

# The EU Treaty Reform Process since 2000: The Highs and Lows of Constitutionalising the European Union



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The period from 2000 to 2008 has seen an extraordinary attempt to formally constitutionalise the European Union. Building on long-standing traditions within the European project, a constitutional discourse initiated in the final stages of the Intergovernmental Conference negotiating the Nice Treaty led to the so-called “Laeken Process”: the launch of a formalised, but open debate about the “Future of Europe”, the setting-up of a “Constitutional Convention” and the negotiation of a “Treaty establishing a Constitution for Europe”. However, the failure to ratify this “European Constitution” then threw the entire reform project into doubt. After a period of “reflection” and subsequent re-negotiation governments agreed a new treaty that maintained much of the substance of the “constitution”, but avoided the symbolic language that this had contained. This article charts the highs and lows of this period of treaty reform, arguing that the constitutionalisation of the EU is best viewed as a long-lasting and gradual process that is set to continue even if the formal project to adopt a European Constitution will not be re-visited for some time to come.

## Introduction

An initial observation, when starting to examine recent developments regarding the constitutional reform process in the EU, is the recognition that the debate about a “European Constitution” was deeply embedded in an existing integration process. The talk about, and the work on, a constitutional document was indeed a radical departure from the previous practice of avoiding, at all cost, the language, symbols and other trappings of statehood. In spite of this discursive break with the past, there was never any serious idea to compose such a constitutional document from scratch. Instead, the debate about the “European Constitution” that began among the European political elites in 2000, took account of the previously established patterns and foundations of European integration. It linked to previous aspirations of the European movement, in particular constitutional federalism; it build on the advances of European constitutional law; and it was situated within the reform

debate of the European Union in preparation of Eastern enlargement. In fact, the launch of the debate occurred during the final stages of the Nice Intergovernmental Conference (IGC) and was initially seen as an attempt to achieve a more federalist outcome of that particular IGC.

### **The nightmare of Nice: The traditional treaty reform method reaches its limits**

The impact of the emerging constitutional discourse on the actual negotiations in the 2000 IGC was in fact minimal, because the IGC was too advanced in order to be able to accommodate a return to broad and far-reaching questions about the EU’s foundations. The initial assessment was, therefore, that the Nice Treaty was a defeat for pro-integrationist forces and served to preserve the status quo. However, the “defeat” of these high aspirations was only temporary, and in fact the momentum right after the Nice European Council was gathering for a deeper revision of the treaties. This was

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partly due because the outcome of the Nice European Council was questionable, both with regard to the content of the revised Treaty and with regard to the way in which it had been negotiated. The treaty reform, while having been launched at a major review of the institutional provisions of the Union in preparation for enlargement, failed to achieve this aim, and while there were modest extensions of co-decision, most other important decisions were postponed to a future round of reform. The extension of qualified-majority voting was linked to a new way of calculating the qualified-majority – a triple majority that actually made decision-making more cumbersome than the previous system.

Equally damaging was the actual experience of the final summit, where negotiators spent three days bargaining over the final issues, and were seen to be more concerned about parochial interests rather than the search for workable solutions for the “new Europe”. France, holding the Presidency, spent significant diplomatic resources on the defence of its voting parity with Germany; Belgium did the same, though with less success, vis-à-vis the Netherlands; and the then candidate states were seen to be excluded from the negotiations about arrangements that would equally apply to them as to the old Member States.

The Nice summit therefore ended not only with an imperfect treaty, but also with a number of important “leftovers” requiring further treaty change, with a desire by many involved in the negotiations to reform the format of

### New beginning? The launch of a formal process of constitutionalisation

It was Belgium – one of the more federal-minded Member States – that held the EU Presidency in the second half of 2001, when the details of this “post-Nice process” were being worked out. At the Laeken European Council in December 2001, a rather maximalist interpretation of the aims of the “post-Nice process” was worked out. This included the reference to a possible “constitutional document” in the mandate of the European Convention that was being agreed on in Laeken. This was then taken a step further by the Convention itself, which, under the leadership of Giscard d’Estaing, set itself the aim of drafting a Constitutional Treaty rather than merely providing the subsequent IGC with a report or a number of scenarios – outcomes that would also have been possible under the Laeken mandate.

