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The Making of a Transnational Constitution: An Institutionalist Perspective on the European Convention

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No matter how one evaluates the product of its work, the Convention on the Future of Europe has marked a turning point in the history of European integration. Up until then, Member States' governments played an essential role in institutional reform because it was carried out through treaty changes. The diplomatic conferences mandated to organize these reforms brought together governmental delegates. Since the treaties could only be modified with the agreement of all of the states, each of them enjoyed a veto power. This very classic system reflected the original nature of the European Communities, then of the European Union: an international organization, admittedly atypical, whose powers have continually increased (in number and scope) over the years, but in which Member States had no intention of giving up their most fundamental power – i.e. the power to determine who does what, their '*pouvoir constituant*', the *Kompetenz Kompetenz*. Therefore, any treaty modifications required negotiation between Member State governments.

The December 2001 Laeken Declaration, the Convention's birth certificate, was inspired by a desire to break with this purely intergovernmental logic (Laeken Declaration, 2001). For the first time, the governments, acknowledging the quasi-failure of Nice, agreed to share part of their power to define the fundamental rules with other actors: they entrusted an enlarged assembly with the task of proposing new reforms. Delegates from parliamentary assemblies (national and European) along with Commission representatives were asked to join the governmental delegates, who even became a minority within the Convention. Plans were also made for a structured dialogue with civil society. As for the rules of the game, the Declaration provided that the Convention would decide by 'consensus', not by unanimity.

But, the Declaration did not specify how to assess if 'consensus' had been reached, stating only that the candidate countries could not block decision-making. It was equally vague as to the desired outcome(s) of the exercise. Although it raised a long series of questions, the Declaration left open the way in which the Convention was to address them, alluding only to 'a final document which may comprise either different options, indicating the degree of support which they received or recommendations if consensus is achieved'. Rather, the possibility of a constitution was contemplated as a long-term prospect. This idea gained credit as the President of the Convention, Valéry Giscard d'Estaing, spoke of a 'Constitutional Treaty' at the inaugural session and later of a 'Constitution' (Giscard d'Estaing, 2002).

The Declaration was very precise on one point: whatever the result of its work, the Convention was to be followed by an Intergovernmental Conference (IGC). It is easy to understand why: in order to calm the fears of some governments about this more open process, they were given the right to scrutinize the assembly's work (Magnette and Nicolaïdis, 2004). As will be seen, this safeguard played an important role especially at the end of the Convention.

Regardless of these ambiguities, the Convention was immediately seen as an innovation, half way between two alternative formulas. While its diversity and the publicity surrounding its work broke with the classical formula of Intergovernmental Conferences, its

members – the majority elected officials – had not been elected in order to participate in the elaboration of a new fundamental pact: it was not a constituent assembly.

This hybrid formula is the source of numerous questions. To what extent did it produce results noticeably different from those of reforms negotiated by Intergovernmental Conferences? What were the strategies pursued by the various actors participating in the work of the Convention? Which elements most strongly influenced the eventual outcome? Our study focuses primarily on the process of elaborating the draft constitution rather than on the final document itself, though the outcome inevitably sheds light on the debates that preceded it. Given our interest in the Convention, the period we survey ends with the adoption of the draft Constitution in June-July 2003. We do not intend to discuss the work of the ensuing IGC, but will sometimes refer to its final product in order to assess the resources held by national governments.

This article is divided into three parts. The first presents the different actors who participated in the Convention and the cleavages that existed within the assembly. The second part addresses the impact of these cleavages and the logics that shaped the final compromise. In the third part, we will attempt to analyze the respective importance of these various decision-making modes and the variables that determined their relative influence. Going beyond the classical opposition between deliberation and negotiation often used to describe the work of the Convention, we will argue that the choices made on the composition and functioning of the Convention had a strong influence on its work, and therefore, on the substance of the draft constitution.

I. The Convention Actors, Organization, and Cleavages

During the Laeken European Council, the Heads of State and Government took up the idea of a heterogeneous assembly comprising members not only from the various Member States, but also from different institutions. This Convention method had been used in 2000 to draw up a European Charter of Human Rights and it was largely viewed as a success (Deloche-Gaudez, 2001). In Laeken, the ‘creators’¹ of the European Convention even increased the size and heterogeneity of the assembly by inviting representatives from the candidate countries.

1. A Large and Heterogeneous Assembly

In hindsight, the hopes raised by the European Convention may astonish, as it was a rather large body whose numerous members could face difficulties agreeing on common decisions.

The plenary sessions for the European Convention included *up to 207 members*, excluding observers.² The distinction made in the Laeken Declaration between full members and alternates could have reduced the Convention to 100 or so members. President Giscard d’Estaing, in particular, tried to play down the alternates’ role, in order to both limit the size of the assembly and favor the emergence of a true ‘spirit of the Convention’ (*esprit de la Convention*). The rules of procedure³ provided that alternates could only take part in the

¹ We use this term in the same fashion as Jon Elster (Elster, 1994).

² The Laeken Declaration provided that three representatives from the Economic and Social Committee, three representatives of the European social partners, six representatives from the Committee of the Regions and the European Ombudsman would be invited as observers.

³ In response to critics, the ‘Draft Rules of Procedure’ (CONV 3/02) was amended by the Presidium and re-baptized ‘Note on Working Methods’ (CONV 9/02). The provision stipulating that ‘an alternate may take the

discussions in a member's absence. Nonetheless, many elements mitigated this distinction. First of all, this provision was not always respected. More importantly, like full members, alternates could submit written contributions to the Presidium and participate in working groups. They could also 'propose' amendments to the various draft articles. Their support was even sought by full members as they could help produce a "mass effect" against the Presidium⁴.

