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The Constitutional Treaty within a Fusion Trend?*

The ‘Draft Treaty establishing a Constitution for Europe’ – hereafter quoted as ‘the constitutional Treaty’ – marks a fascinating stage of the European integration process and the proceedings of the ‘Convention on the future of Europe’ will continue to deserve closer scrutiny for some time to come. At the heart of these debates we find a number of essential questions, the answers to which will shape our perspectives on the constitutional development at large. Should it be the case that the Convention has arrived at the formulation of a proper constitutional document which ventures to create “a special area of human hope”?¹ Less optimistically, might the proposed document enter the annals of integration merely as an additional “draft of a European Constitution”² when viewed with sufficient historical hindsight? Alternatively, we could turn our attention to the Convention as a new mode of treaty reform and ask whether its composition and working method have produced particularly innovative results in a step towards further constitutionalization?³

I. Expectations and Consequences

Undoubtedly, the spectrum of opinions and assessments on this matter is bound to be considerable. Further debates taking place in the context of the intergovernmental conference (IGC) and the ratification process in all 25 member countries, some of which require national referenda, cast a shadow of uncertainty – not least over the question if and how the text of the present proposal could be translated into binding norms for a ‘living constitution’.⁴ More importantly even, will policy makers incorporate the new body of rules into, through or alongside the institutions of the Union in everyday life, and if so, how? And finally, will the opportunities and constraints of the ‘legal constitution’ be applied consistently to both functioning and effectiveness of the institutions in practice?

The finding of answers to such difficult questions requires an intensive discussion; this chapter seeks to contribute three principal ideas. Firstly, to explore the main procedural and institutional changes suggested in the constitutional treaty. Secondly, to trace the lines – or sometimes steps – of development, which map the process of constitutionalization; and lastly, to evaluate the findings from a distance and place them in a larger theoretical context.

The proposed constitutional Treaty should thus be analysed without political emotion, but in terms of its opportunities, obligations, and constraints. In an historical analysis of the constitutional Treaty, so our contention, a number of important provisions amplify tendencies and characteristics which have formulated and intensified during the development of the modern state, and especially so since the Single European Act (SEA) 1986.

This underlying hypothesis permits to venture on an assessment of the constitutional Treaty by drawing from the collected experience with the evolving legal basis. An empirically informed trend analysis should nevertheless be cautious, as any prognosis of the Union’s evolution must take into account – as it did in the past – changing international political and economic conditions. An extrapolation should not assume the legal basis and treaty provisions to be the only variables, while holding the political environment constant. Deeper ‘guiding visions’⁵ – as the expression of wider ‘world views’

– are as much subject to continuous revision and refinement as are dominant constitutional ideas and concepts⁶. Future decision makers could view their actions within this proposed constitutional frame⁷ against the background of a significantly different institutional *Leitmotiv*⁸ than the one presently assumed by the members of the Convention. The ongoing “construction”⁹ of such basic understandings¹⁰ will continue to shape the interpretations of the constitutional Treaty in the future. Thus, the present experience of past practice cannot be a rigid component of any prognosis – the economists’ assumption of ‘ceteris paribus’ has its methodological limits. It is inevitable that analysts, decision makers and citizens will have to speculate – to some extent – over the real effects of the constitutional Treaty and whether it will succeed in taking “democracy, transparency and efficiency”¹¹ of the Union a step beyond the Nice treaty.

II. Old and New Approaches

The Shadow of Uncertainty: Typical Strategies of the Convention

From underneath the ‘veil of ignorance’ about the future, it is not a straightforward matter to attempt a valid assessment of the effects of the written constitution. This uncertainty also influences the behaviour of the participants in the Convention as well as in the IGC. The uncertain shadow of the future as to how exactly such a binding set of norms will function, typically prompts two strategies, both of which the Convention employed in its proceedings. On the one hand, present right bearers, be they national governments or institutions of the Union, aim to minimise potentially uncontrollable risks, by ‘cementing’ the status quo in very detailed provisions and clauses, which intend to prevent possible future obligations exceeding the present political will. As a result, the courage to conceive of a new architecture in support of what could be a more effective Union falls short of the motivation to safeguard current arrangements and spheres of influence. The tendency to preserve and reserve national positions is most pronounced in matters, which were previously not included in the Treaty, or those closest to the heart of national governments. The formulations in the field of the ‘Common Foreign and Security Policy’ (CFSP) are but one example of such firmly entrenched, constitutionally guaranteed fallback positions. State-centred, intergovernmental perspectives thus continue to dominate some areas of policy making in the Union. On the other hand,

however, the Convention has developed formulae facilitating a more flexible common response to future challenges through amendment procedures which permit the adoption of new laws, or ‘framework laws’, without the need for a renewed Treaty revision. A new clause opens up such a possibility (‘Passerelle’ Art. I-24 Para 4 and Art. I-39 Para 8), and thereby further enables and empowers the European Council, which disposes of this instrument. The two strategies, thus, point in two opposite directions: towards maintaining national positions and the right to veto; and towards opening the gates for more flexible workings of the institutions.

