

Light and Shade – An Evaluation of the Convention’s Proposals

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I. Evaluation of the Convention’s Proposals

The wheel of European integration history has turned once again. After 16 months of hard deliberations the Convention has presented its draft EU Constitution. In a text without options and with four parts and a total of 460 articles, the 105 members of the Convention and their deputies have attempted to raise the European Union to a new level. Yet in many respects it proved impossible to redress the deficits of the current Treaties. The opaque structure of the text as a whole and the resulting fact that the citizens will find it difficult to read and comprehend the Constitution, the virtually unchanged retention of the unanimity principle in matters relating to foreign and security policy, the right of the European Council to nominate a candidate for the post of Commission President, or the inadequate reform of the Council of Ministers contradict both the goal of transparency and Europe’s ability to act. As a result the enlarged European Union will not be able to make the most of its potential. But above all it will be virtually impossible to convey the results to EU citizens – a circumstance which certainly does not promote a common European constitutional identity. It is not a complete constitutional text which in a simple and abstract form puts into words the fundamental principles of the EU as a constitutional community.

Yet some things which a year ago still seemed impossible have been achieved. The fusion of the present treaties in a single document, the inclusion of the Charter of Fundamental Rights, the extension of majority voting in the Council of Ministers, and the provision which stipulates that the co-decision-making powers of the European Parliament will form part of the standard legislative procedure are highlights of the Convention’s work. These and other positive results raise the existing treaties to a new level. However, the draft itself quite rightly refers in the concluding provisions of Part IV to a “Treaty establishing a Constitution”.

Taken as a whole the results of the Convention represent a significant step in the right direction. They go far beyond what an intergovernmental conference might have achieved, and redress some of the most important mistakes of the Treaty of Nice. For this reason it must now be ensured that the new level of integration will materialize as constitutional reality, and that the Convention can finally come into force. Things now need to be set on the right track because otherwise the work of the Convention may well come to grief at the intergovernmental conference, and in the end become nothing more than yet another blueprint in the archives of the history of European integration.

II. Analysis of the Convention's Draft

The results of the Convention must take its bearings from five salient points: The future basic European document must create a common identity, make the list of the EU's tasks clearer, guarantee a high quality of political leadership, ensure that a larger Europe will be able to take action, and facilitate the future development of the Treaty establishing the Constitution.

1. Creating identity

Bringing the European project closer to EU citizens is a central goal of the current reform process. A comprehensible basic document is thus of greatest importance if citizens are to be able to identify with Europe. Here the Convention has made a number of important decisions. These include

- the fusion of the present treaties into a single document;
- the assignment of a legal personality to the EU;
- the incorporation of the Charter of Fundamental Rights as Part Two of the Constitution;
- the agreement on a solidarity clause of mutual assistance in cases of terrorist acts and disasters.

However, on account of the language employed and due to its structural complexity, EU citizens will probably find it difficult to identify with this mega-Treaty as their Constitution:

- It was impossible to produce a short and clear constitutional document. Part One of the draft is not enough to provide EU citizens with a clear-cut picture of the EU as a constitutional community. In fact, the rights, obligations, aims and limits of the European Union become apparent only after one has read more than 460 articles.

- In addition to this a number of essential provisions concerning the role of national parliaments, the principles of proportionality and subsidiarity, which not only have an influence on EU legislation, but are also of special interest to EU citizens, have for no good reason been relegated to protocols. This makes it very easy for the upcoming intergovernmental conference to add further provisions and amendments in the shape of protocols and once again to create an impenetrable thicket of provisions and clauses.
- Furthermore, on account of the incorporation of the Charter of Fundamental Rights as Part Two of the Constitution, there is a considerable degree of overlap with the provisions of Part One, above all with the titles on Fundamental Rights and Citizenship and on Democratic Life. This weakens the structural clarity of the text. Furthermore, differing formulations may well lead to legal uncertainties.

2. Clarifying the list of tasks

A clear-cut division of labour is an indispensable precondition for a clear list of tasks. The delimitation of competences between the Union and the member states must above all strike a balance between competing centripetal and centrifugal forces. However, in order to be able to meet future challenges, such a delimitation of competences must not be permitted to curtail unduly the Union's room for manoeuvre and its ability to develop in a dynamic manner.