Not only was the Convention larger than an Intergovernmental Conference, but it was also much more heterogeneous. Its members were drawn from four different kinds of institutions (national governments, national parliaments, the European Parliament and the European Commission). Each category – the 'institutional components' in the language of the Convention – appeared in turn fairly heterogeneous.

The *national governments*, the only actors present in Intergovernmental Conferences, were a minority in the Convention with only 15 members. Even if one includes the representatives from the 13 candidate countries who participated in the Convention (including Bulgaria, Romania and Turkey), they barely represented a quarter of the Convention members. The governments' representatives also formed a very heterogeneous component. The Laeken Declaration made a distinction between Member State and candidate country representatives. According to the Declaration, the latter were not 'able to prevent any consensus which may emerge among the Member States'.⁵ Nonetheless, two factors played down the impact of this distinction. On the one hand, the uncertainties surrounding the concept of consensus limited the practical consequences of this arrangement, which was in any case difficult to apply. On the other hand, by finalizing in December 2002 the accession negotiations with 10 candidate countries and providing that they 'will participate *fully* in the next Intergovernmental Conference', the Copenhagen European Council implicitly enhanced their status within the Convention.

Although the differences in status progressively lessened, the representatives of national governments never presented a united front on fundamental issues, notably as regards the division of powers among the European institutions. The national government component part was crisscrossed by numerous fault lines (large versus small or midsize states; Member States versus candidate countries; founding states versus non-founders). For instance, with regards to the composition of the Commission, the 'one Commissioner per Member State' option was supported by smaller Member States and candidate countries, with the exception of the founding Benelux countries, but including Poland. The new voting rules put forward by the Presidium⁶ even contributed to distinguishing a new category of Member States, the 'midsize Member States', namely Spain and Poland. The latter fiercely opposed the new system, which reduced their weight in the Council of Ministers.

The members of the *national parliaments* formed a majority with two representatives per country, i.e. 53 % of all the members of the Convention. But, the very size of the group, along with other factors such as the absence of a common secretariat, made the elaboration and defense of common positions more difficult. Even on the issue of reinforcing the role of national parliaments within the European Union, which was the subject of a working group within the Convention, the national delegates were unable to find a common position. Some recommended better control over governments inside of each country, while others pushed for the creation of a new body – the Congress – bringing together members of national and European Parliaments. These differences seemed to owe more to differing institutional

floor in a meeting of the Convention when the member whom he replaces will be absent for a full day' remained.

⁴ About the Presidium, see below.

⁵ The same rule applied to national parliamentarians.

⁶ See below

contexts than to precise instructions from their national governments. The French delegates, for instance, were quite eager to compensate for the traditionally weak position of the Parliament in their political system.

Although less numerous – they comprised only 15 % of the Convention members- the *European Parliament delegates* had more influence. As with the first Convention (Deloche-Gaudez, 2001), they had the “home advantage” (i.e. the Convention met in the rooms of European Parliament). They also benefited from being accustomed to dealing with European issues and expressing themselves in a transnational assembly. This enabled them to take a more active part in the Convention deliberations than their numbers would lead one to believe. For instance, during the debate on complementary competencies in November 2002, MEPs represented about 25% of all speakers. Moreover, the fact that they could easily meet outside the plenary sessions and that the European Parliament adopted resolutions on the issues discussed in the Convention allowed them to efficiently promote positions supported by a majority of them. Unsurprisingly, this was particularly true when it came to defending the powers of the European Parliament within the Union, but they were also able to present a fairly united front on other issues. For example, MEPs managed to sideline the conclusions of the ‘Complementary Competencies’ working group, forbidding all European legislation in areas in which the EU only enjoys limited powers (Lamassoure, 2004). Similarly, MEPs successfully opposed the idea of a new ‘Congress’, which they saw as a potential rival. Finally, to clarify the division of competencies, the Convention took up the general framework suggested in a report issued by the EP Committee on Constitutional Affairs and a resolution adopted by the European Parliament in May 2002.⁷

On paper MPs and MEPs formed an enormous group, representing 86 % of the Convention members. But, only toward the end of the Convention, in the hope of countering the demands of the national governments, did they manage to put forward joint proposals (Norman, 2003: 292). Though some of these, like the idea of referenda enabling citizens to ask the Commission to table a legislative proposal,⁸ eventually found their way into the draft Constitution, it cannot be said that this “grand coalition” exerted a decisive influence (Dauvergne, 2004).

Numbers did not play in the *European Commission’s* favor, as only two members represented it. Several factors nevertheless allowed the two Commissioners to compensate for this numeric inferiority: the absence of clear contrasts between their positions; their willingness to participate in working groups; their active contribution to plenary sessions; and, last but not least, their participation in the Presidium. Both were quite familiar with the issues of debate. Portuguese Commissioner Antonio Vitorino was widely regarded by Convention members as one of the best specialists on Justice and Home Affairs, as well as, on the Charter of Fundamental Rights. However, their task was made more complex by the public disclosure of a draft constitution (the “Penelope” project), written by a small group of Commission experts at the request of President Prodi, without their direct involvement.⁹

⁷ Report on the division of competencies between the European Union and the Member States, 24 April 2004, A5-0133/2002,

http://www2.europarl.eu.int/omk/sipade2?PROG=REPORT&L=EN&SORT_ORDER=D&LEG_ID=5&COM_ID=608&LEVEL=2&SAME_LEVEL=1&SV=20&NAV=X;

Resolution adopted by the European Parliament, Division of competencies between the EU and the Member States, 16 May 2002,

<http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+TA+P5-TA-2002-0247+0+DOC+XML+V0//EN&LEVEL=3&NAV=X>

⁸ Article I-46 of the Convention’s draft constitution

⁹ On the “Penelope” project, see Mattera, 2003; on Giscard’s reactions to the Penelope project, see Deloche-Gaudez, 2003a.

