

THE CONSTITUTIONAL PROPOSAL OF THE EUROPEAN CONVENTION: AN APPRAISAL AND EXPLANATION

The European Constitutional Group

The recent European Convention was constructed so that the median voter on the convention had a bias in favour of centralisation. The conclusions of the Convention were therefore not surprising. The European Constitutional Group has made a number of suggestions for change to the Convention that could reverse its centralising approach.

The European Constitutional Group¹

On 10 June 2003, the European Constitutional Group presented the proposal for a Basic 'Constitutional' Treaty for the European Union,² which updates our proposal of 1993.³ On 18 July 2003, the Convention for the Future of Europe published its own final proposal.⁴ In this article, we appraise the most important changes recommended by the Convention, using our own proposal as a reference.

A constitution is a classical means of limiting the power of government. That is why the European Union needs a constitutional treaty. But constitutions may also be abused to legitimise powers which governmental institutions have surreptitiously accumulated over time and to extend their sphere of influence. That is why constitutions may also make things worse. The Constitutional Treaty proposed by the European Convention contains some positive elements but on balance it makes things worse.

An appraisal of the Convention

Any constitutional proposal for the enlarged union must meet two objectives: it must close the gap between the people and the Union's institutions, and it must provide positively for different preferences within a Union of 25 states. In a modern constitutional setting, these objectives involve three elements: (i) choice between tax jurisdictions, (ii) choice between regulatory systems and (iii) choice among important political values, usually expressed in the form of rights. Against this background, the following changes to the status quo proposed by the Convention are crucial:

1. The Preamble is to be praised for emphasising Europe's diversity but it also states that Europe is to be 'united ever more closely'. This is inconsistent with an efficient division of labour between the Union and the lower levels of government, and it prejudices the preferences of its citizens. Since the Convention has not been elected by the citizens but appointed by the governments of the member states, it cannot claim to speak 'on behalf of the citizens'. The Convention proposal starts on the wrong footing by placing power in the hands of the greatest number. This is the opposite of the normal purpose of a constitution which is to place constraints on the use of power by a majority.
2. Article I-1 is to be praised for confining the competencies of the EU to those objectives which the member states 'have in common' (rather than to the objectives of some majority). But it goes too far when it empowers the Union to co-ordinate all policies 'by which the Member States aim to achieve these objectives'. Not all objectives which the member states have in common are best attained by joint or co-ordinated action (e.g. education policy).
3. Article I-3 extends the powers of the Union to the promotion of 'solidarity between generations', 'the protection of children's rights' and 'territorial cohesion'. As we have explained in our proposal, human rights are better protected by joining the European Convention for the Protection of Human Rights and Fundamental Freedoms. Solidarity and cohesion are better left to lower levels of government.

4. Article I-7 is to be praised for suggesting accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms but it also provides for the inclusion of the EU Charter of Fundamental Rights in the Constitutional Treaty. As we shall argue below, the Charter should not become legally binding because it establishes dangerous claims to Union regulation and transfers.
5. Article I-9, no. 3, improves the definition of subsidiarity. It no longer pretends that all objectives which cannot be sufficiently achieved by the member states can be better achieved at the Union level. But while the substantive content of subsidiarity is now prescribed in a better way, the burden of proof should be higher: the Union should not legislate in cases where the public policy concerned can be carried out in smaller groupings or where methods of co-ordination can be used that do not require the passage of Union laws. Even more importantly, the Convention proposal lacks an effective procedure for implementing subsidiarity. It leaves the ultimate interpretation of subsidiarity to the European Court of Justice, an institution which has no incentive to respect subsidiarity (see the article by Martin Howe in this issue).
6. Article I-11, no. 2, and Article 13 extend shared powers in a very imprecise way and explicitly confirm the pre-emption doctrine of the European Court. This means that the member states will lose authority. The European Constitutional Group aims to allow choice among jurisdictions.
7. Article I-11, no. 3, and Article I-14 extend the Union's powers by conferring on it a general competence to 'coordinate the economic and employment policies of the Member States'. These policies are better determined at lower levels of government. They ought to be set competitively and be tailored to local conditions.
8. Article I-12, para. 1, no. 2, gives sweeping external treaty powers to the Union. The European Constitutional Group relies on agreement among the member states treating external policy as a matter of mutual concern.
9. Article I-17 extends the general empowering clause for Union action from 'the operation of the common market' to all 'objectives set by the Constitution' (including, for example, labour market regulation). Thus, the European institutions are generally empowered to bypass the limits set by the parliaments of the member states.
10. Article I-19 and many other provisions of the Convention proposal extend the powers of the European Parliament without constraining its vested interest in centralisation. The European Constitutional Group has argued that subsidiarity has to be protected by a second chamber of the European Parliament which would be composed of representatives of the parliaments of the member states.
11. Article I-24 lowers the quorum for qualified majority decisions in the Council by eliminating the threshold of 72.3% of the Council votes and by lowering the required population share to 60%. As has been shown by Baldwin and Widgren (2003), looking at all possible coalitions, this change would raise the probability of qualified majority decisions in the Union of 27 member states from 2% to 22%.⁵ While this effect may be welcome in some policy fields, it is likely to have disastrous consequences in others (such as labour market regulation). Even more than before, a majority of highly regulated member states could impose their regulations on the less regulated member states (the so-called 'strategy of raising rivals' costs). As competition from the less regulated member states diminished, the intensity of regulation would also increase in the highly regulated member states. This iterative process of regulation is well-known from the history of federal states. The quorum must not be lowered in the field of regulation. According to our own constitutional proposal, the Union should not have the power to regulate labour markets at all. In addition, our proposal includes a provision against a majority ganging up against an individual member state that is less regulated or taxed. A general reduction of the quorum presupposes the repatriation of those Union competencies which the Union should not have. The Convention has missed the opportunity to repatriate those competencies which have clearly failed the test of history (e.g. social regulation, agricultural policy and the Structural Funds).
12. Article I-25 perpetuates the Commission's monopoly of legislative initiative which enables the Commission to prevent any decentralising legislation and explains the current, quite unnecessary, controversy about the appropriate size of, and member states' representation in, the Commission. The European Constitutional Group has proposed that the Commission should not have a right of legislative initiative at all and that neither the Commission nor the directly elected chamber of the European Parliament should have the right to block laws proposed by the Council that simplify or annul previous EU laws.
13. Article I-29 changes the status of the European Central Bank (ECB) and the European System of Central Banks. The ECB would become an ordinary Union institution. Its independence would be limited to 'the exercise of its powers and finances'. Moreover, the Article fails to

