

The Constitutional Treaty: Resuscitation, Long Term Hibernation or Death?

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I Introduction

This paper addresses the likely fate of the Constitutional Treaty in the short and medium term.¹ The short term will see the German Presidency of the EU in the first half of 2007, which has been given the task of reviving debate on the EU's constitutional question, seeking to lead the debate as an honest broker. As the Germans themselves already admit, it is very unlikely that any concrete results will be seen from this endeavour, within the six month timescale which they are afforded by the rotating EU Presidency. However, they may set the scene for further developments by leading the negotiations. Thereafter, in the medium term, the task of chairing the discussions and any eventual IGC negotiations will devolve successively upon Portugal, Slovenia and France, with the notably euro-sceptic Czech Republic and Sweden taking the helm during 2009. This is also the year of the next European Parliament elections, by which date prominent figures such as European Commission President Barroso and German Chancellor Angela Merkel have expressed the wish to see a European Constitution in place. This suggests that some key political actors see a positive trajectory for the constitutional and institutional evolution of the European Union. This paper will consider whether this is conceivable, likely and even desirable, bearing in mind the political limitations of the Constitutional Treaty on which agreement was reached in 2004, the events of 2005 which led to the effective

¹ For a regularly updated review of the issues and the literature see 'The European Union Constitution', a site for researchers, journalists and citizens:
<http://www.unizar.es/euroconstitucion/Home.htm>.

abandonment of the ratification process, and the current state of the European Union including its broader economic and political context.

II Constitutional and institutional evolution: desirable?

Is a further phase of attempted treaty reform in the Union involving in particular institutional change desirable or undesirable?

Three plausible arguments (A1, A2, A3) can be advanced as the basis for engaging in a further phase of treaty reform, but in each case there are rather powerful counter-arguments (CA1, CA2, CA3) which highlight a need for caution:

- A1. There is an urgent practical need for institutional reform, which becomes ever more urgent with the EU's latest enlargement from 25 to 27 countries on the 1 January 2007. Institutions designed for international cooperation across a limited range of issues by six countries are maladjusted to facilitating agreement and promoting cooperation on the part of more than four times as many countries across a much wider range of issues.

- A2. It is not only institutional reform which is needed, but also a constitutional renovation, which will help to restore citizens' faith in the European Union and its capacity to deliver. Developing the constitutional and institutional basis of the European Union remains as urgent as it was in December 2001 when the Heads of State and Government identified the link between these questions and the whole issue of citizen 'disconnect' with the EU in the Laeken Declaration in December 2001, a conclusion which led them to establish the Convention on the Future of Europe. On this view, reviving the Constitutional Treaty means re-connecting with the constitutional moment which some have argued was embodied in the process of deliberating upon and agreeing the Constitutional Treaty first in the Convention and later in the IGC. Certainly, many in the federalist majority who were involved in the Convention genuinely felt that the work they were doing was developing a constitutional basis for the European Union which added to its existing treaty basis in a significant way.

A3. The final argument sets aside the possible constitutional import of what was done in the Convention in particular, and focuses on what the Constitutional Treaty embodies by way of compromises between the Member States. On that view, it seems irrational to toss away such hard won agreements and compromises and to abandon the idea of institutional reform for the European Union at this stage just because the Constitutional Treaty itself became mired in ratification processes in some Member States which ultimately had little, if anything, to do with institutional reform as such. Since the Member States have now shown themselves capable of breaking the logjam of disagreement on certain sticky institutional issues which marked the negotiations on both the Treaty of Amsterdam and the Treaty of Nice, it seems conversely rational to relocate those compromises into a legal instrument which does not attract such controversy, and to try to recapture that spirit of compromise.

The counter-arguments run as follows:

CA1. There is no definitive proof that without institutional reform the post-enlargement EU will not work. Enlargement makes for a *different* European Union, but not necessarily one which is *worse*. In any event, the successful prosecution of many of the EU's policy goals in the medium and long term does not require legislation, but rather – as the example of the Lisbon process shows – reform at the national level, which is driven ultimately by the existence of national political will. In areas where the EU has legislative agendas, e.g. in relation to some areas of justice and home affairs, or in relation to the internal market, it is not clear that reform of the qualified majority voting system would change either the incidence of, or contents of, EU legislation. The example of the services directive makes this point well. Consequently, since the tide of public opinion in the EU seems to be moving against *further* enlargement, which might conceivably take the EU past its institutional tipping point, it seems an unnecessary distraction to engage in further institutional reform at this stage, given the danger that such reforms themselves might also harden popular attitudes towards the EU. The latest

Euro-barometer surveys highlight this danger.² In other words, if there is to be no further enlargement, at least in the foreseeable future, then why bother with upsetting the treaty applecart at all, even for minimal institutional reforms, since the benefits from these are not absolutely clear.