2. *The Organizational Wheels*

The Convention was not only divided along ‘institutional’ lines. The Laeken Declaration assigned a few Convention members a steering role, which proved to be of great importance.

First in line was naturally the former French President Valéry Giscard d’Estaing, appointed by the Laeken European Council to preside over the assembly, instead of being elected by the Convention¹⁰. His prerogatives enabled him to influence what went into and came out of the Convention. At the beginning of the decision-making process, he kept an eye on every document transmitted to the Convention: he read the drafts prepared by the Secretariat before they were transmitted to the Presidium then to the Convention; he was even able to draft some articles himself, in particular those pertaining to the institutions. His chairmanship gave him ample opportunity to shape the consensus within the assembly. At the end of each plenary meeting of the Convention (and of the Presidium), *he* took the floor to summarize ‘the lessons learned from the debate’. He rapidly came to be known for his creative interpretations of the assembly’s views, notably when he tried to ignore the opposition raised by the idea of a new Congress (Deloche-Gaudez, 2003a; Duhamel, 2003, 71-2).

The Laeken European Council flanked him with two former Prime Ministers who served as Vice-Presidents: Italy’s Giuliano Amato and Belgium’s Jean-Luc Dehaene. The three of them formed the Convention’s Presidency. Each Vice-President contributed to shaping the work of the Convention in the working groups he chaired. Their influence was noteworthy on many issues. Amato was instrumental in the process of ‘simplification’, rallying support for a single legal personality, the adoption of a single text to replace existing treaties and the simplification of the Union’s instruments. Dehaene pushed for a ‘double-hatted’ Foreign Affairs Minister combining the conduct of foreign policy with responsibility within the Commission for external relations. All of these proposals were subsequently endorsed by the Convention.

A committee – the Presidium – was established to organize the work of the Convention and submit written texts to the assembly. This body comprised the President, the two Vice-Presidents and representatives from each institutional component.¹¹ At the request of the candidate countries, a ‘thirteenth man’, the Slovenian A. Peterlé, was added to represent them. The members of the Presidium had the opportunity to examine all working documents issued by the Secretariat and to discuss them before they were transmitted to the Convention members. Its members, therefore, had the privilege of examining draft articles before other members of the Convention. Although it has been argued that their influence was sometimes limited due to lack of time and expertise, as well as to internal divisions (Stuart, 2003), the Presidium turned out to be one of the key fora in discussions over the EU institutions¹².

Finally, mention should also be made of another major actor, barely referred to in the Laeken Declaration: the Secretariat of the Convention. That structure included officials seconded from national and EU institutions under the direction of Sir John Kerr, former Permanent Under Secretary of State of the Foreign Office and former Permanent

¹⁰ For the reasons behind this choice, see Deloche-Gaudez, 2003; Magette and Nicolaidis, 2004.

¹¹ There were representatives of national governments which held the Presidency of the Union during the Convention : Henning Christophersen, Ana Palacio (replaced in March 2003 by Alfonso Dastis) and Giorgos Katiforis (replaced in February 2003 by Giorgos Papandreou); the two national parliament representatives were John Bruton and Gisela Stuart; the two European Parliament representatives : Inigo Mendez de Vigo et Klaus Hänsch; the two Commission representatives Michel Barnier et Antonio Vitorino.

¹² See below, section 2

Representative of the United Kingdom in Brussels. It drafted the first versions of virtually all the documents discussed in the Presidium, then in the Convention, including the successive drafts of the constitutional text. The Secretariat enjoyed a number of organizational assets. Unlike most members of the Convention who had other functions, its officials worked full-time for the assembly. Most of their work took place behind closed doors and their combined expertise covered most, if not all, aspects of relevance for the Convention's work. Their diversity, which reflected that of the Convention, even enabled them to test a number of ideas that could be sharpened before being submitted to the assembly. All of these elements explain how it was able to exert a strong influence during the 18 months of the Convention (Deloche-Gaudez, 2004).

3. Overlapping Cleavages

The Convention appeared to be fraught with overlapping divisions. Some were explicitly foreseen in the Laeken Declaration and new cleavages emerged during the course of its work. Three of them seem to have left their mark on the work of the Assembly.

Following the Laeken Declaration, the Convention was organized into groups bringing together Conventioneers according to their different 'institutional' origins. This naturally shaped institutional cleavages. The component parts of the Convention met before every plenary session in order to try to elaborate common positions. When they were successful, these positions generally reflected common institutional interests: the national parliaments supported control over the principle of subsidiarity and Community legislation, the European Parliament pushed to enhance the co-decision procedure and fought against the establishment of a 'Congress' bringing together MEPs and representatives of national parliaments. At the end of the Convention, the members of the Presidency opened a dialogue with the different component parts in order to explore the possibilities for consensus. At that moment, the institutional cleavages appeared to be quite strong. The national governments' representatives threatened not to approve the final draft (each for different reasons), while national and European parliamentary delegates presented common demands in the hopes of influencing the Presidium's final decisions.