- protect the independence of the central banks of the member states. It does not define price stability, nor does it improve accountability. Our proposal addresses these problems by defining the target of price stability and providing for sanctions in the case of violations.
14. Article I-59 establishes a simple procedure for withdrawal from the Union. We have proposed a similar proposal, and we welcome this change.
 15. Part II introduces the Charter of Fundamental Rights of the Union into the Constitutional Treaty. We are opposed to this Charter because it establishes not only personal liberties but also legal claims to governmental action, notably regulation. For example, it asserts a 'right of access to a free placement service' (II-29), a 'right to protection against unjustified dismissal' (II-30), a right to 'fair and just working conditions' (II-31, no. 1), a 'right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave' (II-31, no. 2), an 'entitlement to social security benefits and social services' (II-34, no. 1) as well as a 'right to social and housing assistance' (II-34, no. 3). Article II-51, it is true, states that 'this Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution'. However, since the European institutions are obliged to 'respect' these rights and 'promote the application thereof' (Article II-51), the Charter necessarily modifies their powers. Article II-52, no. 5, also tries to limit the application of the Charter by distinguishing rights and principles. However, this is not a valid distinction. If the Union accedes to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article I-7), the Charter in Part II is neither necessary nor desirable.
 16. Part III extends the Union's powers to and in a number of fields, e.g. co-ordination of social and health policies (Article III-107, para. 2, and Article III-179, no. 2), research and technological change (III-148, no. 2), space policy (III-155), energy (III-157), sport (III-182, no. 2g), civil protection (III-184) and administrative co-operation (III-185). These are not core functions of a Union government. They are better left to the lower levels of government.
 17. Part III abandons the unanimity principle in the Council for a number of competencies which the Union should not have. The most important examples are European laws concerning 'services of general economic interest' (Article III-6), the instruments of the European Central Bank and the distribution of seigniorage (III-79, no. 5a), the 'tasks, priority objectives and organisation of the Structural Funds' (III-119) and industrial policy (III-180, no. 3). Council decisions on these issues ought not to be facilitated. The 'services of general economic interest' are not a proper area of Union legislation. Moreover, such legislation is likely to nullify the Commission's competition policy with respect to these services. Majority decisions in the Council endanger the independence of the ECB and the stability of the euro. There is also no need for an industrial policy.
 18. The average quorum for qualified majority decisions in the Council is reduced from 72.3% to 60% (cf. no. 11). This would have undesirable consequences in all fields in which the powers of the Union are excessive. The most important examples are the restrictions on capital movements with third countries (III-4-8), co-ordination of economic and employment policies (III-71 and III-100), social policy (III-104) – notably 'workers' health and safety' (a), 'working conditions' (b) and 'the modernisation of social protection systems' (k) – consumer protection (III-132), transport (III-134), trans-European networks (III-145), research and technological change (III-146ff.), public health (III-179ff.), culture (III-181), and education, vocational training and youth (III-182f.). These are not core functions of the Union government. They ought to be left to lower levels of government.
 19. Article III-262 is to be praised for proposing a panel of seven persons, among them at least one member of a national supreme court, who shall give an opinion on candidates' suitability for the European Court of Justice. The convention is taking up our suggestion that the supreme courts of the member states should be involved in the process of adjudication at the Union level. However, we have suggested the establishment of a subsidiarity court additional to the European Court of Justice and composed only of delegates of the supreme national courts. The Convention proposal does not solve the problem that the judges of the European Court of Justice have a vested interest in centralisation at the Union level. It ignores the procedural implications of the subsidiarity principle.
 20. The 'Protocol on the Application of the Principles of Subsidiarity and Proportionality' is to be praised for giving the Parliaments of the member states the right to complain to the Commission and, ultimately, the European Court of Justice when the principle of subsidiarity is violated by Union legislation. The Convention is taking up our suggestion that the Parliaments of the member states should be directly involved in the process of Union legislation. However, we suggested the creation

