

Different Ways – One Target

Convention Members present First Draft Constitutions

Claus Giering

Over the past fifty years the treaty structure underlying European integration has been successively developed, amended and revised. Today, it comprises numerous treaties with several hundred articles as well as the related protocols and declarations. Within the individual treaty chapters, policy areas and articles, the respective provisions have grown increasingly elaborate and are dealt with in different passages. Thus it has become ever more difficult to provide for political accountability in “Europe”.

Simplifying the treaties has, therefore, rightly become one of the key tasks of the EU reform Convention. The legal basis is to be reshaped in such a way that the division of labour and assignment of responsibility between the Union and its Member States becomes again comprehensible. Following the end of the “listening phase” in July, the Praesidium of the Convention originally planned to examine the results of the working groups first before presenting a concrete proposal for a draft constitution. However, this strategy seems now no longer feasible since some “impatient” members of the Convention have already gone public with first draft texts after the summer break. Despite their different approaches, the papers presented by Elmar Brok and Andrew Duff have set a high standard for the future work of the Convention.

Constitutional Draft of the Brok Group (EPP)

Elmar Brok has chosen a grand legal-technical approach for the EPP, which, however, does not consider itself uniformly represented and bound by it: the entire text of the treaties is to be restructured into 200 articles, 5 rather extensive constitutional protocols, which combine the previous regulations on Community and Union policies, as well as more than another 30 individual protocols on different matters. The Charter of Fundamental Rights alone, which has been incorporated without a change, comprises 54 out of the 200 core articles. The other treaty articles have been re-arranged and partly changed in a way that considerably re-calibrates the current balance between Member States and EU institutions.

It is especially worth mentioning that, in the future, the Council as “House of States” and the European Parliament (EP) as “House of Peoples” shall share responsibility for legislation on an equal footing. In addition, the sectoral councils of ministers will be abolished. The weighting of votes in the Council is to be replaced by a double majority of states and total population. The President of the Commission will be entitled to determine a hierarchy among the members of the Commission. After being elected by the European Parliament he will be confirmed by the Council. The Commission will represent the Union externally. Moreover, Brok proposes a catalogue of competencies, and a stricter enforcement of the principle of subsidiarity. As concerns future treaty amendments, they are regularly to be dealt with by a Convention and to be assented by the European Parliament.

Overall, Mr Brok has submitted a comprehensive and consistent constitutional text. Unfortunately, his proposal does not explicitly name the sources of the treaty formulations chosen. It is, therefore, difficult to identify where exactly the status quo has been changed and amended. If the relevant passages were indicated, it would have been much easier to use the draft as a basis for the Convention debate. Moreover, some passages, such as those on the ECJ (30 articles) or on the financial regulations (10 articles on 10 pages), are too detailed for a concise constitution concentrating on the essentials. Hence, one of the main advantages of a solution based on protocols of constitutional rank is not sufficiently exploited. It also remains open whether later adaptations of the protocols require a complete revision of the treaties. Already these questions show, however, how helpful concrete drafts can be for the Convention’s further consultations.

Constitutional Draft by Andrew Duff (Liberals)

Andrew Duff has chosen a completely different approach. In merely 19 articles he summarises the core elements of a “Federal European Union” (CONV 234/02). Apart from its formal brevity, this model also contains some revolutionary material reform proposals. Following a proposal made by the President of the Convention, Giscard d’Estaing, a Congress consisting of members of the European Parliament and an equal number of national parliamentarians shall elect the President of the Commission. A vice-president in charge of foreign policy as well as thirteen other Commissioners will be nominated by Parliament. Along the lines of Brok’s proposal, future constitutional reforms are to be transferred to a Convention. Four brief paragraphs in Duff’s text describe the main competencies of the EU by policy areas. The legislative powers of the Union shall be restricted by a number of fundamental principles of governance. Another outstanding element of Duff’s draft is that the EU is to be granted the right to set up armed forces. In addition, the commitment to collective, mutual defence is to be firmly established in a protocol, which shall come into effect once it has been signed by three

quarters of the Member States. With regard to the Charter of Fundamental Rights, Duff suggests to incorporate it in a constitutional protocol.

