

An Appraisal of the Constitutional Treaty Proposed by the European Convention

On 10 June 2003, the European Constitutional Group has presented the proposal of a Basic Constitutional Treaty for the European Union.¹ It updates our proposal of 1993.² On 18 July 2003, the Convention for the Future of Europe has published its own final proposal.³ 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 constitution or 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.

Any constitutional proposal for the enlarged union must meet two objectives: it must close the gap between the people and the Union 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 of the status quo which are proposed by the Convention are crucial.

1. The Preamble is to be praised for emphasizing 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. That is not what a constitution is about. A constitution places constraints on the use of power by a majority.

2. Article I-1 is to be praised for confining the competencies of the European Union 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 coordinate 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 coordinated 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 coordination can be used that do not require the passage of Union laws. Even more important, 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.
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.

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.

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.

7. 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.
8. 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.
9. Article I-24 lowers the quorum for qualified majority decisions in the Council by eliminating the threshold of 72.3 percent of the Council votes and by lowering the required population share to 60 per cent. 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 per cent to 22 per cent.⁴ 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 (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).

10. Article I-25 perpetuates the Commission's monopoly of legislative initiative which enables the Commission to prevent any decentralizing 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 Union laws.
11. Article I-29 changes the status of the European Central Bank 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.
12. Article I-59 establishes a simple procedure for withdrawal from the Union. We have proposed a similar proposal, and we welcome this change.
13. 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). Art. 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" (Art. 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 (Art. I-7), the Charter in Part II is neither necessary nor desirable.

14. Part III extends the Union's powers to and in a number of fields, e.g., coordination of social and health policies (Art. III-107, para. 2, and Art. III-179, no. 2), research and technological change (III-148, no. 2), space policy (Art. 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.
15. 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" (Art. III-6), the instruments of the European Central Bank and the distribution of seigniorage (III-79, no. 5a), the "tasks, priority objectives and organization 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 no need for an industrial policy.
16. The average quorum for qualified majority decisions in the Council is reduced from 72.3 to 60 per cent (cf. no. 9). 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), coordination 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-146 ff.), public health (III-179 ff.), culture (III-181) and education, vocational training and youth (III-182 f.). These are not core functions of a union government. They ought to be left to lower levels of government.

17. Art. 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.
18. 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 with 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 (i) the parliaments of the Member States have only six weeks to complain with the Commission, (ii) the Commission is free to reject the complaint, (iii) 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 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. We, the European Constitutional Group, after analyzing the Convention proposal, have come to the conclusion that our alternative constitutional proposal is much superior in substance and more intelligible.

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¹ "A Basic Constitutional Treaty for the European Union" (forthcoming). At present, the document is available, inter alia, from the website <http://www.european-constitutional-group.org>

² European Constitutional Group, A Proposal for a European Constitution, European Policy Forum, London, December 1993.

³ European Convention for the Future of Europe, Draft Treaty establishing a Constitution for Europe, available from the website <http://www.european-convention.eu.int>

⁴ Richard Baldwin, Mika Widgren, Decision-Making and the Constitutional Treaty, Centre for European Policy Studies, Policy Brief No. 37, August 2003, available from the website <http://www.ceps.be>