Although the way in which the Convention was organized tended to minimize *national cleavages*, the Convention members' national origins did matter. A sharp antagonism between large and small states emerged on institutional issues, although founding members' attempts to play a mediating role, e.g. regarding the composition of the Commission, sometimes mitigated it. Furthermore, government representatives often succeeded in rallying support from countrymen and women around key positions deemed to be of crucial importance. For example, the French government's position in favor of maintaining the '*exception culturelle*' (i.e. the possibility to continue to unanimously decide on culture-related agreements, as an exception to the majority voting rule to be applied to all trade agreements) was also defended by the representatives from the French Parliament. French members of the European Parliament ended up supporting this position, although allegedly for reasons based on 'pragmatism' or 'legal expertise'¹³. Nevertheless, even on such a highly salient issue, national logic was not the only one at work. When cornered by

¹³ French MEP Alain Lamassoure called for the application of the principle of the Union not having external competency over matters in which it does not have internal competence. In other words, since cultural issues were decided on by unanimity, the same should apply to the conclusion of external agreements in that area; see the verbatim report of the plenary session, 9 July 2004, http://www.europarl.eu.int/europe2004/textes/verbatim_030709.htm

President Giscard d'Estaing during a plenary session, French Commissioner Michel Barnier defended the views of the Commission, contrary to his own country's demands.¹⁴

Ideological cleavages were also present during the debates. The two major dividing lines structuring the European political scene co-existed within the Convention. There was a clear antagonism between the pro-Europeans and the Euro-skeptics, despite the latter's under-representation, which in the end led them to present their dissident opinion as an 'alternative report'.¹⁵ Partisan cleavages also played their part. Convention members belonging to like-minded political parties met before every plenary session just like the institutional component parts. Within this framework, they elaborated various written drafts: the European Socialist Party (ESP) offered 'Priorities for Europe', whereas the European People's Party (EPP) went so far as to prepare their own draft constitution. During the third phase of the Convention, when the *Conventionneers* tried to propose joint amendments, they often did so on the basis of political affinities, particularly among members of the European Parliament. Some issues were clearly marked by a left-right cleavage. Left-wing conventionneers long fought to convince a reluctant President to set up a working group on social issues. When it came to discussing the objectives of the Union, right-wing Convention members tried to replace the 'full employment' objective with the idea of a 'high level of employment'. However, it proves difficult to identify amendments that were exclusively proposed by left or right wing members of the Convention. As often happens at the European level, partisan considerations were frequently blurred due to the polarization between supporters and adversaries of greater integration (Magnette, 2004) or by national considerations. For instance, the amendment proposing to introduce the objective of a 'social market economy' in the draft constitution was tabled by German MEP Elmar Brok, who coordinated the EPP group in the Convention and received support from left wing *Conventionneers*.

While the multiplicity of cleavages increased in parallel with the debates' complexity, it nonetheless contributed to the relative fluidity of the work of the Convention by softening the divisions. Given their multiple allegiances (country, party, and institutions), Convention members could 'change hats' in support of a position and make it more 'consensual', thus, facilitating the emergence of a decision-making mode that was more flexible than a standard negotiation.

II. Decision-Making Dynamics

The latter remark brings us to the decision-making process. As indicated in the introduction, the creation of the Convention was largely motivated by a desire to go beyond the negotiations which characterized Intergovernmental Conferences and to allow the development of a deliberative logic. However, to understand the way in which consensus was eventually achieved, additional logics need to be considered.

1. Negotiation and the Role of Interests

Negotiation is the exchange of concessions between actors defending their interests. Of all the methods underlying the work of the Convention, this is the easiest to discern, as it usually involves clearly identifiable actors (government representatives) supporting relatively well-known positions. Despite expectations that the Convention would distance itself from the intergovernmental model, negotiations did occur for two related reasons. First, the Convention was to be followed by an Intergovernmental Conference in which each national government would regain its right of veto. As well, Convention members in general, and their

¹⁴ See the verbatim report of the plenary session, 9 July 2003, http://www.europarl.eu.int/europe2004/textes/verbatim_030709.htm.

¹⁵ See document CONV 851/03.

President in particular, were willing to prevent the document from being ‘unwoven’ during the Intergovernmental Conference. National governments were therefore in a position to impose some of their views by threatening to reject a text that would not meet their demands in the future IGC. Their influence was quite strong in issues on which they had strong preferences, particularly at the end of the Convention. To mention but a few examples, the ‘*exception culturelle*’, so dear to the French government’s heart, was maintained. The word ‘federal’ was withdrawn at the British government’s request and several national governments, including Germany, successfully opposed the extension of majority voting in the social field (on the last example, see Berès, 2003: 56; Dauvergne, 2003: 258). Governments also gave ample evidence of a strong ‘*esprit de corps*’, seeking in priority convergence amongst themselves. The joint proposal, tabled in January 2002 by the French and German governments, is of course, emblematic in this respect.

On this basis, one could be tempted to conclude that even within the Convention, the traditional logic of intergovernmental negotiation remained intact: national interests shaped the eventual outcome, interstate bargains proved decisive on major issues, and decisions tended to reflect the preferences of the larger states (Moravcsik, 2004). Nonetheless, several elements do not fit in with this view.