Measures of particular significance are dealt with by so-called “organic laws”. Moreover, the status of “associated membership” is to be established for all states which, as non-members, take over only part of the Union’s policies or, as current Member States, do abstain from ratifying this constitution. Andrew Duff’s core constitution is supplemented by a subsidiarity treaty, which includes detailed chapters on single policy areas. This subsidiarity treaty would be subject to a simplified amendment procedure, and replace the current treaties. However, even if Duff’s ambitious proposals for institutional and defence-policy reforms are taken into consideration, his draft will probably have little chance to be realised. This is mainly due to the vagueness of the order of competencies he sketches. Indeed, simplifying the amendment of specific policy provisions in a (second) subsidiarity treaty will probably only be feasible if the (first) basic treaty delivers a watertight definition of competence criteria.

Further Proposals

Apart from these two options from the ranks of the European Parliament, other reflections on this topic have contributed to the debate. Without having submitted a draft text, the alternate representative of the German Federal Government, State Secretary Gunter Pleuger, referred to some important aspects of a possible division of the treaties in the Convention’s working group on “legal personality” (see Document WG III-WD 11). Thus, a facilitated procedure to change the second part (“constitutional law”) has been proposed, which is based on the model already applied in the sphere of community law when it comes to decisions requiring ratification (e.g. decisions related to the system of own resources). On this basis, numerous detailed regulations could be shifted into a second treaty text as long as the framework in the fundamental treaty defines the limits sufficiently precise.

Here might be an interesting point of departure for tying in the proposal of the Brok group: Those titles and policy area definitions of the TEC and TEU which ought to be shifted into the second part ought to be adopted via “constitutional laws” rather than being included in several protocols. Such constitutional laws could be modified according to the model set by Art. 269 TEC. Union acts (regulations), framework laws (directives) and decisions would then have to be measured against, and controlled according to the substance of these higher-ranking norms. However, in order to keep the “constitutional” acquis as concise and clear as possible, the Convention ought to clarify to what extent the matters concerned can be transferred to secondary law or statutes. In addition, a systematic categorisation of tasks in the first part of the future

constitutional treaty would be necessary. This would, firstly, create transparency and, secondly, draw the line against unwanted tendencies towards centralisation.

Consequences for the work of the Convention

The proposals presented here as well as earlier constitutional drafts (EUI, Florence; C•A•P, Munich) have in common that, ultimately, they intend to dissolve the pillar structure, equip the European Union with a legal personality, render the Charter of Fundamental Rights a legally binding element of primary law, and establish the principle that Member States are responsible for all matters that are not explicitly provided for in the constitutional texts. Moreover, the Convention as an instrument of reform finds its way into the treaties. At the same time, the different approaches show three basic problems of simplifying the treaty structures:

- Firstly, the question of how to delimit competencies needs to be clarified. The principle of specific conferment of powers is still taboo even though it has, to date, hardly been able to effectively restrict the extension of EC activities. Without a clear categorisation in the basic treaty and excluding large parts of the detail regulations, however, transparency of the system cannot be improved.
- Secondly, dividing the treaties into two parts needs to be combined with a simplified procedure to amend the second part. Only then can the Union improve its capacity to adapt to new challenges. To date, this proposal has not found a majority since many Member States - but also, for example, the German *Laender* - are afraid to lose control over the allocation of competencies as “masters of the treaties”. Yet some progress seems to be possible in this respect after even a group of British Conservatives chaired by Lord Brittan went so far as to propose that the detailed regulations established in the second part may be changed without ratification after unanimous agreement of the Member States.
- The third crunch is the maintenance of balance between Council, Parliament and Commission on the one hand, and between the Union and the Member States on the other. A strengthening of merely supranational elements, such as for example the election of the President of the Commission by Parliament, seems hardly more feasible given the fact that an intergovernmental conference will take the ultimate decision. Proposals such as the election of the President of the European Council must, in consequence, be considered not only as an intergovernmental alternative but as a complementary proposal of an inherent systemic logic.

