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EU Constitution Newsletter

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This monthly newsletter monitors the debate, events and developments surrounding the ratification process in all 25 member states. It offers a particular UK perspective of this process and provides a forum for differing views on the debate. Back issues are available at www.fedtrust.co.uk/constitution_newsletter.

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1. Editorial

By Peter Sutherland

The European Union is in serious crisis, and it is not a salutary crisis. In the past we have had crises which in the medium term led to progress for the European Union, but this time it is more difficult to be optimistic. The crisis in which the EU now finds itself is one of failing political leadership. European leaders are increasingly viewing the European Union through the wrong end of a purely national telescope.

This short-term thinking was clearly demonstrated by the decisions to hold referendums on the EU Constitutional Treaty in the first place. Experience with referendums from other European countries has shown what is likely to happen when people are asked to vote on a long and complex document such as the Treaty, a Treaty wrongly described as a 'constitution' and with little obvious damage following from its non-adoption. Public opinion is always fickle in such circumstances, as the dizzying changes in opinion polls in the weeks and months before the referendums show. But this reaction is only to be expected when dealing with such a lengthy document, open to all kinds of contradictory interpretations.

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The Federal Trust for Education and Research

Brendan Donnelly, Director

Newsletter Editor: Ulrike Rüb
ulrike.rub@fedtrust.co.uk

Further copies available from:
7 Graphite Square
Vauxhall Walk
London, SE11 5EE
Tel: +44 (0)20 7735 4000
Fax: +44 (0)20 7735 8000
www.fedtrust.co.uk/constitution_newsletter

...is a think tank that studies the interactions between regional, national, European and global levels of government.

Founded in 1945 on the initiative of Sir William Beveridge, it has long made a powerful contribution to the study of federalism and federal systems.

2. Overview of 25

Austria	Ratified the EU Constitution on 25 May through parliament. On 12 May, the lower house (Nationalrat) approved the Constitution with 182 to 1 in favour. In the upper house (Bundesrat), the Constitution passed with 59 to 3 votes in favour. This made Austria the eighth country to fully ratify the Constitution.
Belgium	The ratification process is being pursued. The upper and lower houses of parliament, the Brussels regional parliament, the German community parliament and the Walloon regional parliament have ratified the Constitution. The document still awaits approval by the French community parliament and the Flemish community parliament.
Cyprus	The Cypriot parliament ratified the EU Constitution on 30 June. 30 deputies voted in favour and 19 against ratification, with one abstention, making Cyprus the eleventh country to complete ratification.
Czech Republic	Ratification by referendum has been postponed indefinitely by the Czech government after the meeting of the European Council in June.
Denmark	On 16 June, the Danish prime minister Anders Fogh Rasmussen announced that the referendum scheduled for 27 September would be postponed.
Estonia	Ratification through parliament will continue, with a vote planned for this autumn.
Finland	On 17 June, the Finnish prime minister Matti Vanhanen announced that parliamentary ratification, originally planned for late 2005/early 2006, would be postponed.
France	Rejected the EU Constitution on 29 May in a referendum with 54.68 per cent against and 45.32 per cent in favour. Turnout was 69.34 per cent.
Germany	Ratified the EU Constitution on 27 May through parliament. The lower house (Bundestag) approved the Constitution with 569 to 23 in favour, with two abstentions. The Constitution passed the upper house (Bundesrat) with approval from all federal states except Mecklenburg-Vorpommern, which abstained. This made Germany the ninth country to ratify the Constitution, although it is still awaiting the signature of the German president as ratification is being challenged in the German courts.
Greece	Ratified the EU Constitution on 19 April by a parliamentary vote with 268 to 17 in favour. 285 of the 300 Greek deputies took part in the vote, with ratification supported by both main parties, Nea Demokratia and PASOK. Greece is the fifth country fully to ratify the Constitution.
Hungary	Ratified the EU Constitution on 20 December 2004 by a parliamentary vote with 322 to 12 in favour and eight abstentions, easily achieving the necessary two-thirds majority. Hungary was the second member state to ratify the EU Constitution.
Ireland	Ireland is required to hold a binding referendum in order to ratify the Constitution, but no date has been set for a vote. The government has announced that it will nevertheless publish a White Paper on the Constitution in September in order to publicise the benefits of ratification.
Italy	Ratified the EU Constitution on 6 April, with 217 votes for and 16 against in the Senate. On 25 January, the Chamber of Deputies had ratified the EU Constitution by a majority of 436 in favour, 28 against and five abstentions. This made Italy the fourth country fully to ratify the Constitution.
Latvia	Ratified the EU Constitution on 2 June by a parliamentary vote with 71 votes in favour and 5 against. This made Latvia the tenth country to ratify the Constitution.
Lithuania	Ratified the EU Constitution on 11 November 2004 by a parliamentary vote with 84 to four in favour, with three abstentions. This made Lithuania the first country to ratify the text.
Luxembourg	In the non-binding referendum on 10 July 2005, 56.52 per cent voted for the Constitution and 43.58 per cent against. The turnout was over 90 per cent, as voting is compulsory in Luxembourg. Prime minister Jean-Claude Juncker had announced his resignation in the case of a negative outcome of the referendum. Final ratification will take place in the Chamber of Deputies and will make Luxembourg the thirteenth country to complete ratification.
Malta	The Maltese parliament unanimously ratified the EU Constitution on 6 July. On 2 June, the previously EU-critical Maltese Labour Party had overwhelmingly endorsed the Constitution at a party conference. Malta was the twelfth country to complete the ratification process.
Netherlands	Rejected the EU Constitution in a non-binding referendum on 1 June with 61.6 per cent against and 38.4 per cent in favour. Turnout was 62.8 per cent.
Poland	On 5 July, the Polish lower house of parliament narrowly decided to suspend the ratification process. 189 deputies voted to halt ratification, while 180 deputies, mainly from the governing social-democratic party (SLD), voted to continue the process.
Portugal	The planned referendum was postponed after the meeting of the European Council in June. An amendment to the national Constitution would be necessary for a referendum to take place. The referendum was scheduled for early October.
Slovakia	Ratified the EU Constitution on 11 May by parliamentary vote with 116 to 27 in favour, with 4 abstentions. Final approval by the president will be given after the resolution of a constitutional challenge to ratification.
Slovenia	Ratified the EU Constitution on 1 February by a parliamentary vote with 79 to 4 in favour and 7 abstentions, easily reaching the necessary two-thirds majority. Slovenia was the third member state to ratify the EU Constitution.
Spain	Ratified the EU Constitution on 18 May. In the non-binding referendum on 20 February, 76.7 per cent voted for the Constitution and 17.2 per cent against, with a high number of blank and spoilt ballots. The turnout was 43.3 per cent. The Constitution was ratified by the lower house of the Spanish parliament on 28 April, with 311 votes in favour and 19 against, and by the upper house on 18 May, with 225 votes for and 6 against.
Sweden	On 17 June, the Swedish prime minister Göran Persson postponed parliamentary ratification of the Constitution, originally planned for December.
United Kingdom	The UK government has said that it will hold a referendum on the Constitution in 2006 if there is still a Treaty to be voted on. The relevant European Union bill is due to be introduced in parliament on 6 June.

