Issues Relating to the Constitution for an Enlarged European Union

Contrary to the expectations of many, the 105 members of the Convention on the Future of Europe – after one and a half years of sometimes heavily controversial discussions – finally achieved consensus on a draft constitution for the European Union. How is the result to be judged? Will the proposed reforms enable the EU to function after the coming enlargement?

Elmar Brok*

The Convention Has Achieved an Impressive Consensus

On 18 July the President of the Convention, Giscard d'Estaing, presented the full draft Treaty establishing a Constitution for Europe to the Italian President of the Council, Prime Minister Berlusconi, in Rome. Following the summit at Thessaloniki at the end of June, the Convention had finished its work a few days previously with the passing of the resolution on the political section.

After a year and a half of intensive discussion with phases of controversy and standstill, the Convention in the end achieved an impressive consensus. No-one would have liked to bet much in February 2002 that in the end a draft for a constitution would be completed. Particularly in the final phase many members of the Convention criticised the Praesidium's mode of operation as opaque and biased in favour of the large Member States. The differences between large and small Member States could probably have been at least defused, if not resolved, by an earlier discussion of the institutional questions.

In the final phase, however – with the danger of possible failure vividly clear – the appreciation of the importance of the inclusion of the delegations and political groupings grew, strengthened by common positions of the members of the European Parliament and the national parliaments. The chairpersons of the political families of the PPE, socialists and liberals in the Convention contributed to the formulation of compromises with common position papers, particularly on the extension of the decisions to be taken with a qualified majority and on the balance of the institutions. This was also the case for the limiting of the function of the new full-time president of the European Council and the decision on the setting up of a diplomatic service of the Union within the framework of the Common Foreign and Security Policy (CFSP).

The result produced by the 105 Convention members from the European Parliament, the national governments and parliaments and the Commission is a considerable improvement over the present, complex collection of treaties. An integrated draft constitution without options was presented in consensus which strengthens the character of the Union as a union of citizens and states. It is above all remarkable that representatives from 28 states were able to come to an agreement on common values for the Union.

Questions which had to be left unanswered in Amsterdam and particularly in Nice could be solved, at least for the time-frame to 2009. That is primarily true for the rules on majority decisions in the Council and the size of the Commission and the distribution of seats in the European Parliament. The largest accession round since the existence of the Union had produced the necessary pressure to act. The threat of a non-functioning Union with 25 or more Member States led to the required flexibility.

The result also showed the advantages of the Convention method over the usual, unanimity-based

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conferences of civil servants at the government level. The Convention, the majority of whose members were MEPs, achieved politically far-reaching compromises through public discussion compelling the exchange of arguments instead of the quick national "no". It is therefore to be welcomed that it was possible at the last minute to firmly embody the Convention method as the rule for dealing with proposed amendments to the Constitution. The European Council can only dispense with convening a Convention before the Intergovernmental Conference with the consent of the European Parliament. It would make sense in future to strengthen the independent role of the Convention by electing the president and the two vice-presidents from among the Convention members.

The criterion for judging the results of the Convention is the assignment by the Laeken summit to make the extended Union more efficient, more transparent and more democratic. The integration of the Charter of Fundamental Rights in a prominent position in the Constitution, the clear division into exclusive, shared and supplementary competencies and the reduction in the multitude of legal instruments are qualitative improvements in this direction. For the European Parliament the general introduction of co-decision as the rule for the process of legislation is to be particularly welcomed, as is the consolidation of its negotiating position in the now obligatory multiannual financial planning. The European Parliament is further strengthened by the newly introduced consultation by the European Council in the choice of the Commission President taking into account the result of the European elections and by his election.

The safeguarding of the status of the churches in line with the Amsterdam Protocol and the structured dialogue in the Constitution itself was an important objective to which the PPE as a Christian democratic party was committed. The formula in the Preamble which was finally developed, which refers not only to the religious inheritance of Europe but also to its contemporary values, is considerably more than could be achieved in the Charter of Fundamental Rights.

It would be false not to mention that some things which were desirable and necessary were not achieved. However, it is the nature of a compromise that in order to achieve a satisfactory solution for the whole, everybody has to yield on some points in the end. For the majority of the Convention members the upgrading of the European Council to an institution and the establishment of the function of a full-time President of the European Council was unnecessary. It can lead to a paralysing competition with the Commission President and the new Minister for Foreign Affairs. This solution was arrived at due to pressure by several large Member States. Close cooperation on the part of the European Parliament and the national parliaments in the final phase was able to achieve a limitation of the functions, however. Under pressure from them it was included in the Constitution that the European Council may not exert legislative competence. The competencies of the President are essentially limited to the coordination in the European Council and the external representation of the Union in the CFSP at the level of the heads of state and government, which means at summit meetings with third countries and in the framework of the G8, as long as this does not restrict the rights of the Minister for Foreign Affairs.

The position of the Commission President, who receives a greater democratic legitimacy through his election taking into account the results of the European election, was strengthened within the Commission. He can assign areas of responsibility to the Commissioners and the European Commissioners and even demand the resignation of individual Commissioners. It would also have been desirable, however, to give him the possibility of rejecting the candidates proposed by the Member States. In the Council, decision-making with a qualified majority on the basis of the double majority of the states and of 3/5 of the population and the possibility of reducing the number of MEPs will lead to more efficiency. The fact that the innovations in the setting up of the Commission, the majority decision-making and the set-up of the European Parliament will not take effect until 2009 is, however, part of the compromise with which in particular the consent of several hesitant national governments to the package deal was wrung. From the perspective of integration policy it would of course have been preferable if these essential regulations had already been in place when the constitution enters into force.

A central argument for the setting up of the Convention was the improvement in the functioning of the enlarged Union. This calls for the possibility of the dynamic development of the Constitution itself. It would be unrealistic, and also undesirable, for the Constitution to be unalterable. The alteration of the Constitution requires unanimity and ratification by all Member States. This can lead to the prevention of necessary improvements. A solution is necessary which on the one hand makes essential changes dependent on the agreement of all 25 or more Members, but on the other hand prevents the permanent blockade of necessary developments by one Member State. In the Conven-

tion it was therefore suggested by all political parties that changes to the constitution, with the exception of the Charter of Fundamental Rights and the transfer of competencies, should be allowed to enter into force with a 5/6 majority of the states and a 2/3 majority in the European Parliament.

The Convention has finished its work. The European Parliament will, as usual, critically accompany and influence the Intergovernmental Conference with two representatives. The PPE Convention group, as the largest political grouping, will continue to meet during the Italian Presidency in order to exert a constructive influence on the negotiations within the framework of the political family.

In order to be successful, the compromise package of the Convention must remain untouched. If one stone is removed from the pyramid, the whole thing will collapse. After all, a large number of governments, through the participation of their foreign ministers or members of the government in the Convention, have a share in the consensus which has been found. The Intergovernmental Conference should be completed by December 2003 and the Constitutional Treaty signed after the accession of the new Member States on 1 May 2004. The proposal by President Giscard d'Estaing that the Constitutional Treaty should be signed on Europe Day, 9 May 2004, by the then 25 Member States in Rome, deserves approval.

The European election in June 2004 could be used as a type of Europe-wide "referendum" with a consultative character. The actual process of ratification should, however, be conducted in each country according to its own political tradition and constitutional rules.

Edward Best*

Decision-Making and the Draft Constitution: Have We Really Cleaned Up Our Legal Acts?

The European Convention is over. On 18 July 2003, its Chairman, Valéry Giscard d'Estaing, presented the final version of a "Draft Treaty establishing a Constitution for Europe". It is a major achievement to have a single text at all, although it remains to be seen what will happen to it in the Intergovernmental Conference starting in October 2003. In the end, a significant European consensus was reached, at least at the political level, after nearly 17 months work by the 105 national and European parliamentarians, representatives of 28 national governments and the European Commission who made up the Convention.

Nobody will say that the draft is perfect, and it would be unrealistic to think that the final text will be to everyone's satisfaction: consensus generally means compromise. But there is a trade-off. Compromise usually works against simplicity and clarity, whereas one of the main goals of the whole process was, of course, to achieve "simplification" and an increase in the "democratic legitimacy and transparency" of the institutions. So, if the draft[1] is more or less confirmed in the IGC, will we be any nearer to having a legal and institutional system which is clearer and more comprehensible to the EU citizen?

The general framework of the Union should be easier to understand. There will be only one basic Treaty,[2] compared to the post-Maastricht mess of treaties within treaties: no more of those confusing "pillars" as such, but one European Union with legal personality. The draft marks an important step forward in more clearly stating the basic principles on which the Union rests. The first, and relatively short, part states the principles on which the sharing of competences between the Union and the Member States is based as well as the basic political and legal principles which govern the Union's functioning. This includes some basic legal principles – such as the primacy of European law – which have long been accepted but never before written explicitly in primary law. The results are rather more mixed, however, when it comes

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[1] References in this text are to CONV 850/03 of 18 July 2003.

[2] The Treaty establishing the European Atomic Energy Community (Euratom), however, is to retain its own separate existence.

to the Union's legal instruments and decision-making procedures, which are the focus of this article.

Has Simplification Made Things Clearer?