Which conclusions for its work can the Convention draw from these proposals, termed by the authors themselves as “an example” or “basis for discussion”? All drafts up to now illustrate that the Convention might very well quickly agree on a common basic structure of a constitution. Far more difficult is the question of how then to materialise

and shape the individual main chapters in a constitutional logic and in accordance with the constitutional traditions of the Member States. The working groups will soon present first proposals on individual subject areas. At the end of October, the Praesidium will present a coherent structure as a framework which will allow to attribute to the individual categories the results of the working groups to date. This will render the still unsolved problems clearly visible.

Despite the tight schedule, targeted small working groups on those open questions ought to be established with a narrow timeframe. Giving due consideration to the then existing draft constitutions, they would have to present concrete proposals for texts or, if need be, options of how to design the disputed elements of the draft constitution. This mainly concerns decisions, which entail a substantial change in the power balance among the EU Member States, between the EU Member States and the EU, or within the EU institutions. The results of these working steps must, finally, be combined into a more advanced draft for the third and last stage of the Convention. At the end of this stage of decisions an ambitious, clearly structured and readable draft constitution ought to be available which can hardly be rejected by the heads of state and government if they do not want to call into question the European project as such.

Draft Proposals for a European Constitution
- overview of the contributions by Mr. Elmar Brok and Mr. Andrew Duff -

	Proposal of Mr. Brok	Proposal of Mr. Duff
Constitution of the EU	EU with own legal personality (Art. 55)	EU with own legal personality (Art. 2 I)
Charter of Fundamental Rights	original text fully integrated in draft (Art.1-54)	integrated as a protocol to the draft constitution (Art. 3 I)
Competencies of the Union	distinction between exclusive and shared competencies (Art. 67-71)	distinction between exclusive and “shared or co-ordinating” competencies; however, distinction between the individual categories of competencies is not always clear (see Art. 5)
- exclusive:	Art. 67: - citizenship of the Union - external trade, customs and competition policy - EMU - structural and cohesion policy, statistics of the Union - agricultural and fisheries policy	Art. 5 I+II: - trade and the customs union - competition, monetary policy and the euro - basic freedoms of the common market - common foreign policy and a joint capability in the field of external security and defence
- shared:	- internal market and basic freedoms taking into account the principle of subsidiarity (Art. 69) - codification of the current AETR-doctrine of the ECJ concerning the external competence of the EU in the fields where it is competent internally (Art. 71)	so-called co-ordinating competence (Art. 5 II+III): - macro-economic policies - common policies regarding employment, equality of opportunity, the financial markets, transport and communications, energy, science, research and technology, food, consumer protection, environment, overseas development, immigration and asylum - international crime, co-ordinating of member state police, customs and judicial authorities
- complementing/ supportive:	- no comment	- sport, youth, tourism, planning, civil defence, public health, social services, culture and education