First, as regards institutional issues, it is easy to overestimate the influence of the Franco-German axis. Reflecting their very different national political cultures, the two governments’ starting positions were fairly far apart. Germany favored a federal-type solution and advocated a strengthening of both the Commission and the European Parliament, whereas France remained faithful to its traditional intergovernmentalism (Interviews at the Quai d’Orsay, February 2003). Eager to present a common position, the two heads of the executive finally agreed on a text – which was made public during the fortieth anniversary celebration of the Elysée Treaty. The Franco-German document (Fischer, de Villepin, 2003) included both countries’ favorite solution with little concern for coherence. It called for a permanent president of the European Council (to satisfy the intergovernmental camp) and for the Parliament to elect the president of the Commission (an important goal of the federalists). No wonder then, that this compromise “inspired” the final agreement, for it incorporated antagonistic solutions. Indeed, this is one of the strengths of past Franco-German proposals: they often strike a balance between distinctly opposite preferences, the other governments can usually get something out of it as well. But, to speak of leadership in this case would be excessive.¹⁶ As a matter of fact, in the final text of the Constitution, the European Council President is more a ‘chairperson’ than the leader Paris envisioned and contrary to Berlin’s wishes the President of the Commission is not directly elected by the European Parliament.

Recognizing that some interstate bargaining took place during the Convention does not mean agreeing with traditional “realist” analyses on the formation of national preferences. These analyses tend to underline the importance of interest assessments: each government advocates the solution it feels is most consonant with its national interest (Moravcsik, 1998). It is difficult to deny the importance of this factor, illustrated by Spain and Poland’s rejection of the Constitution in order to preserve their weighted votes within the Council. Nonetheless, one should also not overlook the value of ideas in the process of institutional reform (Christiansen, Falkner and Jorgensen, 2002).

As was already mentioned, a state’s traditional position is often inspired, at least in part, by its political culture. Whereas the French and British visions of the common good emphasize the need for leadership, the Germans generally favor a federal system similar to

¹⁶ Indeed, at the very moment when the institutional debate heated up in the Convention, the Iraqi crisis demonstrated that Franco-German agreement is not enough to gain the support of their peers, if their positions did not reflect the entire range of national governments’ opinions.

their own and the Swedes favor the principle of transparency, a value enshrined in their constitution.

Obviously, it can be difficult to establish a clear causal link between ideas and the positions upheld by a government, since ideas and interests can coincide. Germany's defense of an increased role for the Parliament could as easily be a means to promote its own interests, since it has the greatest number of delegates. At the same time, there is no shortage of counter-examples to make the 'ideational' argument plausible. The federal government's pro-parliament attitude does not date back to the Treaties of Maastricht and Nice, which improved Germany's parliamentary representation; rather, it corresponds to a traditional position held by German diplomats since at least the early 1980s. In contrast, a purely interest-based logic would see larger states pleading in the Parliament's favor – where they are better represented than in the Council – with resistance from the smaller states, conforming to a cleavage common to all federal systems. Yet, the United Kingdom and France are not among the Parliament's allies, whereas the small Benelux countries are. In a nutshell, the position of a government can be influenced by 'world visions', which do not necessarily correspond to their interests.

2. *Deliberation and the Weight of Ideas*

Negotiation is traditionally opposed to deliberation, a process through which actors modify their preferences in the light of exchanged arguments. Ideational factors play a key role in this process, as they often do when collective decisions are about issues of aggregate welfare, rather than about redistributing resources (Majone, 2000?). By bringing together heterogeneous actors, formally deprived of any veto power, within an assembly where they could confront their views, supporters of the Convention method hoped to create a space for deliberation. There were clear signs of such a dynamic in the early phases of the Convention, largely devoted to an exchange of views on the ambitions of the enlarged EU (Magnette 2003). In some instances, deliberation appeared to lead to changes even in the drafting phase. During an informal session in March 2003, British government representative Peter Hain first opposed the inclusion of the concept of the primacy of Community law in the draft constitutional treaty. His objections were later dropped following a series of arguments in favor of the draft¹⁷.

However, this very example demonstrates how challenging it is to precisely identify the existence and the impact of deliberation. Did exchanging opinions truly modify Hain's stated preference or was his eventual assent more prosaically the result of a realist evaluation of the power relationship? Negotiation and deliberation are mutually exclusive on a theoretical level only. In practice, these two approaches can complement each other. Clearly, the creation of a permanent chair of the European Council owes much to the will of the larger states, actively supported by Giscard d'Estaing. But, the final compromise was facilitated by discussions within the Convention (during the January 2003 session and in preparatory meetings). This prompted smaller Member States to put forward arguments against it – notably the risk of having a new, powerful actor in the EU who would encroach on the powers of the President of the Commission¹⁸. Hence, the compromise over the idea of a "chairperson", which could be accepted by both sides, as it could provide the Union with greater stability while limiting the risk of a clash with the Commission.

¹⁷ EP. Background information. Convention 05/03 : Discussion on the competences of the Union, http://www.europarl.eu.int/europe2004/index_en.htm, see 'Debates at the Convention', then 'Summary of debates'.

¹⁸ Intervention G. de Vries, 20 January, 2003, http://www.europarl.eu.int/europe2004/textes/verbatim_030120.htm

One should distinguish between deliberation and consensual ideas. Much of the Convention's work was inspired by ideas shared by a large number of delegates. Some ideas met with little resistance, whether they involved issues to address (e.g. the democratic deficit, the complexity of the existing treaties) or solutions to envisage (e.g. the role of parliamentary assemblies in enhancing legitimacy). Was this a case of successful deliberation? This would assume that initially divergent positions became more closely aligned through discussion. Yet, on the topics mentioned above, consensus was easily reached and the debate played a more modest role, revealing and confirming the existence of initial convergent opinions upon which concrete reforms could be built.

Despite the uncertainty surrounding the actual influence of deliberation on the Convention's outcome, it seems clear that the "Convention method" altered the rules of the game. Whatever their true preferences were, participants in the discussion had to comply with a certain code of conduct.

