaging than some EU leaders expected." The second were external shocks, culminating in the bombings in Spain: ""At a time of insecurity the EU leaders need to demonstrate unity and a sense of purpose." The third factor was a realization that "postponing a decision will only make matters worse." This included upcoming negotiations about the next financial framework and decisions concerning membership negotiations with Turkey (*Financial Times,* March 25, 2004).

Let us mention also at this stage that it was on 20 April that British Prime Minister Tony Blair told the House of Commons that the Constitutional Treaty would be put to a referendum in Britain. Obviously frustrated by the domestic debate he said, "It is time to resolve once and for all whether this country, Britain, wants to be at the centre of European decision-making or not" (Quoted from *Financial Times*, April 21, 2004). Whatever the exact reason for the British u-turn, it forced the other member states to listen even more to the British 'red lines' in the end-game.

The End-Game in 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, where the turn-out had been extremely low.

On the 16th of 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 first one included texts on Council configurations (pre-established groups of three Member States for a period of 18 months), the EU Foreign Minister, budget procedures, own resources (unanimity), financial frameworks, judicial cooperation in criminal matters (possibility of transferring draft framework law to the European Council), defence policy (permanent structured cooperation, incl. QMV, and "closer cooperation on mutual defence"), QMV in the field of CFSP (basically for implementing decision, with the possibility of referring the decision to the European Council for a decision by unanimity), decision-making in the area of the Common Commercial Policy (normally QMV, but unanimity for cultural and audiovisual services as well as trade in social, education and health services), social security (possible referral to the European Council), taxation, enhanced cooperation and a number of other issues. It also included a preamble that did not contain a reference to Christianity. Further, the text included simplified procedures for amending the constitution, viz. the possibility of the European Council by unanimity deciding to move some policy area from unanimity to QMV, referred to as a *passerelle*, (with the exception of defence) and the possibility of changing internal policies of Part III through unanimity in the European Council, i.e. avoiding an IGC. The text also included a protocol on Denmark making the Danish opt-outs from 1992 part of the new treaty (On Denmark's special problems, see Laursen, 2004a).

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%, but a blocking minority should also include at least four states. This meant that three big states, such as Germany, France and the UK, would not be able to bloc a decisions 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 document further included proposed texts for economic governance,

especially for the member states that have introduced the euro, multi-annual financial framework (unanimity) and explanations relating to the Charter of Fundamental Rights.

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 was retained: A blocking minority must include at least four states (CIG 84/04, p. 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, p. 4).

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 total membership is increased from 736 to 750.

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 some cases this included the emergency break of sending an issue to the European Council or further negotiations to try to reach consensus (social security for migrant workers). In some cases closer cooperation was mentioned 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.

Afterwards the Irish Taoiseach and European Council President Bertie Ahern presented the new treaty as "fundamental progress." "We are all winners," he said. British Prime Minster Tony Blair said he had "won a victory for the United Kingdom and Europe." He welcomed the strengthened role of national parliaments and said that the treaty ensured the United Kingdom of a right of veto in sensitive areas such as taxation, social security, foreign policy and defence (*Agence Europe*, 21 June 2004). Chancellor Gerhard Schröder talked about a "truly historic" decision. Prime Minister Jean-Claude Juncker from Luxembourg talked about a "qualitative breakthrough" and said that the constitution was "good for Europe, as it makes the Union more transparent, more democratic because of the increased powers of the European Parliament and more effective" (Ibid.).

Analysis III: Why did the Irish succeed where the Italians had failed?

The question here is a question of efficiency of negotiations. Again, different theoretical perspectives will give different answers. Andreas Dür and Emma Mateo have compared the bargaining efficiency of IGC 2000 that negotiated the Treaty of Nice with IGC-2003-04 that finalized the Constitutional Treaty. They criticise Moravcsik's inter-state bargaining theory by saying that "intergovernmental bargaining theory fails to appreciate that efficient bargaining can produce agreements even if on individual issues some parties favour unilateral solutions;

compromises require issue linkages, rather than overlapping win sets on all issues." They suggest two preconditions for efficient intergovernmental bargaining, namely preparation and mediation. "Extensive preparation can put enough issues on the negotiating table to allow for future issue linkages," and "mediation by a third party can resolve the problem of all participants concentrating on distributional bargaining rather than 'value creation', namely maximizing joint gains" (Dür and Mateo).