The number of instruments and procedures is apparently reduced in the draft, as was explicitly urged by the Laeken European Council which established the Convention. The draft proposes that there should only be four binding instruments. There are to be two kinds of "legislative act" adopted directly on the basis of the Constitution – the *European law* and the *European framework law*, which have the characteristics of present Regulations (directly applicable) and Directives (binding as regards the results but leaving open the choice of form and methods) respectively – and two kinds of "non-legislative" binding act: the *European regulation* and the *European decision*. The draft also retains the two present non-binding Community instruments: the *Recommendation* and the *Opinion*.

On the positive side there are, at the heart of this new system, several changes which mark a real improvement in terms of clarifying the rules and relationships involved. The fact that secondary legislation will henceforth be called by its name – European "laws" – certainly helps the task of cleaning up (or, perhaps, coming clean) with regard to the nature of Union decision-making. That these are to be adopted as a rule by co-decision, as the "ordinary legislative procedure", not only means a significant expansion in majority voting. It should also make it clearer to the citizenry of the Union that these laws have been adopted by two identifiable bodies respectively representing states and citizens. The proposal to distinguish between "delegated regulations" and "implementing acts" is also, as discussed below, a step towards greater clarity of roles as well as institutional accountability.

At the same time, however, it is undeniably not as easy as it could be for people actually to see this greater clarity! True, there are fewer terms, but one term – for example, "regulation" – in fact hides quite a variety of different realities, concepts and even instruments. And, if one looks at the much longer Part Three which sets out the Union's policies, there are a large number of exceptions to the rules.

It is suggested here that there are two main ways, discussed in more detail below, in which clarity became clouded as simplification proceeded.

First, there may have been a tension between two different aspects of "simplification": conceptual clarification and quantitative reduction. The fundamental challenge has been to establish greater consensus and clarity regarding the relationship between the Union and the Member States; between the EU institutions; between EU legal acts; and between binding and non-binding approaches to policy areas of common concern. Some of these – notably the hierarchy of acts – have in fact proved to demand an increase rather than a reduction in the number of instruments and procedures, precisely in the interests of transparency and accountability. This has not sat easily with simplification in the sense of a quantitative reduction of terms: on the one hand, we want to differentiate more clearly between kinds of acts; on the other, we want to reduce the number of terms available to denominate them.

Second, the European Union, it seems, is just not ready for too much simplicity! This is not just due to the fact that, as usual, complications were introduced as a result of some Member States' insistence on special rights and exceptions. On the one hand, we are not yet prepared to adopt the same rules and procedures across the board. It seems to be accepted that the Union will maintain "specificities" in sensitive areas for some time to come. There may be no more "pillars" as such, but the Common Foreign and Security Policy (CFSP) and Police Cooperation and Judicial Cooperation in Criminal Matters will certainly continue to operate according to different rules. On the other, the Union still does not seem ready for a clear-cut division of powers between the institutions. So long as the executive function is shared between the Council and the Commission, it will not be possible to have a simple distribution of tasks and a correspondingly simple list of acts and procedures.

Clarifying the Hierarchy of Norms: Too Many Concepts or Not Enough Words?

Present terminology makes it hard to differentiate between legislative and implementing acts of the EU. There are two levels of legal acts below the treaties. The first is secondary legislation, adopted on the basis of the treaty either by the Council, usually after consulting the Parliament or, where the co-decision procedure is foreseen, jointly by Parliament and Council.[3] Below this come implementing acts, usually adopted by the Commission on the basis of powers delegated to it by the legislator in the act of secondary legislation which is to be implemented. Although a hierarchy between these norms has clearly been established in case law, acts at both levels use the same set of names (regulation, directive and decision) reflecting

[3] The Commission is empowered directly by the Treaty to adopt measures in some areas of competition policy and in one case (Article 86 (3)) to adopt "directives".

the nature of the instrument rather than the place in the hierarchy.

The answer proposed is – and for good reasons – not to change the names at these two levels, but to increase the number of different levels to three.

This question has to be seen in the context of the continuing discussions over "comitology" – that is, the system by which the Commission is "assisted" by different types of committee composed of representatives of the Member States to which the Commission must present its proposed measures when carrying out the implementing tasks given to it. Three procedures may be involved: an advisory committee to which the Commission must listen; a management committee, from which the Commission must avoid a negative opinion; and a regulatory committee, from which the Commission requires a positive opinion in order to proceed.

There have been two main institutional issues over the years. On the one hand, the Commission, generally supported by Parliament, has expressed its opposition to procedures which imply control over its work and its preference to work only with advisory committees, which perform an essential function of information and feedback. On the other hand, since the advent of co-decision, Parliament has insisted on establishing scrutiny mechanisms which adequately reflect its new status as co-legislator. If both institutions are delegating powers, then they should both have the right to exercise oversight. A new "comitology" decision adopted in 1999 only went part of the way towards satisfying the Parliament's concerns. For both reasons, the Commission has opposed maintaining the treaty provision which allows the Council to reserve implementing powers for itself.

The Commission's apparent interest in changing the system in the direction of greater executive autonomy, as well as greater accountability towards both co-legislators, was again reflected in its 2001 White Paper on European Governance. Council and Parliament should concentrate on legislation and budgets and let the Commission get on with its role as the executive body. Legislation would define the conditions and limits of that role, with a simple legal mechanism for monitoring and control by Council and Parliament. Otherwise, the Commission should be as free as possible to do its work, listening to the advice of committees as required. Management and regulatory committees would not be needed.[4]

A third perspective was also raised in the Convention, namely the need to distinguish between legislative and executive tasks, if not completely (which is difficult given the special features of the Union system) then at least more clearly than at present. As the Final Report of the Convention's Working Group on Simplification put it:

"At present there is no mechanism which enables the legislator to delegate the technical aspects of details of legislation whilst retaining control over such delegation. As things stand, the legislator is obliged either to go into minute detail in the provisions it adopts, or to entrust to the Commission the more technical or detailed aspects of the legislations as if they were implementing measures."

It was therefore proposed to distinguish between "delegated" acts which would "flesh out the detail or amend certain elements of a legislative act" subject to control by the legislator and "implementing" acts required for application of that act at Union level.[5] There would thus be *three* levels of acts. This idea was accepted variously as a means to clarify the real nature of the different acts; to give Parliament and Council equal rights regarding control of powers delegated under co-decision; or as a means to achieve a "refocusing" of the institutions while easing control over purely executive tasks.

Indeed, in this last perspective, the idea is very much the same as the Commission's Proposal for a Council Decision amending the 1999 "Comitology" decision[6], presented in December 2002, in which the Commission is quite clear that this should mean:

- "doing away with the Council's executive powers", thus clarifying institutional roles;
- adopting a new version of the regulatory procedure giving equal rights to Council and Parliament for basic instruments adopted by co-decision, thus increasing transparency and accountability; and
- limiting committees to advisory procedures in the case of implementing acts.

The final formulation in the draft Constitution (Article I-35 (1)) largely reflects European case-law, although it may also be inspired by Article 80 of the German Basic Law.[7]

[4] European Governance: A White Paper, COM(2001) 428. Brussels, 25 July 2001, pp. 29-31.

[5] Final report of Working Group IX on Simplification, CONV 424/02, 29 November 2002, pp. 8-9.

[6] Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM(2002) 719 final, 11 December 2002.

Figure 1
The Present System of Binding Acts in the European Union

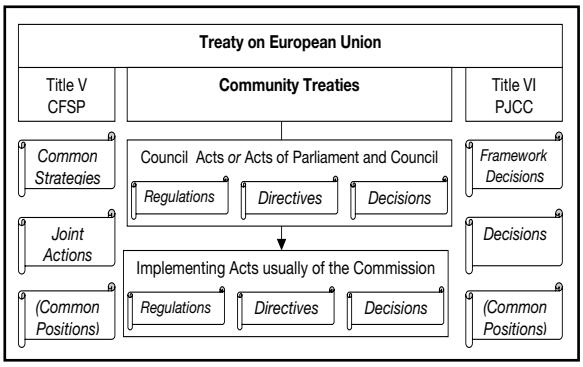
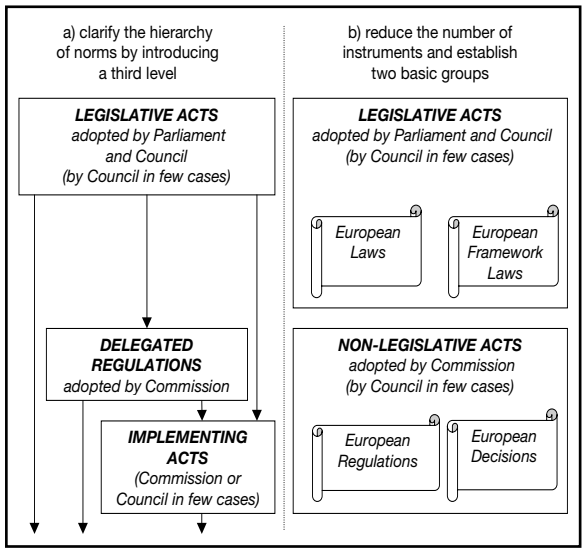


Figure 2
Two Sides of Simplification as Proposed in the Convention: How to Make them Match?



"European laws and European framework laws may delegate to the Commission the power to enact delegated regulations to supplement or amend certain non-essential elements of the European law or framework law.