President Giscard d'Estaing often reminded the Convention members that they were not to act as simple agents of their home government or institutions (Magnette, 2003). As Vice-President Giuliano Amato put it during the final plenary session, contrary to IGCs, in which governments were under no obligation to justify their position, the Convention method obligated each person to justify his or her point of view.¹⁹ True, in IGCs too, national governments' representatives do argue, but they can put an end to the discussion quite easily by using their veto right. In the Convention, they were more constrained. Thus, when the French government representative threatened that France would refuse to ratify a document not respecting the '*exception culturelle*', reactions from the floor were tumultuous²⁰. Many Convention members saw this veiled veto threat as contravening the code of conduct that ought to govern the assembly's work. This prompted the French government to link its proposal to the protection of 'cultural diversity', already approved as one of the Union's objectives,²¹ making a compromise possible.²² This is consonant with the conclusions drawn by Jon Elster from his comparison of 18th century constitutional conventions: notwithstanding the 'strategic use' that is often made of argumentation, the exchange of arguments facilitates a gradual convergence (Elster, 1994; see also Magnette, 2003).

The final result bears the mark of numerous "ideational" matrixes, even in areas in which governments vigilantly protected their interests. The splitting of the Treaty in two parts – an institutional one and one devoted to policies²³ was discussed even before the Amsterdam Treaty; indeed, the Commission had commissioned a series of feasibility studies.²⁴ The idea of a "double-hatted" foreign minister, with one foot inside the Commission, had been floated by Romano Prodi in a speech before the European Parliament in October 2000 (Petite, 2005). The procedure for appointing the President of the Commission was also influenced by the strength of the parliamentary model in the political culture of European countries. Although many governments – from large and small states alike – indicated they wanted to maintain

¹⁹See the verbatim report of the plenary session, 10 July 2003, http://www.europarl.eu.int/europe2004/textes/verbatim_030710.htm

²⁰The verbatim report of the plenary session of 11 June 2003 indicates that Pascale Andréani's intervention provoked 'various reactions' ... http://www.europarl.eu.int/europe2004/textes/verbatim_030611.htm.

²¹Article I-3

²²Article III-315 stipulates that the Council shall act unanimously only when agreements 'risk prejudicing the Union's cultural and linguistic diversity'.

²³Which became Part III after the incorporation of the Charter of Fundamental Rights.

²⁴See in particular the reports put forward by the European University Institute of Florence 'A fundamental treaty for the EU. Studies on treaty reorganisation' May 15, 2002, see also "Reforming treaty revision procedure. The second report on treaty reorganisation" July 31 2002.

control over this important appointment, the language used in the draft constitution implies strong parliamentary involvement, as the Parliament gained the right to ‘elect’ the president of the executive. In practice, however, the Parliament will only be able to vote on the candidate “nominated” by the heads of state and government. The actual impact of this new provision remains to be seen, it is not clear that it significantly alters the current system in which the influence of the European Council is decisive (Hix, 2001; Dehousse, 2004). Nevertheless, coating the President of the Commission in a parliamentary polish clearly demonstrates how important the parliamentary matrix was among members of the Convention.

3. *The Importance of Expertise*

Earlier analyses have stressed the role of expertise in institutional reform processes, highlighting for instance, the part played by the Council Secretariat in recent IGCs (Christiansen, 2002) or by the Committee of Central Banks Governors in the Maastricht Treaty negotiations (Verdun, 2000; McNamara, 2001). As with many complex decisions, the role of experts was often considerable in the Convention. Their importance was enhanced by two sets of factors: the agenda was very broad and the *tabula rasa* option was excluded. The intention was to reform the existing, rather than create *ex novo* structures. The Convention had to find its way through a maze of existing treaties – a result of previous, usually incomplete reforms that tended to increase the complexity of the European institutional system. It also needed to consider the Court of Justice’s interpretation of the law. Therefore, in certain cases, the most influential actor was neither a national government representative brandishing his right of veto, nor a Convention member offering convincing arguments, but rather an official with the necessary expertise to analyze a particular problem and propose a solution. Unsurprisingly, the pertinent expertise was often of a legal nature: the Convention needed experts capable both of mastering the current state of legal affairs and of writing precise texts.

Thus, lawyers from the Commission, the Parliament and the Council were given the task of tidying up Part III dealing with EU policies, which was hardly discussed in the last session of the Convention (and on which the subsequent French referendum campaign largely focused) . The Secretariat of the Convention predominantly made up of lawyers, also weighed in on a number of key decisions. One of its members drafted large bits of the report of the working group on freedom, security and justice, as well as the first versions of the corresponding articles. The Convention’s general endorsement of the need for stronger European action in the area of Justice and Home Affairs facilitated the acceptance of provisions aiming to ‘communitarise’ the third pillar. In the same way, while there was broad support for increased ‘simplification’, an expertise in European law was necessary in order to put forward proposals and to understand their possible effects. Some members of the Secretariat, under the Vice-President Giuliano Amato, played an important role in this respect (Deloche-Gaudez, 2004). Amato, himself a law professor, chaired the two Working Groups on this issue (simplification and legal personality) and in plenary meetings, eloquently drew on concepts like separation of powers, hierarchy of norms and the procedural typologies currently used in constitutional law. His proposals were therefore difficult to challenge.