Towards a State-like Agenda

There is one major feature, which runs consistently through the entire constitutional evolution and previous rounds of Treaty reform. The members of the Convention, as before the “Masters of the Treaties”¹², continue to attribute traditional and even new competences and functions to the institutions of the Union. The constitutional Treaty does not shy away from integrating political domains, which were taken from a previously exclusive realm of the state. Beyond the core themes of trade, currency and foreign policy, the Convention anchors other traditional components of national sovereignty firmly in the constitutional Treaty text. The additional provisions for the “area of freedom, security and justice” (Art. I-41) widen the scope of Justice and Home Affairs (JHA) (Art. III-158). Furthermore, there are “specific provisions for implementing the common security and defence policy” (Art. I-40 and Art. III-210 – 214) which timidly lay the foundations for what could become a military assistance clause (Art. I-40 Para 7 and III-214). While making explicit reference to the existing structures of the United Nations and NATO and the resulting “rights and obligations”, it has become an explicit intention of the Union to define a common policy in this area and to put it into the framework of the constitutional Treaty. However, the envisaged regulatory depth varies across these sectors and there remains a rather unequal allocation of competences between CFSP/CFDP on the one side and the core building blocks concerning economics, and increasingly also JHA, on the other side. Part II of the constitutional Treaty further incorporates a ‘Charter of Fundamental Rights of the Union’; also the domain of ‘space’ has now become a ‘shared competence’ between the Union and Member States (Art. I-13 Para 3).

More generally, it can be observed that the last stronghold of nation state competences – its *domaine réservée* – is slowly but noticeably eroding. As a consequence, the borderline between traditional corner stones of national sovereignty and issues situated at the margin is blurred. For what concerns the list of objectives, which the Union sets out to pursue as stated in Art. I-3, the classical distinction between “high and low politics”¹³ can no longer be drawn so sharply. The constitutional Treaty is thus extending the catalogue of attributed competences and functions of the Union to an almost ‘state-like’ agenda. Already the Maastricht treaty signalled that the Union was understood to be more than merely a special association¹⁴ for a limited economic purpose and the Convention articulates even more through the constitutional Treaty that it continues to view the EU as a comprehensive, political system which ought to be strengthened, developed and enhanced further. In short, the trend can be said to point towards a catalogue of functions, which is analogous to that of the state, but as it stands, these functions are not (yet?) pursued quite in the same way.

Overcoming the Pillar Architecture

One central motivation of the Convention was to replace the patchwork, which is currently forming the legal basis of the Union. The pillar architecture had resulted from earlier voluntary cooperation in matters of politics, and incremental pragmatic agreements in the area of justice and home affairs. This legal foundation was first spelt out fully in the Maastricht treaty and subsequently came to be modified by the revision of Amsterdam, and it remains an intricate arrangement. Contrary to some assessments and best intentions of the Convention, relevant characteristics of the pillar construction still exist and continue to apply – masked through only slightly different labels.

As a substitute for the pillar structure, the constitutional Treaty envisages a unitary legal basis as documented through the establishment of the Union’s “legal personality” (Art. I-6). It suggests a single consistent logic for the “Categories of competence” (Art. I-11) and the “Legal acts of the Union” (Art. I-32). Such a simplification could prove to be a useful and workable concept and constitute a considerable improvement with regards to terminology and “transparency”¹⁵. The exact degree of innovation the Convention was able to bring to the attribution of competences and simplification of instruments¹⁶ is, at

this stage, difficult to evaluate. The change of terms, for example “European framework law” instead of the previous notion of “directive” (Art. I-32 Para 1), is not – in itself – sufficient for a major change. While such smaller steps are of importance, they can be no more than a starting point for further-reaching considerations. The constitutional Treaty has gone some way in achieving a consolidation of the existing legal basis, but for a deeper analysis, attention should be drawn to the finally relevant parts: “The scope and arrangements for exercising the Union’s competences shall be determined by the provisions specific to each area in Part III” (Art. I-11 Para 6). There, some already existing provisions are kept, while others are modified.