C2. Constitutionalism of the type proposed by some of the adherents to the Convention method and the Convention process is the problem, not the solution.³ The EU remains, in essence, a limited exercise in international cooperation between sovereign states guaranteed already by a sufficiently diverse and effective range of legitimation mechanisms. On that view, all reform endeavours which wrongly seek to focus on impossible strategies of democratisation should cease immediately. Moreover, the EU already has a constitutional settlement of a composite nature, which has developed incrementally in particular as a consequence of the case law of the Court of Justice, which has articulated a complex relationship between the national and the EU legal orders, and which has outlined the nature and scope of the powers of the EU. This constitutional settlement is legally legitimated through the treaties, which are international instruments of which the Member States remain the ‘masters’, and politically legitimated primarily through the political systems and democratic structures of the Member States. On this view, the democratization of decision-making at the EU level is only a secondary concern. It is clear from numerous polls of public opinion, and also from the French and Dutch referendums on the Constitutional Treaty, that there is no wider public appetite for the type of finality for the European integration process which was envisaged in Joschka Fischer’s 2000 Humboldt University speech⁴ and which underpinned much of the work of the Conventioneers. On the contrary, such developments risk upsetting the delicate balance that has been worked out over many years, under which the EU’s legal order has been one of the primary motors of integration, whilst at the same time no definitive

² See Standard Eurobarometer 66 for Autumn 2006, results made available in December 2006; http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_en.htm.

³ E.g. A. Moravcsik, ‘What Can We Learn from the Collapse of the European Constitutional Project?’ (2006) 47 *Politische Vierteljahresschrift* 219-241.

⁴ J. Fischer, *From Confederation to Federation - Thoughts on the finality of European integration*, Speech given at the Humboldt University Berlin, 12 May 2000. Available from <http://www.rewi.hu-berlin.de/WHI/english/>.

answer has been given regarding what the finality of European integration might be.

- C3. Finally, it is not so easy just to set aside the constitutional pretensions of the Constitutional Treaty, and retreat to a position of support only for minimal reforms. An argument which states that it is not the content of the Constitutional Treaty which is the problem, but the form in which it is packaged – the pretension to be a ‘Constitution’ with a big ‘C’ – is naïve. This is partly because the national publics themselves are generally not naïve about what they are voting on, and moreover from now on they are much faster to demand the right to vote on reforms to the EU’s founding treaties. The same Member States which have had problems with ratifying the Constitutional Treaty (and here I include not only France and the Netherlands, but also other states which suspended their ratification processes such as Sweden, Denmark, the UK, Poland, the Czech Republic and Ireland) would probably encounter significant difficulties with the ratification of any reforming treaty, however modest. In that sense, the referendum genie is definitely out of the bottle. However, it is also because it is not clear that the delicate compromise which underpinned the Constitutional Treaty’s institutional provisions still obtains amongst the Member States, many of which have gone through changes of government in the intervening two years or more. It would be foolish, for example, to assume that Poland would now accept the modification of the system of qualified majority voting which it eventually accepted under the Irish Presidency in June 2004. It may not revert to the position of ‘Nice or death’ articulated during the earlier failed attempt of the Italian Presidency to bring the Constitutional Treaty negotiations to a conclusion in late 2003, but even so the current Polish government is unpredictable in how it is likely to react to the prospect of renewed negotiations on institutional reform questions. Poland is increasingly taking on the mantle of the EU’s awkward partner from the UK. Politically speaking, precisely because the Constitutional Treaty was a rather successful compromise, this makes it all the more complicated to try to replicate that compromise a second time around.

