

The EU Reform Treaty - Small Step or Giant Leap?

Monday 10 December 2007

Conference Report

The conference started with a keynote address by **Lord Kerr of Kinlochard**, formerly Secretary-General of the Convention on the Future of Europe and now an active member of the EU Select Committee and its sub-committees in the House of Lords.

Lord Kerr began by pointing out that the debate in the UK about the Reform Treaty was in his view dominated by discussion about two “red herrings.” The first such “red herring” was the question whether the Reform Treaty was the same as the abandoned Constitutional Treaty. He pointed out that the Reform Treaty was for the UK more different from the Constitutional Treaty than for the other member states, since Britain secured a number of opt-outs in the negotiations leading up to the Reform Treaty. But he argued that those claiming that the Reform Treaty was completely different from the Constitutional Treaty were clearly wrong, while at the same time branding as absurd the claims by the opposition that the Reform Treaty was an EU constitution by the backdoor and the start of the slippery slope towards a European superstate. Lord Kerr emphasised that the text had never been a Constitution, but a Treaty, an agreement between nation states, and the outcome of bargaining between nation states. In his view it had been a serious mistake ever to use the word “Constitution” since it implied state-building characteristics that were not present in a text which contained no “We, the people...” claim to direct legitimacy, and which left the Union unable to tax, borrow, raise military force, or even determine who its citizens were. He thought that the agreement by Mr. Blair’s government to hold a referendum on the Constitutional Treaty had been an example of the tendency for British politicians to look for short-term political advantage instead of long-term solutions. For the parliamentary ratification of the Treaty he expected a solid majority for the Reform Treaty in the House of Lords, possibly with add-ons in the UK implementing legislation, such as a “turnstile” provision to would stop any future British government using any of the passerelle clauses of the Treaty without the consent of both Houses of Parliament.

The second “red herring” was in Lord Kerr’s view the question whether the Reform Treaty was the right treaty. The Conservatives argued that it was the wrong treaty and that the EU should have a looser structure. However, Lord Kerr stressed that even if the UK now rejected the Reform Treaty this would not lead to agreement on a different treaty of the kind the Conservatives sought: They had run their ideas in the European Convention, and had secured the support of only 8 delegates (out of 207), none from parties then in power in any of the 28 countries represented. Despite their claims that ‘they would not let the matter rest’ once they were in power the Conservatives left it very unclear what they were intending to do with the treaty should they enter government. Lord Kerr accepted that the majority of the British public was probably generally hostile to the new treaty: they had been told of its defects, but the government had never publicised its merits. But he doubted very much whether any similar majority would favour the endangering of British membership of the European Union by a future Conservative government which sought to renege upon a European treaty ratified by all, and by then in force.

Lord Kerr concluded that neither of these two “red herring” questions mattered and that instead it was important to now look ahead and decide how to make the best of the treaty. In response to the conference question on whether the Reform Treaty was a small step or giant leap his answer would be that it depended on what we made of it.

He then continued, discussing four specific aspects of the Reform Treaty. His first observation concerned the role of national parliaments. In his view the detailed mechanisms of red or yellow cards were perhaps not of central importance, but the Treaty would enable national parliaments to play an important role in bridging the gap between the debate in Brussels and the debate in Westminster. There were a number of options, ranging from the ‘hard mandate’ practised in Denmark and the ‘soft mandate’ used in Sweden, to improving liaison between EP committees and their

Westminster counterparts, or simply improving the system of scrutiny currently in place. At the moment the system clearly did not work well, as highlighted by the recent example of an anti-dumping regulation, which was only submitted to Lords and Commons scrutiny committees a month after it had come into force. He concluded that it was important to find a real-time system which allowed Parliament to make its point to ministers and MEPs in time. Ministers should not be allowed to get away, after the event, with claiming that Council legislation, in which they had participated, was an unwelcome "fait accompli" by "Brussels".

His second observation concerned future treaty-change in the EU. In his view there would not be another major intergovernmental conference for at least a decade. When the moment arrived however Lord Kerr believed that there would be a Convention again. The Convention in which he participated had been seen as a positive innovation, in particular by parliaments. "Closed doors" IGCs were unavoidable, for final political bargaining, but a prior consultative process, fully transparent, made sense. There was however in Lord Kerr's view room for improvement of the Convention method. In particular he thought that the Presidency should not be imposed onto the Convention: the Convention should have the power to vote on its own choice of President. This however should in Lord Kerr's view be the only vote, since democratic criteria were not fulfilled in a Convention with national delegations of equal size despite very unequal population sizes. Conventions also needed plenty of time: the European Council had been wrong, in 2003, to refuse the Giscard Convention's plea for a few more months, to finish its work.