"The objectives, content, scope and duration of the delegation shall be explicitly defined in the European laws and framework laws. A delegation may not cover the essential elements of an area. These shall be reserved for the European law or framework law."

On the other hand, "implementing acts" (Article I-36) would either be measures of national law adopted by Member States or, "Where uniform conditions for implementing binding Union acts are needed, those acts may confer implementing powers on the Commission, or, in specific cases duly justified and in the cases provided for in Article 39 *[i.e. CFSP]*, on the Council of Ministers."

This distinction should be a positive contribution to transparency and accountability. There is an important difference between the two kinds of act both in terms of powers and of practices which is currently lost. By way of example, take the End of Life Vehicles Directive. The Commission is mandated to carry out four tasks. Three of these are technical implementing acts which are needed in the interests of uniformity – for example, minimum requirements across the Member States for the certificate of destruction. These are quite different from adopting "the amendments necessary for adapting the Annexes to this Directive to scientific and technical progress", which involves modifying a "non-essential" part of the law itself. In the future, the two kinds of powers would be clearly distinguished.

As for the "comitology" aspects, it remains to be seen exactly how this would be worked out in practice. The draft Constitution gives a general indication of the control mechanism to be introduced for the Parliament and Council with regard to delegated regulations. The proposed measure can only be adopted if neither the Parliament nor the Council objects within a specified period, and the Parliament or Council can revoke the delegated powers and legislate instead. With regard to implementing acts, some *conventionnels* tried to remove all reference to committees, others to stipulate that only advisory committees were foreseen. The Praesidium concluded that further debate was inappropriate since this was "a matter for secondary legislation". However, it did accept proposals to introduce an explicit reference in the draft Constitution to the principle of "control" by the Member States.[8]

This conceptual clarification, however, does not sit easily with terminological "simplification" – that is, the emphasis on reducing the number of different instruments by comparison with the present system – as illustrated in Figures 1 and 2. On the one hand, the Convention proposed clarifying the hierarchy of acts by differentiating further within the category of non-legislative acts. On the other hand, it wanted to reduce the overall number of different acts. Rather than introducing different terms to reflect the new con-

[7] Article 80 reads: "The Federal Government, a Federal Minister, or the Land governments may be authorized by a law to issue statutory instruments. The content, purpose and scope of the authority conferred shall be specified in the law. Each statutory instrument shall contain a statement of its legal basis…"

[8] See comments in: Revised text of Part One, CONV 724/03, 26 May 2003.

cepts, both levels are squeezed into the same boxes as "European regulations" or "European decisions". The result, it is argued here, is to weaken the real gains in terms of transparency and comprehensibility.

To understand the resulting situation it may help to distinguish, within the concept of "non-legislative acts", between procedures and instruments (see Figure 3). In other words, a "delegated regulation" refers to the kind of powers involved (in contrast to a "law" or an "implementing act") whereas "European regulation" refers to the kind of instrument involved (in contrast to a "decision"). Yet even this does not fully clear things up since the new "European Regulation" consists of instruments which can either have the characteristics of present Regulations or those of present Directives![9]

It is hard not to conclude that the insistence on achieving a quantitative reduction in the apparent number of acts has in fact made it more difficult to come up with a system which is easier for people to understand if they dip below the surface. If there is to be a three-level hierarchy of norms, would it not have been better to adopt a three-level set of terms ?

"Give Me Simplicity – But Not Yet"

The second set of factors which have complicated "simplification" reflect the continuing resistance of Member States to introducing a genuinely simplified system governing relations between the Union and the Member States or between the Union Institutions. The reasons behind this are perfectly understandable in political terms. However, they do have the effect of, yet again, weakening the results of the whole exercise in terms of clarity and "comprehensibility" of the system.

First, there are several exceptions to the procedure for the adoption of "ordinary" laws and framework laws. There a few cases in which the Council, due to special demands of particular Member States, must act by *unanimity* within co-decision.[10] And, just like in the present "Third Pillar", the Commission does not have the exclusive right of *initiative* in judicial co-operation in criminal matters and police cooperation. Acts, including laws and framework laws where this is provided, are to be adopted either on a proposal from the Commission or on the initiative of a quarter of the Member States.[11]

Second, there is in fact more than one kind of "ordinary" law. It seems to have been accepted early on that co-decision would not be acceptable "in areas where the special nature of the Union requires autonomous decision-making, or in areas of great political sensitivity for the Member States".[12] The first draft stated only that "In the specific cases provided for by the Constitution, European laws and framework laws shall be adopted by the Council." The Praesidium proposed not to add anything about the role of the Commission or the Parliament "in order to highlight the exceptional nature of this procedure and avoid giving the impression that it might be an alternative for the adoption of legislative acts".[13] A series of amendments were tabled either to delete this paragraph, to refer to the Parliament, or to provide for phasing out these provisions. The result was not only to include a reference to Parliament but even, presumably in the interests of equality between the institutions, to add the possibility of European laws and framework laws being adopted by the Parliament with the participation of the Council! The consequence is that the basic definition ends up by giving more space and attention to the exceptions than to the rule, which is unfortunate since Part One was meant to be as short and clear as possible. The text explicitly refers to three kinds of European law and framework law. *"European laws and framework laws of the Council of Ministers"* are mentioned twice in Part One and in 18 provisions of Part III. The European Parliament is to be consulted in 14 of these cases and to give its assent in four others.[14] The Council is to act by unanimity in almost all these cases.[15] There are also *"European laws of the European Parliament"* in three cases directly related to the organisation and work of Parliament.[16]

Third, it is not only laws and framework laws which can be adopted directly on the basis of the Constitu-

[9] "A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain specific provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as regards the result to be achieved, on all Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result." (Article I-32).

[10] Tasks, priority objectives and organisation of the Structural Funds and the Cohesion Fund, until 1 January 2007 (Article III-119); and "trade in cultural and audiovisual services, where these risk prejudicing the Union's cultural and linguistic diversity" (Article III-217).

[11] Article III-165.

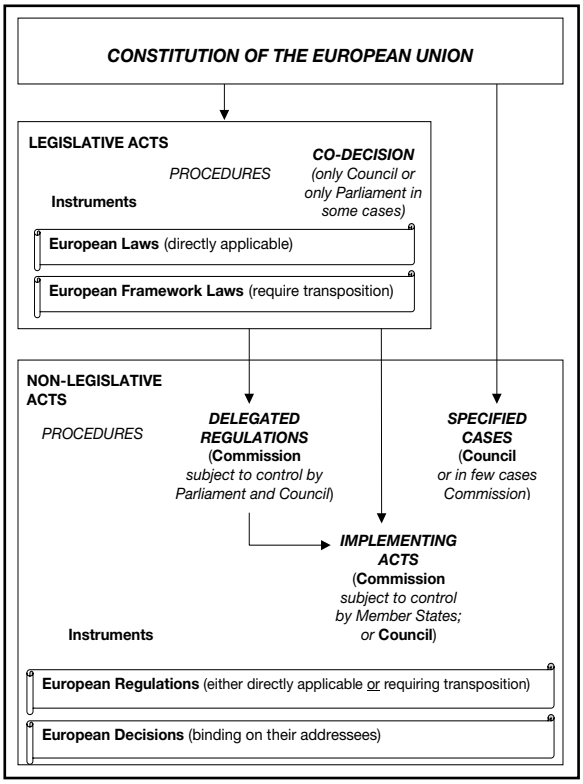
[12] Final report of Working Group IX on Simplification, p.15.

[13] See comments in "Draft of Articles 24 to 33 of the Constitutional Treaty", CONV 571/03, 26 February 2003. pp. 12-13.

[14] The Parliament must give its "consent" for measures to combat discrimination (Article III-8); decisions to add to the rights of EU citizenship (Article III-13) and adoption of a uniform procedure for elections to the European Parliament (Article III-232(1)), and its "approval" for establishment of a European Public Prosecutor's Office (III-175).

[15] An exception was introduced for Articles III-62 and III-63 concerning taxation. Qualified majority can apply "where the Council of Ministers, acting unanimously on a proposal from the Commission, finds that the measures…relate to administrative cooperation or to combating tax fraud and tax evasion".

Figure 3
The System of Binding Acts Proposed in the Draft Constitution



tion. Article I-34 provides that in "cases specifically provided for in the Constitution" the Council and/or the Commission[17] may adopt European regulations or decisions – that is, non-legislative acts of a binding nature – directly on the basis of articles of the Constitution. These are mainly decisions on individual issues and cases rather than new rules of general application.[18] Yet they can hardly be considered exceptional, since there are over 60 such provisions in the text, of which 15 concern Economic and Monetary Policy and 19 are in the domain of External Action.

The overall picture resulting from all this is presented in Figure 3. It is not an easy picture to digest, even for those familiar with European law!

Conclusion: Two Steps Forward, but One Step Back?

At base, the draft Constitution contains a fairly simple set of "general rules" which, it is argued here, favours greater comprehensibility of the Union system and accountability of its Institutions.

