

## The Convention scores a partial success

### The structure of a constitutional treaty has now been made public

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The Convention is currently passing through a phase which, in addition to hearings and strategic negotiations, calls for something which hitherto has been forced to play a low-key role: political leadership. With the preliminary draft for a constitutional treaty presented to the Convention on 28 October, President Giscard d'Estaing and the Praesidium have to a large extent fulfilled this requirement.

After no more than eight months of the Convention's work, the proceedings have unleashed such dynamism that it proved possible for the Praesidium to release the first draft earlier than had been anticipated. The structure that has now been presented represents the most important stage in the Convention's proceedings, for it

- provides for procedural target orientation;
- indicates a possible way of reordering the treaties in a transparent manner;
- integrates the points of consensus of the debates that have already taken place;
- contains important suggestions for reforms which go beyond the treaty regulations already in force;
- leaves open, despite a detailed structure, decisions with regard to particularly intractable matters.

### Provisions for procedural target orientation

The majority of the Convention is in favor of a constitution. President Giscard d'Estaing has once again emphasized the constitutional character of the document by referring to the draft as a 'Constitutional Treaty'. Thus the possibility of permitting the Convention to present a number of different options, which was provided for in the Laeken declaration, has been categorically excluded.

At the end of the proceedings there will probably be a constitutional text consisting of two main parts based on the 414 articles of the present treaties. Of these, as President Giscard d'Estaing explained on Monday to the Convention, 205 articles can be taken over largely unaltered from the treaties already in existence; 136 articles can be modified; and 73 articles would have to be substantially restructured. Thus, despite modifications and additions, it would be possible to combine the salient elements of the present treaties. The suggested subdivision of the constitutional text involves two main parts on the constitutional structure and Union policies and their implementation, which are complemented by a third part containing general and final provisions. Such a structure makes sense, since it explains to citizens the Union's values, objectives, and fundamental rights in the first part, which is of a constitutional nature. Furthermore, under Title II the link between Union citizenship and the EU Charter of Fundamental Rights can help to demonstrate to citizens the value of the European unification project. However, at the conclusion of the Convention's proceedings, the Charter of Fundamental Rights should be incorporated completely into the constitutional text.

#### Points of consensus from past discussions

In addition to the various suggested solutions for the constitutional incorporation of the Charter of Fundamental Rights, there is also, in the first part of the preliminary draft constitutional treaty, the reference to the legal personality of the Union under Article 4. Here again a final definition has been avoided. However, it is clear that a single legal personality represents an indispensable precondition for a constitutional treaty. This position is shared by a large majority in the Convention and in Giuliano Amato's working group.

Discussions in the Convention concerning the question of how to provide for various categories of Union competence have elicited considerably more controversy. The division into *exclusive and shared competencies as well as supporting actions* now included in the draft may provide an indication of the direction of ensuing debates.

With regard to monitoring the principle of subsidiarity, there is the implicit reference in Title III, Art. 8 to the early warning system proposed by the relevant working group headed by Mendez de Vigo - an excellent compromise which represents a balance between the legal and purely political surveillance mechanisms

**The preliminary draft Constitutional Treaty of the Praesidium CONV 369/02 can be found on the Convention homepage: <http://european-convention.eu.int/docs/sessPlen/00369.en2.PDF>.**

**Our model for a reform of the treaties is available under: <http://www.cap.uni-muenchen.de/konvent/grundvertrag.htm> in German, English and French.**

that have been discussed, but without increasing the complexity of European decision-making structures by involving an additional body with members drawn from national parliaments.

An additional point of agreement that has been included is the transparency of the Union's legislative debates (Part I, Title VI, Article 36). As President Giscard d'Estaing declared when presenting his draft to the Convention, the legislative debates of the European Parliament and of the Council shall be public.

### **New articles going beyond the current stage of the Convention debates**

#### ***The question of the Union's name, Part I, Title 1, Art. 1***

On various occasions President Giscard d'Estaing has recently emphasized that it is time to think about a new name, since the noun and not the adjective is of primary significance for the Union's citizens. For this reason the draft constitution lists as options 'The United States of Europe' or 'United Europe'. However, in the course of such a debate it should not be forgotten that the current name, 'European Union', has already had the effect of creating an identity for the EU 15, and has also elicited a positive integrational dynamism in the accession states. If the Convention fulfils its task and paves the way for a European Union which is transparent, capable of taking action, and democratically resilient, the Union will convince its citizens, and at the same time have the external effect of a 'seal of approval'.