Overall they considered IGC 2003-04 efficient, because it produced a treaty proposal without leaving issues on the table. It did not leave the kind of left-overs that both Amsterdam and Nice had left. But they do see differences between the Italian and Irish Presidencies. They admitted some progress during the Italian Presidency, but said: "The main problem of the Italian Presidency, rather than partiality in the negotiations [which had been France's problem during the Nice negotiations], was that it failed to seriously consider the Spanish and Polish threats with a veto against any change in the decision-making rules in the Council of Ministers." The Irish consulted and conducted confidential meetings. "This cautious approach helped the Irish Presidency gain the trust of other member governments." Effective mediation by the Irish Presidency was an important factor that explains the successful conclusion of the IGC. "The persistence of some conflicts … until the end serves as an indicator that agreement was due to issue linkages rather than a convergence of preferences."

Beyond these elements discussed by Dür and Mateo we should also remember the factors of the changing mood in March 2004, including the terrorist bombing in Madrid and the election victory of the more pro-European Socialists in Spain. In December 2003 the atmosphere among the member states was rather bad because France and Germany had broken the rules of the Growth and Stability Pact. Further, the disagreement over Iraq earlier in the year had not been completely overcome.

Ratifications and Non-Ratifications: Enter the Voters

EU Treaties have to be ratified by all member states to enter into force. Traditionally most member states have ratified EU treaties as other international treaties by authorization from national parliaments. The original six member states of the European Communities adhered to the Paris and Rome treaties after parliamentary authorization of ratification. But Denmark and Ireland joined the Communities in 1973 after holding referendums and these two member states have used referendums in connection with major treaty reforms since they joined, the Single European Act in 1986, the Maastricht Treaty in 1992/93, the Amsterdam Treaty in 1997 and in the Irish case also the Treaty of Nice in 2001/2002. Indeed, it required two referendums for the Danes to ratify Maastricht and for the Irish to ratify Nice. The French authorized the first enlargement in 1973 by referendum and also held a referendum in 1992 about the Maastricht Treaty, which was barely accepted by a very small 'Yes' majority (on referenda, see for instance Hug, 2002).

The Norwegians have twice rejected membership of the EU and the Danes and Swedes have rejected joining the euro in referendums in 2000 and 2003 respectively. So politicians know that referendums can be risky business. Despite this knowledge 10 of the 25 member states of the EU decided to have a referendum about the Constitutional Treaty. Until now four of these referenda have taken place, two with positive outcome, Spain (20 February 2005) and Luxembourg (10 July 2005), and two with negative outcome, France (29 May 2005) and the Netherlands (1 June 2005).

By the time of writing 13 member states, i.e. a majority, have actually ratified the Constitutional Treaty: Lithuania (11 November 2004), Hungary (20 December 2004), Slovenia (1

February 2005), Italy (6 April 2005), Greece (19 April 2005), Slovak Republic (11 May 2005), Spain (19 May 2005), Austria (25 May 2005), Germany (27 May 2005), Latvia (1 June 2005), Cyprus (30 June 2005), Malta (6 July 2005), and Luxembourg (10 July 2005) (EurActiv, 2005).

The French 'No' on 29 May and the Dutch 'No' on 1 June came as shocks for the political establishment. The meeting of the European Council in June 2005 decided for a reflection period until June 2006. The Commission came up with Plan D for democracy, dialogue and debate.

Analysis IV: Why did the French and Dutch vote 'No'

The Constitutional Treaty survived the first referendum, the one in Spain on 20 February 2005. 76.7% of the votes were cast in favour of the "Yes."

The French referendum took place on Sunday 29 May. The turnout was high, namely 69.3%. The "No" vote was 54.7%.

In a *Flash Eurobarometer* conducted on 30 and 31 May the voters were, among other things, asked why they voted 'No' to the Constitutional Treaty (European Commission, 2005a). 31% gave answers in the category "It will have negative effects on the employment situation in France/ relocation of French enterprises/loss of jobs." 26% answered "The economic situation in France is too weak/there is too much unemployment in France." On the third place we finally find a group of voters that did refer to the treaty they voted about. 19% answered "Economically speaking, the draft is too liberal." 18% of the answers fell in the category "Opposes the president of the Republic/the national government/certain political parties." And 16% said "Not enough social Europe."