- Constitutional provisions are translated into Laws jointly by the Parliament and the Council on the basis of a Commission proposal, except in foreign policy.
- These Laws may require amendment in their non-essential elements through Delegated Regulations which are adopted by the Commission subject to control by the co-legislators.
- Both Laws and Delegated Regulations may require EU Implementing Acts, which are adopted by the Commission, or the Council in exceptional cases.

Yet this potential clarity is obscured both by multiple meanings – a single term in fact covering a variety of instruments and procedures in practice – and multiple exceptions. This is due not only to political compromise but also, *de facto*, to methodological contradiction – a tension between the aims of reducing the number of terms, to make the system "simpler", and of increasing the variety of instruments and procedures, to make the system "clearer".

The final question, at this stage, is to what extent one considers it desirable and advisable to try to modify the draft Constitution in the course of the IGC. Realism may dictate that those pursuing a clearer political system for the Union should not try to hold out for the perfect at the expense of the good, and try rather to phase out the less sensitive anomalies as soon as is politically possible.

Yet a case can be made in the same spirit for not simply ratifying the deal which was finally agreed by the Convention. This article has argued that a superficial pursuit of simplification all too easily leads to less clarity than before in the sense of real "comprehensibility". Beneath this lies also the belief that it would be politically inappropriate – even dishonest – to present the EU system in too simple terms. We are indeed not ready for a simple system of European government. The challenge is thus to find ways to improve the performance of our unique and unusual system of multi-level governance, and to do what we can to make it

[16] These are: regulations and general conditions governing the performance of the duties of Members of the European Parliament (Article III-232 (2)); detailed provisions governing the exercise of the right of inquiry (Article III-235); regulations and general conditions governing the performance of the European Ombudsman's duties (Article III-237 (4)). Even within this category there are variations! These are adopted on Parliament's own initiative with the approval of the Commission and Council for the right of inquiry, and the opinion of the Commission plus approval of the Council in the other two cases.

[17] There are six cases in which the Commission is empowered directly by articles of the Constitution to adopt binding acts, mainly in the field of competition policy as at present.

[18] Three provide for the application of the "ordinary legislative procedure" in parts of social policy (Article III-104 (3)), environmental policy (Article III-130) and judicial cooperation in family law (Article III-170).

consistent with certain underlying democratic *principles*. Wherever it is possible to make clear some basic and recognisable principles of good governance, we should do so. A few changes aimed at cleaning up our acts even further, while the opportunity is there, might not be such a bad idea.

Heather Grabbe*

The Draft EU Constitution: Still a Work in Progress

The grandly named "Convention on the Future of Europe" completed its work in July 2003 on a draft constitution for the European Union. It was set up to prepare the EU for enlargement, after the EU's prime ministers and presidents had failed to reach agreement on the most knotty issues in a series of inter-governmental conferences (IGCs). The principal aims of the Convention were to make the EU more efficient – so that it can cope with 25 and more member states – as well as more democratic. The constitution is supposed to make the EU simpler and easier to understand, as well as making necessary reforms to its procedures and institutions.

The draft as it stands does not make the EU significantly simpler, or more comprehensible to the average citizen. It is still a long legal text that preserves the complex deals struck over the past half-century of EU history. However, the draft contains many useful improvements that would make the EU more efficient and democratic. The text brings together previous treaties and other documents, and it helps to rationalise the EU's complex and messy legal framework.

Ultimately, the text of the constitution produced by the Convention is just a draft. The member states will haggle over a final text in an IGC that will take place in Autumn 2003. Most governments have a particular part of the constitution that they would like to change at the IGC. But if they re-open too many of the deals struck in the Convention, that could unravel agreements on other areas, because so many of the deals are linked in complex trade-offs. All the Convention's work could be undone if each member state tries to use the IGC to regain what it lost in the compromises already agreed.

Where Would Power Lie?

The draft constitution makes the *division of powers* between the EU's institutions and its member states much clearer than in previous treaties. It states explicitly that the EU draws its powers from the member states, not the other way around. It defines clearly where the EU can and cannot act. The constitution names just five areas where the Union has exclusive powers: competition rules within the single market; monetary policy for the euro members; common commercial policy; customs union; and the conservation of marine biological resources under the common fisheries policy.

The draft constitution proposes improvements to increase the *efficiency* of the EU's institutions, the most important of which is the European Council. Consisting of the heads of government and the president of the European Commission, it meets quarterly to set the Union's broad strategy and priorities. Currently the *chairmanship of the European Council* – like that of the many sectoral councils of ministers – shifts from one member state to another every six months. This "rotating presidency" is widely recognised as an inefficient system: each country uses its stint in the chair to promote its own pet projects, while countries outside the EU find it confusing that a new group of people take over every six months.

The constitution calls for the European Council to elect a chairman or woman for a period of two-and-a-half years. His or her task would be to "drive forward" the work of the European Council, "ensuring proper preparation and continuity"; and to facilitate "cohesion and consensus" within it. This proposal is a very good one. It would abolish the ludicrous system of the rotating presidency at the level of the European Council. With ten more countries due to join the EU in May 2004, that body is going to grow to unwieldy proportions. A competent individual needs to guide and steer the European Council, lest it become ineffective. He or she will also need to ensure follow-through of European Council decisions: too often the prime ministers sign up to promises that they soon forget.

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The Commission, the federalists and the small countries hate the plan for a European Council chairman – partly because the Commission president would no longer be able to claim to speak for Europe on the international stage. The Commission would be obliged to focus on its core internal and economic tasks. The appointment of the new chairman would confirm that the EU's foreign policy and grand strategy rest with the governments, represented in the European Council, rather than the Commission. The small countries believe – correctly – that this scheme would enhance the influence of the European Council, which the big countries tend to dominate, against that of the Commission, which often protects the interests of small countries.

The powers of the *Commission* are not extended significantly. The constitution makes provision for reducing the number of commissioners with voting rights to 15, which will prevent inefficiency after enlargement brings in more commissioners. However, in a last-minute deal to bring the smaller countries on board, the Convention agreed that this reform will only come in effect in 2009. But the postponement will be counter-productive to the interests of the small countries. A Commission with a college of 25 voting members will be more fractious and weaker than one in which the president can manage a smaller, more cohesive team of commissioners. The small countries want the Commission to be more effective and stronger, but they have sacrificed this ambition in order to keep all their commissioners for the first five years after enlargement.

The draft proposes a *simpler system for voting* to replace the complicated "qualified majority vote". To pass, a measure would have to be supported by a majority of states which also represents at least three-fifths of the EU's population. This is a more democratic system because it ensures that people living in big countries are represented equally with those living in small ones. However, this new system would only take effect on November 1, 2009. This postponement was a concession to Spain, which wants to keep wielding its over-weighted vote in decisions on the next two budgetary plans to ensure it retains its subsidies even when poorer countries enter the Union. In the CER's view, this delay is absurd. If a reform is needed for enlargement, why wait until 2009?

The constitution would enhance *democracy* in EU decision-making – although the CER believes it should go further. The Council of Ministers and the European Parliament would explicitly share the task of law-making. All areas with majority voting would be subject to "co-decision", meaning that they are scrutinised by directly elected MEPs. The constitution proposes the establishment of a separate "legislative council", so that a single body deals with all EU law-making. The UK opposes this idea, but the CER supports it because it would increase transparency by making it more obvious that ministers make most EU laws, not bureaucrats. Moreover, the constitution proposes that the Council should meet in public when it is passing laws, making it easier for citizens to follow how their national ministers vote.

National MPs would become more directly involved in European affairs, through a more systematic exchange of information between EU bodies and national parliaments. The draft proposes a special procedure whereby one-third of national parliaments could block Commission proposals at an early stage if they risked breaking the subsidiarity principle (which is that decisions should be taken at the lowest appropriate level of government).

Citizens would gain from the inclusion of the *Charter of Fundamental Rights* in the constitution. It will protect citizens from any EU laws that might infringe their rights, for example invasion of their privacy. The Charter could not be used to strike down purely national laws that affect the citizens of only one country. The economic and social rights in the Charter – including the right to strike – are mostly hedged with the proviso that they apply only "in accordance with Union law and national laws and practice".

Changes to EU Policies

On *economic policy*, the draft constitution does little more than consolidate the EU's existing powers. The EU's approach is primarily based on the "co-ordination" of policies, which means that member states remain in ultimate control of their budgetary, employment and social security systems. Member states have a veto on all tax matters.

The draft constitution would grant formal powers to the *Euro Group* – the committee of eurozone members which at present meets only informally. In future, the Euro Group alone would vote on issues relating solely to the single currency, such as enforcement of the EU's fiscal rules. These fiscal rules, currently enshrined in the *Stability and Growth Pact*, would become an integral part of the treaty. The draft foresees a more flexible approach to the Pact, for example by taking into account public investment spending and the long-term sustainability of public finances – which

is remarkably similar to the budget rules of Gordon Brown, the British finance minister.

Like previous treaties, the draft constitution encourages EU member states to work together to create more and better *jobs*. Co-operation here means comparing what works and what does not across different countries, and drawing up recommendations – a process know as the "open method of co-ordination" in EU terminology. The Commission and the Council gain no new powers to dictate member states' employment policies.

Similarly, the EU would gain few new powers in the area of social policy. The EU already requires its member states to protect certain minimum rights of workers, such as non-discrimination between men and women. The Council of Ministers has long been able to adopt such minimum standards, especially for health and safety, by a majority vote. But decisions on key issues of *social security* would still require unanimity in the new constitution.