It is not, in sum, completely clear that engaging in a further period of institutional reform will be a positive experience for the European Union and its Member States (or indeed for the citizens of those states), or indeed that it is a pathway which they ought to follow. There is a delicate trade-off between the likely benefits that would accrue in terms of institutional function from such reforms and the possible risks to the long term stability of the EU which will result from re-opening these questions.

III Constitutional and institutional evolution: conceivable?

What are the conceivable options for dealing with the Constitutional Treaty and the issues which it raises in the short and medium term?⁵

During the past eighteen months, since the referendums, and during the so-called period of reflection, only a rather limited number of observers have consistently called for the resurrection of the Constitutional Treaty itself.⁶ Usually, this has been a call for resuscitation but in a slightly revised form, in order to focus more directly on the issues where the EU is expected to ‘deliver’, such as climate change and the European social model.⁷ This latter approach is the focus of Andrew Duff MEP’s extended set of proposals for a ‘Plan B’, published by *Notre Europe*. The difficulty with such approaches is that any attempts to include more explicit commitments on social issues which might appease the French public are just as likely to alienate UK voters, many of whom remain fixed upon an understanding of the EU as a free trade system, and nothing else. It would certainly entrench the view of UK political commentators that the EU exists primarily for the benefit of its core ‘continental’ members, rather than others such as the UK (and indeed the many new Member States which are benefiting from the internal market). On the other hand, the most obvious lever upon elite UK political opinion, which remains largely in favour of enlargement even though the popular approval for this has largely ebbed away as politicians have

⁵ For an extended of the background to this review see G. de Búrca, ‘The European Constitution Project after the Referenda’, (2006) 13 *Constellations* 205; see also L. Pech, ‘The Future of the EU Constitution: Escaping the Ratification Maze’, *Jurist Legal News and Research*, Forum, <http://jurist.law.pitt.edu/forumy/2006/07/future-of-eu-constitution-escaping.php>, 11 July 2006.

⁶ ‘European Socialists set to relaunch Constitution’, *EurActiv*, 24 October 2006, <http://www.euractiv.com/en/constitution/european-socialists-set-relaunch-constitution/article-159040>.

⁷ A. Duff, *Plan B: How to Rescue the European Constitution*, *Notre Europe*, Studies and Research, No. 52, 2006.

continued to mismanage the labour market consequences of the 2004 enlargement, is the argument that institutional reform must precede enlargement. This leads back to the mini-Treaty argument, as we shall see. Bertie Ahern, the Irish Prime Minister, suggested that non-Treaty-based routes such as political declarations could be used to overcome objections in France and the Netherlands, as they were after the Irish voted no in the first referendum on the Treaty of Nice in 2002, in order to assuage most national anxieties about what is contained in the Constitutional Treaty.⁸ This at least would preserve the ‘substance and balance’ of the existing text, which is probably not something the UK government would favour. It is not an option which has been enthusiastically grasped by any prominent Dutch and French politicians.

The European Commission has tended to avoid too many shrill pronouncements directly on the Constitutional Treaty, for fear of alienating opinion in the national capitals, but the general view of most individual Commissioners who have actually expressed a view (such as Commissioners Margot Wallström and Benita Ferrero-Waldner)⁹ is supportive of the Constitutional Treaty, and concerned about the implications of potentially ‘watering it down’, in order to achieve acceptance. European Commission President José Manuel Barroso appears to have shifted his position. For more than a year, his focus was on urging that the EU and the Member States to ignore the Constitutional Treaty, especially in the immediate aftermath of the referendums, and to concentrate instead on a ‘Europe of results’; towards the end of 2006, he shifted towards supporting the German Government’s current endeavours to bring the Constitutional Treaty back onto the agenda.

Much of the reforming energy of the last year or so has consequently been diverted away from the Constitutional Treaty itself towards the possibility of concluding a type of ‘Constitutional-Treaty-lite’, or a ‘Nice Treaty *bis*’, which might garner sufficient support at the national level from governments, but which would not necessarily need

⁸ ‘Irish PM suggests EU leaders should learn from Nice Treaty rejection’, EU Observer, 31 November 2006.