Despite the unified legal basis and legal instruments, the suggested procedures are still significantly differentiated; it would require a separate examination to give an estimate of how efficiently the instruments are likely to operate in their respective policy areas. It is noticeable that through the explicit definition of “specific provisions for implementing common foreign and security policy” (Art. I-39), the “common security and defence policy” (Art. I-40), as well as the “area of freedom, security and justice” (Art. I-41), the draft Treaty upholds, at least in part, what it sought to eliminate: the existence of policy-specific rules and, thereby, the continuation of the pillar structure. Such procedural difference can be shown by contrasting the different modes of decision making as laid out in the constitutional Treaty (see table 1a, b and c):

When comparing selected areas, it becomes apparent that the variation of procedures is smaller for the realm of exclusive competences, and for the “area of freedom, security and justice”, while the rules governing CFSP are still more diverse with respect to those other policy fields. The specifics of different policy areas, coupled with existing traditional provisions, meant that the Convention could not consistently install a fully unified procedure.

Such distinctions are not uncommon in national constitutions either, and it is only to be expected that procedures of decision making would not always be identical: there are intrinsic differences between monetary interventions by a central bank, a legislative act concerning environmental protection or activities by a foreign ministry to deal with human rights violations in third states. Nonetheless, even when bearing in mind such

distinctions as conditioned by the policy field¹⁷, the degree of procedural differentiation in the Union remains high.

Reduction in Procedural Variation: Towards ONE 'Ordinary' Community Method?

The Convention set out, more than previous rounds of treaty reform, to consolidate the legal basis and, importantly, simplify procedures. Whether it has achieved a visible reduction in the complexity of decision making to a smaller number of key procedures is best probed by filtering the entire text. In fact, in the case of two decision procedures, the draft treaty continues the trend towards favouring what is commonly understood by the 'community method'. It increases the number of cases where qualified majority voting (QMV) is used in the Council by 24, to a total of 156 articles. The European Parliament (EP) obtains powers of 'codecision' – which has been renamed in "ordinary legislative procedure" according to (Art I-33) – in 85 instances, an increase of 30 as compared to the Nice treaty.

It can be seen in table 2 that the "ordinary legislative procedure" coupled with the modalities of QMV in the Council have become a leading, if not yet exclusive procedural pattern. As far as the overall level of variation is concerned, the Convention has reduced the number of different formulae only slightly from 50 to 48.

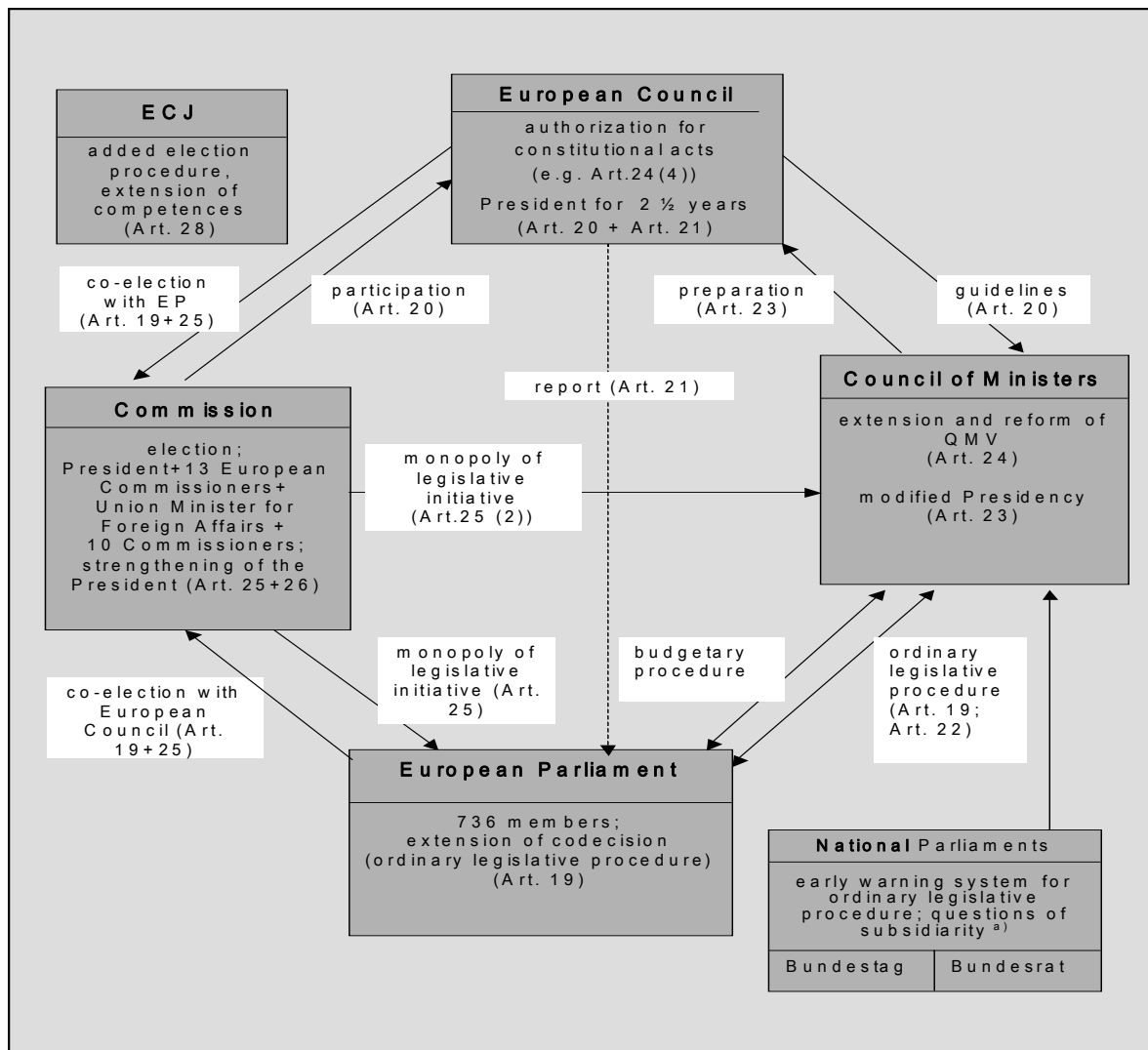
This categorisation is not necessarily final, as the European Council has been empowered by means of the 'opening clause' (Art. I-24) to change the "special legislative procedure" (e.g. Art. III-170 Para 3) into an "ordinary legislative procedure". The Convention has introduced this possibility especially in the "area of freedom, security and justice".

