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All change or no change? Convention, constitution and national sovereignty

Background

The Convention on the Future of Europe, made up of governmental and parliamentary representatives from all 15 EU member states and all 13 accession countries, as well as observers and representatives from the European Commission and the European Parliament, was set up in December 2001. In July 2003, the Convention finished its work on the preparation of a draft treaty establishing a 'European Constitution.' Since October of this year the governments of the present member states and the ten countries that will join the EU in May 2004 have been discussing the possible adoption, amendment or rejection of this document in an Intergovernmental Conference (IGC). Contrasting views have been expressed in this country about the real constitutional significance of the Convention's suggestions and in particular about their implications for British national sovereignty. The following paper considers in some detail these questions, with reference to the most important proposals put forward by the Convention.

A simplifying treaty

The Convention's mandate from national governments was to examine the EU's institutional framework and to prepare it for the forthcoming enlargement to 25 member states, by making it more efficient, more transparent and more comprehensible. Its mandate was not to revise the existing constitutional structure of the European Union, but to clarify that structure.

This mandate is reflected in the most visible achievement of the draft treaty, which is the merging of all previous treaties into a single text. Before the Convention, the EU's legal basis was rooted in four different treaties, some of which were partial amendments of preceding treaties. The Treaty of Amsterdam achieved a certain level of consolidation by re-numbering and re-ordering treaty articles. The Convention has attempted to go further, seeking in a single document to define and describe the EU's objectives, competences, institutions and policies. It was primarily this desire to consolidate which led the Convention's members to conceive of their work as a 'Constitution'. For the vast majority of the Convention's members, the term was a technically accurate designation, not intended as a politically provocative catch phrase.

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EDITOR's NOTE

This is the first in a series of regular *European Policy Briefs* produced by the Federal Trust. The aim of the series is to describe and analyse major controversies in the current British debate about the European Union. Forthcoming papers will consider European defence, the role of national parliaments in the European Union and the European Union's democratic legitimacy.

We would welcome comments on and reactions to this policy brief. It and its successors will be available on the Federal Trust's website **www.fedtrust.co.uk**

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The new draft treaty does indeed represent some simplification of the European Union's founding documents. It is divided into four discrete parts, covering constitutional and institutional issues, the Charter of Fundamental Rights, EU policies and final provisions respectively. The first part (containing 59 Articles) is relatively accessible as a description of the EU, its objectives and competences. In addition to this work of clarification, the draft treaty suggests a number of significant changes in the day to day working of the Union. But these changes, even if finally endorsed by national governments in the IGC, cannot properly be regarded as changing the underlying constitutional relationship between member states and the European Union.

The European Council

The Convention has suggested revising the role of the European Council, the regular meetings of the heads of state and government of the member states. In particular, it has proposed the election of a long-term President of the European Council, replacing the current system of six-monthly rotation among the member states. The European Council will elect its President from outside its own ranks and by qualified majority for a term of two and a half years (once renewable). Apart from chairing the European Council and driving its agenda, the President will be one of the European Union's representatives abroad, without pre-empting the work of the new Foreign Minister (see below).

The Convention does not propose any legislative powers for the European Council or its President. Indeed, the general role ascribed to the European Council's elected President is remarkably limited. The rationale of the Convention's proposal for a long-term President of the European Council was a desire to assure greater continuity and efficiency in this Council's work. Only time can tell whether an elected long-term President will in fact help the work of the European Council. What is already clear is that the new system will mark no significant change in present constitutional arrangements, whether between the institutions of the European Union or between the Union and its member states.

The Council of Ministers

A major organisational innovation of the Convention is its proposal to abolish the traditional rotating Presidency of the European Union, whereby each member state in turn presides over all meetings of the Council of Ministers and its working groups for six months. In an enlarged Union, such a system would clearly be unsustainable, providing for each country a European Union Presidency at best every thirteenth year and arguably straining the administrative resources of smaller states. The recommendation of the Convention for a semi-permanent Presidency of the European Council in any case deprives the traditional EU Presidency of one of its most important elements, namely the right to hold a well-publicised European Council in the relevant national capital.

Having agreed to abolish the existing system, the Convention was unable to propose a coherent new arrangement for the Council. First discussions among national governments during the IGC suggest that the existing system of sectoral Councils (such as Agriculture, Transport and Environment) may continue, under Presidencies longer than the present six months. Some form of national and geographic balance would then be established between the holders of these various Presidencies. Organisationally and technically, this will be a complicated negotiation, but its significance is purely administrative. It will not affect the legislative powers of the Council.

The Foreign Minister

At first glance, the new position of 'European Foreign Minister' may appear to be a major institutional change. In reality it is merely the amalgamation of two existing roles: the High Representative for CFSP and the Commissioner for External Affairs. The Foreign Minister will assume the powers and responsibilities currently held by Chris Patten and Javier Solana. However, the holder of the position will not exercise any new competences, either in foreign and security policy, or in defence policy.