From the answers it emerges clearly that many French voters voted 'no' because of the economic situation with high unemployment in France. The French tried to punish their President and government. To the extent that the actual treaty motivated the voters it was mainly because it was found too liberal, not enough social. So it was clearly not a vote against the EU as such.

The turnout was high in the Netherlands, too, namely 62.8%. The "No" vote was even higher than in France, namely 61.6%. The situation in the Netherlands was different when we analyse the reasons for the "No" vote (European Commission, 2005b). The biggest category of 'No' voters, 32%, answered "Lack of information." This was followed by a group of 19% who answered "Loss of national sovereignty." The third group, 14%, fell into the group "Opposes the national government/certain political parties." So in the Netherlands it seems that many voters wanted to punish the government, a government that had failed to provide them with sufficient information about the treaty.

Space does not allow for a more substantial discussion of the use of referendums. It remains a mystery that so many Member States that did not require a referendum for constitutional reasons chose this instrument of ratification. It is well known that voters often vote about other things than what they are asked to vote about. So why not stick to representative democracy where MPs can take time to analyse the text in question?

Maybe it was a mistake to call the new Treaty a Constitution. After all it was a treaty not much different from the existing treaty, still complex, but simpler. It would especially have contributed to a more efficient decision-making process after the big enlargement in 2004.

Quo vadis Europe?

At the end of 2005 the Constitutional Treaty has been ratified by 13 member states. Luxembourg was the 4th state to have a referendum on 10 July 2005. 56.5% of the votes voted "Yes" (EurActiv, 2005). Before then the European Council meeting in June had decided to call a reflection pause. So the treaty's future is uncertain.

The most likely scenario is a Nice-Treaty-plus future where elements from the Constitutional Treaty are introduced through mini-reforms, some without formal treaty changes, and others with small treaty reforms that can be ratified by parliamentary votes. But we may well have to wait till after the next parliamentary elections in France and the Netherlands in 2007 before further steps can be taken. In the meantime expect the debate about 'closer cooperation' or flexibility to re-emerge. But the fact that France voted "No" complicates such a scenario. Who will join France to create more Social Europe?

References and Select Bibliography

Aldecoa Luzarraga, Francisco (2004), "La CIG confirma el Tratado Constitucional de la Convención" Documento de Trabajo No. 44, Real Instituto Elcano.

Barber, Tony (2004), "Italians fret as EU's big three forge closer ties", *Financial Times*, January 23.

Beach, Derek (2005), *The Dynamics of European Integration: Why and when EU institutions matter*. Basingstoke: Palgrave Macmillan.

Belgium, EU Presidency (2001), "The Future of the EU: Declaration of Laeken." Downloaded from www.eu2001.be

Charlemagne (2003), "God meets the lawyers," *The Economist*, December 6.

CIG (diverse numbers), documents from the IGC 2003-04:.Available online at: <http://ue.eu.int/cms3_applications/Applications/igc/doc_register.asp?content=DOC&lang=EN&cmsid=900>

CONV (diverse numbers), documents from the European Convention. Available online at: <http://european-convention.eu.int/doc_register.asp?lang=EN&Content=DOC>

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 Eastblishing 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.

Dempsey, Judy (2004), "Small partners fret as Europe's 'Big Three' combine on defence," *Financial Times,* January 30.

Dür, Andreas and Gemma Mateo (2004), ”Explaining Bargaining Efficiency: A Comparison of the IGCs of 2000 and of 2003-04”, *CFES Working Paper* No. 18/2004. Odense: Centre for European Studies, University of Southern Denmark.

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?tcmuri=tcm:29-130616-16&type=Overview>

European Commission (2005a), “The European Constitution: Post-referendum survey in France.” Flash Eurobarometer EB171.

European Commission (2005b), “The European Constitution: post-referendum survey in The Netherlands.” Flask Eurobarometer EB172.

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), Downloadable from http://www.europa.eu.int/eur-lex/en/treaties/index.html

Evans-Pritchard, Ambrose and Kate Connolly (2003), “Blair ‘backs plan’ to give EU army more power,” *The Daily Telegraph*, September 22.