After all the confusion of the referendum campaigns in France and the Netherlands, one thing, however, is clear. Those that say that the negative votes in France and Netherlands are a sign for the disenchantment of the people with the EU are simply wrong. In polls conducted after the referendums, vast majorities were found in support of the European Union and its continuing evolution in both countries. Particularly in France, many voters seem to have believed that by voting 'no' they would be able to secure the renegotiation of the Treaty to make it more integrative in character. The claim that 'Europe' has been rejected by its people, and that British euroscepticism has now become the European orthodoxy, is wishful thinking at best.

In France particularly, the rejection of the Constitutional Treaty owed much to the country's current unfavourable economic performance. Some commentators, particularly in this country, ask us to believe that Europe is riven into rival economic camps, one following an outmoded failing social model, while the other camp, triumphally led by the United Kingdom, is forging ahead on a wave of liberal reform. But this view is far too simplistic. There are many social and economic models throughout Europe, and Britain's is by no means the only successful one. More importantly, where economic reform and modernisation is needed, the European Union is very much on the side of the angels. The European Commission has played a leading role in the liberalisation of state monopolies. It has not always received the credit it deserved from national capitals, including London, traditionally reluctant to recognise the constructive role of the Union's central institutions.

Unfortunately intergovernmentalism has been for many European governments a leitmotif of the past decade, at a time when we should not have been rejecting the core values and principles of the supranationalism which has served us so well. Today's European leaders are very willing to annex to themselves the credit when Europe seems to be doing something popular.

But their commitment to the European process is often only skin-deep. The most recent example of this was the European Council in March of this year, which congratulated itself for its numerous new initiatives as part of the Lisbon strategy, in the areas of innovation, research and education. But in the next moment the same European leaders rejected the budget that would have enabled all these initiatives to happen. Where is the principle of European solidarity, if the budgetary debate is conducted exclusively in terms of 'juste retour'? The debate should not only be about how much money one country puts into the budget and how much it gets back. In the medium to long term, all benefit from a thriving and prosperous European Union. Only the Commission can consistently remind the member states of this fundamental reality. It may now be time for the Commission to call a halt to the unsatisfactory compromises and horse-trading, which so disfigure the current Union. Not every compromise is better than no agreement.

The future looks now much bleaker than it did before the June European Council meeting. This was a defining moment and we underplay its consequences at our peril. The current crisis is the consequence of a failure to recognise that the European Council is meant to be an institution of the European Union and not just a gathering place of conflicting interests. It is meant to be a place where the heads of government come together to forge consensus, reconciliation and agreement. We created the European Union out of the understanding, grounded in bitter experience, that unchecked intergovernmentalism does not and cannot work.

Sadly, this understanding has always been rare in the United Kingdom. Even those who regard themselves in this country as 'pro-European' frequently regard the Union as little more than a sophisticated mechanism for intergovernmental co-operation. But the day to day reality of the Union's workings shows just how inadequate an analysis this is. Many of us in the UK relished the prospect of a British referendum on the EU Constitution,

which would have been the occasion for a genuine and illuminating debate on European issues. We looked forward to challenging the negativism of the European debate in the UK, a debate conducted exclusively in terms of 'red lines' and 'thus far, but no further'. The suspension of the British referendum has not reduced the need for British voices to be heard speaking loudly and boldly in favour of European integration. On the contrary, that need is probably greater today than ever before.

Peter Sutherland,
President of the
Federal Trust

3. News from the institutions

At the European Council on 16 June, European leaders decided to begin a 'period of reflection' on the future of the Constitution. Their official statement stressed that the EU's heads of state and government still believe the Constitutional Treaty to be a valuable and necessary document. The rejection it received at the hands of French and Dutch voters, they added, does not 'call into question citizens' attachment to the construction of Europe'. However, a 'broad debate' involving citizens, civil society, political parties and national parliaments will need to take place to address the 'concerns and worries' expressed in France and the Netherlands.

The 'period of reflection' will last one year, with European leaders coming together once again at the European Council meeting at the end of the Austrian presidency of the EU in the first half of 2006. At this point, leaders will 'make an overall assessment of the national debates and agree on how to proceed'.

In a separate statement, the President of the European Council at the time, Luxembourg's Jean-Claude Juncker, insisted that the ratification process had not been suspended. However, the deadline for ratification has been extended until mid-2007 to give countries more time to ratify the

Constitution. Juncker also pointed out that parliamentary ratification could continue as planned - as has already happened in Cyprus and Malta, which have recently adopted the Constitution. Juncker further argued that the post-referendum debate has proved that there was never a Plan B for the Constitution and that renegotiation remains out of the question.