- In this sense, it is a progress that Part One now categorizes the order of competences. It stipulates the policy areas in which the EU has exclusive powers, the tasks which are shared by the Union and the member states, and the areas in which the EU may only act in a complementary or supportive capacity. Special regulations have been devised with regard to the coordination of economic and employment policies, the common foreign and security policy, defence policy, and the area of freedom, security and justice.
- As a result of this list there is greater clarity with regard to the division of labour between the EU and the member states. However, in practical terms it could lead to a continuation of the pillar structure, with an additional pillar built around open coordination in the area of economic and employment policy.
- The task categories have not been clearly defined enough as to provide the EU with a durable and clear-cut distribution of competences. The relevant provisions, which clearly state who may take action in which policy area and which means are to be employed, are regulated in Part Three of the Constitution. The opportunity was thus missed to determine basic rules for the various categories which sufficiently limit the extent and depth of Union action. The principle of case-by-case empowerment, according to which EU competences are transferred from the member states, continues to predominate and makes the categories in Part One look like rhetoric, and not like a legally enforceable constitutional principle.

- Furthermore, the system classifying the competences in Part One is not reflected in Part Three of the Constitution, since a different sequence and classification of EU competences was employed in both parts. In more concrete terms, the list of exclusive and shared competences in Part One is not applied to Part Three of the draft Constitution.

3. Providing for leadership

The power to take action in a Union of 25 and more states will largely depend on the ability of the political leadership to define strategic goals and to encourage their implementation in day-to-day politics. The future power structure of the EU must equally live up to both the community and intergovernmental strands of the EU's legitimacy, as a combination of both states and citizens. Here the Convention's proposed Constitution has provided for some progress:

- A positive feature is the introduction of a President of the European Council elected by the Heads of State and Government. The President's role will be to prepare and chair European Council meetings, issue reports on the results of the meetings, and to ensure, at his level, the external representation of the EU. This will lend continuity, visibility and coherence to the internal and external representation of the EU.
- Furthermore, the foreign policy profile has been enhanced by the establishment of the position of a European Foreign Minister with powers going far beyond those currently enjoyed by the High Representative.
- The envisaged decrease in the number of Commissioners is a real breakthrough. Even if the reduction will come into force only after 2009, it will ensure that the Commission will continue to be manageable with 25 and more member states and that appropriate tasks can be assigned to its members.
- Linked to this are the additional powers given to the Commission President when determining the division of labour inside the Commission, since he will thus be able to shape the Commission on the basis of factual considerations and not merely on the grounds of national proportionality. The Commission President powers are also strengthened by the fact that the President can request individual Commissioners to resign.

However, as was already the case in Amsterdam and Nice, the highest hurdles on the way to a final agreement were associated to the reform of the most prominent institutional bodies:

- A weak President of the European Council runs the risk of becoming a marionette. A position at the top of the European Council which is not appealing enough to attract energetic personalities will do little to improve the quality of leadership and external representation of the EU. It should thus not be a matter of symbolism, but

of greater output efficiency in the European Council. A matter of particular importance when EU member states can only act on the basis of a compromise on the highest political level.

- The envisaged reform might especially in the area of foreign policy lead to considerable disagreement on questions of competence between the President of the European Council and the new Foreign Minister and between those two and the Commission President.
- Furthermore, the Foreign Minister has a hybrid role, which he could also interpret to the disadvantage of the Commission. He might come into a situation in which he uses all foreign policy resources in the interest of the European Council and not of the Commission college.
- The national lists for the selection of Commissioners restrict the independence and autonomy of the Commission President when determining the composition and size of his college.
- The balance of power between the institutions is above all called into question by the fact that the President of the European Council and the Commission President are both in the final analysis appointed by the European Council. Instead of giving the European Council the right to propose a candidate for the post of Commission President, the latter should be elected by the European Parliament and subsequently confirmed by the Heads of State and Government. This is the only way to enhance the legitimacy and power base of the Commission and its President, to encourage the personalization of European politics, and to increase the significance of European elections as an electoral act with which EU citizens can exercise democratic control.