⁹ See, for example, ‘Commissioners reject Sarkozy mini treaty plan’, EU Observer, 22 November 2006; M. Wallström, ‘The consequences of the lack of a European Constitution’, Presentation to the European Parliament Constitutional Affairs Committee, 22 November 2006.

ratification via referendum because of its limited character.¹⁰ The focus in many of these proposals, although they have differed in areas of detail, has primarily been upon minimal institutional reform to smooth the ongoing effects of both the 2004 and 2007 enlargements,¹¹ and possible future enlargements.¹² Such arguments exercise the greatest political leverage over the UK government, which is in favour of enlargement, but shies away from the prospect of putting the current Constitutional Treaty text to a popular vote in the UK. The UK's most favoured approach would probably be one which saw minimal institutional amendments inserted in an Accession Treaty, such as one with Croatia. The accession of Croatia is not effectively blocked (as it seems likely that all subsequent enlargements will be), as a result the requirement inserted into the French constitution at the initiative of President Jacques Chirac that future Accession Treaties are approved by referendum vote.

To take one specific example of a more modest reform agenda, the 'mini-Treaty' proposal of French presidential hopeful Nicolas Sarkozy focuses on the following key elements:

- The extension of qualified majority voting
- The redefinition of QMV
- The possible use of supermajorities as an exception to most cases where unanimity was retained even in the Constitutional Treaty
- The election of the Commission President by the European Parliament
- The promotion of subsidiarity and the boosting of the role of national parliaments
- The creation of a permanent Presidency of the European Council
- The creation of a Minister of Foreign Affairs
- The use of citizens' initiatives

¹⁰ See the proposal for a mini-treaty by French Presidential candidate of the right Nicolas Sarkozy: N. Sarkozy, Speech to Friends of Europe, 8 September 2006, Brussels; 'France's Sarkozy urges EU reform', BBC News Website, 8 September 2006, <http://news.bbc.co.uk/1/hi/world/europe/5327488.stm>; N. Sarkozy, 'EU reform: what we need to do', *Europe's World*, Autumn 2006, 56.

¹¹ E.g J. Emmanouilidis and A. Metz, *Renewing the European Answer*, Bertelsmann Stiftung, CAP, EU-Reform Papers, 2006/2.

¹² 'MEPs outline list of further reforms for EU enlargement', EU Observer, 14 November 2006, <http://euobserver.com/15/22850>.

- The availability of mechanisms for enhanced cooperation amongst Member States where not all Member States can agree upon further integration
- Establishment of single legal personality for the Union.

However, he rejects the possibility of agreeing upon the reform of the size and composition of the Commission, on the grounds that the differences between the Member States on this matter are intractable at the present time. The difference between such a Treaty and the Constitutional Treaty would partly be one of content. Quite a number of issues are omitted which were included in the Constitutional Treaty, not least the Charter of Fundamental Rights in Part II and the substantial reforms in the area of justice and home affairs policy-making included in Part III. However, it would also be one of form. Such a treaty would merely reform or amend the existing treaties, and would not replace them as a whole, as was proposed with the Constitutional Treaty. This meant that when the electorates of France and the Netherlands voted on the Constitutional Treaty, they voted on a comprehensive, albeit very lengthy, treaty document comprising four parts, including detailed provisions on the execution of EU policies. As an aside, it is worth noting that it was this which brought into a play a number of questions in the referendum debates (notably in France) about whether the EU offers a bulwark against the effects of globalisation or whether, post enlargement, it brings actually reinforces the effects of globalisation. This is because, for the first time, these voters found themselves directly asked questions about the single market, and whether they approved of it.

The approach taken by the German government in advance of its 2007 Presidency was a little difficult to read. On the one hand, the German position appeared to reject the Sarkozy mini-Treaty option, and instead to support the integrity of the Constitutional Treaty.¹³ On the other hand, the Germans also appear to have accepted the inevitability of holding a short ‘technical’ intergovernmental conference (ruling out a repeat Convention) to agree a new looking constitution during the latter half of 2007. This looks like something other than merely resuscitating the Constitutional Treaty. During the Finnish Presidency, as is clear from reports covering last week European Council meeting in Brussels, some ground-clearing work has been done by

¹³ ‘Germany plans to revive EU Treaty,’ 11 October 2006, <http://news.bbc.co.uk/1/hi/world/europe/6041680.stm>; ‘Merkel set for lonely battle to resurrect full EU constitution’, *The Times*, 4 December 2006.

officials, in a series of one-to-one confessionals. In mid December 2006, the Finnish prime minister Matti Vanhanen stated that member states agreed that ‘treaty reform is needed’ and that they ‘cannot throw out the entire text...and start from scratch’.¹⁴ However, in reality, the voice of the President-in-Office of the European Council has been only one of many articulating divergent views on the way forward. We must turn now to consider whether constitutional and institutional evolution in the European Union is likely, in the short or medium term.