The Luxembourg Prime Minister did, however, endorse the idea of a Plan D - meaning democracy, dialogue and debate - as a way of helping European citizens reconnect with the EU. The idea of a Plan D, which originated with Commission President José Manuel Barroso and Communications Commissioner Margot Wallström, has been embraced by other groups as well. On 29 June, for instance, a group of some 40 left-wing NGOs and unions from across Europe handed a 'Citizens' Key to Europe' to Commissioner Wallström as part of a campaign to increase dialogue between European institutions and the citizens. The aim of the campaign is to improve the grassroots 'democratic infrastructure' of the Union.

In the session of the European Parliament following the European Council, MEPs made a link between the halted ratification process and the budget negotiations. Several speakers saw the EU as faced with the choice between political union and a free trade area. The leader of the European People's Party group, Hans-Gert Pötering, said, 'our goal is a strong, efficient, enabled EU, and we will fight against those who just want a free trade zone'. Martin Schulz, the leader of the Socialists in the EP, argued that the 'no' votes in France and the Netherlands were based on fears of an eradication of the welfare state. These fears, he said, need to be combatted by insisting on making legislation such as the services directive more 'socially' acceptable.

Prime Minister Tony Blair's speech later that day in front of the European Parliament was designed to reduce the fears that the UK was endorsing a free-trade vision for Europe. On 1 July, the

day he took over as President of the European Council, he announced that there would be a special summit this autumn with the aim of initiating a debate about the future direction of Europe and giving 'energy and commitment to the European project'. In preparation for that summit, the Commission is charged with preparing a paper on the sustainability of the social model of Europe.

In reaction to Luxembourg's approval of the EU Constitution in the referendum on 10 July, the President of the European Parliament issued a statement declaring his 'great satisfaction' with the result. However, he cautioned that the future of the Constitution remained 'uncertain' and used the opportunity to promote the Commission's project of a Plan D. This, he said, would be put into place as quickly as possible and was designed to create 'a new European debate which would involve not just European and national politicians but society as a whole'. The aim of this debate would be to communicate more directly with European citizens and reconnect them with the European project as a step towards achieving democracy at the European level. Tony Blair, in his new role as president of the European Council, said he 'welcomes this result and congratulates Prime Minister Juncker and the people of Luxembourg on the open and lively debate during the campaign', but stressed that whether to pursue ratification or not is up to each member state.

Finally, on 15 July 2005, the presidents of Austria, Finland, Germany, Italy, Poland and Portugal released a joint statement entitled 'United for Europe' calling for a better communication of the European project. They acknowledged that the EU is currently unpopular and argue that it needs to be seen to bring prosperity to its citizens to gain acceptance. They wrote, 'We want well-functioning markets hand in hand with social justice and balance. This is the European model that can guarantee long-term prosperity for our citizens.' They also called for the pursuit of enlargement - including to Turkey - and argued that this

is the time for the EU to take the right decisions in order to reconnect with its citizens: 'Now we really have to use the period of reflection. We must not lose heart, rather show tenacity and ingenuity.'

Markus Wagner
The Federal Trust

[Citizens' Key to Europe](#)

[Downing Street statement on the result of the Luxembourg referendum](#)

[Barroso's statement after the Luxembourg referendum](#)

[Appeal of the six Presidents](#)

3. The UK in Europe

Since the government announced in early June its decision to suspend indefinitely the Constitution's ratification procedure in the United Kingdom, discussion of the issue has almost entirely disappeared from public consciousness. The issue of the Constitution has been replaced in British public discussion by the bad-tempered failure of the June European Council to agree on budgetary questions and the start of the British Presidency of the Union.

At the European Council of 16 and 17 June, the British government found some allies for its view that national ratification procedures of the European Constitution should be suspended. But it found much less support for its approach to budgetary questions. In the discussions leading up to the summit, a number of calls had been made for the abolition of the British budgetary 'rebate', voiced in particular by the French President. The British government consistently rejected these calls and seemed taken aback by the unanimity of all its twenty-four partners in the European Council, calling for the abolition or at least the modification of the UK's rebate arrangement.

In order to broaden the budgetary negotiations beyond the rebate question, on which it enjoyed so little support, the UK government tried at the European Council to link the question

of the rebate to the question of reform of the Common Agricultural Policy. This linkage met with strong and predictable opposition from President Chirac. While the British approach to reform of the Common Agricultural Policy enjoys some support in other member states, there is little sympathy for the view that no change is possible to the British rebate until the CAP has been reformed.

Since the European Council Foreign Secretary Jack Straw has employed slightly more conciliatory rhetoric on the issue of the British rebate. He admitted that the rebate was an 'anomaly', but insisted that this could only be redressed in conjunction with 'the other anomaly' on which it was based, namely the CAP. He added that the British government would try to achieve an agreement with its EU partners on 'a more rational budget' during its EU Presidency.

The dust had not yet settled after the European Council when the focus turned to the upcoming British EU Presidency. The British government has said that it intends to use its Presidency as a springboard to launch a wider debate about the future direction of the EU, in particular its economic future. In the government's analysis the need for this debate to take place was the main message arising from the negative referendums in France and the Netherlands.

On 22 June, Tony Blair used the opportunity of his pre-Presidency speech to the European Parliament to set out his views on reform. He challenged Europe to accept the need for change in the face of globalisation, saying that 'only by change will Europe recover its strength, its relevance, its idealism and therefore its support amongst the people' and calling for an 'open and frank exchange of ideas' on the future of the EU. On 1 July the Prime Minister announced his intention of holding an informal summit in October with a view to discussing ideas on the future direction of the EU, and in particular the future of the social model in Europe.

The need for reform was echoed by Foreign Secretary Jack Straw when launching the government's White Paper

on the UK Presidency in Parliament on 30 June. But he also made clear that alongside this wider debate there were specific measures on which the UK Presidency intended to make progress in order to make the EU more competitive in the globalised economy. Of particular concern to the UK Presidency will be an attempt to make progress on European Services Directive.

But how much the UK government can hope to achieve in this and related will be constrained by the fact that its term as President of the Union only lasts six months. Not everyone in the European Council shares Mr. Blair's economic analysis. President Chirac, for instance, used his Bastille Day speech to defend the French social model and after the bitter disagreement on the budget at the European Council is unlikely to show a conciliatory attitude towards Tony Blair. The new European member states, many of which are seen by the UK as natural allies for its reform ambitions, may not feel inclined either to support the UK after its fierce defence of the British rebate, a rebate to which the new member states contribute, at least in accounting terms. The British government appears to hope that a new German government, which is likely to be formed under Angela Merkel's leadership in the autumn, will be supportive of its economic reform ideas.