of a Second Chamber of Parliament composed of delegates of the national parliaments with a power to block legislation. The Convention proposal will not be effective because the parliaments of the member states have only six weeks to complain to the Commission; the Commission is free to reject the complaint; and the ultimate decision rests with the European Court of Justice which has a vested interest in centralisation. We insist on the need for a European subsidiarity court composed of judges delegated from the highest courts of the member states. We conclude that the Convention does not wish to have an effective procedure to implement subsidiarity. This may also explain why these provisions have been relegated to a mere protocol.

The Convention proposal in its present form could only be made acceptable if amended in line with these suggestions. The European Constitutional Group, after analysing the Convention proposal, has come to the conclusion that its alternative constitutional proposal is much superior in substance and more intelligible.

An explanation of the Convention proposal

Why is the Convention proposal so unsatisfactory? The main explanation, it seems, is that the composition of the Convention, including its presidium, was not representative but biased in favour of centralisation.

Table 1 shows the composition of the Convention in column I. We rank the various groups represented by their vested interest in centralisation. The representatives of the European Commission (1) and the European Parliament (2) have the strongest interest in European centralisation because political integration increases their power. As an executive institution and legislative agenda-setter, the Commission has a more pronounced centralist bias than the Parliament which merely reviews the legislative proposals of others (if at all). Moreover, the Euro-Parliamentarians of some member states may at the same time be members of their national parliaments. This dual role reduces the incentive to centralise.

Group (3) in table 1 comprises the President and the two Vice-Presidents of the Convention. V. Giscard d'Estaing, G. Amato and J. H. Dehaene are probably more enthusiastic about European political integration than the average representative of the national governments (4). This is also true with regard to the representatives of the governments of their home countries: Giscard and Amato are more centralist than Villepin and Fini.

Finally, the average representative of the governments of the member states is more interested in European centralisation than the national parliamentarians (5) are. Through the Council, the governments participate directly in the legislative process, they appoint the Commissioners, the judges of the European Court of Justice etc. and, as members of the Inter-Governmental Conference, they possess the monopoly of initiative in amending the European Treaties. The national parliaments are merely called upon to ratify the amendments proposed by their governments.

The ranking of table 1 leaves no doubt that the median position is occupied by the representatives of the governments (no. 33/34 out of 66 representatives to the Convention). This might have been expected because the composition of the Convention was decided by the governments (at the European Council in Laeken).

However, in the Presidium of the Convention (column (II)), the median position is not taken by the representatives of the governments but by the President and the two Vice-Presidents (no. 6/7 out of 12). Among the three, Giscard is probably least centralist. He seems to be the decisive voter in the Presidium.

Since the median of the Presidium is more centralist than the median of the Convention, the Presidium is not representative of the Convention. This misrepresentation was made possible by the fact that the Presidium was not elected by the Convention but appointed by a simple majority of the European Council.

Why did the European Council (in Laeken) give the median position in the Presidium to Giscard? The majority of the governments were dissatisfied because, at the Intergovernmental Conference in Nice, Jacques Chirac had frustrated their attempts at further European centralisation. In Laeken, the majority appointed a European Constitutional

	Convention (I)	Presidium (II)
(1) Representatives of the European Commission	2	2
(2) Representatives of the European Parliament	16	2
(3) President and Vice-Presidents of the Convention	3	3
(4) Representatives of the governments of the member states	15	3
(5) Representatives of the parliaments of the member states	30	2
All members entitled to vote	66	12

Table 1: The European Constitutional Convention: members entitled to vote according to their vested interest in centralisation

Notes: Median of Convention (33/34): Representative of the Governments of the member states. Median of the Presidium (6/7): President and Vice-Presidents of the Convention.