IV Constitutional and institutional evolution: likely?

There was little signal in the Presidency Conclusions of December 2006 pointing in the direction of progress. The following brief paragraph represents the sum total of what the Member States could agree to articulate in a joint statement under this heading:¹⁵

As agreed by the European Council at its meeting in June 2006, the Union has followed a two-track approach. It has focused on making best use of the possibilities offered by the existing treaties to deliver concrete results while preparing the ground for continuing the reform process. The Presidency provided the European Council with an assessment of its consultations with Member States regarding the Constitutional Treaty. The outcome of these consultations will be passed to the incoming German Presidency as part of its preparations for the report to be presented during the first half of 2007. The European Council reaffirms the importance of commemorating the 50th anniversary of the Treaties of Rome in order to confirm the values of the European integration process.

However, behind the veneer of this bland statement other forces, both for and against reform, have been at work. Spain and Luxembourg have proposed bringing together the eighteen Member States (if one includes Bulgaria and Romania) which have ratified the Constitutional Treaty for a series of meetings in the New Year. A joint letter from these two states was circulated at the European Council meeting arguing

¹⁴ Quoted in ‘EU constitution back on the political agenda’, EU Observer, 15 December 2006.

¹⁵ Brussels European Council, 14/15 December 2006, Presidency Conclusions, Doc. 16879/06, at 1.

that those eighteen countries 'have a 'particular interest' in helping the German Presidency to restart the process of reform 'keeping the substance' of the text'.¹⁶ This provoked a negative reaction from President Jacques Chirac of France and Prime Minister Jans Peter Balkenende of the Netherlands, who continue to want to avoid placing too much prominence upon the Constitutional Treaty in EU political discourse, given that their populations have expressed themselves firmly against that text. The most that these political leaders might tolerate would be a rapid low key process resulting in a significantly different text to that contained in the Constitutional Treaty. The argument of those who have ratified already is that such a text would render their own political and legal processes nugatory, and require them to ratify a new text separately. Newspaper reports indicate that in addition to France and the Netherlands, the UK, Denmark and the Czech Republic are amongst the Member States which would only be happy with a shorter, simpler text, concluded after a low key and preferably rapid process, and definitely not requiring ratification through a referendum process. However, in practice, given the nature of public debate in the European Union in some of those states, a referendum may not be so easy to avoid. It will remain constitutionally essential in at least one state, Ireland, although it is arguable that through the National Forum on Europe, created after the first Treaty of Nice referendum in 2002, Ireland has found a way of orchestrating national debate on European integration more constructively.

Furthermore, many think that the Germans have articulated an over-optimistic timetable given the schedule of likely political changes at national level during the first part of 2007, including the French presidential election and the anticipation that Tony Blair will step down as UK Prime Minister.¹⁷ This may well leave little or no time before the end of the German Presidency for negotiation with the new political forces. One advantage of the German Grand Coalition is that informal contacts can be taken up by Ministers and officials with either of the two most likely victors in the French presidential election, Ségolene Royale of the *Parti Socialiste*, and Nicolas Sarkozy of the *Union pour un Mouvement Populaire*.¹⁸ The official German position

¹⁶ 'EU constitution back on the political agenda', EU Observer, 15 December 2006.

¹⁷ 'EU constitution talks likely to sideline Brussels', EU Observer, 6 December 2006, <http://euobserver.com/9/23039>.