At the Laeken Summit, another important decision was taken, namely the nomination of Valéry Giscard d’Estaing as the Chairman of the Convention, with Jean-Luc Dehaene and Giuliano Amato, former prime ministers of Belgium and Italy, respectively, as Vice-Chairs. Giscard d’Estaing had previously been a French President, but had also served many years as a member of the European Parliament and thus combined the roles of representing both Member State and EU institutional interests. A further important appointment in the Convention was that of John Kerr, the



(from left to right) Mr Giuliano Amato, Vice-Chairman; Mr Valéry Giscard d’Estaing, Chairman; and Mr Jean-Luc Dehaene, Vice-Chairman, before the official opening of the inaugural session of the European Convention, 28 February 2002.

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negotiations as well; and with an explicit mandate, contained in Declaration 23 attached to the Nice Treaty, to launch a process to engender a wider debate about the “Future of Europe”. In different circumstances this might not have had the consequences that it did, but given the contingencies at the time, these developments set a course for a period of formal constitutionalisation.

former UK Permanent Representative, as Secretary-General. He brought with him not only close connections to the British establishment, but also experience and familiarity of COREPER/Council procedures.

The European Convention thus had a strong leadership, both in political and administrative terms. Giscard had a clear vision of the direction he wanted the Convention to

go, and even though he suffered certain setbacks in the closing stages of the Convention, his agenda of formally constitutionalising the European Union did resonate with the membership of the Convention.<sup>2</sup> The Convention was made up of representatives of national governments, members of the European Commission, members of national parliaments and of the European Parliament, and even though there were differences among its members about the substance of any draft Constitutional Treaty, Giscard's approach of seeking "consensus" (rather than the more formal unanimity or majority-voting) proved to be effective in achieving a final agreement.

The members of the Convention organised themselves in a number of working groups on specific, mainly sectoral issues, but due to the parliamentary majority of the membership there was also a strong party-political dimension to the Convention's work. In the final analysis, though, the Convention was very much a top-down affair, with a "Praesidium" bringing together 12 key members of the Convention steering the drafting of the new Treaty (Kleine 2007). This Praesidium, which – unlike the plenary sessions or the working groups who met in private – was supported by a very effective secretariat composed of officials from the Commission, the EP Secretariat and, above all, the Council Secretariat (Deloche-Gaudez 2007).

Giscard's handling of the Convention was controversial, partly because his constitutional ambitions so explicitly went beyond the kind of treaty reform that had been initially expected. While the draft treaty ultimately did include a lot of the language of statehood (flags, symbols, a European President and Foreign Minister, European laws, a supremacy of EU law clause), he did not succeed with proposals for a renaming of the Union to the "United States of Europe". He was also heavy-handed in the use of his procedural resources, frequently ignoring opposition from the floor in favour of his own preferences with regards to specific aspects of the treaty, the preamble being a case in point. Finally, he was criticised towards the end of the Convention, when he was seen to consult extensively with national governments, anticipating their views in advance of the subsequent IGC, at the expense of listening to opinion within the Convention.

The European Convention was not the "deliberative forum" that many constitutionalists had hoped to see (Eriksen et al 2004; Panke 2006). There was a certain degree of deliberation, but negotiations about the final draft treaty were neither fully transparent nor did they necessarily reflect the substantive work that had taken place in the working groups. Even so, when the Convention had completed its work in the summer of 2003, it did achieve two significant objectives: first, to have been able to agree on a single, comprehensive draft treaty, and, second, to have set the agenda for the Constitutional IGC that followed the Convention, and that had the formal power to agree on changes to the treaty (Milton and Keller-Noëllet 2005; Church and Phinnemore 2006).

Treaty reform always implies an agenda-setting phase, and it is possible to see the Convention as simply a forum

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for more systematic setting of an agenda. Earlier IGCs had been preceded by reflection groups, and one perspective on the Convention is to see it as a "super reflection group". However, given the strength of opinion, the detailed work and the high degree of consensus that had been achieved in the Convention, the approach of the Italian Presidency to minimise any changes to the draft Treaty in the IGC appeared as an obvious choice. The Convention Draft did indeed constitute the basis of negotiations in the IGC, and even though the Italian strategy of seeking to avoid the "re-opening" of individual articles appeared to fail when the December 2003 summit ended without agreement, the subsequent Irish Presidency succeeded in getting agreement on a revised version of the draft treaty, approved at the final summit in June 2004. Heads of State or Government then met in Rome in October 2004 for a formal signing ceremony of

the "Treaty Establishing a Constitution for Europe" – a document that thereafter was widely referred to as the "European Constitution".