In the meantime the bomb attacks on the London transport system have shifted the focus of the European debate, in Britain and elsewhere, to the Justice and Home Affairs agenda. Within a week of the events, Home Secretary Charles Clarke called a special meeting with his EU colleagues to discuss measures in response to the terrorist threat. Certainly in this policy area the UK finds itself squarely in the mainstream of the European Union's business and policies.

Brendan Donnelly,
Ulrike Rüb
The Federal Trust

[Tony Blair's speech to the European Parliament](#)

[Jack Straw's statement to the House of Commons](#)

5. Country of the month

Analysis of the Luxembourg Referendum

56.52 per cent of Luxembourgers voted 'yes' in the referendum on the EU Constitution on 10 July. The best results for the 'yes' were recorded in Luxembourg City and its suburbs. The 'no' obtained 43.48 per cent of votes. The 'no' was ahead of the 'yes' only in the former coal and steel industry area in the Southwest of the country. The turnout was above 90 per cent of registered voters; in Luxembourg, voting is compulsory. It was a consultative referendum that the Parliament had undertaken to respect the wishes of the electorate.

After the clear victory on 10 July, Jean-Claude Juncker declared: 'If Luxembourg had voted 'no', it would have been the final shot in the back of the head to the Constitution. As Luxembourg has said 'yes', the process can go ahead.' Foreign Minister Jean Asselborn said that the outcome of the referendum had stopped the 'no' trend in the EU. He rejected the idea that the vote amounted to giving a vaccination to a dead patient. Instead, he argued, the people of Luxembourg had helped a slightly ill patient with a little cold by handing him a good cup of tea with a drop of honey. He added that the patient is on its way to recovery.

The 'yes' obtained the majority in the Grand Duchy for three main reasons. First, the Luxembourgers do not share the feelings of the French and the Dutch on the construction of Europe. Second, the Luxembourg political system is structured differently on European issues: there is no strong sovereignist party. Third, Luxembourg Prime Minister Jean-Claude Juncker, who had said he would resign if Luxembourgers voted 'no', toured the country to try to win round voters ahead of the referendum. His popularity, like that of his government, was at its zenith.

First, in an Autumn 2004 Eurobarometer survey, 66 per cent of Luxembourgers were satisfied with the way democracy works at the European

level. In comparison, only 45 per cent of French and 44 per cent of Dutch respondents had similar positive views. The average in the all member states of the European Union was 48 per cent. In Europe, the inhabitants of Luxembourg were the most convinced by the idea that membership of the EU was a good thing, with 85 per cent holding this view against an average of 56 per cent in the rest of the Union.

Second, unlike in France and the Netherlands, even though the euroscepticism inspired by 'neo-liberalism', social protectionism and nationalism is present in Luxembourg society, these political ideologies have not yet found electoral channels that could lead to new electoral dynamics. The political parties – Action Committee for Democracy and Social Justice (ADR) (a rightist and sovereigntist party), the Left ('déli Lénk') and the Luxembourg Communist Party (KPL) – that supported the 'no' obtained less than 15 per cent at the last national elections in June 2004. In addition, a strong ideological gap existed between the electorate and the main actors of the campaign for the 'no'. The ADR raised fears related to the future of the Luxembourg national identity and the role of small states in the Constitution. In particular, they were worried about the country's national language, and the pursuit of enlargement. The leftist parties emphasised the demolition of the welfare state, the bringing down of public services and the reduction in women's rights (for example, abortion and divorce).

Third, referendums present voters with a clear-cut choice, so they should have the possibility of developing motivations for voting behaviour other than party attachment. They should be able to identify with an opinion leader on the referendum issue. In the Luxembourg political system, only the Prime Minister has traditionally appeared as a charismatic person on European politics. This charismatic function was completely assumed by Jean-Claude Juncker when he said he would resign if the 'no' was victorious. This focus on one personality was not a

risk for the 'yes'. It was a reiteration of the Christian Social Party (CSV) campaign during the last European elections in June 2004 ('Juncker on Tour'). Then, the Prime Minister obtained 41535 preferential votes, almost 9.5 per cent of this kind of votes and the record since the first direct election of the European Parliament in 1979. The campaign coincided with the end of the Luxembourg Presidency of the European Union – presented by the government and the media as a cause for national pride – and its failure was rightly or wrongly attributed to the United Kingdom, the European country considered by Luxembourg citizens to be the most eurosceptic.

The 'yes' supporters insisted that this Constitution would reinforce the power and the representation of small states. Although qualified majority voting would be extended and simplified, at least 15 of the member states representing at least 65 per cent of the EU's population would still be needed for a European law to be adopted. A blocking minority could be formed by at least four member states. For the 'yes' camp, the Constitutional Treaty preserves the comparative advantage for small economies in the services sector in the EU. They argued that it would also give the EU the ability to negotiate and impose its point of view more easily in the World Trade Organisation, in particular in matters like sustainable development, cultural diversity and public services. The EU Constitution was also presented as an instrument for a strong external and internal security policy, as qualified majority voting would apply to the areas of asylum, immigration and judicial co-operation in criminal matters and an EU Minister of Foreign Affairs would be created.

Finally, the economic and social context differentiates the Luxembourg referendum from others. In Autumn 2004, if Luxembourgers were worried by the economic outlook for their society, they were still less so than the French and the Dutch. 51 per cent of French saw unemployment as a main priority and 27 per cent insecurity as a second priority. 53 per cent of Dutch

respondents were unsatisfied with the economic situation and 30 per cent with insecurity. In comparison, only 16 per cent of Luxembourgers were worried about the economic situation and 14 per cent about insecurity. The average in the other member states was 27 and 24 per cent respectively. 34 per cent of Luxembourg citizens said that the EU was the arena in which the problem of unemployment could best be solved. Only 19 per cent of French and 24 per cent of Dutch shared this opinion. The average in the European Union was 24 per cent.