With regards to the scope of policies and the decision making procedures, the constitutional Treaty has clearly shown two trends which steadily occur throughout the constitutional evolution of the Union. On the one hand, there has been a tendency to widen the policy scope of the Union, and extend it to fields in the vicinity; and equally, there is a continuous process of deepening, or a 'communitarization' of decision making, as exemplified in the consolidation of existing rules and the renewed increase of the use of 'codecision'.

III. The Revised Institutional Architecture

Another aspect central to a trend analysis is concerned with scrutinising the articles defining the institutional architecture (see diagram 1) and test them for their innovative potential. It emerges that the Convention has reformulated and partly added to a number of important provisions, though the overall result is not striking. The impression cannot be avoided that a previous feeling of confusion over the institutional landscape comes to be replaced by a new sense of uneasiness.

diagram 1: Additions and revisions of the institutional architecture



^a See: „Protocol on the role of National Parliaments“, in: Draft Treaty Establishing a Constitution for Europe 2003, pp 271-2 Source: own

The European Council

The European Council has undergone a number of significant revisions. While it is now a proper organ of the Union (Art. I-18 Para 2), its actions are nevertheless not subject to judicial review by the European Court of Justice (ECJ), according to Art. III-270 Para 1. At the same time, the European Council has been entrusted with the execution of a number of new tasks (Art. I-20). Firstly, it is conceived to perform wider constitutional functions, and thus participate more directly in shaping the backbone of the Union. Through the “Passerelle”, the Convention will empower the heads of states and governments to change procedural rules – in what resembles a constitutional act – by a unanimous vote (Art. I-23 Para 3, Art. I-24 Para 4 and Art I-39 Para 8). The European Council is also the central decision maker for special procedures, such as the “Suspension of Union membership rights” (Art. I-58) as well as the “Procedure for revising the Treaty establishing the Constitution” (Art. IV-7). Furthermore, it is likely to exert a high degree of political influence and control over the leadership within the Union through its rights in key elections, such as for the office of the President of the Commission, the President of the European Council and the Union Minister for Foreign Affairs. In these cases, a veto by a single member is not possible, which should have positive effects by enabling the European Council to act without greater difficulty.

To further contribute to the strengthening of this institution, the constitutional Treaty envisages the creation of a new office: the installation of a President of the European Council (Art. I-21), to be elected by the heads of governments only, i.e. without participation of the European Parliament, for a period of two-and-a-half years. While the exact profile of this position is only vaguely sketched out, the future President – as contrasted with the current system of 6-monthly rotation – is hoped to professionalize, stabilize and facilitate the work of the European Council, thus preparing the grounds for the continuing unanimous, or consensual, decision-making within it. A further task of the President would be the external representation of the Union “at his or her level and in that capacity” in a manner “without prejudice to the responsibilities of the Union Minister for Foreign Affairs” (Art. I-21 Para 2). This formulation hints at the potential

conflicts between these two positions. Such difficulties will have to be settled in the living constitution.