While a lot of work, energy, diplomatic skill and other resources had gone into drafting this treaty, the process was still not complete without ratification. Given the constitutional aspirations of the Treaty, it generated significant public interest and in a large number of Member States a popular referendum was seen as the ratification method of choice. This not only included countries that had regularly held referendums in the past, but also several others which had not previously submitted EU matters to such a test, and indeed some where referendums had never been held before. The Netherlands was one such case in point. France and the UK had both called referendums for reasons that were regarded as more politically than legally motivated, and in both cases doubts were raised about the likelihood of achieving a positive result of such a vote.<sup>3</sup>

### The "failure" of the Constitutional Treaty: The limits of politicisation

In the end, it was first in the Netherlands, at the end of May 2005, and a few days later in France, that the electorates of two of the original Member States voted against the Constitutional Treaty. Analysis of the voting intentions and of the public debate in these countries has sought to show that the result was less a verdict on the actual text of the treaty, but was best explained by a variety of factors which included both European and domestic issues. While the "no" votes in these two countries were a severe shock to the "system", there was nevertheless an immediate reflex by the EU institutions to persist with the ratification process, and indeed several countries did ratify the Constitutional Treaty in subsequent months, including Luxembourg by referendum. After all, there were precedents when initial "no" votes had been subsequently overturned, after domestic politics had had a chance to react and make arrangements for a second vote that would assure a more favourable reception.<sup>4</sup>

There was also, however, a sense that the opposition to the Constitutional Treaty had been so strong in these two

countries, and that these countries were so central to the European project, that it would be difficult, if not impossible, to overcome this double “no”. In addition, a number of Member States decided to put their referendums on hold after the rejection of the treaty in France and the Netherlands. A more concerted effort was therefore perceived to be necessary in order to keep the constitutional project going. Both the European Commission and the Member States acted in response to the “constitutional crisis”. The Commission identified a gap in the communication between the EU and the citizens, and launched a programme aimed at enhancing the opportunity for dialogue between citizens

### Agreement on the Lisbon Treaty: Constitutionalisation in all but its name

The Lisbon Treaty was signed by the Heads of State or Governments in December 2007. A number of factors facilitated this process: there had indeed been the anticipated change in domestic politics in key countries, namely in France with the election of Nicolas Sarkozy as President. EU enlargement, which had been one of the main reasons that were given for the need of a fundamental, constitutional overhaul of the Union, and which had been one reason for the opposition towards the Constitutional Treaty, had



Versions of the Treaty establishing a Constitution for Europe in the English language, published by the European Union for the general public.

and elites, the so-called “Plan D” (Wallström 2007). Coming together in the European Council in 2005, governments agreed that what was needed was a “reflection period”, which would last until 2007 and enable a possible re-negotiation of the treaty in time for the next EP elections in 2009. This period of “reflection” about the future of the constitutional project would also, and conveniently, include the national elections that were due in both France and the Netherlands, thus allowing the new governments to present the European issue differently to their electorates.

The reflection period, which lasted from mid-2005 to mid-2007, served the actors to buy time. During this period, the Union celebrated its 50<sup>th</sup> anniversary, which included the adoption of a “solemn declaration” in Berlin about the Union’s values and aims, and thus provided a text with some constitutional principles (Presidency of the European Union 2007). In terms of treaty change, the realisation by early 2007 was clearly that, despite previous statements to the contrary, a re-negotiation of the treaty was both necessary and possible. The German and the Portuguese Presidencies collaborated closely in order to launch a new IGC in the summer of 2007 – Berlin managing to get agreement on an extremely detailed mandate for the IGC, and Lisbon then following up on this with a conference that was concluded in the second half of the year.

happened *without* the Union suffering any immediate or obvious negative effects as a result,<sup>5</sup> and Turkish accession to the EU, while still on the agenda, had clearly moved into the background of public deliberation. Above all there had been a growing acceptance among the EU’s political elite that, while a reform of the treaty was still seen to be necessary, that this should preferably not be presented as a constitutional project. Ratification of “ordinary” treaty change would be more easily achieved if referendums could be avoided, and for this to be the case, the language of constitutionalism had to be replaced.