4. Enabling the EU to take action

The Union's ability to act not only requires political leadership, but also effective mechanisms and procedures in order to implement strategic declarations of intent swiftly and appropriately in day-to-day politics. In the light of these demands the proposals of the Convention point in the right direction:

- The fact that on the grounds of the standard legislative procedure decisions will as a rule require a qualified majority in the Council and co-decision by the European Parliament is a success. Exceptions to this rule, when Council decisions are to be taken on the basis of unanimity, will have to be explicitly listed. In the end, this will substantially improve the enlarging EU's ability to act. Moreover, it will help prevent unjustified crossover deals, for example, between milk quotas and tax issues.
- Another positive development is the fact that a "General Affairs and Legislative Council" will together with the European Parliament be responsible for adopting

EU legislation. Most importantly, the fact that one Council formation will be responsible for adopting EU legislation can prevent different ministerial formations from taking contradictory decisions. However, only an explicit distinction between a Legislative Council and other Council formations with pure executive and coordinative functions would have in the end met the demands of a clear separation of powers.

- The recognition of the Eurogroup as an independent body, which elects its President (“Mr Euro”) for a period of two years was a long overdue decision. However, the Convention’s draft proposal does not settle the question, whether the Ministers participating in the Eurogroup will elect the President from among their numbers or whether s/he could possibly be someone from outside.
- Of particular importance are those proposals of the Convention which stipulate that the European Parliament will on the expenditure side receive full budgetary powers, and that the budget, legislation and democratic control are thus part of a clearly structured bicameral system.
- In spite of this positive assessment, the EU’s potentials cannot of course be fully harnessed as long as numerous important decisions can be vetoed by each and every member state. For this reason, the Convention should in its final working phase until mid-July attempt to extend qualified majority voting in the Council to as many policy areas as possible – especially in the fields of CFSP, commercial policy (intellectual property and services) and taxation. The retention of the unanimity rule in those fields will in an EU-25-plus lead to blockades, which especially in the area of CFSP might in the end require a higher degree of differentiated integration – possibly even outside the treaty framework.

5. Facilitating further development

The ability to permanently reconcile dynamism and stability is decisive for the endurance of the European Constitution. Thus, the Constitution must on the one hand define a basic consensus, and on the other create the prerequisites for innovation and institutional adaptation.

- In this context, it should be emphasized that the draft Constitution specifies and expands the basic principles of flexible integration originally introduced into the Treaties in Amsterdam and Nice. The provisions governing the flexibility instrument of enhanced cooperation are combined in a more comprehensible manner. Moreover, two new instruments of differentiation have been introduced in the area of the common defence policy. On the one hand, the draft Constitution envisages a “structured cooperation” for those member states whose military capabilities fulfil higher criteria. On the other hand, the draft Constitution provides the possibility of “closer cooperation” in the area of mutual defence.

- Furthermore, steps must be taken to ensure that the Constitution drafted by the Convention and adopted by the Heads of State and Government can in fact come into force. On this point the draft envisages that constitutional reforms have to be ratified by all member states before actually coming into force. If the Constitution is ratified by four-fifths of the member states within a period of two years after it has been signed, and there are difficulties with ratification in certain member states, the European Council is to discuss the issue. In contrast to this procedure, it should be clearly stipulated that, for those states which have given their assent, the Constitution should come into force, even if some individual member states have failed to ratify. Thus, the Constitution should enter into force once it has been ratified by a predetermined number of states which represent a minimum number of EU citizens. If individual states or their citizens repeatedly reject the Constitution, they would have to consider relinquishing their EU membership. In this context, one should mention that the draft Constitution includes the possibility of a voluntary withdrawal from the Union on the basis of a clearly specified procedure. A possibility which in the end might also prove to be counterproductive when certain member states employ it as an instrument of political blackmail.
- From a historical perspective the most dramatic fact is that it has been impossible to bring together all constitutional provisions in one document and, conversely, to treat all the non-constitutional provisions separately. Thus, the opportunity has been missed to provide the EU with the ability to amend the latter on the basis of a less complex procedure. Instead a complicated procedure for revising the Constitution remains in place. A fact which in an EU of 25 and more member states could in the long term prove to be very counter-productive.