While the President of the European Council does not have any procedural rights at his disposal, he/she will serve as a 'face' and 'voice' of the organ, which after all possesses more than a mere symbolic power over a number of tasks. The European Council has been planted more determinedly into the institutional landscape so as to impact on and interact with the other branches of EU government. How effectively the President will be able to chair the European Council, drive forward its work and exert influence on other positions within the institutional landscape will probably depend foremost on his/her reputation amongst the heads of government. If they grant him full support, this new office will be of major importance in the future architecture. If not, the role of the President may come to be reduced to that of a press officer for the European Council.

The European Parliament

The position of the European Parliament has been confirmed and strengthened within the new layout of the constitutional Treaty. This is not least because of the extension and enhancement of the "codecision" or "ordinary legislative procedure" (Art. I-33 Para 1 and Art. III-302). The work of the Council of Ministers and the Parliament are thus more strongly intertwined and resemble, more than before, a 'bicameral system'. Despite numerous suggestions concerning the election of the Commission president, the present procedure of the Nice Treaty has hardly been revised. The European Council continues to have the right of proposing the candidate, though additionally, it is supposed to take into account the results of the parliamentary elections after appropriate consultation of the delegates (Art. I-26 Para 1). The EP lacks, however, an important constitutional right: parliamentary consent is not necessary in matters of amending the Treaty establishing the Constitution (Art. IV-7). At the same time, Parliament's opportunities for contributions were extended so that it can submit own draft proposals for amendments (Art. IV-7 Para 1) and participate through the Convention in the preparation of recommendations to the intergovernmental conference (Art. IV-7 Para 2).

The status and importance of the EP in the legislative procedure have been consistently on the rise. Despite this growing influence, however, there are no means to dissolve the EP during its regular five-year period, as the constitutional Treaty does not envisage any such procedure of dissolution. The possibility for the EP to block the internal process could have serious consequences for the ability of the Union to work effectively.

The proposed constitutional Treaty also establishes a qualitatively new parliamentary component within the institutional configuration. A so-called ‘early warning system’ allows national parliaments to enter the debate on proposed legislation by voicing reservations or objections on the grounds of the principle of subsidiarity. If deemed necessary, they can proceed to have the validity of their positions judged by the European Court of Justice. For one, through the closer involvement of entire national parliaments, the Convention has again increased the procedural complexity – with the consequence that the precise locus of political responsibility for a legislative act is further obscured. Further, not only national governments but also oppositions may thereby gain access to the European legislative process, a *modus operandi*, which constitutes a break with the parliamentary logic of the Member States¹⁸ themselves.

The Council of Ministers

One focal point of reform regarding the workings of the Council of Ministers is the extended use of QMV (see table 2) while preserving the right to veto certain decisions in some cases. In areas, traditionally of special importance to individual member states as well as for constitutional acts of the Union, the Convention reconfirms unanimity voting. In the domain of CFSP, decisions between the European Council and the Council of Ministers are generally sought unanimously, with the exception of elections or appointments (Art. I-39 Para 7). Even if the Treaty allows for some exceptions in that field, it simultaneously offers national ‘fallback positions’ in the renewed form of a revised Luxembourg compromise. Furthermore, the hurdle for a qualified majority has been lowered. The rather complicated calculation of a certain percentage of the weighted votes, which formed the basis of voting until today, has been discarded in favour of a combination of two factors: the majority of Member States and the representation of 60% of the Union’s population (Art. I-24). The Federal Republic of Germany stands as one of

the winners of the new rule, as the attainment of a blocking minority is thereby facilitated. Spain and Poland, which enjoyed a disproportionate number of votes – especially in relation to the size of their respective populations – might suffer a comparative loss.

As a ‘working horse’, the legislative and General Affairs Council (Art. I-23) shall continue to ensure consistency in the work of the Council of Ministers. In its function as legislator, the formations should include one or two representatives at ministerial level with relevant expertise. This form of division of labour within the Council reinforces a central position for European affairs even within national politics. The words of the constitutional Treaty provide a sustained incentive to create the position of a national Minister for European Affairs,¹⁹ or raise their profile where they have played a rather subordinate role – as is the case in most Member States. Such a promotion may prove less likely to ensue where ministers or even heads of government, who are currently entrusted with this task must fear the loss of influence. The Presidency for the different formations of the Council is to be determined by the European Council for at least one year, instead of the biannual rotation mechanism, while respecting the “political and geographic balance” in Europe (Art. I-23 Para 4).