This reversal from the high degree of politicisation that treaty reform had “enjoyed” during and after the European Convention, to the active de-politicisation of negotiations towards a “Reform Treaty” is remarkable,<sup>6</sup> as is the fact that substantively the vast majority of provisions that had been contained in the Constitutional Treaty were included in the Lisbon Treaty.<sup>7</sup> The Treaty contains key elements of the original Treaty that would need to be regarded as constitutional:

- The *President of the European Council* will be chosen by the Heads of State or Government for a term of 30 months. This office does not empower the elected top politician to take any executive decisions. Furthermore, the Presidency system will be revised, with representatives from three Member States jointly running sectoral Council

- meetings over period of 18 months.
- The *High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the Commission* will combine the functions of the current High Representative and the External Relations Commissioner. The powers of the High Representative are limited to implement policies, but he or she will play an important role in representing the EU globally.
  - The *President of the European Commission* will be elected by the European Parliament, based on a proposal from the European Council. The size of the College will be reduced from 2014 onwards. Only two-thirds of Member States will have a Commissioner at any one time, rotating every 5 years.
  - The Commission's delegations will form part of a "European External Action Service" of the Union and will come under the joint responsibility of the Council and the Commission.
  - The *European Parliament*, comprising 750 members and a President, will gain further powers as the co-decision procedure becomes the "ordinary legislative procedure" and is expanded to further areas. Additionally, the new budgetary procedure requires approval by both the Council of Ministers and the Parliament.
  - *National parliaments* also get more involved in the legislative process. They are to be notified of proposed legislation and have eight weeks to deliver their comments.<sup>8</sup>
  - *Qualified-majority voting* was extended to new policy areas. As from 2014, a new voting system shall be introduced: a vote is passed if 55% of Member States are in favour and if these countries represent 65% of the EU's population – an element that makes the size of the country's population much more important.
  - The *European Court of Justice* is granted enhanced powers to rule on cases dealing with EU Justice and Home Affairs legislation.<sup>9</sup> The Charter of Fundamental Rights, agreed in 2000 as a "solemn proclamation", will become legally binding with the Lisbon Treaty.<sup>10</sup>

Ratification of this Treaty remains, of course, an important issue, but the changes that national governments have made to the domestic arrangements make an ultimate adoption of the treaty by all Member States more likely. All Member States except Ireland have decided to rely on parliamentary ratification alone – something that is especially remarkable in countries like Poland, Denmark and the UK, which had been previously committed to referendums on the Constitutional Treaty.

Beyond the Irish referendum, there is also the possibility for judicial review of the Treaty by national supreme courts, a scenario that might be likely in both Germany and the Czech Republic. Overall, the chances of ratification are uncertain, but appear to be significantly higher than they were for the Constitutional Treaty.<sup>11</sup>

## Conclusions

While the outcome of ratification, at the time of writing in early 2008, cannot be predicted, we can say that the Union appears to have found a way out of the constitutional impasse. The three elements that formalised constitutionalisation after the Nice Treaty – the use of the convention method for deliberation of treaty changes, the adoption of a language of constitutionalism, and – at least in many Member States, the search for legitimisation of treaty change through public referendums – have not been present in the (negotiation of) the new treaty. Instead, the Lisbon Treaty has reverted back to the pre-Laeken practice with regards to language, negotiation method and ratification format, even though in substance it maintains the constitutional elements that the formal "constitution" contained.

This observation demonstrates that the Lisbon Treaty is, indeed, "constitutionalisation without the name" – the continuation of a process that began decades ago and is being carried forward despite the "failure" of the formal project to design a "European Constitution". Our analysis, on the basis of a conceptualisation developed elsewhere,<sup>12</sup> has demonstrated that neither was the Constitutional Treaty a radical break with the past, nor was the Lisbon Treaty a radical break with the constitutional project. In both cases there was a huge shift in the degree of formalisation of the constitutional process – a shift that, as the politics in the ratification phase have shown, has been hugely significant – but it did not change the underlying trend towards greater constitutionalisation. The thesis of a continuous process of constitutionalisation in the European Union, taking different forms at different times, is therefore confirmed rather than disproved by the experience of treaty reform since the turn of the century.