In the last polls published at the beginning of June by ILReS, a Luxembourg market research company, showed that the gap between the 'yes' and the 'no' had fallen to 8 per cent, with 46 per cent in favour, 38 per cent against and 16 per cent saying they would abstain. 70 per cent of respondents who wanted to vote 'no' said their choice was a reaction to enlargement, 59 per cent did not trust European institutions, 58 per cent wanted to renegotiate the Treaty, 55 per cent found the text too complicated and 48 per cent disagreed with Turkish accession. One could say that the 'no' in Luxembourg was motivated by general opposition to EU institutions and objectives. Nevertheless, the majority of the people of Luxembourg decided to endorse the Constitution in the country's first referendum since 1936.

Dr Philippe Poirier
University of
Luxembourg

6. Commentaries

After the referendums: Change or continuity in the legal and constitutional orders of the European Union?

There has already been a tremendous outpouring of political commentary on the French and Dutch referendums on the Constitutional Treaty, and what significance they might have for the future of the European Union. However,

as we are at a critical juncture in terms of debates about the future development of the Union, it does seem useful to ask the question about the legal and constitutional dimension to such a debate. Are we in a period of change, and indeed would the Constitutional Treaty itself have brought about change, or merely a seamless continuation of the *acquis*? Or should we largely expect continuity? Perhaps the decision to submit to popular vote in nearly half the Member States a document such as the Constitutional Treaty will go down as one of the biggest political blunders committed by political leaders during the history of the EU. In developing what can be seen as a severe case of constitutional delusion, political leaders opened the way for the popular expression of discontent, not necessarily with European integration as such, but certainly with many aspects of both national and European politics.

Of course, there were many voices warning that the whole process of reform as a *constitutional* process was unwise, as it risked trying to fix that which was not broken or – worse – upsetting the delicate balance and settlement between the national and EU legal orders which underpins the EU's current constitutional settlement. That does not mean to say that the we should all now agree that the Convention and the IGC, and their products, were a bad thing, and that they will not constitute in the longer term useful ideas factories from which future framers of the Treaties can derive ideas about what does, and does not, work in the EU's context. The negative side, however, is that there is a risk that carrying on as before will not be a wholly straightforward option in the aftermath of the referendum. In conversation with a colleague, we thought the unthinkable: could the rejection of the Constitutional Treaty be construed as the *ex post facto* delegitimation of the Court of Justice's case law on the relationship between EU law and national law dating back to *Costa v. ENEL*?

Thus there could be, although I would submit that this is by no means certain to occur, a backlash against the constitutional *acquis* in the form of the

case law of the Court of Justice dating back more than forty years, and this backlash could come both in the form of more reluctant national court acceptance of EU law doctrines. This could occur, I would argue, in the new Member States, where the process of reception of principles such as supremacy and direct effect places a visible question mark over recently reasserted national sovereignty. Even so, it seems unlikely that it will ever be possible to trace any direct cause-effect relationships between the outbreak of popular democracy in the form of the ill-fated referendums on the Constitutional Treaty and the approaches taken by national supreme or constitutional courts to challenges posed by EU law. If there is to be a backlash it might also be expected to concentrate in areas where new forms of EU law, especially those in the third pillar segment of Justice and Home Affairs, pose new constitutional challenges at the national level. The European Arrest Warrant measure is one where many constitutional questions have been raised at national level, both by the Polish Constitutional Court and before the German Federal Constitutional Court. In addition, the Court of Justice's *Pupino* judgment of 16 June 2005 (Case C-105/03) appears to have extended the principle of loyal cooperation contained in Article 10 EC to the field of cooperation in criminal matters. The Court concluded (rejecting an argument made by the UK and Italian governments) that:

It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions (para. 42).

This led the Court to conclude that there was a general obligation on national courts to interpret national law so far as is possible in conformity with relevant provisions of EU law – a similar

obligation to that which exists as a general principle under the law pertaining to the EC treaty. How will national courts react to such a new demand upon their sympathies in relation to the application of EU law in national courts? It is interesting to see that the Court's judgment is dated after the French and Dutch referendums. There is certainly no evidence of a sudden mood of caution taking over within the Luxembourg Palais.

But there is a paradox at the heart of the EU's legal order. On the one hand, the fact that it is a rules-based regional integration system, which relatively (and surprisingly) high levels of voluntary compliance on the part of the High Contracting Parties, combined with a legal order which penetrates to the very core of the national legal orders of the participating states by virtue of the effects of EU law is one of its greatest strengths. EU law can and will continue, it would appear, especially in relation to the workings of the single market and the gradual process of compliance with the body of legislation. On the other hand, that strength also poses its greatest challenge to the EU, so far as the logical consequence of EU law can and sometimes does pose a direct challenge to national sovereignty. That is the point at which it has been suggested that the national constitutional courts and the Court of Justice can stand in a relationship of mutually assured destruction, since each can make claims *vis-à-vis* the other which cannot be sustained.

The challenges for those concerned with the analysis of the EU as a legal and constitutional order remain, as I see it, largely the same, after the debacle of the Constitutional Treaty and the referendums, as they were before. The key to EU law continues to be its complexity, both in a factual sense since there is ever more law for students and academics to assimilate, and also in a normative sense, since the EU retains its Janus-faced part-international/part-constitutional system of law which defies straightforward classification. In that context, complexity also shades into ambiguity. The Constitutional Treaty would not, in itself, have addressed

directly that ambiguity, as it largely failed to address those aspects of the EU's constitutional power map, other than at the margins through the abolition of the pillar system, the steps taken to clarify questions of competence, and the arrangements suggested for national parliamentary input into the legislative process. Arguably, the provisions suggested in relation to the incorporation of the Charter of Fundamental Rights alongside the existing system under which fundamental rights are treated as general principles of EU law would have confused and muddied the legal position, rather than clarified it for the benefit of citizens and residents.