Some of the systemic faults are already so firmly entrenched that it is impossible to change them. This is true above all concerning the size, the structure and the procedures for amending the Constitution. But the Convention still has the opportunity to overcome a number of hurdles before the proposed Constitution has to prove its worth in the arena of the intergovernmental conference. Only there will it become apparent whether the framework of the Constitution is stable and sufficiently compelling enough to be able to survive the pressure from member states to change the Convention's proposal.

III. From Draft to Realization

Yet before the Constitution can come into force for EU citizens and member states, it will have to survive a number of acid tests: The Convention's draft Constitution has been presented to the Heads of State and Government in Thessaloniki; the Convention can still make some final adjustments until mid-July; the intergovernmental conference, beginning in autumn, will scrutinize the alterations to the current status quo in a critical manner before the Constitution undergoes the ratification process in

25 member states; and finally, EU citizens must accept the Constitution as the basic document of European unity. In the light of these acid tests, the following points will determine the fate of the draft Constitution:

First, the Convention should use the time at its disposal to make final adjustments to the weak points of the draft wherever these can still be revised. This applies above all to improving the efficiency of the working procedures of the Council of Ministers and the abolition of veto rights in order to pre-empt inertia in an EU with 25 and more member states. Furthermore, the procedure by which the Commission President is elected needs to be turned upside down. The European Parliament should elect the President of the Commission, who would then have to be confirmed by the Heads of State and Government.

Second, steps must be taken to prevent the upcoming intergovernmental conference from unravelling the whole package, and allowing the progress that has been made to be whittled away as a result of conflicting national interests. The Convention's draft should not only be a proposal, but a binding basis for the forthcoming intergovernmental conference. Furthermore, the intergovernmental conference should have a definite timetable and a clear-cut mandate.

Third, it will be necessary at this early stage to think about how EU citizens can be familiarized with the Constitutional Treaty. For in the final analysis citizens must be prepared to accept it as an identity-forming document of European unity. To this end there is need for a long-term initiative on a European, national, regional and local level, which aims to convey the Constitution to a large public. This is the task of governments and especially of the members of the Convention, whose mandate does not come to an end when the consultations in Brussels have been completed. This is the only way in which it can be ensured that the necessary referendums and ratification processes in the member states will turn out to be a success.

	The greatest achievements of the Convention's proposals are ...	The greatest deficits of the Convention's proposals are ...
structural	<ul style="list-style-type: none"> - the restructuring and the fusion of the present treaties into a single document; - the assignment of a legal personality to the EU; - the incorporation of the Charter of Fundamental Rights as Part Two of the Constitution; 	<ul style="list-style-type: none"> - the sheer size and the structural complexity as well as the overlap between the various sections of the Constitution; - the protocols and declarations attached to the various parts of the Constitution, since they severely harm the clarity of the text; - the imprecise distinction between constitutional and non-constitutional provisions, and thus a lost opportunity to amend the latter on the basis of a less complex procedure;
institutional	<ul style="list-style-type: none"> - the introduction of a President of the European Council who will lend continuity, visibility and coherence to the representation of the EU externally and internally; - the envisaged reduction of the number of Commissioners from 2009 onwards, since this will allow the Commission to remain manageable even with 25 and more member states and to assign appropriate tasks to its members; - the introduction of a EU Foreign Minister; - the agreement on a solidarity clause of mutual assistance in cases of terrorist acts and disasters; - the recognition of the Eurogroup as an independent body which elects its President ("Mr Euro") for a period of two years; 	<ul style="list-style-type: none"> - the vague definition of the division of labour between the President of the European Council and the future EU Foreign Minister, since the lack of a clear assignment of roles will weaken Europe's ability to act; - the missing distinction between a Legislative Council and other Council formations with pure executive and coordinative functions, which would have met the demands of a clear separation of powers; - the right of the European Council to submit nominations for the post of Commission President, since this counters the significance of European elections; - the national lists as a basis for the selection of Commissioners, since the Commission President cannot determine the composition of his college independently and autonomously;
procedural	<ul style="list-style-type: none"> - the employment of qualified majority voting in the Council as the standard decision-making procedure and its simplification from 2009 onwards; - the adoption of the co-decision procedure as the standard legislative procedure. 	<ul style="list-style-type: none"> - the failure to introduce qualified majority voting as the standard decision-making procedure in the fields of Common Foreign and Security Policy, commercial policy and taxation.