In terms of the future outlook, we can say that the signs are that constitutionalisation will continue further, but no formal constitutional project and probably no "ordinary" treaty reforms either, are likely to occur in the near future, for a number of reasons. Given the tortuous process by which the Union managed to arrive at the Lisbon Treaty, there is a certain degree of treaty reform fatigue detectable, both among governments and electorates. Even if the Lisbon Treaty is unlikely to last the "50 years" which Giscard d'Estaing had predicted the Constitutional Treaty would

last without revision, governments will seek to avoid another, major treaty reform in the foreseeable future. The Lisbon Treaty is, in many ways, a much more fundamental overhaul of institutions and procedures than either the Amsterdam Treaty or the Nice Treaty were. The Lisbon Treaty also includes a new article concerning the changes to the treaty revision

procedure. This article (Art.33) provides for both an ordinary and a simplified procedure for changing the treaties. This means that a major reform project would – again – require the convening of a European Convention, but it would also allow minor reform steps to be taken using a simplified procedure, the so-called *passarelle* clause, which allows the European Council, acting unanimously, to make changes to parts of the treaty, for example with regard to the

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extension of the ordinary legislative procedure into new areas.

If and when the Lisbon Treaty is ratified, there is then an expectation that constitutionalisation will continue further, even if the formal method of Constitutional Convention and Intergovernmental Conference is not applied. Thus, having moved from a fairly informal process of constitutionalisation to become highly formal and politicised in the context of the Constitutional Treaty, constitutionalisation is again reverting to a less formal process in the wake of the ratification failure of that treaty.

This analysis of EU treaty reform from Nice to Lisbon, via Laeken, demonstrates that there is a very close linkage between treaty reform and constitutionalisation. Treaty reform itself is best viewed in terms of a continuous process of constitutionalisation has both formal and informal dimensions. Looking at the period from the mid 1980s until today, it is evident that treaty reform has been a constant feature of the political life of the Union during this time. The project to draft and adopt a "European Constitution" must be seen in this context: it built on the previous rounds of treaty reform, and fuelled further treaty reform after the "constitution" itself failed (Christiansen and Reh forthcoming). The "Constitutional Treaty" may have turned out to be a brief episode in the integration process, but constitutionalisation, albeit under a different name, is very much alive and present.

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## NOTES

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- <sup>1</sup> The argument of this article is based on a book publication (Christiansen and Reh, forthcoming) where these themes are elaborated in detail. The author gratefully acknowledges the research assistance provided by Johanna Oettel.
- <sup>2</sup> For a detailed examination of the proceedings of the Convention, see Norman (2005); for an analysis of Giscard's leadership, see Kleine (2007).
- <sup>3</sup> For a detailed discussion of the motivations behind individual countries' choices in favour of holding referendums, see Closa (2007).
- <sup>4</sup> Denmark initially voted 'no' on the Maastricht Treaty, and then ratified the Treaty after a second, favourable referendum, and the Irish government lost a referendum on the Nice Treaty, which was then overturned in a second referendum.
- <sup>5</sup> See Best et al. (forthcoming) for a discussion of the impact that EU enlargement has had on the workings of the key institutions in the European Union. The contributors conclude that there is no significant detrimental effect on the efficient function of the EU institutions.
- <sup>6</sup> In the Lisbon Treaty IGC, the political level was almost entirely absent and detailed negotiations on the basis of the June

- 2007 mandate were conducted by a group of legal experts that was chaired, not by the Presidency, but by a senior official of the Council Secretariat.
- <sup>7</sup> Most observers agree that the Lisbon Treaty is essentially the Constitutional Treaty, minus the name, the flag/symbols clause, the title of the Foreign Minister and the terminology for EU legislative acts. Ways of "measuring" the degree of congruence between the two treaties differ, but according to some analysts the Lisbon Treaty is more than 90 per cent identical with the Constitutional Treaty.
- <sup>8</sup> When one-third of national parliaments object to a proposal, the Commission has to consider whether to maintain, amend or withdraw the legislative proposal; when the majority of the national parliaments object, and the Commission still wants to press ahead with its proposal, the European Parliament, and the Council consider both sides of the argument and come up with a decision.
- <sup>9</sup> Special provisions were given to Denmark and the United Kingdom.
- <sup>10</sup> Special provisions were given to Poland and the United Kingdom.
- <sup>11</sup> See Hagemann (2007).
- <sup>12</sup> See Christiansen and Reh (forthcoming).