The new provisions aim to professionalize the presidency as the central locus of political activity in the Union. The risk of appointing inexperienced civil servants and politicians, whose capacity or willingness to reach consensus may be small, could thus be diminished. What is lost in the new design, however, is the national public mobilisation which often accompanies the beginning of a presidency.

The Union Minister for Foreign Affairs

The creation of an office for a ‘Union Minister for Foreign Affairs’ stands as the most central innovation of the proposed institutional architecture. It is another attempt, in line with past efforts, aimed at promoting the efficient cooperation between the Member States, as well as ensuring the “consistency between the different areas of its external action and between these and its other policies” (Art. III-193 Para 3). The Minister for Foreign Affairs functions, at the same time, as the Vice-President of the Commission;

this constitutional set-up places him in a remarkably demanding environment, especially because the expectations invested in his office are high while the instruments at his disposal are limited. The Convention has intended to locate the Minister in a position of strong inter- and intra-institutional tension²⁰. It is hoped that he will advance the objectives of the Union through far reaching proposals and activities on the one hand, yet as president of the Foreign Affairs Council, his main objective must remain – not least because of the dominant use of unanimity – the forging of consensus among the Member States. In fulfilling his duties, he will have to reconcile different political interests not only of Member States, but also of Commission ressorts and relevant interest networks. Through his creation, the constitutional Treaty intricately fused two positions which, given their institutional setting, do not always pull in the same direction.

The Commission

The constitutional Treaty intends to further reinforce the scope of action of the Commission. Its former profile of tasks and prerogatives, including the right to legislative initiative has been reconfirmed, quite against proposals to the opposite effect. The compromise, which was reached over the composition of the Commission, may not be uncommon for the Union, but it is not convincing (Art. I-25 Para 3). The College is envisaged to consist of 15 “European Commissioners” with full voting rights and “non-voting Commissioners” coming “from all other countries”. At the same time the position of the President is unambiguously strengthened (Art. I-26) and his leadership may be particularly crucial to avoid the building up of unproductive tensions between the two different classes of Commissioners in order to safeguard the effectiveness of the Commission’s day-to-day working practice. The ‘magic triangle’ between the leading role of the president, the collegiate principle and the individual members’ area of expertise cannot be squared. The leadership role of the President is markedly defined vis-à-vis his colleagues and the original founding idea of the President as ‘primus inter pares’ appears to have been replaced, at the expense of the traditional collegiate principle. However, this concept was not consistently applied. Following its own logic, the Convention ought to have introduced the option for of a censure motion directed only at the President.

Instead, the old formula was kept and the European Parliament can only target the Commission as the College.

Personalisation and Politicisation: New Institutional Tensions?

The detailed analysis of the present constitutional Treaty thus manifests a somewhat remarkable finding. The proposed reform could in effect contribute to a strengthening of *all* organs of the Union²¹. One result of such institutional upgrading can be seen in a trend towards personalisation, as high politicians gain new means of influence. As a consequence, it is to be expected that the heads of government, as much as the European Parliament, will intensely politicise the elections for key positions. As for previous rounds of Treaty reform, the “Draft Treaty establishing a Constitution for Europe” has not ended the ongoing debate whether the Union is best described by either an ‘intergovernmental’, ‘supranational’ or ‘community’ terminology and whether its nature can be best characterised by either of them. In fact, given the considerable differences of opinion from the outset, a consensus over the present document is likely to have been achieved mainly because of the significant number of ambiguous provisions – of which there are now more than after previous rounds of Treaty reform. Bearing in mind the strong inter- and intra-institutional tensions set out in the Treaty, the future Union may increasingly become an arena for passionate fights over competences between a number of key office holders. The equilibrium point of institutional balance will then be determined through the daily application of the new Treaty provisions in the living constitution. A first experimental phase of constitutional practice could proceed to set the precedents, which in turn, could hint at the possible future of the Union’s real institutional configuration.

Variation of flexibility

With regards to forms of flexibility, the Convention has included a number of provisions, which confirm, complement or change such existing options. One such example is a revised version of the “Flexibility clause” (Art. I-17), which enables the Council to extend its powers into previously unspecified fields in pursuance of the general objectives of the Union. This requires a unanimous vote and the consent by the European Parliament after

“drawing national Parliaments’ attention to [these] proposals”. Despite its restrictive formulation, this clause allows the future generation of politicians to react more flexibly to unforeseen challenges.