The Foreign Minister will be appointed by a qualified majority vote in the European Council, in agreement with the Commission. He will be based in the Commission (and thus have access to Commission resources) but will receive policy guidelines from the European Council. In addition the Minister will chair the Foreign Affairs Council, to ensure the preparation of its agenda and to follow up its decisions. In his role of head of external relations in the Commission, he will also be responsible for co-ordinating the aspects of the Union's external actions for which the Commission is already responsible, namely development policy and trade.

Whether merging Patten's and Solana's responsibilities in this fashion will lead to an increase or decrease in efficiency remains to be seen. Nonetheless, although imbued with a certain symbolic importance, the introduction of a European Foreign Minister as such (without any additional competences) cannot be regarded as a constitutional change to the EU's legal order. It certainly does not change the nature of the relationship between the member states and the EU. For better or worse, European foreign policy will continue to be predominantly the domain of national governments, operating for the most part by unanimity.

The European Commission and its President

The draft Constitution does not expand the powers of the European Commission. It re-states the Commission's key function of political initiative and lists its powers and competences, which remain identical to earlier treaties, with the exception that the Commission will now initiate, but not adopt the Union's annual and multi-annual programming. This latter is a purely administrative change.

In response to enlargement, the Convention suggests (although the suggestion is unlikely to be adopted by the IGC) changing the size and composition of the Commission College. The next Commission, appointed in November 2004, will consist of 25 members, one Commissioner from each

member state. But the draft Constitution foresees that as of 1 November 2009 the College will consist of 13 voting Commissioners, the President and the Foreign Minister, selected on the basis of equal rotation between the member states. These full Commissioners would be supported by non-voting Commissioners from the remaining member states.

The Convention further suggests a revised procedure for selecting the President of the European Commission. The European Council will select, by qualified majority and by taking into account the outcome of the European Parliamentary elections, a candidate for President of the European Commission. The candidate must then be endorsed by a majority of the European Parliament's members. This procedure is similar to the *status quo*, but differs in one respect, namely that the European Council decides its candidate for Presidency in light of the most recent European Election results. The Convention clearly believed that a greater role for the European Parliament would enhance the legitimacy of the Commission President when he or she exercised the unchanged powers of the office.

Qualified Majority Voting

A new procedure for qualified majority voting (QMV) in the Council has been proposed by the Convention. Under the draft treaty a qualified majority for decision-making is defined as a simple majority of member states, which combined represent at least three fifths of the Union's population. This is both a simplification and a revision of the system adopted in the Nice Treaty. Compared with that agreement, the population threshold has been dropped by the Convention from 62 per cent to 60 per cent. In an attempt to make QMV more comprehensible, the Convention has also abandoned entirely the traditional 'weighted votes' system for individual member states, which was retained in the Nice Treaty.

In common with the Treaties of Nice, Amsterdam and Maastricht, and with the Single European Act, the Convention's draft treaty proposes an extension of the policy areas in which decisions can be taken by qualified majority voting in the Council. The proposed extension is less radical than that contained, for example, in the Treaty of Nice. The Convention proposal moves 34 policy areas from unanimity to QMV; the Nice Treaty did the same for 38 areas. The draft Constitution falls well short of abolishing entirely the principle of unanimity, which is retained for common foreign and security policy, tax, legal immigration and treaty revision. The issues that have been moved to qualified majority voting are technical policy areas with cross-border implications, such as measures regarding capital movements necessary to fight crime and terrorism, urgent financial aid to third countries and structural funds (from 2007 onwards).

These changes in the QMV procedure (which will come into force only on 1 November 2009) and the policy areas governed by QMV are of some constitutional significance, but this significance should not be overstated as far as the United Kingdom is concerned. By no means all the proposals of the Convention for the extension of QMV are applicable to this country. Britain does not participate, for instance, in the substance of European policies on the constitutionally sensitive topic of immigration. It will therefore remain unaffected by the possible adoption in the IGC of the Convention's proposals for more QMV in this area. For the United Kingdom, the proposed extension of QMV policy areas covers essentially technical issues with little political salience.

It is true that the proposed change in the *modus operandi* of QMV has aroused considerable controversy, especially in Poland and Spain, two countries benefitting disproportionately from the system agreed at Nice. Nevertheless the constitutional implications of this change for the largest countries, such as the United Kingdom, are minimal. If the British government wished in future to construct a blocking minority of population, its capacity to do so would only be marginally affected: it would need to construct a coalition of governments representing 41 per cent rather than 39 per cent of the entire EU population. Moreover, despite the lowering of the proposed population threshold in the Convention text, the likelihood of a blocking minority of member states will increase as the total number of member states increases by ten with the next enlargement. The greater the number of member states, the more likely it is that shifting coalitions could be formed against any particular new proposals.