Moving on to his third observation Lord Kerr stressed that the EU institutions needed to abandon the zero-sum-game idea that one institution could only gain at the expense of another institution. This fear had influenced the Commission's approach to the work of the Convention. The Commission had in his view been hostile towards the idea of making the Council more effective, because it had lost its authority and confidence since the Delors era. A strong Commission should welcome a strong Council, handling its legislation better. Lord Kerr's principal concern was that the Treaty might damagingly weaken the Commission itself: Prodi's promise to new and small member states that each would have its "own" Commissioner had been a bad mistake, and the outcome – equal rotation, two-thirds in, one-third out every five years – risked resentments without maximising quality. The Commission should not worry so much about its own rights and prerogatives, but rather seek to recapture the public's interest and support.

The final point by Lord Kerr was that the European Parliament should become more political, a forum for real political debate. European election campaigns in particular should be about personalities competing for office, with transnational

debate about the EU, rather than simply midterm referenda on national governments. The rancour and asperity that gave oxygen to national party politics would help rather than hinder the development of the European Parliament. It was now sufficiently mature to drop its obsession with its own standing vis-à-vis the other institutions. Press and public would be more interested in the rancour of policy debate between the EP's political parties than the minutiae of squabbles between EU institutions.

In response to questions from the floor Lord Kerr pointed out that one problem with the timings of parliamentary scrutiny was the low priority given to the Explanatory Memoranda issued by government departments to Parliament. Replying to a further question he rejected the view that the Convention only made a marginal contribution to the drafting of the European Constitutional Treaty and the Reform Treaty following it. He thought the Convention's open method was a good process, which had led to beneficial results. He did not believe it would be possible in future to undertake any further substantial treaty revision without a similar Convention.

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The first panel session looked at the issue of "**What's new in the Reform Treaty: Policies and Institutions**" and was chaired by **Professor Stephen Haseler** of London Metropolitan University. The first panellist was **Professor Jo Shaw** from the University of Edinburgh who discussed the changes in the Treaty relating to Justice and Home Affairs Policy. She started her presentation with the remark that although the changes in the JHA policy area were significant, the actual "giant leap" for the "Area of Freedom, Security and Justice" had taken place in the Treaties of Maastricht and Amsterdam and had therefore taken place over the last 10 to 15 years. The Reform Treaty now merged the vast majority of JHA issues into the first pillar. The substantial thinking preceding this reform had taken place in the Convention and had now made its way into the Reform Treaty. It was particularly significant that the "Community method" would be applied in an area where member states had initially been very cautious to concede sovereignty. The new Treaty would define the scope of the EU's competences, in particular in the areas of policing and judicial co-operation, and therefore clarify the current controversies over the legal bases. Another important advantage of JHA issues being dealt with under the first pillar arrangements was that they would now become more accessible to scrutiny at national level. Professor Shaw then turned to the "massive mess" of the British opt-outs and made three observations. First, she suggested that these opt-outs might turn out to limit the UK's ability to manoeuvre rather than increasing it. Secondly, it was significant that the UK had secured an opt-out from legislation arising from regular first pillar legislation, as the example of penalties for

environmental crimes highlighted. And thirdly, in relation to the British opt-out from the Charter of Fundamental Rights she said it was difficult to tell how the British courts would react to the limitations apparently placed upon their actions.

The second panellist was **Dr Karen Smith** from the London School of Economics and Political Science, who discussed the innovations in the Reform Treaty concerning the area of the Common Security and Defence Policy. She pointed out that the changes in the Reform Treaty concerned the institutional arrangements, but not the scope of the EU's competences in this policy area. The scope had remained the same since the St Malo agreement in 1998 and the level of integration had therefore not changed. There were two institutional innovations in the Reform Treaty: the creation of the position of a High Representative who would be a Vice-President of the Commission and chair meetings of the Foreign Affairs Council, and the creation of the European External Action Service with the role to support the High Representative. In terms of the conference question on whether this was a small step or a giant leap Dr Smith concluded that it was "in between" and it depended very much on what the member states decided to make out of it. She then turned to explain that in her view there were three main implications from these changes. First, the disappearance of the rotating Presidency might not lead to the consistency and effectiveness in foreign policy which member states hoped. On the contrary, the change undermine the legitimacy of the overall process, in particular for the smaller member states who would have less opportunity to get their views heard. Secondly, the diminishing role of the European Commission and strengthening of the role of the Council might have the effect of reducing the effectiveness of the EU in its structural foreign policy, such as in the areas of aid and trade, in favour of short-term crisis management. The third comment was that the relations between national foreign ministries and the EEAS were not clear and there was a danger of losing national expertise in the centralisation process. Dr Smith then concluded that while institutions were important they were not a guarantee for a more consistent foreign and security policy.