The idea of “Enhanced cooperation” which originated in the Treaty of Amsterdam was again taken up in the constitutional Treaty, though with a number of new formulations (Art. I-43 and Art. III-322 – III-329). This provision is tied to a series of conditions and constraints; thus the incentives to actively use this option are rather limited. Based on the sobering experience with its predecessor, which remained an inactive device confined to the realm of theoretical possibility, it is not clear that the article on enhanced cooperation could provide an appropriate tool for states with further reaching ambitions. Equally uncertain will be the effect of the newer forms of “structured cooperation” (Art. I-40 Para 6 and Art. III-213) and “closer cooperation” (Art. I-40 Para 7 and Art. III-214) in matters of defence. It remains to be seen, whether these mechanisms can offer more incentives for common action than forms of cooperation outside the limits of the Treaty; but the temptation for a “core Europe”²² or a “pioneering group”²³ in the sense of a ‘directoire’ is not sufficiently excluded by the constitutional Treaty.

The “Voluntary withdrawal” clause (Art. I-59) represents a new form of flexibility as introduced by the Convention. An expulsion, however, is not foreseen – only a “suspension of Union membership rights” (Art. I-58) following a serious violation of the Union’s values. That the withdrawal clause could be used in the European Council to pressure or force some members or a small group of states to exit the Union, for example because of their unwillingness to ratify constitutional amendments (Art. IV-7 Para 4), is improbable so long as those countries view membership in the Union as advantageous. Indeed, should any Member State decide to withdraw, this would constitute a step towards disintegration and mark a major shift in the Union’s development ever since its inception. However, the likelihood of such a move should be assessed in terms of its subsequent costs and benefits. It can be argued that the Treaties have consistently created real opportunities, which could be fully materialised only through membership of the Union. The realisation that an ever increasing interdependence may require closer cooperation and the pooling of sovereignty, even for the successful pursuit of specific

national interests, places considerable incentives and rewards in the direction of further integration. By the same token, the costs of withdrawal, potential and real, economic and political, are rising substantially.

Larger countries could, however, use the threat of exiting as a tactical move to necessitate renegotiations – an option which could significantly destabilise the political system. National electoral campaigns could serve as a platform for such a strategy of intimidation aimed at the Union but only insofar as the arguments employed resonate sufficiently among the electorate. The success of such a route thus depends upon the credibility and persuasiveness of its supporting ideas. Another possibility of using this voluntary withdrawal clause is the common exit of a core group of states. The founding states, for example, may decide to push further than others and subsequently agree to appropriate forms of partial integration with the more hesitant newer members. It is, in the absence of concrete experience, a matter of speculation whether such a course of action could be preferable over the employment of the enhanced cooperation clause, but it cannot, in principle, be excluded.

IV. A constitutional change of the EU system?

A Trend towards Fusion?

The presented results allow a first tentative answer to the question, whether the singular working methods of the Convention have given the constitutional evolution a qualitatively distinctive momentum following a different path than previous rounds of treaty reform. Or rather, do the proceedings reveal a further step in a continuous and consistent trend towards “an ever closer fusion”²⁴ – as stated in the above hypothesis? Undoubtedly, the present constitutional Treaty contains some novel provisions which are not quite like the results of previous reforms. It must nonetheless remain subject to further lively discussion, precisely in which direction these innovations are pointing. In the light of still varying changes of the constitutional Treaty, a final conclusion cannot yet be drawn. However, we can see the extension of the Union’s scope of policy, functions and competences. Furthermore, some sectors, such as the area of freedom, security and justice, show a clear step from non-binding agreements outside the legal framework,

towards increased decision making under Community auspices combined with the intensive participation of national governments. Other provisions – and newer ones – still show only a limited progression towards communitarization. Despite new remarkable formulations, CFSP remains one such example.

With respect to the institutional architecture, the constitutional Treaty strengthens an enduring development towards further institutional fusion²⁵. The concurrent strengthening and merging of community elements together with intergovernmental aspects can be observed most clearly in the office of the Union Minister for Foreign Affairs. Quite literally, even the two words ‘constitutional’ and ‘Treaty’ depict such a mixed evolution. It is to be expected that the heads of government will further mould the text in this spirit during the Intergovernmental Conference and, at later stages of its practical application, interpret the Treaty accordingly. In the light of this longer-term perspective, the impact and consequences of the Convention can be judged only tentatively. Until then, the constitutional Treaty will be exposed to instances of intense strain and stress: firstly in the negotiations of the IGC, further during the debates preceding its ratification in national parliaments and finally in its practical implementation from 2006 onwards. It seems at this present stage that the Union is eventually becoming a more comprehensive, increasingly inclusive policy area, in which decision makers from national as well as sub-national levels and different European institutions gradually come to coordinate their measures in a wider and more integrated communal system.