The 'Escalator Clause'

The Convention's draft treaty also contains the so-called 'Escalator Clause' which allows member states to move policy areas, by a unanimous vote, from unanimity to the qualified majority procedure, without having to convene an IGC. The operation of the proposed new system could only be invoked by a unanimous vote of the European Council, thus ensuring that national vetoes remain effective in this area. The rationale of this proposal is that experience of an enlarged European Union may demonstrate to member states that desirable decision-making in certain policy areas is becoming impossible through the need for unanimity. The 'escalator' system would make it easier to solve any such problems without recourse to the cumbersome procedure of an IGC.

National Parliaments and the European Parliament

The Convention has proposed to engage national parliaments more fully in the EU decision-making process. National parliaments will receive immediately any legislative proposal put forward by the Commission. They will then have the right to declare that they believe the proposed legislation should be dealt with at national rather than European level. If one third of national parliaments declare the proposed legislative act outside the Union's remit, the Commission will be forced to review its proposal. This system has been dubbed the 'early warning system'. It does not fundamentally change the existing position, since the proposed powers for national parliaments are simply consultative. The system does, however, increase the political capacity of national parliamentarians to act as guardians of the 'subsidiarity' principle.

The draft Constitution grants some new powers to the European Parliament through the co-decision procedure, which gives the EP legislative powers equal to those of the Council. This procedure would be extended to some 30 new legislative areas. In particular, the powers of the EP have been extended to certain aspects of agricultural and social policy as well as to co-operation between police forces in matters of cross-border crime. The Parliament's existing role in the European budgetary process is also enhanced. With regards to the EU's common foreign and security policy (CFSP), the EP will only be 'regularly informed' and it does not gain any new legislative powers in this policy area.

The extension of the co-decision procedure should not be confused with an increase in EU competences. The EU already holds competence to legislate in these areas. The extension of the co-decision procedure simply means that the Council will not be able to legislate on its own in these areas, but will be dependent on co-operation with the European Parliament. Nor should new powers for the European Parliament be confused with a diminution of the powers of national parliaments. The powers of the latter exist separately and independently from those of the European Parliament.

The Charter of Fundamental Rights

The Charter of Fundamental Rights has been incorporated into the Convention's draft constitutional treaty (Part II). This Charter contains 50 Articles guaranteeing to European citizens the protection of various rights and freedoms which have already been recognised by the European Court of Justice, or which are common to the legal arrangements of all the member states. Although the Charter will become legally binding, the Convention added some general provisions to the Charter's text to clarify its scope. As a result the rights granted by the Charter are only applicable to European law, or when European law is being implemented by the individual member states. The Charter itself will not create any new social or economic rights which might be directly enforceable before national courts. It will simply ensure that existing and future European laws respect the human rights of those citizens throughout Europe that might be affected by them.

European Public Prosecutor

The draft Constitution envisages the possibility that member states may create the office of a European Public Prosecutor. This decision would have to be made by unanimity. The role of the Prosecutor would be to combat, where appropriate in co-operation with Europol, crimes with cross-border dimensions as well as crimes affecting the interests of the Union itself. The specific rules of procedure applicable to the Prosecutor's activities would also be decided on by the member states under unanimity.

A number of member states have already expressed considerable reservations about the concept of a European Public Prosecutor. As the Prosecutor will be solely concerned with crimes of cross-border nature or those affecting the EU itself, his/her activity will have no effect on member states' judicial sovereignty. This analysis is reinforced by the fact that all decisions governing the Prosecutor's office (including that of creating it in the first place) can only be made by unanimity.

Decision-making procedures

The EU's decision-making procedures have been reduced by the Convention from fifteen to six. This simplification through range of new names for procedures does not in itself alter the powers or competences of the Union nor does it change the relationship between member states and the EU. Decision-making in the Union will become easier to understand but the nature of the decisions taken will not change.

Competences

The draft treaty clarifies in what policy areas the Union can and cannot act. It proposes three principal kinds of competences: exclusive areas of competence in which only the Union can act; shared ones in which both the Union and member states can act; and supporting actions in which the Union can mainly make non-binding recommendations. The Union's exclusive competences are monetary policy for countries in the euro, the common commercial policy, the customs union and the conservation of maritime resources. Shared competences constitute policy areas with cross-border implications such as environmental policies, consumer protection and energy. Supporting actions can be taken in areas such as industry, protection and improvement of human health and education.

The competences listed in the proposed treaty are not new. The competences were previously spread out across different parts of different treaties and the draft Constitution organises these competences so as to make them more comprehensible. The new listing is an attempted improvement in EU transparency, but it does not give the Union any new powers.

Conclusion

The new draft treaty establishing a Constitution for Europe is an important document. For the first time it consolidates the various EU treaties into one single text. The constitutional and sovereignty-related implications of the changes it proposes are for the United Kingdom, however, at most marginal. The British Parliament has in the past ratified European treaties with much more extensive constitutional consequences than anything proposed by the Convention. If the British government were to decide on avowedly constitutional grounds to hold a referendum on a text similar to that proposed by the Convention, then that decision would, by a curious irony, itself represent a substantial constitutional innovation.

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Forthcoming titles in the *European Policy Briefs* series will include contributions on defence, national parliaments in the EU and the European Union's democratic legitimacy.