The member states, rather than the EU, will also continue to be responsible for their own national *pensions*. EU countries have started a useful process of comparing notes on their pension reform efforts. Like previous treaties, the new constitution explicitly prohibits both the EU and its member states from paying to get any member state out of fiscal trouble. This "no bail-out" clause also includes national pension systems.

The draft constitution has missed an important opportunity to propose reforms to the *European Central Bank*. The draft confirms the independence of the ECB and only provides broad guidelines on the ECB's decision-making structure and its monetary policy targets. This is a shame, since the ECB has not proven very good at reforming itself.

In *foreign policy*, the draft constitution proposes some modest reforms, but they do not amount to a step-change. The biggest innovation is the creation of a new post of "minister for foreign affairs". The Convention has yet to work out the details, including the precise name and institutional affiliation for this post. But the basic idea is to merge the roles of Javier Solana, the High Representative for Foreign Policy, and that of Chris Patten, the Commissioner for External Relations. The point of this merger is to ensure that these two sides of EU external relations – broadly, diplomacy and aid – work better together. But the draft is careful to emphasise that the new foreign minister will be an agent of the Council of Ministers, whose meetings on foreign affairs he or she will chair. The foreign minister will be answerable to the member states, not the Commission.

The main innovation for *defence policy* is that member states can sign up to a "mutual assistance" clause which allows each country to ask for help – military or otherwise – from other EU members if it is attacked. But member states would not be obliged to sign this mutual assistance clause, and the neutral countries are unwilling to do so. In addition, to ensure that progress in EU defence policy cannot undermine NATO, the constitution says that EU commitments should "respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO)". Governments are also supposed to provide the EU with military and civilian capabilities when the Union needs them to deal with international crises, but the constitution does not establish a standing EU force that could become a European army.

On *asylum and immigration*, the draft constitution introduces provisions that would make it harder for countries to ignore EU laws or fail to apply them properly. Immigration and asylum measures would be passed by a majority vote rather than a unanimous one. The draft treaty allows the member states to establish a *European Public Prosecutor* if they want to in future. However, all member states would have to agree unanimously to do this, and there is no deadline for the creation of this job. The draft proposes that such a European Public Prosecutor would be able to investigate and prosecute serious cross-border crimes – such as terrorist acts – and fraud involving EU funds.

Will this Constitution Allow the EU to Function after Enlargement?

The Convention has put forward some useful proposals, but they do not go far enough. When the EU enlarges from 15 to 25 member states in 2004, it will change much more than the constitution's drafters expect. Later this year, the member governments will have a chance to revise the constitution. They ought to make many of the reforms more radical. But many governments are now in defensive mode, seeking to reduce the impact of the Convention's proposed reforms rather than deepening them. If they unravel the deals reached in the Convention, major problems will quickly emerge after enlargement. It will be much harder to gain consensus between 25 countries with a much greater variety of views.

The most likely date for another round of reforms is 2008. The new constitution will probably come into effect in 2005-06 – assuming that all the member states ratify it. Meanwhile, the EU's 25 leaders will be locked in combat over the next EU budget for the first two years after enlargement, as the current financial deal runs out at the end of 2006. They will have little energy for more institutional reform. But by 2008 EU decision-making could be gridlocked.

A crisis could ensue, but it will be a necessary one to force the EU to take an axe to its unwieldy institutions. The history of European integration shows that the Union rarely reforms itself until the need is urgent. The Convention would probably never have existed if expansion had not been imminent. Enlargement is a necessary catalyst for long-overdue reforms, but the new constitution will be only the first step.

Rudolf Hrbek*

(More) Federal Features for the EU?

Amongst reflections on European integration and proposals/demands concerning the final goal of the integration process there have, again and again, been contributions with a federalist orientation. This perspective has been, at the same time, the subject of irritation, criticism and opposition, primarily for two reasons: those who are opposed to it associate a federal structure with a state, which they do not accept as the desired end result of integration; second, they consider a federal structure to represent centralisation (a European "super-state"), at the expense of sovereign nation states.

Therefore, the federalist frame did not appear in the official documents agreed upon amongst the representatives of European nation states.

- In the debates of the Congress in The Hague in May 1948 on European unification a difference of opinion between the partisans of a federal orientation and those advocating the sovereignty of the nation state became obvious. The former criticised what was laid down in the founding document of the Council of Europe – an institution merely to coordinate national interests – and demanded the transfer of sovereignty. Their basic belief was that the dogma of the indivisibility of national sovereignty should be departed from and abandoned.
- Monnet's memorandum on sectoral economic integration (1950) understood the Coal and Steel Community as a first step towards a European federation. The Treaty itself, however, did not point to such a finality, but attributed to the new community the function of laying the foundation for a wider and deeper community amongst peoples. The same was true of the Rome Treaties.
- During the preparatory work for the Treaty of Maastricht the Dutch presidency submitted, in the autumn of 1991, the following statement to be placed at the beginning: "This Treaty marks a new stage in the process leading gradually to a union with a federal goal". Britain insisted on removing this "F-word" and the respective clause now reads "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."
- In his famous lecture at the Humboldt University in Berlin on 12 May 2000 – famous, since it was the starting-point and point of reference for a grand debate on the future of the EU with many comments from leading politicians and the academic community – the German Foreign Minister, Joschka Fischer, presented his (long-term) vision under the title "From Confederacy to Federation – thoughts on the finality of European integration". Since he was aware of what might be associated with the term "federation", he qualified his visionary concept by stressing that existing national institutions and traditions would have to be included; by renouncing the traditional and widespread concept of a federation *(Bundesstaat)* which would – as a new sovereign entity – replace the old nation states and their democratic regimes; and by advocating as an alternative the concept of "divided sovereignty" (between Europe and the nation states).

There was, nevertheless, an intense debate on the fundamentals of the present and future EU and this

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still ongoing debate shows prejudice (against federal structures), misunderstanding and confusion about what federalism and the federal principle really mean – and what the application of that principle to the EU would imply.

In brief, federalism, as a structural principle for the (territorial) organisation of the state, is expected – in normative terms – to fulfil two major functions:

- to bring about "unity in diversity", that is to say to form a larger whole composed of smaller entities with their special features (e.g. language, religion, culture, history, economic structure etc.); the compound includes the component parts, forms something like a roof and coexists with them while each of them preserves its identity which makes it distinct from the others;
- to contribute to patterns and mechanisms of "checks and balances" in that different levels of government – for the exercise of political power – exist and the whole institutional pattern shall bring about a proper balance amongst the institutions located at different levels.

What are the key elements of a federal structure?

- the existence of at least two levels (national and subnational) for the exercise of political power
- the allocation of competences and financial resources (including equalisation mechanisms) between them, resulting in a system of shared/divided competences and resources
- a legal basis (treaty or constitution) for this arrangement
- a system of government for each entity (national and subnational) with an elected parliamentary assembly and an executive accountable to the assembly
- an institution to settle disputes (in most cases: a constitutional court or its functional equivalent)
- procedural rules on the participation of lower level entities in decision-making at higher levels.

Against this background it can be argued (and we shall argue) that the present EU can be classified as possessing features typical of a federal structure (system).

- Decisions (including legislative acts) with a direct effect upon citizens or enterprises are taken at national and community level; the EU system is characterised by the principle of shared and divided sovereignty. There are cases in which the ultimate decision lies with the EU.
- The number of competences at the disposal of the EU has grown, since the functional scope of the Community has been extended considerably in connection with treaty reforms and via Article 308 of the treaty. This has resulted in a situation characterised by a lack of safeguards for member state competences, since the Principle of Subsidiarity, introduced in the Treaty of Maastricht, has proved to be of only marginal effect for limiting the activities (including legal acts) of the EU.
- The EU has its own financial resources, although not the power to determine its revenues. Some EU policies (especially structural and cohesion policy and the common agricultural policy) lead to a de facto financial equalisation (cf. the terms "net payers" and "net receivers"); and another feature of the EU's financial system is the principle of co-financing, that is to say: shared financial responsibility for particular joint projects.
- The constituent parts of the EU, the member states, participate in a very elaborate and complex way in decision-making at EU level; and we find the coexistence of unanimous and qualified majority decisions. The weight of member states' votes, contrary to the pattern in the USA (with two seats for each state in the Senate) differs, but the smaller (in terms of population) member states are overrepresented.
- The legal basis of the EU is an (international) treaty, but the European Court of Justice in its ruling considers treaty provisions to be of "constitutional" format and quality. Citizens, enterprises and member states (their governments) have to comply with its decisions. European law prevails over national law.
- The European Parliament is the institution which represents the citizens (not the states which are represented by their governments in the Council) as participants in EU decision-making. The EP's internal and working structure is primarily determined by party political (not national) groups; and the EP's role in decision-making has been strengthened considerably.

There can be no doubt that the EU system can be subsumed under the category of a federal system without resembling any one particular pattern of already existing federations (like e.g. Germany, Belgium, the USA or Canada). It does represent a special type ("sui generis") of federal structure, which has emerged and is developing further.