I am not amongst those who say 'good riddance' to a flawed and imperfect document. However, the story of the emergence of the Constitutional Treaty, the treatment of key issues by the Convention and then the IGC, and its later rejection in acts of popular sovereignty must all feed into any future reform processes. The Constitutional Treaty could have been another positive step not towards a superstate future, but towards the continued negotiation of a *sui generis* constitutional settlement in which the paradoxes of governance in a multilevel constitutional polity are resolved. As I have suggested already here, it will be interesting to see if there continues in the EU to be (legal) business as usual, or whether there will be some sort of backlash, which turns promised positive continuity (the ratification of a Constitutional Treaty essentially codifying the *acquis*) into threatened negative change (with challenges not hitherto seen to the solidity of the EU's underpinning legal order).

Professor Jo Shaw
Senior Research
Fellow, The Federal
Trust

Why Europe's leaders must listen to their citizens

When the European integration process began in the 1950s, it evoked surprisingly little public controversy or even discussion. The leaders of the six

founding states – France, Germany, Italy and the Benelux – all took the view that the European Communities that they established would help their countries economically and foster stability and cooperation among their members, making war among them 'materially impossible'. Although the opinions of the European citizens were not sought directly, they appeared to support the project, not least because of the economic and political benefits it brought. For twenty years this 'permissive consensus' whereby elites moved the integration forward with the tacit support of their citizens seemed to work very effectively.

Gradually, however, popular support for the integration process could less and less be taken for granted. Direct elections to the European Parliament, which were intended to enhance the Union's democratic credentials, have still not provided the hoped for impetus towards a deeper identification of ordinary European voters with the integration process. Indeed, the low and sometimes declining turnout for the European elections in many Member States has cast doubt on the popular legitimacy of the Union. Such problems were further highlighted by the Danish rejection of the Maastricht Treaty in 1992 and the Irish rejection of the Treaty of Nice in 2001. In both cases, there was minor tinkering with the Treaties at issue and a reaffirmation that the interests of the states concerned would not be adversely affected in the way the 'no' lobbies had argued, a second referendum was held and the voters got 'the right answer' the second time round. It became clear, however, that the high-handed attitude that voters should be sent back to get it right next time could not persist.

Already at the Nice Summit in December 2000 the leaders of the then 15 Member States recognised the need to make the integration process more relevant to the citizens. Thus, when they launched the Convention on the Future of Europe in 2002, the aim was to find a way of bringing Europe closer to the people, of making the Union more democratic and transparent. The European Council hoped that the

Convention process itself would open up a dialogue on Europe, and it was hoped that agreement on the Constitutional Treaty could be reached by Spring 2004 in order that the Treaty could form a key part of debate in the European Parliament elections that year. Yet none of this was to be.

The Convention engaged in lively debate but, despite the presence of members of national parliaments from all the Member and Candidate States, there was little popular discussion about its work outside of elite circles. The Forum's hope of enabling ordinary citizens to participate in the deliberations via the internet was similarly ignored by the general public. Nor had the Member States managed to reach agreement on the proposed Constitution ahead of the EP elections. Thus, the best opportunity for generating a pan-European debate on the future of the Europe was lost.

In any case, the Treaty establishing a Constitution for Europe as drafted by the 105-member Convention and amended by the Heads of State and Government, while an improvement of the plethora of treaties and case law already in place, was not userfriendly – running at more than 300 pages it was unlikely to be popular bedtime reading among Europe's citizens. It provided for various institutional reforms and outlined proposals for sharing powers between the Union and its Member States more clearly than the existing treaties. Perhaps most importantly in terms of the Union's democratic legitimacy, it outlined a procedure whereby the European Parliament would 'elect' the European Commission. This provision could render EP elections more relevant to the voters and thus, perhaps, enhance the Union's legitimacy in the eyes of its citizens. But apart from this provision, here was little in the document that would make Europe more immediately attractive to the voters.

Having reached agreement on the draft last year the Member State governments were obliged to ratify it. Most could do so by a simply parliamentary vote but several opted to hold referendums on the issue, deeming

this to be a more democratic way of approving a key document. It is certainly the case that referendums allow the public a say. But they are dangerous tools – all too often the results depend on attitudes towards the governing elites rather than the issue at hand, as seems to have been partly the case in both France and the Netherlands.

Whatever the reasons for the ‘no’ votes in France and the Netherlands, the very fact that a majority voted ‘no’ means that it would be foolish and arrogant of Europe’s leaders to try to continue the ratification process and assume the French or Dutch votes can be overturned later, the results in the subsequent Luxembourg referendum notwithstanding. A previous attempt to push the French electorate backfired on President Chirac in 1997 – he held early elections in the hope of consolidating the centre-right majority in parliament and was rewarded with a solid left-wing government headed by Lionel Jospin. He should not assume that his electorate will be more malleable on European questions.

There is another, more fundamental, reason why Europe’s leaders should take note of the French vote and reflect carefully before deciding their next course of action. The reasons for the ‘no’ were numerous – it would be quite wrong to infer that it meant the French had turned away from Europe. Many opposed the Constitution because they felt it did not go far enough or because they deemed it to be too economically liberal or because they feared that the Constitution brought the prospect of Turkish membership closer. Thus, what the vote did highlight was a sense of frustration with the integration process, just as the ‘No’ votes in Denmark and Ireland did in the 1990s. To persist in ignoring public concerns risks alienating voters, particularly those already teetering on the brink of Euroscepticism as is the case in several Member States. It is ultimately self-defeating to hold a referendum on the grounds that it is democratic if one then ignores the views expressed by the citizens.

Of course, attitudes across the Union differ. The policies which some fear

other warmly embrace. But it is also clear that even pro-European voters in core EU countries have concerns about the future of Europe. It is vital that Europe’s leaders now lead an open and wide-ranging debate rather than sweeping such concerns under the carpet. And such a debate should go back to the fundamentals – ‘What is Europe for?’ remains a crucial question. If we get that right we can then argue over whether it should have Anglo-Saxon economic policies or pursue liberalisation, just as opposing parties in the individual Member States fight on socioeconomic concerns. Such policies need not be enshrined in a Constitution. The core principles and values of the Union are what should be in the Constitution, and these are the issues that should now be urgently discussed.