Legal and executive instruments	introduction of a hierarchy of norms and distinction between: <ul style="list-style-type: none"> - legal acts: Union acts, Union framework acts, Union regulations (Art. 154, 157) - executive acts: decisions, recommendations and opinions (Art. 157) 	conclusive catalogue of instruments with a hierarchy of norms (Art. 6): <ul style="list-style-type: none"> - Organic Law - Regulation - Directive - Joint Action - Decision - Opinion - Code of Conduct (mandatory or compulsory) - Interinstitutional Agreement
Legislation	Council and EP as “House of States/Peoples” (Art. 82 I, 93 I)	Council and EP as legislative bodies; no law or budget may be passed unless approved by both of them (Art. 7)
Right of Initiative	right to submit legislative proposals to COM (Art. 155 I)	sole right for legislative and budgetary proposals to COM (Art 7 II)
Legislative Procedures	Codecision procedure as a rule (Art. 155-159); Council decides with QMV; unanimity only where especially stipulated	Codecision procedure, in which decisions are adopted by: <ul style="list-style-type: none"> - EP simple majority (abs. majority for Organic Laws) (Art.10 II, 7 IV) - Council qualified majority, e.g. majority of MS representing majority of Union population (3/4 for Organic Laws) (Art. 12 IV, 7 IV)
Finance	<ul style="list-style-type: none"> - EU with own budget wholly financed by own resources; esp. option to levy a direct tax by EU; rate of VAT and GNP of MS (Art. 162) - no different procedure for obligatory/non-obligatory expenditure 	<ul style="list-style-type: none"> - EU with own resources (creation of system of own revenue by Organic Law that may include levying of taxes and duties of the EU) - expenditure limits expressed as a percentage of EU GDP (Art.8)
Institutions	<u>institutional novelties:</u> <ul style="list-style-type: none"> - Convention for constitutional amendments (consisting of a Chairman appointed by the Council, approved by EP; 1 representative per gov. and 2 per national parliament of MS, 54 members from EP, 2 members of COM (Art. 196) - ECJ with Grand Chambers on Competence and on Fundamental Rights (Art.113 II) 	<u>institutional novelties:</u> <ul style="list-style-type: none"> - Congress of Parliaments (EP + same number of representatives of nat. Parliaments to elect or impeach COM-President, Art. 9 II) - Convention for constitutional amendments (consisting of a President, representatives from Council and COM, equal number of delegates from EP and national parliaments, Art. 9 III)
EP	<ul style="list-style-type: none"> - “House of Peoples” (Art. 82) - max. 700 MEPs starting from 2009 (Art. 82) - right to request submission of proposals from COM (Art. 85) - Ombudsman (Art. 87), but no direct petition right to EP mentioned - motion of censure against COM as a whole (Art. 106) 	<ul style="list-style-type: none"> - 700 MEP elected for a 5-year term (Art. 10 I) - 630 from regional constituencies, 70 elected from across the whole territory of the EU (Art. 10 I) - dissolution of EP in the event of a dismissal of COM through a motion of censure by EP (Art.10 IV, 13 VI)

Council – Competencies	<p><u>European Council (Art. 98 I):</u></p> <ul style="list-style-type: none"> - provides impetus for development and defines general policy guidelines <p><u>Council of the EU (Art. 93):</u></p> <ul style="list-style-type: none"> - mainly functions as legislative body (“House of States”) - additionally coordinates the economic policies of MS, CFSP, police and judicial cooperation in criminal matters (JHA) 	<p><u>European Council (Art. 11 II):</u></p> <ul style="list-style-type: none"> - establishes work programme of the Union - gives overall political direction - may act on behalf of the Council of Ministers <p><u>Council of Ministers (Art.12):</u></p> <ul style="list-style-type: none"> - on proposal of COM and after consulting EP may take Joint Action or Decision - right of initiative in the field of external security and defence
Council – Presidency	<p><u>European Council (Art. 98 II):</u> rotation following the Council; chaired by Heads of State/Gov. in turn</p> <p><u>Council of the EU (Art. 94):</u> rotation every 6 months; longer term may be convened unanimously</p>	<p><u>European Council (Art. 11 I):</u> rotation every 6 months;</p> <p><u>Council of Ministers (Art. 12):</u> chaired by COM President or his representative (chairman has no vote in Council)</p>
Council – Composition	<p><u>European Council (Art. 98 II):</u> Heads of State/Gov. + COM-Pres.; assisted by Foreign Min. + 1 Comm.</p> <p><u>Council of the EU (Art. 94 I):</u> One representative of MS at ministerial level; may be assisted by conferences of departmental ministers (no decision-making powers in legislative affairs, Art. 94 III) and COREPER (Art. 99 I); at request of Council COM may act as General Secretariat (Art. 99 III)</p>	<p><u>European Council (Art. 11 I):</u> Heads of State/Gov. + COM-President</p> <p><u>Council of Ministers (Art. 12 I):</u> Ministers of the Gov. of MS and Com-President as chair</p>
Council – Decision making	<p><u>European Council:</u> N.N.</p> <p><u>Council of the EU (Art. 96):</u> QMV (majority of MS representing majority of EU population)</p>	<p><u>European Council (Art.11):</u> N.N.</p> <p><u>Council of Ministers (Art.12):</u> QMV (majority of member states representing majority of EU population)</p>
COM – Competencies	<ul style="list-style-type: none"> - executive (Art.102) and external representation of the EU respecting the decisions of the Council in CSFP-matters (174 I, III) - General Secretariat of the Council in JHA and CSFP (Art. 99 III) - shall forward to EP, Council, nat. Parliaments its annual legislative programme (Art.103 I) + right of initiative in leg. matters (Art.155) 	<ul style="list-style-type: none"> - right of initiative for budget + work programme of the EU - responsible for implementing the acts of the Union, management of expenditure and policy - negotiation of international treaties - power to take Decisions and issue Opinions (Art. 13 V)