Most participants in the exercise seemed to be aware that expertise can be a strong political asset. On occasion, the experts tried to conserve their ‘comparative advantage’ over Convention members. The Secretariat created catalogs to better visualize the effects of simplifying procedures and instruments, but it was reluctant to transmit them to the

Convention because they allowed a clear view of both the extension of qualified majority voting/ co-decision procedure and the exceptions that remained²⁵. The architects of the final compromise, eager to avoid head-on confrontation, often used their expert knowledge to diffuse potential conflicts. They could, for instance, argue that opposing the elimination of the Maastricht Treaty “pillars” was pointless if the distinct procedures that characterized them – in particular, unanimous voting in foreign policy matters – remained (Amato, 2003). Similarly, making co-decision and majority voting the rule (Article 33, paragraph 1) was easier to accept due to the fact that significant exceptions remained. Such tactical tricks largely explains the *trompe l’oeil* elements present in the final text (Dehousse, 2004). This notwithstanding, there were limits to what experts could achieve: their role appears to have been most important in areas in which technical issues were at the fore and there was a broad consensus on the kind of changes that were required. In areas in which states had strong and contrasting preferences, they were less inclined to give them a free rein (Magnetite and Nicolaïdis, 2004).

III. The Influence of Institutional Factors

Institutionalist theories have long argued that the rules of the game structure the power play and eventually the policy outcomes (Steinmo, 2004). The work of the Convention provides many illustrations thereof. We have already seen that the heterogeneity in the assembly’s membership and the shift to decision-making by consensus have occasionally allowed the development of a deliberative logic (see above section 2). The organizational powers conferred upon the President and the Presidium have largely contributed to shaping the discussion. Similarly, the fact that the Convention’s work was to be reviewed by a subsequent IGC influenced the behavior of many actors. In other words, institutional factors clearly impinged upon the final result.

1. *The Weight of Organizational Power*

In the work of any assembly, the ability to control the agenda, organize the work, chair debates and choose the elements appearing in the documents provided to members are crucial assets. Used strategically, they enable actors in control to privilege certain orientations. In contrast with the situation in intergovernmental conferences, which are largely unregulated exercises, and therefore more difficult for any one actor to control (Smith, 2002), in the Convention’s case, those powers were concentrated in the hands of a few people: the President, the members of the Presidium and the members of the Secretariat.

Valéry Giscard d’Estaing’s initiatives clearly exerted a strong influence over the debates. As early as the inaugural session, he suggested submitting a single proposal to the IGC instead of the options contemplated in the Laeken declaration. He later proposed that the final product take the form of a draft constitutional treaty, whose provisions were to be approved by the convention. The President often made use of his organizational power, sometimes in collusion with the Presidium, sometimes alone. His decision to begin with a long ‘listening phase’ and his refusal to accept working groups on certain subjects clearly impinged on the debates. The conclusions he drew from the plenary sessions were contested time and again by Convention members, fearful of being instrumentalized. Not only did the

²⁵ That document was later made public as an annex to document CONV 727/03.

organizing bodies structure the debates, but they were also able to filter what was proposed to the assembly²⁶ or indeed what was *not* proposed. For instance, on the key issue of how the Constitution would be modified in the future, some members of the Convention had asked in plenary for a more flexible revision clause.²⁷ A proposal to this effect was even tabled by the coordinators of the three main party groups, Giuliano Amato, Elmar Brok and Andrew Duff. Yet, given the governments' opposition, the President and the Secretariat did not issue any concrete proposals, thus securing the status quo: unanimity was retained (Duhamel, 2003:124-25).

The best illustration of the power enjoyed by the oligarchy piloting the work of the Convention is the way discussions on institutional reform were handled. Whereas on other issues a fairly open procedure had been followed, with preliminary discussions in working groups, followed by a debate in plenary, the method chosen for the institutions did differ. The president deferred the debates on this subject as long as possible and seemingly, with the agreement of the two Vice-Presidents, decided not to create working groups on institutional issues, thereby largely 'confiscating' the debate. While the Secretariat wrote the first drafts for most texts, Giscard d'Estaing himself produced the draft articles on the institutions with the help of John Kerr and two 'drafters' from the secretariat (one French and one British). Unsurprisingly, given the nationality of their authors, those proposals were generally close to the views of larger Member States.²⁸ The draft articles were leaked to the press even before any discussion in the Presidium. They were then subjected to a heated debate in that body where a number of modifications were introduced. From that moment, the Convention members had little time left to discuss them in plenary. A limited number of amendments were introduced to meet the concerns of smaller countries,²⁹ but they were agreed upon within the Presidium.

2. *The Looming Shadow of the IGC*

As already mentioned, it had been decided in Laeken that the Convention was to be followed by an Intergovernmental Conference, in which states would regain their veto. Therefore, Convention members had to be careful not to cross the lines drawn by the governments. The looming shadow of the Intergovernmental Conference prompted more than one Conventioneer to alter his preferred solution in the name of realism. The bargaining in the final weeks was worthy of any Intergovernmental Conference. The key issue was no longer finding an hypothetical common good, but to work out concessions to satisfy particular governments, in the hopes of finally arriving at a compromise acceptable to all (Dauvergne, 2004; Norman, 2003).

This notwithstanding, even at the end of the Convention, the negotiation logic was not the only one at work. Despite their strong objections to the new system of qualified majority proposed by the Presidium, the Spanish and Polish governments were unable to prevent its inclusion in the draft Convention. At the very end of the Convention, the President of the Convention took advantage of his position to isolate the Spanish representative in the Presidium, Alfonso Dastis, by making concessions to other opponents in order to break the

²⁶ Cite the relevant provisions in the rules of pcd

²⁷ See for instance Antonio Vitorino's intervention in the verbatim report of the plenary session of 25 April 2003, http://www.europarl.eu.int/europe2004/textes/verbatim_030425.htm.