The final panellist in this session was **Krzysztof Szczerski**, Under-Secretary of State of the Office of the Committee for European Integration of the Polish government. He started off his presentation on the institutional changes in the Reform Treaty by discussing whether the balance between intergovernmental and community tendencies in the EU would change through the new treaty. He pointed out that the new permanent President of the Council could interpret his job either way and either see himself as part of a supranational community or as acting for an intergovernmental interest. The same was true in the case of the new High Representative for foreign policy, who might see himself as either a friend of the foreign ministers or as a "Community player." The Treaty itself could not give a clear answer to this question of internal

balance between intergovernmental and community currents. His second comment concerned the role of the European Parliament. Mr Szczerski pointed out that the position of the President of the European Parliament had slightly changed, as he was now not officially counted towards the 750 members of the MEP. Mr Szczerski raised the issue whether this would have an impact on the work of the EP President, and on the EP's traditional parliamentary role towards the European Commission. His third comment concerned national parliaments. He explained that the Polish government was under the obligation to present all EU papers to Parliament before the relevant Council meeting took place and the Parliament's Committee on European integration discussed issues with the minister before the Council. He then concluded that the Reform Treaty left many questions unanswered, such as the composition of the Commission; how the European External Action Service would work; and how and when the new voting system would be introduced. How these issues would develop would depend on future decisions of the European Council.

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The second panel discussed the "**Ratification of the new Treaty**" and was chaired by **John Palmer** of the European Policy Centre and the Federal Trust. Mr Palmer introduced the session by pointing out that the Danish government had decided against a referendum to ratify the Treaty. It was also planning to revisit its opt-outs both in Justice and Home Affairs and from the euro. He then handed over to **Tony Brown** from the Institute for European Affairs in Dublin who talked about the ratification process for the Reform Treaty in Ireland. He started by explaining that this was the seventh referendum on an EU treaty that was to be held in Ireland, and that of the six previous ones five had returned a 'yes' vote. He pointed out that a Commission would be established in order to carry out an information campaign since the government was prevented by high court judgements from spending money on any such campaign, although funds could be spent through the political parties. The European Affairs Committee in Parliament would play a key role, holding public sessions throughout the country for the first time. The speaker then went on to discuss the results of the first and only opinion poll, which showed 25 per cent in favour of the Treaty, 13 per cent against and 62 per cent as still undecided. This last group was in Mr Brown's view the most important one, since people tended to "vote no if they don't know". A lack of information was seen as a reason for the failure of the first Nice Treaty referendum. Another danger was seen in a low turnout, because people might not be interested in voting on a complex treaty they do not understand. Mr Brown then turned to discuss the campaign that would take place. All political parties except Sinn Fein supported the Treaty. The National Forum on Europe, a unique Irish institution, would play a key role by organising public debates, while the "Alliance for Europe", which was crucial in winning the second

referendum on the Nice Treaty, would be re-established. Mr Brown then listed a number of factors which were working against the pro-Lisbon Treaty campaigners, such as the unpopularity of the government, the slowing economy, problems with the health service, large-scale immigration since the last EU enlargement, problems in the agricultural sector and an unhelpful negative media overspill from Britain. However, despite these issues he concluded that it would still be possible to win this referendum.

The final speaker in this session was **Leszek Jesien** from the Polish Institute of International Affairs who gave a brief overview of the issues surrounding the ratification of the Reform Treaty in Poland. He explained that with the new government in place a referendum on the Reform Treaty was unlikely and he did not expect any problems arising from the ratification process. The Prime Minister had decided on parliamentary ratification but the government did not have on its own a large enough majority in parliament and therefore relied on the votes of the opposition Law and Justice party. This latter party was however opposed to Poland signing up to the Charter of Fundamental Rights. In order to secure their vote Poland would retain the Protocol on the opt-out from the Charter and would ratify the Reform Treaty together with the Protocol. Mr Jesien explained that the new government intended to be among the first countries to ratify the Treaty, in an attempt to improve their standing and rhetoric in the eyes of their European partners and in order to return to the European mainstream, considering that over 80 per cent of Poles were in favour of European integration.

In the response to a question from the floor about the timing of the Irish referendum Tony Brown explained that the government had been considering holding a second referendum on a contentious issue of family policy on the same day as the referendum on the Reform Treaty. If this were not to be the case the Reform Treaty referendum would be likely to take place only in autumn.