Fuller, Thomas (2003), ”In Europe of 25 Equals, No Consensus on a Charter,” *The New York Times*, October 6.

Giscard d'Estaing, Valéry (2003), *La Constitution pour l'Europe.* Paris: Fondation Robert Schuman/Éditions Albin Michel, S.A.

Grevi, Giovanni “Light and shade of a quasi-Constitution: An Assessment,” *EPC Issue Paper* No. 14 (23 June 2004)

Hug, Simon (2002), *Voices of Europe: Citizens, Referendums, and European Integration.* Lanham: Rowman & Littlefiels Publishers.

Laursen, Finn (1992), “Explaining the Intergovernmental Conference on Political Union,” in Finn Laursen and Sophie Vanhoonacker (eds.), *The Intergovernmental Conference on Political Union: Institutional Reforms, New Policies and International Identity of the European Community*. Maastricht: European Institute of Public Administration, pp. 229-248.

Laursen, Finn (2001), “EU Enlargement: Interests, Issues and the Need for Institutional Reform,” in Svein S. Andersen and Kjell A. Eliassen (eds.), *Making Policy In Europe*. 2nd ed.. London: SAGE, pp. 206-228.

Laursen, Finn, ed. (2002a), *The Amsterdam Treaty: National Preference Formation, Interstate Bargaining and Outcome*. Odense: Odense University Press.

Laursen, Finn (2002b), "Institutions and Procedures: The Limited Reforms," in Finn Laursen (ed.), *The Amsterdam Treaty: National Preference Formation, Interstate Bargaining and Outcome* Odense: Odense University Press, 2002, pp. 565-590.

Laursen, Finn (2003), "The Convention's Draft Constitutional Treaty: Towards a more federal EU?" *L'Europe en formation* No. 2, pp. 59-76.

Laursen, Finn (2004a), "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, pp. 91-119.

Laursen, Finn (2004b), "Enter the Member states: an Analysis and Evaluation of the Intergovernmental Conference 2003-2004," *L'Europe en formation*, No. 4, pp. 31-52.

Laursen, Finn, ed. (2006), *The Treaty of Nice: Actor Preferences. Bargaining and Institutional Choice*. Leiden: Brill Academic Publishers.

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.

Lindberg, Leon N. and Stuart A. Scheingold (1970), *Europe's Would-Be Polity: Patterns of Change in the European Community.* Englewood Cliffs, NJ: Prentice-Hall, Inc.

Magnette, Paul and Kalypso Nicolaïdis (2004), "The European Convention: Bargaining in the Shadow of Thetoric," *West European Politics*, Vol. 27, No. 3 (May), pp. 381-404.

Milton, Guy and Jacques Keller-Noëllet with Agnieszka Bartol-Saurel (2005), *The European Constitution. Its origins, negotiation and meaning.* London: John Harper Publishing.

Moravcsik, Andrew (1993), "Preferences and Power in the European Community: A liberal Intergovernmentalist Approach," *Journal of Common Market Studies* Vol. 31, No. 4, pp. 473-524.

Moravcsik, Andrew (1998), *The Choice for Europe.* Ithaca, NY: Cornell University Press.

Norman, Peter (2005), *The Accidental Constitution: The Making of Europe's Constitutional Treaty.* New and Revised Edition. Brussels: EuroComment.

Pierson, Paul (1996), "The Path to European Integration: A Historical Institutionalist Analysis," *Comparative Political Studies* Vol. 29, No. 2, pp. 123-63.

Schimmelfennig, Frank (2003), *The EU, NATO and the Integration of Europe: Rules and Rhetoric*. Cambridge: Cambridge University Press.

Schimmelfennig, Frank (2004), "Liberal Intergovernmentalism," in Antje Wiener and Thomas Diez (eds.), *European Integration Theory.* (Oxford: Oxford University Press, 2004, pp. 75-94.

Tréan, Claire (2003), "La crise irakienne a rapproché Londres de Paris et Berlin sur le projet de défence," *Le Monde,* September 23.

Yarnoz, Carlos (2003), "Schröder, Chirac y Blair quieren limitar al 1% del PIB el dinero destinado a la UE," *El Pais,* 16 December.