Convention which could exert more public pressure on the minority, and they appointed a French national, a centraliser and non-socialist, as President and median of the Presidium.

The official justification for appointing the Convention was completely different, however. The Convention was to enable the parliaments – the European Parliament and the parliaments of the member states – to participate in the preparations for the next amendment of the Treaties, a ‘constitutional treaty’. Table 1 shows that, indeed, the European and national parliamentarians together command a clear majority (46 out of 66) in the Convention. But this is not true for the Presidium (4 out of 12). Moreover, as the ranking in table 1 has shown, the European and the national parliamentarians do not have a common interest with regard to centralisation. The only objective on which they could unite is to take powers away from the Commission. However, the national parliamentarians do not need the support of the European parliamentarians for this purpose – neither in the Convention nor in the Presidium. They could more easily form a majority coalition with the representatives of the national governments, the President and the Vice-Presidents.

Was the composition of the Convention compatible with the principle of subsidiarity? The principle has substantive and procedural implications. Procedurally, it implies that the burden of proof rests with those who want to centralise and that the decision whether to centralise or not must not be taken by those who have a vested interest in centralisation.

The procedural dimension of the subsidiarity principle is a special case of the classical constitutional principle that the rules must not be made by those who later have to keep them. If those who will have to play by the rules are called to formulate these rules, they will not adopt the rules which are best for the citizens but those which are best for them.

This insight played an important role in the constitutional debate of the first French National Assembly (*‘la Constituante’*) which adopted the Constitution of 1791. The Constitution stipulated that no member of the *Constituante* was eligible for the *Assemblée Legislative* elected in September 1791.

The French constitution-makers had learned from the failures of the American Constitutional Convention in Philadelphia (1787). The Convention had been chaired by George Washington who later became the first President under the new constitution. Other influential members of the Philadelphia Convention (Hamilton, Jay, Randolph) obtained important offices in the first administration, and James Madison, the intellectual father of the constitution, was later elected President as well.

The founders of the European Economic Community made the same mistake: the first

president of the Commission was Walter Hallstein – the man who had negotiated the EEC Treaty for the German government. Likewise, several other members of the first Commission had been the negotiators of their countries.

There is a strong temptation to appoint those who have drafted a constitution or treaty as chief executives of the new institution. They have mastered the legal details and seem most competent to apply them. But such an assignment is not ‘incentive-compatible’. It creates undesirable incentives at the constitution-making stage.

This means that the composition of the European Constitutional Convention, too, was deeply flawed. The representatives of the European Commission and Parliament had a vested interest in centralisation. The presence of Commissioners in the Convention and its Presidium was also incompatible with the principle of the separation of powers. Nobody can prevent the European Parliament from drafting a European Constitution (which it did in 1984 and 1994) but it should not have been represented in a Constitutional Convention. Even the governments of the member states may suffer from distorted incentives: they may be tempted to abuse centralisation as a means to evade parliamentary control or establish a tax and regulatory cartel against the citizens. The value-added-tax directive, the *droit-de-suite* directive and most European labour-market regulations are striking examples.

It follows that the European Constitutional Convention ought to have been composed only of representatives of the parliaments of the member states (including experts which they might have appointed). These representatives would not be eligible for public office or mandate in the European institutions in the future.

For the same reason, the Inter-Governmental Conference ought to be replaced by an Inter-Parliamentary Conference. Like in the USA, the legislatures of the member states should have the right to call a constitutional convention composed of their delegates. Like in the USA, this inter-parliamentary constitutional convention would submit their amendments for ratification to the legislatures of the member states. And like in the USA, the legislatures of the member states should be entitled to alter the constitutional order against the explicit wishes of the state governments, the union executive and the union parliament.

The composition of the European Constitutional Convention was not incentive-compatible. This explains why its proposal is biased in favour of centralisation.

1. The following persons are members of the European Constitutional Group: Professor Peter Bernholz, Basle; Professor Charles B. Blankart, Berlin; Professor Francisco Cabrillo, Madrid; Dr Detmar Doering, Potsdam; Professor Jacques Gareilo, Aix-en-Provence; Dr Habil Lüder Gerken, Berlin; Professor Christian Kirchner, LL.M., Berlin; Dr Elena Leontjeva, Vilnius; Professor Angelo

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2. 'A Basic Constitutional Treaty for the European Union', *Public Choice*, 118, no. 1.
 3. European Constitutional Group, *A Proposal for a European Constitution*, European Policy Forum, London, December 1993.
 4. *European Convention for the Future of Europe*, Draft Treaty establishing a Constitution for Europe, available from the website <http://www.european-convention.eu.int>
 5. Richard Baldwin and Mika Widgren (2003) *Decision-making and the Constitutional Treaty*, Centre for European Policy Studies, Policy Brief No. 37, August, available from the website <http://www.ceps.be>