The Convention has contributed to this "constitutional" development and we shall try to identify and

evaluate the respective provisions. Of particular interest will be the question which type of federation the future EU will resemble. Scholars of federalism distinguish two major types of federal system.

- Dual federalism as a pattern distinguishing clearly between two levels and demarcating neatly their domains, which means giving the entities at the lower level their autonomous domains for decisions, with the rationale that they shall maintain their identities and diverse features ("unity in diversity").
- Cooperative or even interlocking federalism as a pattern characterised not only by cooperation between the two levels but by interpenetration, which results in unitarian solutions, more and more harmonisation brought about by a complex decision-making machinery with players from both levels jointly exercising political power. Due to the existence of a third (the subnational) level – Länder, regions, autonomous communities etc., not to forget the municipalities – this structure has become even more complex.

In its current form the EU seems to tend to belong to the second type, which has aggravated the democracy deficit of the EU.

What, then, are the proposals of the Convention relevant to our question?

- The founding document of the European Union is given the label "Constitution" which indicates a new quality of the EU and the integration process, notwithstanding the fact that the basic document needs to be ratified as a treaty in each member state.
- The Charter on Fundamental Rights of the Union adopted in connection with the Nice summit in late 2000 has been formally included into, and forms part II of, the Constitution; this means that all institutions, when exercising power, recognise the rights, freedoms and principles listed there as common values.
- The relationship between the Union and the member states is determined by their mutual obligation to cooperation, allegiance and trust; Article 5 says, "The Union shall respect the national identities of its Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." And both "... shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution". This implies, for member states, orientation towards the Union and excludes national autonomy.
- As we have seen, Article 5 explicitly recognises the regional and local levels as integral component parts of the EU, as a compound with a multi-level structure.
- According to Article 6 ("The Union shall have legal personality"), which means it can enter into international commitments which are binding for all members, "actorness" of the EU has been envisaged.
- The allocation of competences has been an issue of vital concern to the Convention, in line with the mandate of the Laeken summit. There are two innovations designed to achieve greater clarity: first, Union competences are limited in that they need to be conferred explicitly (and the use of these competences is governed by the principles of subsidiarity and proportionality); second, the draft distinguishes three categories of Union competences: exclusive competences, shared competences and "areas of supporting, coordinating or complementary action" (excluding harmonisation of national laws or regulations). This can be interpreted as a step towards the "dual federalism" type, but since there is an additional article (14) on "The coordination of economic and employment policies" (which mentions the adoption of "guidelines" in this context) and since part III of the draft with more detailed provisions for different policy areas is obviously not fully in line with the more general provisions in part I, the picture – again – is blurred and many observers will miss clarity.
- As concerns the principle of subsidiarity, the focus has shifted to procedural aspects of how to control compliance with the principle. These new provisions have been formulated in the "Protocol on the application of the principles of subsidiarity and proportionality". The following three points are especially noteworthy. First, rules to reinforce the way in which the institutions involved in the legislative process take into account and apply the principle of subsidiarity. The Commission is obliged, before proposing legislative acts, to consult widely; and "such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged". Second, there will be a new political early-warning system to strengthen the national parliaments' monitoring of the principle of subsidiarity. It would be up to each national parliament to make the internal arrangements for consulting both chambers in the case of bicameral parliaments and, where appropriate, regional parliaments with legislative powers. According to the new procedure each national (or subnational) parliament would be entitled within

six weeks to send a reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity. Third, and finally, national parliaments would have the right to bring an issue before the European Court of Justice if the political early-warning system did not result in a solution which they accept. The right to appeal to the European Court of Justice is given to the Committee of the Regions, as well. These provisions may lead to strengthening the "dual federalism" type of relations between the Union and member states (including their subnational levels).

- The number of cases to be decided with a qualified majority has been extended, which further reduces the autonomy of member states. In this context, the definition of "qualified majority" has been modified: "... such a majority shall consist of the majority of member states, representing at least three fifths of the population of the Union". This formula tries to respond to the very sensitive problem of striking a fair balance between the principle of equality of member states, which would privilege smaller member countries, and the claims of the bigger member states to a greater weight.
- The co-decision procedure, which strengthens the role of the European Parliament in legislation, has been extended to a larger number of issues. This, again, reduces the autonomy of individual member states.
- Finally, as a last-minute decision, the Convention included an article on "The symbols of the Union": the flag ("a circle of twelve golden stars on a blue background"), the anthem ("based on the Ode to Joy from the Ninth Symphony by Ludwig van Beethoven"), the motto ("United in diversity"), the currency ("the euro"), and "9 May shall be celebrated throughout the Union as Europe day". These symbols are expected to generate a sense of common identity within the Union.

All these new provisions contribute to the character of the (future) European Union as a federation in being. The provisions, however, do not point clearly to one particular type of federal system; there are tendencies towards "dual federalism", accompanied by provisions which may strengthen the cooperative or even interlocking type of federalism. The application of these new provisions and experiences collected in this process will be part of the ongoing constitutionalisation process in the European Union which, from May 2004 on, shall consist of 25 member states.

Wolf Schäfer*

Withdrawal Legitimised? On the Proposal by the Constitutional Convention for the Right of Secession from the EU

The European Convention's draft Treaty establishing a Constitution for Europe contains in Article I-59 a major constitutional novelty, which was not to be found in the Community Treaties so far: the regulated voluntary withdrawal of a Member State from the EU, i.e. legitimised secession. Whether the right of secession can implicitly be derived from the already existing Community treaties is a controversial issue.[1] Constitutional questions regarding the right of secession have already been discussed by various authors.[2] According to integration theory, secession as an exit option is the counterpart to the entry option, which is almost exclusively at the centre of attention in the traditional concepts of integration – perhaps in the tacit assumption that the EU has the character of a "res publica immortalis". At the latest in view of the coming eastward enlargement, however, it has become obvious that the EU will become more heterogeneous, the mecha-

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[1] Friedemann Götting: Die Beendigung der Mitgliedschaft der Europäischen Union, Baden-Baden 2000.

[2] Peter Bernholz: Grundzüge einer europäischen Verfassung, in: Detmar Doering, Fritz Fliszar (eds.): Freiheit – die unbequeme Idee: Argumente zur Trennung von Staat und Gesellschaft, Stuttgart 1994, pp. 189-200; Detmar Doering: Austritt erlaubt? Die Verfassung der Europäischen Union braucht ein Sezessionsrecht, in: Ordo, Vol. 51, 2000, pp. 383-404; James M. Buchanan: Europe´s Constitutional Opportunity, in: Institute of Economic Affairs Readings, Vol. 33, London 1990; European Constitutional Group: A Proposal for a European Constitution, London 1993; Roland Vaubel: The Political Economy of Centralization and the European Community, in: Public Choice, Vol. 81, 1994, pp. 151-190.

nisms of redistribution will become more important, the financial burdens will be more asymmetrical, the distribution coalitions will be formed more strategically, the area in which majority decisions can dominate a minority will become larger, and the finality of development will become more vague. Exit options flourish in such a scenario. History teaches us that there is no such thing as institutions which last forever. Integrated areas arise, change or decay – peacefully or violently. If in addition to the conditions for joining a club at the same time those for withdrawing from the club are regulated, then integration policy is given the necessary degree of symmetry, which – even if this appears paradoxical – contains an element of stabilisation.

Secession can be defined as the realisation of the exit option by a collective (state, region, group) or – from an extremely individualistic viewpoint[3] – by individual citizens. The less comprehensive option of opting out involves the voting out of individual policy areas. The objective of opting out is the assumption of individual central regulating competencies from the EU by a Member State, without the latter leaving the Union. Opting out is therefore a partial secession. Examples are the United Kingdom and Sweden, which have not adopted the euro and therefore the common monetary policy of the EU, or those Members which do not practise the Schengen Agreement. It is obvious that secession and opting out are useful as elementary building blocks for the definition of "optimal integration areas". Will Europe become too large for a common currency? Is Europe large enough to defend itself? Opting out and secession are components of a theory of the optimal size of the state and are closely connected to that which is described as fiscal federalism.

Subsidiarity and Secession

The principle of subsidiarity, which was explicitly included in the Treaties of Maastricht and Amsterdam, plays a central role here. According to this principle, which is a special variation of the principle – related to the institutional division of labour – of the advantages of comparative costs, those institutional levels in the EU should be given regulating competence for individual areas of policy which are best suited for this, i.e. which have the greatest advantages as far as grass roots and cost efficiency are concerned. This general principle, the procedural operationalisation of which in the EU is inadequate, must be understood as a counterweight to the immanent tendency towards centralisation in the EU, because it gives more weight to the municipalities, regions, federal states and states within the EU in relation to the institutions of the Community. One particular problem of the subsidiarity principle, however, lies in the fact that it is not the Member States or the regions within the EU that decide on the individual measures but that it is Union bodies which in the final analysis within the framework of the "competence-competence" reserve for themselves the decision as to which level is responsible. But these bodies have, in principle, no incentive to delegate responsibilities. It would therefore make sense to shift the competence-competence to the Member States or their parliaments.