#### ***Presidency of the European Council, Part I, Title IV, Art. 15bis***

Since the question of the institutional structure of the Union has not yet been the subject of discussion or of a working group, there are only headings here. However, at the presentation President Giscard d'Estaing mooted the idea of replacing the rotating system of the Presidency with a President of the European Council who would be elected for a set period. Yet this suggestion can only receive approval if it can simultaneously be ensured that the Commission and the Parliament will receive additional powers. In such a balanced institutional triangle the President of the European Council could assume important political leadership tasks primarily in the field of foreign and security policy.

#### ***Congress of the Peoples of Europe, Part I, Title IV, Art. 19***

This idea was also to a large extent mooted by President Giscard d'Estaing. However, a principle has emerged in recent months in the Convention's debates which will probably determine the response to this question: no institutional duplication or innovation! If the work of the Convention proves to be a success in the shape of a body based on broad legitimacy (EU + nation-states) with a brief to prepare the treaty changes within the framework of intergovernmental conferences, then nothing can be

said against retaining this institutional framework with what is now a familiar name, the ‘Convention’. An additional body without explicit powers should be rejected. Similarly, the concluding recommendations of the working group on the role of national parliaments headed by Gisela Stuart demonstrate that the incorporation of national parliaments in such a congress is not perceived to be a great improvement.

***Finances of the Union, Part I, Title VII, Art. 38-40***

According to President Giscard d’Estaing, provisions will be included here to ensure that the Union is fully financed by own resources. This is an important statement. However, hitherto the discussions in the Convention have hardly dealt with this issue. A great deal of intensive discussion is required, for example, to determine whether or not own resources are to be raised in the form of an EU tax.

***Union action in the world, Part I, Title VIII, Art. 41***

Here again the Convention has not provided a specific text which could form the basis for discussion. Some thought should be given, for example, to achieving common representation of the Union externally by the establishment of its own diplomatic service, which in a transitional period could complement the national EU missions, and later replace them. Overt support for common representation in international organizations should be welcomed. This point has already been discussed in the Convention, though it proved impossible to reach agreement. In this connection it is worth recalling a remark made by Peter Hain, the British government’s representative in the Convention: “We need no common representation - we need a common policy“. However, it should be pointed out that a common foreign and security policy can only be efficient if it is also mirrored in institutional terms, for example, in the form of common representation in international organizations.

***The Union and its immediate environment, Part I, Title IX, Art. 42***

Privileged relationships between the Union and its neighboring states will be listed in this article. This is a creative idea which could be formulated on the lines of a redefinition and reorganization of the association agreements with third countries. However, such an article should not lead to the establishment of new dividing lines between the enlarged Union and its neighbors.

***Withdrawal from the Union, Part I, Title X, Art. 46***

The possibility of a voluntary withdrawal of a state from the EU would seem to be imperative in a Union of 25 and more member states if called for by internal events in order to preserve the status quo and to ensure subsequent development. However, the possibility of withdrawal already exists, although there is no explicit article in the treaties to this effect. In view of the fact that such an article could also be negatively

instrumentalized by individual member states in the context of internal policy, it should be considered carefully to include such an article.

### **Examining the structure of the draft constitutional treaty with regard to coherence**

The draft which has now been presented sets out what has already received supported from the majority of the Convention. However, it also has the strength to include new ideas and suggestions for reforms which in the weeks to come will lead to exciting debates in the Convention and its working groups. Its president has, for instance, even made unexpectedly daring suggestions with regard to the reform of the European Council. In order to make it possible to discuss the important issue of institutional reorganization within the framework of the method prescribed for the Convention's proceedings, it is now time to set up a working group on the subject.

However, certain articles should be reexamined carefully with regard to both their inclusion in the present draft constitution and their efficacy. For example, it is unclear why Title VI in Part I, "The democratic life of the Union", needs to be listed as a separate title. Such subdivision suggests that it will overlap with Title II, "Union citizenship and fundamental rights". The same applies to Title VIII, "Union action in the world", and Title IX, "The Union and its immediate environment". The logic of a constitutional treaty would make it seem apposite to integrate them into the common foreign and security policy area, and if there were to be a decision in favor of common external representation, to include an appropriate reference in the institutional part.

After the initial months of the Convention's work the overall picture that emerges from the preliminary draft makes it possible to predict that the results will be convincing. The draft combines the results of the negotiated agreements, and its numerous new reforms will be a spur to the next phase of the Convention's work - the Convention has certainly scored a partial success!