¹⁸ During the negotiations leading to the conclusion of the Amsterdam Treaty, which coincided in the UK with the final months of the Conservative Government of Prime Minister John

remains that only a ‘very short’ intergovernmental conference would be needed towards the end of 2007 to agree a text, and they are supported in this view by the Portuguese Government, whose ministers state that ‘our ambition is to make a strong contribution to the rapid resolution of Europe’s constitutional impasse during the Portuguese presidency.’¹⁹ At this stage, there is probably little more that can be said, because political progress depends upon behind the scenes work conducted by the two ‘sherpas’ appointed by Chancellor Angela Merkel, to travel between the national capitals after January, in order to ascertain the existence of political will in the national governments. There are few, if any, precedents in the EU for a short sharp successful IGC focused on a very limited agenda. While the IGC which preceded the Single European Act, which was signed in 1985 was certainly short, and it resulted in what many saw as quite a modest set of treaty amendments, it was animated by a grand idea, namely the completion of the internal market, and it was sustained by political momentum which had a number of champions, not only amongst the governments of the Member States, but also within industry and wider civil society. Large European manufacturing firms lobbied vigorously in favour of the single market programme. The attempt to have a limited IGC focused on institutional issues – the so-called Amsterdam leftovers – resulted in a very bitter negotiation leading to the Treaty of Nice, which many describe as not a very ‘nice’ treaty at all. Indeed, it was the Declaration on the Future of the Union appended to the Treaty of Nice by a set of very tired Heads of State and Government at the European Council meeting in December 2000 which led us into the current cycle of reform in the first place. The problem with limited IGCs is that the agenda on the table may be simply too narrow to enable a set of compromises to be effected across 27 Member States with very divergent interests, but each holding a veto. Furthermore, there is no guarantee that any agreement, however modest, could actually be ratified in the European Union in its current state of disarray, with the discontent demonstrated, for a variety of reasons, by a number of different national electorates. Very substantial doubts about the existence of effective political leadership in the EU at the present time need to be articulated.

Major, Sir John Kerr, who was at the time Permanent Under-Secretary of State at the Foreign Office perfected a fine linguistic distinction in reacting to various proposals put forward: Compare ‘this is unacceptable to the British Government’ to ‘this is unacceptable to any British Government.’

¹⁹ Quoted in G. Parker, ‘Fresh push to end EU constitution deadlock’, *Financial Times*, www.ft.com, 6 December 2006.

Despite such a gloomy assessment of the prospects for the German and Portuguese Presidencies brokering a restricted set of institutional reforms, I want to finish on a less gloomy note. Perhaps the better view about the political future of European constitutionalism at this stage is to avoid too much short term prognosis about the Constitutional Treaty and to adopt instead a longer term perspective. While such a perspective would focus, with an open mind, on the question: ‘what sort of constitution for what sort of European Union?’, there would be no specific attachment to any particular destination, but rather a continued concentration on the process itself and on the journey.²⁰ Some commentators have pointed out that, over a period of years or even decades, the most enduring and effective ideas put forward in documents such as the earlier Tindemans report of 1976 or the Draft Treaty of European Union elaborated by the first directly elected Parliament after 1979, have tended to be incorporated into the European Union’s legal and constitutional structure in the end.²¹ The Constitutional Treaty may eventually fall into this category, acting as a laboratory of ideas over a period of time. To put it another way, if what is in the Constitutional Treaty would ‘work’ in an EU context, then it will most likely be picked up again in future reforms, probably piecemeal rather than all at once, over a period of years.

Such ideas will not necessarily be built into treaty reforms, but may also take the form of legislative change, or sub-constitutional change through inter-institutional agreements, or experiments which seek to explore the limits of the current treaties to the maximum. There have been many objections to cherry-picking from the Constitutional Treaty, although there have been some instances of it already, notably the attempts to bring more transparency to proceedings within the Council of Ministers, which are now televised, at least where legislation is under discussion. Other attempts, notably to bring about institutional reforms in the area of justice and home affairs, have failed. It is certainly arguable that despite all the discussion of institutional change, it is the loss of the substantial reworking of the basis for justice and home affairs policy-making which represents the greatest cost of ‘no-

²⁰ D. MacShane, ‘Germany must seize the chance to keep Europe on course’, *The Observer*, 31 December 2006, <http://observer.guardian.co.uk/world/story/0,,1980518,00.html>.

²¹ P. de Schoutheete, ‘Scenarios for escaping the constitutional impasse’, *Europe’s World*, Summer 2006, 74.

Constitution'. In this field, despite pressure from the Commission, no progress was made either on using the so-called *passerelle* to move current third pillar matters into the first pillar or on related questions such as the role of the Court of Justice at the December 2006 European Council, although many the Council Conclusions did give some indication that progress was being made on the policy and operational side of justice and home affairs.