What role can the constitutional right of secession play here? The answer is obvious: it supports the procedural operationalisation of the principle of subsidiarity.[4] If, namely, the Member States are granted the right to withdraw partially or completely from central areas of policy in order to take responsibility for them themselves, then the accompanying process of searching for the best solution to the problem of the institutional assignment of public tasks within the Community could be stimulated. Through the authorisation to transfer state tasks vertically, which is implicitly contained in secession, the states could then in principle decide themselves what services they prefer to offer their citizens under their own responsibility instead of at the EU level, taking into account grass roots and cost efficiency. The right of secession therefore supports vertical institutional competition within the EU. The current debate over the possible renationalising of various areas of policy – e.g. the Common Agricultural Policy – is to be seen in this context.

Secession and Redistribution

Empirical analysis teaches us that secession decisions are all the more likely, the more the average income of the regions differs within the integration area.[5] Now, with each enlargement the EU has imported a greater variation in welfare. The eastward enlargement will increase the differences in welfare significantly once again. The redistribution mechanisms of the EU Structural Funds, which are fed by transfers, will therefore become even more important. To a certain degree we can attribute an inter-regional insurance function

[3] Murray N. Rothbard: Nations by Consent - Decomposing the Nation-State, in: David Gordon (ed.): Secession, State and Liberty, New Brunswick and London 1998, pp. 79-88.

[4] Viktor Vanberg: Bürgersouveränität und Zuordnung politischer Kompetenzen in föderalen Systemen: Das Beispiel EU, in: Wolf Schäfer (ed.): Zukunftsprobleme der europäischen Wirtschaftsverfassung, Berlin 2004 (forthcoming).

[5] Norbert Berthold, Michael Neumann: Opting-Out Klauseln und der Europäische Einigungsprozeß: Eine sezessionstheoretische Analyse, Würzburg 2002.

against region or country specific shocks to a Union of redistribution. But this function always implies the problem of perverse incentives, which imply moral hazard and are documented in the fact that states behave exactly as it is feared: they outrightly provoke the "insurance case" by conscious misuse of the institutionalised rules of redistribution, by attempting to get as much as possible out of the EU Funds via strategic negotiation games. This lowers the economic risks for the states or regions but the political risks for the EU as a whole increase.[6]

An effective counterweight to this, in addition to the unanimity rule, would be the termination of specific redistribution agreements, i.e. secession or opting out, in analogy to the general termination possibility of insurance policies, in order to prevent long-term false incentives to the behaviour of the EU Members. The struggles over distribution in the EU, which express themselves in strategic games, lead to individual states' economic responsibility and liability for bad economic policy being offloaded onto the Community and no longer clearly separated from the country specific exogenous shocks which represent the real basis for the insurance-theoretical reasoning behind redistribution funds. For countries which primarily have a losing position in the strategic games of redistribution, secession as an exit option – and even only threatening to use it – can work to reduce redistribution and therefore increase efficiency. This is the more true since the constitutional Convention has suggested the extension of majority decisions at the cost of unanimity.

Free Trade, State Size and Secession

Free trade and particularism increase the probability of secession. This hypothesis is derived from the economic costs which accrue to international trade every time a national border is crossed as a result of barriers to trade.[7] In a world of barriers to trade the size of the protection-free market is of decisive importance, from which it follows that the size of the state, which determines the size of the market, is subject to a tendency to expand in order to enable domestic trade which is as protection-free as possible. The greater the protection in the world, then, the stronger is the tendency toward political integration, toward the formation of larger states. Or to put it the other way around, free trade supports the tendency towards smaller states. Smaller states, on their part, have a greater interest in free trade and a lesser interest in political integration. The advancing globalisation is a worldwide free trade programme from which above all the smaller countries profit, which then means that separation tendencies are strengthened. Embedded in this context, an institutional right of secession in the EU corresponds completely to the free trade tendencies caused by globalisation as well as to the intentions of institutions committed to free trade such as the WTO.

Is Secession Worthwhile?

A constitutional right to secession and opting out creates a counterpressure to the (over-) centralisation in the EU. Such pressure can only be effective in the individual case, however, if it is credible, i.e. if secession would *de facto* and obviously bring more advantages than disadvantages to the country threatening with it. But the evaluation of the advantages and disadvantages of a "stay or go" in the sense of a systematic stock-taking is difficult. Is it worthwhile for a country to terminate its EU membership? In some studies, for example, the EU agricultural market and structural policy is evaluated as negative for the net payers in connection with the increasing number of regulations, while the effects of participation in the EU Single Market are evaluated as positive. If the negatively valued indicators of EU membership prevail, in the case of withdrawal each Member State faces the problem of the evaluation of its situation as a country outside the common EU external tariffs. In view of the fact that the EU itself is a member of the WTO, this situation is perhaps eased by the existence of anti-protectionist WTO rules. The following must also be taken into account, however. Even if a country is damaged as a whole e.g. by the Common Agricultural Policy, individual interest groups within the country nevertheless profit from it. It is well-known, for example, that the minority of the farmers' lobby is successful in many countries in preventing governments from supporting offensively the reform of EU agricultural policy towards less protection and a greater adaptation to the world market, which would bring advantages to the majority of consumers and tax-payers. A decision in favour of secession can thus be prevented by minorities against the interests of the majority.

It should be recognised that secession decisions are not generally based on the evaluation of the marginal advantages and disadvantages of "loyalty or exit" but tend, rather, to be gross "heads or tails" decisions. Opting out decisons, as partial secessions, tend

[6] Alberto Alesina, Roberto Perotti: Economic Risk and Political Risk in Fiscal Unions, in: Economic Journal, Vol. 108, 1998, pp. 989-1008.

[7] Alberto Alesina, Romain Wacziarg: Openness, Country Size and the Government, in: Journal of Public Economics, Vol. 69, 1997, pp. 305-21.

in contrast to be based on marginal considerations. Compared to complete secession, partial secession can pose a number of additional problems. For example, membership in the EU as a customs union would not be possible for a country if its opting out related to the non-application of the regulations for common external tariffs. The same is true of non-participation in the EU Single Market. EU membership is therefore not compatible with every type of opting out. For this reason it seems sensible to define the areas in which partial secession is not allowed, which means in turn that it can only be had at the price of complete secession. In addition, the right of secession must be designed with suitable rules so that it cannot be misused as an instrument for free-riding.

For full secession, however, the principle of the unilateralism of the decision should in general prevail. The principle of "mutual agreement" between the Member State and the EU must definitely not be allowed because this would reduce the pressure against increasing centralisation aimed for with the right of secession. If secession required that the central bodies agree, it would be robbed of its basic function for the establishment of subsidiarity principles, which support the search process for efficient arrangements in the sense of an institutional discovery procedure. Thus, the regulation foreseen in Article I-59 of the Convention's draft constitution is not efficient, according to which a withdrawal agreement between the Council and the Member State wishing to secede can only be decided upon with a qualified majority in the Council of Ministers following the consent of the European Parliament. Of course, this does not preclude that the practical problems of an institutional and procedural nature connected with the exercising of the right to secede – e.g. the treatment of property claims and debts, the time horizon for the completion of secession etc. – must be regulated with the central Community bodies.

Summary

All in all it can be stated that since the heterogeneity of the EU will increase considerably due to its enlargement and at the same time the trend towards centralisation and redistribution will be strengthened, secession and opting out will become important as constitutional arrangements for the EU. They are an instrument against stronger centralisation and redistribution mechnanisms. They make a contribution to the operationality of the subsidiarity principle. They form a counterweight to the domination of minorities by majority decisions. At the same time they facilitate the mechanisms for the endogenous determination of the optimal size of the EU and for the increasing of the efficiency of the EU institutions in the sense of federalism theory. Globalisation increasingly requires and enforces liberal institutions of integration. Every country should therefore have the choice of terminating its participation in a Community policy or even its membership of a club in a regulated fashion. Thus, the European Convention has made a trail-blazing proposal with the constitutional right of secession from the EU.

Stefan Voigt*

Towards Ever More Confusion? The Convention's Proposal for a European Constitution

The Declaration of Laeken describes the purpose and aims of the European Convention. According to that Declaration, the end of the Cold War constitutes a "real transformation clearly calling for a different approach from fifty years ago, when six countries first took the lead." The aim was thus nothing less than to find a new approach for an enlarged European Union. The Declaration further stresses that the Union should refrain from interfering in every little detail in the lives of its citizens. Efficiency, transparency, and democracy should be increased. In particular, the division of competence between the Union and the Member States should be (i) clarified, (ii) simplified, and (iii) adjusted. This could lead to "restoring tasks to the Member States" as well as assigning new competences to the Union. The Declaration makes explicit mention of the possibility of creating a new organ that

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would represent the national parliaments at the European level.

This contribution discusses whether the draft for a European Constitution as produced by the European Convention meets the aims spelled out in the Declaration of Laeken. Two issues will be dealt with particularly:

- Has the Convention proposed an allocation of competences between Member States and Union that is in line with efficiency considerations?
- Would the implementation of the decision rules proposed by the Convention lead to more efficient decision-making in the European Union?

Our hypothesis is that the draft proposal falls far short of the aims spelled out in the Declaration of Laeken.

The Functions of a Constitution

A constitution can be seen as the most basic written document of a polity. It contains the rules on how to make decisions on the provision of public goods, including their financing. It entails the necessity of delineating a private from a public sphere. One means of doing so is via a catalogue of basic (negative) rights that define the private sphere. A constitution further needs to define the organs that are to provide the public goods, the modi according to which they are chosen and their specific competences including the interplay of the various organs. In federal polities, constitutions also have the function of determining the competence of the various levels of government. With regard to the European Union, this means that the allocation between Union and Member State competences should be clear-cut.