A Further Evolutionary Phase of the European State?

Beyond the theory of European integration, or the logic of fusion, the work of the Convention can be seen from an even larger historical angle. The future perspective enshrined in the preamble of the constitution stands as a demonstration that the current project is perceived to be but one instance in a long lasting tradition of state development since the end of the Middle Ages.

One notable observation constitutes a starting point for such an analysis: it is the fact that the treaty shows principal elements of traditional statehood, which go beyond a mere look

at the institutions and functions of the Union. While many members of the Convention emphasize the fact that the present “Draft Treaty establishing a Constitution” does not intend the creation of a state, they have inserted symbols commonly attributed to the nation state. The notion of Constitution alone follows in the footsteps of an established terminology commonly associated with forms of the state and its political order. The preamble of the Treaty propagates visions and missions, which go far beyond a community confined to functional tasks. Analogous to established constitutions, the charter of fundamental rights and, further, the values of the Union (Art. I-2 and Art. I-3 Para 1) intend to give meaning to a common identity and thus lend support to a wider Union of values. The most concrete depiction of this vision is expressed through the “Symbols of the Union” (Art IV-1) which comprise its flag, anthem, motto (“united in diversity”), currency and the Union-wide holiday (9th May).

While most of these symbols have more or less been established in the everyday life of the Union already, their inclusion into the constitutional document is reminiscent of nation states in their attempt to gain legitimacy and secure loyalty²⁶ amongst the political community through the creation of visible forms of identity and identification. The reference to solidarity, which appears no less than 18 times in the text, for example in the “Solidarity Clause” (Art. I-42), can help to construct a sense of community through social and civilian interaction – even in the deliberate absence of a binding military assistance clause.

These selected elements of the constitutional Treaty cannot simply be described in terms of a “postnational”²⁷ or postmodern era, or “governing beyond the nation state”.²⁸ The line of reasoning, rather, takes up the concept of the modern European state. In this context, the Union under the constitutional Treaty could be viewed as another stage of a long development²⁹ of the European State³⁰. From this analytical perspective, the current process of fusion, which is also reinforced in the constitutional Treaty, could characterise the present step in the century long evolution of the state.

Table 1: modes of decision making between the Council and the European Parliament

<i>1a: exclusive competence</i>								
Council \ EP	unanimity	4/5 majority	QMV	Special QMV ¹⁾	simple majority	no role	heads of government	SUM forms of EP-participation
no participation	6		6					12
report								
consultation	4		4					8
cooperation								
ordinary legislative procedure			5					5
consent								
SUM Council mode of decision	10		15					25
<i>1b: CFSP and CSDP</i>								
no participation	11		6	5				22
report								
consultation	1							1
cooperation								
ordinary legislative procedure								
consent								
SUM Council mode of decision	12		6	5				23
<i>1c: area of freedom, security and justice</i>								
no participation	1							1
report			1					1
consultation	4		2					6
cooperation								
ordinary legislative procedure			15					15
consent	3		1					4

SUM Council mode of decision	8		19					27
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1) Forms of special QMV:

- Qualified Majority according to Art. I - 24 Para 2 (2/3 of MS and 4/5 of the population),
- Qualified Majority without the vote of the MS concerned
- Qualified Majority with reference to the European Council

Source: Draft Treaty establishing a Constitution for Europe, 18. July 2003 (CONV 820/1/03 REV1; CONV 843/03, CONV 848/03, CONV 850/03). Table: Funda Tekin.

Table 2: decision procedures between Council and European Parliament – an overview

<i>Council</i> <i>EP</i>	unanimity	4/5 majority	QMV	Special QMV ¹⁾	simple majority	no role	heads of government	SUM forms of EP-participation
no participation	37		39	13	8			97 (-1)
report	6		8	2		3		19 (+14)
consultation	20		19	2	3		2	46 (+2)
cooperation								(-5)
ordinary legislative procedure	1		84					85 (+30)
consent	14	2	6	3	1	3		29 (+14)
<i>SUM Council - mode of decision</i>	78 (+9)	2 (+1)	156 (+24)	20 (+9)	12 (+10)	6 (5)	2 (+0)	276 ²⁾

1) Forms of special QMV:

- Qualified Majority according to Art. I - 24 Para 2 (2/3 of MS and 4/5 of the population),
- Qualified Majority without the vote of the MS concerned
- Qualified Majority with reference to the European Council

2) gezählt wurden alle im Vertrag genannten Verfahrens- und Abstimmungsarten.

Source: see Table 1

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