COM – Presidency	<ul style="list-style-type: none"> - COM-Pres. appointed by EP and approved by the Council (Art. 105) 	<ul style="list-style-type: none"> - COM-Pres. nominated by one or more MS (immediately after elections of EP) and elected by Congress with absolute majority (Art.13 II) - may be impeached by 2/3 majority of Congress acting on initiative of EP or Council (Art. 13 VII)
COM – Composition	<ul style="list-style-type: none"> - no maximum number, but 1 Commissioner per MS; number may be changed unanimously by Council, if approved by EP (Art. 104) - COM-President nominates Comm. who are elected by EP and approved by Council (Art. 105) - COM-President may establish hierarchy among Commissioners and shall appoint 2 Vice-Pres.; one being “Commissioner for Foreign Relations” representing EU externally (Art.110) - motion of censure against COM as a whole by 2/3 EP (Art.106) 	<ul style="list-style-type: none"> - 15 Commissioners, including COM-Pres. + 1 Vice-Pres. resp. for CFSP - Vice-Pres. nominated by Council, elected by EP; thereafter nomination of other members of COM by COM-Pres. and appointment by EP (Art. 13 II, IV) - dismissing of COM as a whole by 2/3 majority of EP leading to dissolution of EP (Art. 13 VI, 10 IV)
Role of National Parliaments	<ul style="list-style-type: none"> - receives annual legislative programme with right to call on COM for a reasoned opinion on the compliance with the principle of subsidiarity (Art. 69 II) - competence control of EU through judicial ex-ante control of acts (Art. 130 I) and right to action of annulment (Art. 125 III) 	<ul style="list-style-type: none"> - national Parliaments legitimated to file action of annulment to ECJ on grounds of lack of competence of the EU (Art. 14 IV)
Control against Infringement of Competence	<ul style="list-style-type: none"> - <u>ex ante</u>: special preliminary procedure at ECJ against proposed acts by EP, Council, COM, nat. Parl./Gov. etc. (Art. 130) - <u>ex post</u>: action of annulment by EP, COM, Council, Gov. and Parl. of MS, Committee of the Regions , ECB etc. (Art.125 II, III) 	<ul style="list-style-type: none"> - ECJ has jurisdiction in actions brought by an institution of the EU, a Government or Parliament of a MS, or even regional/local governments (where their rights may be violated) on grounds of lack of competence (Art. 14 IV)
EU - Citizenship	<p>integration of current provisions through Protocol Nr.1 (Annex)</p>	<p>Citizens of MS are those of the EU; establishment of an Ombudsman at the EP; current provisions integrated through protocols to the treaty (Art. 3)</p>
Constitutional Amendments	<ul style="list-style-type: none"> - Convention prepares propositions (convened by Council on initiative of governments of MS, EP or COM) that are approved by conference of representatives of MS, ratified in MS and assented by EP (Art. 196) 	<ul style="list-style-type: none"> - COM or MS submit proposal to Convention which will prepare the amendment that will be adopted either: <ol style="list-style-type: none"> a) by the Council (3/4 majority MS) and EP (2/3 majority of cast votes) + ratification by all MS or b) by a referendum of the EU citizens, the EP and the Council (Art. 18)

compiled by: Ludwig Blaurock, Bertelsmann Foundation, Brussels