Dr Julie Smith,
Senior Research
Fellow, The Federal
Trust

The troubled re-politicization of Europe

29 May 2005 has already become a turning point in the history of European integration. After a long, intense and vibrant campaign, seven out of ten French citizens expressed their views on the draft Constitutional Treaty of the European Union, thus falsifying the claim that Europeans do not care about Europe. They do if they feel their views count. For months, French citizens debated the pros and cons of the text. Ignited by the internal referendums in several political parties, focused by the wide coverage in the quality media and rendered rather sophisticated by around thirty high-quality books on the Constitution (with total sales close to a quarter of a million copies), French women and men started to come to grips with the political agenda for the future of European integration. This heralds the re-politicization of European integration, even if the shape of things to come is hard to pin down.

What lessons can be drawn from these popular votes; or in the European jargon, what to do, Spinelli? Two things

are clear. First, the French (and the Dutch) vote cannot simply be shelved, awaiting a favourable occasion to call for another referendum (as Mr Giscard d’Estaing suggested prior to the vote, and as President Chirac might intend, given his request for extra time). The supporters of the Constitution – however sincere their reasons might be – cannot simply frame their choice as the ‘only viable option’ for Europe and treat the voters like first graders by repeating the same question until they give the right answer. Re-politicization means that there might be different and better choices. European leaders should not be tempted to muddle through at this stage and hope for better days. By raising the constitutional card and then failing to design the ratification process consistently according to democratic standards, they have made this a structural crisis which calls for structural, not ad hoc, solutions. Instead of sheltering behind legal provisions, instead of asking for extra time, they should not waste more time and start coming to terms with the causes which underlie the French ‘no’.

Second, and related to this, the ‘no’ of the people cannot be said to be an expression of a wave of feelings at a given time (as perhaps the Irish ‘no’ to Nice, or for that matter the Spanish ‘yes’ in February could be interpreted). Quite to the contrary, it is maybe the first time in the history of European integration that a popular vote satisfies the democratic requirement of opening a truly European space of reflection and debate and thus making a deliberative choice for Europe. True, many French voters wanted to punish President Chirac and Prime Minister Raffarin, but their discontent did not have its exclusive source in domestic politics. It also stemmed from the European choices of their (and other) governments moving European integration in a direction which the voters found clearly wrong. High unemployment, social dumping and lack of social protection are not only national, but mainly European questions. And the people who said ‘no’ are very conscious of their European-ness and the fact that they did not only sanction national politicians but also a European elite that they dislike.

So why then did the French vote 'no'? The reasons for the outcome, no doubt, were manifold and ranged from the articulated to the subconscious. But it is hard to doubt that there was a close relationship between the majoritarian negative vote and the belief that the Constitutional Treaty undermined the element of the European patrimoine which the French, and Europeans in general, cherish more: *the European social model*. Among the 'no' voters, many felt that the Constitutional Treaty was too generous to market freedoms. Post-referendum surveys have revealed that almost one third feared its harmful effect on employment while one fourth were concerned about the French economy and the labour market. One fifth said it was 'too liberal'. The 'no' should not be interpreted as a rejection of a Constitution *per se*, as 75 per cent of the French population believe such a text is indispensable in order to go on with the European integration process. However, they felt there was a serious risk that this Constitution would give a final blow to the welfare state as we know it. Such a fear is far from irrational if one considers the enormous pressure (felt even among socially conscious employers) to bargain for reduced wages and increased working hours, or else perish in the tough competition against foreign companies who pay sweatshop wages. The no-side bravely rejected the view that there is no alternative. There is at least one, and that is, as they repeated again and again, a European Union which simultaneously shelters national welfare states and lays the ground for solidaristic redistribution within the Union: a Union which is ready to protect welfare states by regulating international capital flows and acting against 'social dumping'. To do so, Mr Fabius or Mr Génèreux, to refer to two voices from the 'no' camp, did not want a smaller, but a bigger European budget; they wanted France to pay for enlargement through taxes, and not through 'social dumping' and deteriorated working conditions.

Still, for democracy to prevail it must be possible to convert the will of the people into practical political action. A public vote which is reduced to the

expression of a veto position does not, for obvious reasons, guide the rulers in how to comply with the will of the people. The very deficiencies of the present Treaty framework, which actually prevent the formation of a coherent European common will by leaving most of the power in the hands of national executives, by multiplying veto points where they are needed least while streamlining decision-making where more complexity is called for, pushes us into a 'Catch-22' type of situation. In the absence of clear constitutional rules or relevant precedents, can national governments just leave aside the Constitutional Treaty and ignore their commitment to ratify the text? Or should the Constitutional Convention be reconvened to amend the text in view of the results of the ratification process? And in the latter case, should they choose to re-nationalize or scale down parts of the European project? Or opt for further integration? *Who* is to decide these questions? *How* are they to be decided? The true dimensions of the crisis are revealed by the fact that the 'no' presupposes a political leadership with a decisional and governing capacity that simply does not exist, and which, paradoxically enough, the Constitution aimed (even if unsatisfactorily) at establishing.

All power stems from the people, the saying goes. The positive news of the two referendums is that the people of Europe are back on stage. Their re-empowerment is directed against those at the top who have wide-ranging decision-making powers without being democratically controlled. European decision-making is not only problematic in formal democratic terms - because it violates chains of representation, empowers governments and disempowers parliaments - but also because it does not make politics sensitive to the opinions and interests of citizens. Referendums prove that there is also a general public concerned with European issues in which critical views are expressed and communicative power is created. It is this power that renders it possible for decision-makers to refer to public opinion and that gives the citizens the *power* to hold decision-

makers to account. Without such processes, institutional reforms to strengthen democracy become irrelevant. By saying 'no' after broad debates, French citizens have showed us how European communicative power can be materialized and that the European Union, last but not least, is ripe for democracy. The heritage from the French revolution lives on!