²⁸ Such as the concept of a non-rotating president of the European Council, which in the interim gained the support of the larger states

²⁹ e.g. the idea of an "equal rotation" for commissioners or provisions limiting the role of the European Council President.

alliances built by Spain (Norman, 2003: 281) Thus, on a key issue, the threat of a veto by two large countries did not prevent the Convention from going ahead.

This was, of course, a risky choice given the Member States' sensitivity on voting rights issues. Challenging some of them was, however, not irrational. The alleged virtue of the "Convention method" and the qualities conferred on its work by most European leaders meant that although every national government retained the right to veto the entire project, doing so would be a costly choice, particularly for those who were generally supportive of the Convention's work. Governments therefore had to pick their fights in the second round, to an extent they may not have anticipated during the Convention. This may explain why some of them ended up accepting concessions that would have seemed unthinkable in a 'normal' IGC. Very few people, for instance, would have bet on French acceptance of a greater influence of the European parliament on agricultural expenses. Yet, this is what eventually happened (Jabko, 2004). In other words, if the prospect of the forthcoming IGC influenced the deliberations of the Convention, the reverse was also true: the choices made by the Convention did constrain the margin of maneuver of national governments in the IGC.

3. Discussion Fora

Finally, the fora within which the discussions took place effected the dynamic at work.

A deliberative logic was more likely to emerge in a working group, with fewer actors who could speak freely, without time limits. This may in part explain why France was led to accept the elimination of the distinction between compulsory and non-compulsory spending, referred to earlier. During the discussions within a small 'reflection circle', the alternate representative of the French government, Pascale Andréani, came to realize that the French positions met with strong resistance from various corners. Given the history of parliamentary regimes in Europe, the democratic election of the EP and the consensus on the need for simplification within the Convention, how could one argue that a part of the EU budget should be kept in the hands of national governments? In such a setting, changes of preferences in light of exchanged arguments were not rare.³⁰ This tends to confirm lessons from the Philadelphia convention, where the possibility of holding informal debates seems to have facilitated the emergence of a consensus (Deloche-Gaudez, 2003b). Conversely, the fact that institutional issues were considered only at a late stage and without preparation in working groups did not allow the diffusion of tensions that had emerged between national governments. As a result, there was no real alternative to a classical negotiation scheme in which participants had to exchange concessions.

Conclusion

The institutional reform process triggered by the Laeken Declaration was essentially hybrid. The previous sections have illustrated the complexity of the Convention process. Work in that new body was subject to multifarious, sometimes contrasting influences, which cannot be summed up in a single model. To be sure, on the whole, national cleavages seem to have had more impact than ideological cleavages. At the same time, both the reform process and its eventual outcome bear the mark of the ideas made by numerous European actors prior to and during the Convention. The role played by experts, both in the national capitals and the Secretariat, appears equally significant. Negotiations, the hallmark of

³⁰ See also the exchange between Swedish delegate G. Lennmarker and Alexander Earl of Stockton on the 'right of withdrawal' from the EU during the Meeting on 3 April 2003,

Intergovernmental Conferences, have anything but disappeared, but they were constrained by the ‘strategic use of argumentation’. Notwithstanding the high hopes generated by the new ‘Convention method’, other, less transparent factors, such as the weight of expertise or the control exercised by a few actors over the work of the assembly, also influenced the eventual outcome.

Trying to make sense of this complex reality, we have argued that institutional variables have had a decisive influence on the work of the Convention. Membership rules, which rendered the Convention much more heterogeneous than an intergovernmental conference; the possibility of holding informal discussions in working groups; or the fact that a more flexible decision-making rule was retained all concurred to make room for new, more deliberative dynamics. At the same time, the fact that an IGC followed pushed in the opposite direction and largely explains why, in areas where governments had strong preferences, the latter could not be ignored. Last but not least, the organizational powers of the President and the Presidium enabled them to exert a strong influence on the final outcome. Thus, assessing both the elements of novelty and the elements of stability introduced by what came to be known as “the Convention method”, one sees the mark of institutional choices made before or during the Convention. To be sure, these are elements that ought to be kept in mind if the experience is to be repeated.

These elements largely explain the mixed outcome of the process. The draft constitution is by no means revolutionary. The Member States, and in particular their governments, remain the true masters of the “constitution”, even if they did not retain full control of debates on the Convention’s floor. This is obvious from the ratification and amendment clauses, which require their unanimous agreement. The changes made to the institutional architecture, while significant, were only of an incremental nature. At the same time, however, some governments have accepted changes they opposed in the previous IGC, such as the definition and the scope of qualified majority voting or the legal status of the charter.

Moreover, history has taught us modesty when evaluating the results of institutional reforms. The Single European Act, which is now assigned a critical role in the revival of European integration in the mid-1980s, was described by Mrs. Thatcher as a “modest step” and was subjected to fierce criticism by a number of scholars who deemed it too conservative (Pescatore, 1986?). In the same fashion, some elements in the draft constitution may unexpectedly cause new dynamics to emerge. The sheer reference to a “constitution” has already given rise to debates that were much more open than in the past. Several countries, including some in which this was not formally required, have already indicated they consider a referendum necessary prior to ratification. Granting a legal status to the Charter on Human Rights might lead a whole series of actors to follow legal channels to help defend their interests. The Court of Justice might find there a fertile ground for judicial activism. In other words, chances are good that even if the governments have only partly loosened their control, the reform process may have unexpected consequences.

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