Constitutions are a specific subset of institutions. Institutions have the function of enabling individuals to form expectations that have a good chance of turning out to be correct. This refers to possible actions by both private players and representatives of the state. Predictability is a necessary condition for forming a long time-horizon, for being willing to specialise, for making long-term investment etc. Predictability is thus a crucial precondition for economic growth.

Constitutions furthermore serve to make the actions of the state legitimate. The state is endowed with a monopoly of the use of force, the power to tax etc. A government based on force alone is not likely to survive for long; a government attributed a low level of legitimacy by its citizens will have to spend disproportionately many resources on monitoring the behaviour of its citizens, which will reduce the growth prospects of the polity. Efficiency, transparency and democracy – the three items mentioned in the Declaration of Laeken – can all be interpreted to be conducive to legitimacy.

How to Design Optimal Constitutional Rules

The premise here is that the EU will be enlarged from its currently 15 members to some 30 members and the question is: does the draft Constitution preview a modification of its competences and decision-rules such that individuals who are members of the enlarged Union will be better off? Answering this question presupposes that economists have at their disposal tools that enable them to find an "optimal" solution to these issues. Among the various solutions offered, we propose drawing on the notion of "interdependence costs" proposed by Buchanan and Tullock.[1]

In their approach, they take a rational individual who is interested in his/her own utility as the starting-point. This individual would have to decide:

- which goods should be provided by collective action and which ones by private action;
- whether the publicly provided goods should be provided at the European level or the nation state level;
- what the respective majorities used in order to decide upon the provision of public goods should be.

Buchanan and Tullock gave the following basic answers:

- goods should be provided by collective action only if private action is more expensive;[2]
- where possible, collective action should be organised in small rather than in large units;[3]
- the decision-rule should lead to the minimisation of interdependence costs which are defined as the sum total of external costs ("costs that the individual expects to endure as a result of the actions of others over which he has no direct control") and decision-making costs ("costs which the individual expects to incur as a result of his own participation in an organized activity").[4]

[1] J. Buchanan, G. Tullock: The Calculus of Consent - Logical Foundations of Constitutional Democracy, Ann Arbor 1962, University of Michigan Press.

[2] Ibid., p. 57 f.

[3] Ibid., p. 114 f.

The enlargement of the European Union will lead to an increase in the heterogeneity of the preferences of the citizens who are part of the Union. Suppose preferences were completely homogeneous: this would mean that the external cost that any individual would have to bear because s/he is in the minority should be minuscule. The same holds for decision-making costs: if all are of the same opinion, getting to a collective decision should be rather cheap. The more heterogeneous the preferences become, the higher the expected external costs. Different levels of heterogeneity lead to different external cost functions. A similar argument can be made for decision-making costs: the more heterogeneous the preferences with regard to public goods, the higher the decision-making costs. This means that the sum of both types of costs – the interdependence costs – increases with the degree of heterogeneity. Public goods should be provided at the level of government at which they can be provided with least costs. The larger the Union, the higher the costs of provision at the European level. This means that the chances that the provision of public goods at the level of the nation state is less costly increase with the size of the Union. The larger the Union, the fewer the public goods which should optimally be provided by the Union itself!

Suppose that some goods should still be provided at the European level even after enlargement, what should be the decision-rules used in order to determine their specific characteristics? In the abstract, this should be that form of majority rule where interdependence costs are at a minimum. *Ex ante*, it is unclear whether higher degrees of heterogeneity lead to more or less inclusive majorities.

The Decision-Rules of the Proposed Constitution and their Likely Consequences

We have just seen that the number of public goods optimally provided at the European level should decrease with the number of members; although the Declaration of Laeken explicitly mentioned the possibilities of reallocating certain tasks to the level of the Member States, not one such reallocation is provided for in the draft. Quite the opposite: European legislation would become easier in quite a few policy areas, which means that more laws and further centralisation can be expected. The decision-rules used in order to provide public goods are a crucial component of every constitution. Unfortunately, the European Convention has not been able to propose precise modi according to which representatives of the Parliament, the Council, and the Commission are to be elected. But based on what the Convention did agree upon, what predictions can be made with regard to future activities of the Union? Will more or less legislative activity result? Will it lead to more or less centralisation?

The rule of unanimity in the Council means that any member can prevent policies from being implemented. The rule of qualified majority voting (qmv), in turn, means that some 70% of the Council votes are sufficient to push a policy through. Increasing the importance of qmv can thus be expected to lead to more legislation being passed by the Council. The draft Constitution proposes reducing the areas for which unanimity is necessary from 84 to 37. This means that there are 47 policy areas in which we can expect substantially *more* legislative activity at the European level.

The so-called "democratic deficit" of the European Union is often identified with the (low) number of areas in which the consent of the European Parliament (EP) is necessary in order to pass legislation. The Convention proposes increasing the use of the co-decision procedure in which the EP needs to agree from 37 to 92 areas. In order to pass fresh legislation, not only is the respective Council majority required, but also a parliamentary majority. This means that it has become more difficult to pass fresh legislation, since two majorities – instead of one – are necessary. But the refraining effect of the EP concerning legislative activity at the European level seems to be more of an academic exercise than a real possibility: it is reasonable to assume that the median voter of the EP is more integrationist than the pivotal player of the Council. In all likelihood, the extended use of the co-decision procedure will therefore not prove to be a counterweight to the higher number of laws passed by the Council due to the change from unanimity to qmv.

The Convention has, however, proposed another institutional modification that might have some counterbalancing effect: it has strengthened the positions of the President of the Commission as well as that of the Council. The President of the Commission can, for example, select his commissioners among three candidates nominated by the respective Member States. The strengthening of both positions can also be wel-

[4] Ibid., p. 45 f.

comed because they can be interpreted as a strengthening of the systems of checks and balances.[5]

To sum up: it has been argued that:

- too many public goods could be provided at the European level;
- the decision-rules seem to favour a further centralisation because the passing of additional legislation has been made cheaper by the draft in many policy areas.

Additional Issues

We now turn to other rules that can, however, be sketched only very briefly.

- The draft contains the possibility of *exit* from the Union. This can be interpreted as an ultimate veto right. Alluding to the possibility of using it can constrain a majority of other states to systematically neglect the interests of the member contemplating its use. Its effects should, however, not be overestimated: the threat of leaving will only remain credible if it is not used too often.
- The draft contains the possibility of *participatory democracy*. At least one million citizens "may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing this Constitution". In general, direct democracy can serve as an additional check on government action and the possibility should thus be welcomed. Yet, the possibility is quite constrained and its effects should, again, not be overestimated: inviting the Commission to do something is, of course, not the same as having the right to make the Commission do something.
- The draft establishes a new procedure that is to protect the *principle of subsidiarity*: a number of national parliaments can question whether the Union's actions are still in line with the principle. In the case of non-agreement, the national parliaments can take the case to the ECJ. It is doubtful whether this constitutes an appropriate safeguard of the principle, given that the ECJ has been the most consistent player in extending the competence of the Union.[6]

[5] This is, however, only the case if two different persons are appointed to the two positions. The draft does not exclude the possibility that one and the same person fulfils both functions, which would be similar to having the President of one legislative chamber (the Council) be the head of the executive (the Commission).

[6] S. Voigt: Iudex Calculat – the ECJ's Quest for Power, in: Jahrbuch für Neue Politische Ökonomie, 2003 (pending).

Observers have often noted that federal states seem to become ever more centralised and that the notion of subsidiarity does not have a constraining effect. What is thus needed is a mechanism against ever more centralisation. The current architecture of the Union works in exactly the opposite direction: the *acquis* is considered as a minimum level of integration to be secured against any deviation. The German version of the draft uses *"Besitzstand"* as the term which shows that currently, there is a ratchet-effect in favour of ever more integration. Due to the experiences with federal states, the exact opposite would be needed. One could, for example, discuss the possibility of "sunset competence": a competence is allocated to the European Union level for a given number of years after which it automatically extinguishes if it is not prolonged unanimously by the Council.

What Should Now Be Done?

The draft Constitution has been criticised on various grounds. The question is how to improve it now. The length of the Constitution is stunning, its architectural complexity immense. In order to reach the aim of transparency, complexity needs to be reduced radically. Three approaches seem to suggest themselves.

- Reduce the number of areas in which the Union has competence; tourism is just one example where competition between the Member States would lead to better products.
- The Charter of Fundamental Rights contains a number of positive rights that entail the danger of creeping further centralisation, especially by the Court; it should be radically reduced to negative rights that are directly enforceable.
- The Constitution should contain the rules on how to provide public goods but not too many details on any particular public goods; there is a vast potential for shortening the draft.

Ratification in all Member States is needed. The principal-agent contract between the citizens of the Member States and their representatives at the Convention is a very imperfect contract. If the representatives to the Intergovernmental Conference know that the Constitution that they propose will be subject to a referendum at home, they will have more incentive to take the preferences of the median voter at home into account. Member States should thus rapidly agree to the requirement that referenda be used.