Erik O. Eriksen,
Agustín Menéndez,
Anne Elizabeth Stie,
Hans-Jörg Trenz
Arena - Centre for
European Studies
University of Oslo

The wrong answer and the wrong question

It is a familiar complaint of the losing side after a referendum that the voters did not answer the question put to them. Precisely this complaint has been raised by the losers in the recent French and Dutch referendums. Objectively, the complaint has much to support it. Politically, the complaint is not merely irrelevant, but dangerous. It ignores a central weakness of the European Constitutional Treaty, namely its incapacity to lend itself to a plausible, coherent and persuasive account of its contents and goals. If the French and Dutch electorates answered the wrong questions in their referendums, it was at least partly because the European Constitution was a peculiarly unsuitable document to provoke clear public discussion and straightforward political choices.

Much analysis has been devoted to the vexed question of whether the document put to the French and Dutch electorates was best described as a "treaty" or a "constitution." Paradoxically, both opponents and advocates of the text were divided on the issue. The division of opinion was illuminating. The European Constitutional Treaty was a profoundly ambiguous document. It was not by chance that it could so easily be represented in radically different terms, depending on the political agenda of the speaker.

The European Convention, and even more the Intergovernmental Conference which succeeded it, needed to bring together a number of different and in some instances contradictory views of the European Union, its nature and goals. It needed to reconcile the intergovernmentalists and the federalists, the free marketeers and the dirigistes, the Atlanticists and the Europeanists, the big countries and the small countries, new Europe and old Europe. This would have been difficult enough had the Convention confined itself to proposing a limited number of specific changes to the European Treaties. It became exponentially more difficult with the Convention's ambitious decision to try to rewrite, or at least reorder, the whole corpus of the treaties which have shaped today's European Union.

The final result of this decision was a document which of necessity represented an elaborate compromise, a document in which few individual clauses or paragraphs could be understood in isolation. When in the national referendum debates controversy came to settle on such individual clauses or paragraphs, the result was at best confusing, and usually misleading. But such controversy, partial and polemical as it may be, will always form the backbone of any national referendum campaign. National electorates rightly expect to be presented with stark political choices, choices which they want crystallised (not obscured) by specific examples and argumentation. The European Constitutional Treaty did not (probably could not) meet this exigent standard.

It is of course true that the European Union has always been based on compromises, and it could be argued that the European Constitutional Treaty was simply the latest product of this largely fruitful tradition. This is a defensible position, although it may be questioned whether the compromises of the European Constitution are as creative and forward-looking as those of the Maastricht or the Amsterdam Treaties. But there is now a new element in the European constitutional equation which Europe's political leaders neglect at their peril, namely the increasing need

to put future European treaties to popular scrutiny in national referendums. For all its merits, the European Constitutional Treaty was not (perhaps at the time could not be) drawn up with sufficient consciousness of the bruising scrutiny to which it would be submitted in a series of referendums. This was a mistake which the European Union cannot afford to repeat.

It is clear that for future treaty revisions, at least as many national governments will wish or feel compelled to hold referendums as did or would have done for the European Constitutional Treaty. It is equally clear that such national referendums will demand from national political leaders a much clearer rationale and explanation of the proposed treaty changes, what is the problem they are designed to address and why the suggested solutions may be expected to work. The wide-ranging nature of the European Constitutional Treaty and its impenetrable compromises on such issues as voting weights, reform of the Council, the Charter of Fundamental Rights, the election of the President of the Commission and many other topics, were far removed from this model of political discourse. In retrospect, it is unsurprising that the debates in France and the Netherlands wandered so widely, from Turkey, to Poland, to the European budget, to social models, to the European Services Directive. The diffuseness and ambiguities of the Constitutional Treaty were standing invitations to such ill-focussed political exchanges, exchanges not limited to the text of the Treaty, and in some instances even casting doubt upon central elements of the European *acquis* going back to the Treaty of Rome.

There are undoubtedly genuine problems in today's European Union, problems of transparency, efficiency and democracy. These problems have probably been rendered more pressing by the Union's recent enlargement. Nothing in the French or Dutch referendum campaigns suggests that those electorates would be unsympathetic to well-constructed proposals for dealing with these

problems. But these proposals must be capable of discussion and justification in terms that will be comprehensible and attractive to the widest range of Europe's citizens, whose national political cultures and attitudes to the European Union differ widely. The consequence of this may be that the next proposed set of European treaty revisions will be more narrowly focussed and less ambitious than at least the rhetoric of the European Constitution seemed to imply. Any future European Convention should be given a much more precise and limited agenda by the European Council than that which was given to the Giscardian Convention. Even more importantly, the European Council should strictly ensure that any future European Convention carries out this well-defined mandate and no other. Further heroic failures are emphatically not what the European Union needs over the coming decade.

Brendan Donnelly
The Federal Trust

7. News from the Federal Trust

Recent events

On the eve of the UK taking over the EU Presidency, the Federal Trust held a two-day conference on 20-21 June in London on 'The UK Presidency: Priorities and Objectives'. A brief conference report will shortly be available at the Federal Trust website www.fedtrust.co.uk/presidency

Recent publications

No European Constitution, no European Flexibility?

European Policy Brief No. 14

Brendan Donnelly

The double rejection of the Constitutional Treaty in France and the Netherlands has postponed, probably indefinitely, the introduction of the specific procedures it envisaged for sub-groups within the Union.

This Policy Brief considers three possible avenues the member states may explore now for a more flexible European Union: the setting up of a European 'hard core' among a limited number of member states, greater use of 'enhanced co-operation' along the lines already permitted by the Nice Treaty and the development of a more integrative system of political and economic governance for the Eurozone.

This Policy Brief can be downloaded at www.fedtrust.co.uk/admin/uploads/PolicyBrief14.pdf

The UK Presidency of the European Union 2005

European Policy Brief No. 13

Brendan Donnelly and Ulrike Rüb

On 1 July 2005 the UK took over the EU Presidency. This Policy Brief considers the questions likely to dominate the work of the British Presidency, and the progress the British government may hope to make on them.

This Policy Brief can be downloaded at www.fedtrust.co.uk/admin/uploads/PolicyBrief13.pdf

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