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The Convention on the Future of Europe - Thoughts on the Convention-Model

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The Convention on the Future of Europe - Thoughts on the Convention-Model

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Abstract

This article examines the difficulties the IGC-model as a treaty amending institution has encountered, especially during the 1996 and 2000 IGCs. It argues that the ICG-model has limitations and under the current circumstances is not able to provide the Union with efficient and effective treaty reforms. The paper then sets out to explore the overall framework within which the Convention has been placed by the Laeken Summit. It is argued that the Convention-model provides a much more open and diverse arena for debate and negotiations than an IGC; yet the Heads of State have attached several 'institutional safety features' so that the Convention will not overshoot the mark. Moreover, the paper analyses how the Convention has to proceed in order to secure the support of all member states during the next 2004 IGC. The Convention will only be considered successful if the final document does not provoke any vetoes and yet includes reforms which transform the Union into a more effective and transparent institution. The last part of this article argues that the Convention is a legitimate arena to produce efficient treaty reforms. It could become a more permanent institution and the Convention-model could complement the simple IGC-model as sole forum for European treaty reforms.

The Convention on the Future of Europe - Thoughts on the Convention-Model

Lars Hoffmann¹

Introduction

The Convention on the Future of the Union held its inaugural session on 28 February 2002. This is the second convention the European Union has created, following the self-styled Convention which drafted the Charter of Fundamental Rights in 2000. However, it is the first dealing directly with institutional and constitutional issues that lie at the very core of the Union's power basis. The first heading in the Laeken Declaration,² establishing the Convention, reads 'Europe at a Crossroads'. In other words, the Convention has been created to decide how the EU is going to deal with the problems and challenges it is currently facing. The overall functioning of the Union has been widely criticised: the EU is not democratic enough and lacks transparency. The past Intergovernmental Conferences in Amsterdam and Nice have produced two new treaties but also a whole list of 'leftovers' – issues of great importance that could not be resolved. With the increasing complexity of the Union and the necessity to expand and/or limit its competences, the stakes today are higher than ever before and national delegations sitting at the negotiating table in Nice and Amsterdam had been unable to strike a deal acceptable to all participants. Therefore, it has become clear that before it can be decided which direction Europe is going to take at the 'crossroads', the EU first needs to reverse out of this dead end. Valéry Giscard d'Estaing, the Convention President, declared at the opening session of the Convention, 'We are a Convention, we are not an Intergovernmental Conference [...] we are not a parliament [we are] a group of men and women meeting for the sole purpose of preparing a joint proposal. [...] If it succeeds [...] it will light up the future of Europe.'³ If the Convention is indeed able to 'light up the future', it is likely that in case of future crossroads, the 'Convention-model' could become the pathfinder that the last two Intergovernmental Conferences in Amsterdam and Nice failed to become.

¹ Research Officer at the Federal Trust. I gratefully acknowledge the support and consistent feedback from Jo Shaw and also the very helpful suggestions and comments from Lynn Dobson. I would also like to thank Anna Verges-Bausili, Sebastian Barnutz, Alexis Krachai and David Finnes for commenting on earlier drafts of the paper.

² <http://european-convention.eu.int/pdf/LKNEN.pdf>

³ <http://european-convention.eu.int/docs/speeches/1.pdf>

This paper gives a short analysis for the reasons for convening this Convention on the Future of the Union. It argues that the current Convention on the Future of the Union might offer not only a way out of the current dead end – into which the Amsterdam and Nice negotiations have led – but also a possible new way to successfully deepen the integration process. It argues that it is an ideal forum as it combines legal, political and public players and might thus be able to become a permanent institution that complements the simple ICG-model.

The first part of the paper gives a broad overview explaining the problems that the IGC-model has been facing. It looks at the deadlocks the last IGC in Nice has produced and explains the reasons behind them. The second part explains what mandate the Convention has been given and analyses the ‘safety features’ that the Laeken Summit attached to the Convention to prevent it from overshooting the mark. The third part argues that the Convention will need to secure broad support from its own members and civil society in order to put enough pressure on the 2004 IGC to adopt its proposal. The final part argues that the Convention-model provides an ideal forum for institutional reform. It is a new body that is much more open and representative than any Intergovernmental Conference. The ‘Convention-model’ could become a constant feature in the European constitutional process replacing the ICG-model.

I The limitations of the IGC-model

The process of European integration has witnessed four new treaties over the past two decades. The revision of existing treaties and the subsequent drafting of an additional one has been carried out by Intergovernmental Conferences (IGCs). The general feature of IGCs is that they act as both the guardians of existing European achievements and treaties – the *acquis communautaire* – and the ultimate sources of their revision.⁴ Whereas the bulk of the IGC work is carried out by national ministers and government representatives, the most controversial and contested issues are left to the final summit of Heads of Government/State:

Three types of issue were identified: a) those that could be kept out of the final discussions and for which agreement could be obtained before the European Council in Nice (Court of Justice and Court of First Instance, composition of Institutions other than the Commission); b) pivotal issues (qualified majority, reinforced co-operation) for which the Group of Representatives had a mandate to

⁴ Lodge, J. ‘Intergovernmental Conferences and European Integration: Negotiating the Amsterdam Treaty’, in *International Negotiations*, No 3, 1998, p. 347

go as far as it could in order to arrive at significant agreements before Nice; and c) questions relating to the balance of power (weighting of votes, composition of the Commission), where there would be only a technical examination of the options on the table and the final decision would be left to the Heads of State or Government in Nice.⁵

However, in view of the results achieved in Amsterdam and Nice, the IGC-model seemed to lose its effectiveness mainly due to four different issues:

First, the issues that the last (and the forthcoming) IGCs were dealing with are more likely to lead to deadlock in negotiations. The stakes are rising as the possible solutions are much more likely to give national governments the impression that they are losing political influence within the Union's framework. Compromises are thus more unlikely because it is becoming more difficult to guarantee that negotiation outcomes result in win-win situations for all participants. Not only the last IGC in 2000, but also the one before that in 1996 reached deadlock, producing so-called 'leftovers' because governments were not able to compromise on certain 'taboo areas.'⁶ In fact, the 2000 IGC in Nice was supposed to deal with the Amsterdam leftovers, i.e. issues the final summit of Heads of Government/State could not agree on in 1996 and thus had left to be solved by the next IGC,⁷ but it failed to do so in a satisfactory manner. If we take a closer look at these leftovers, it is clear that they are concerned with the very core of the Union's power structure. They are of huge political and economic importance and therefore have a great constitutional significance for the future outlook of the Union, in particular three issues: the composition of the Commission, the decision-making procedure in the Council (including the weighing of the votes) and the expansion of qualified majority voting into areas such as social policy and taxation.⁸ As the leftovers Nice had to deal with were constitutional issues, the stakes were rising and Member States became eager to make sure that their national position and influence within the power-structure of the Union would not be undermined. The EU found itself in a difficult situation: on

⁵ Yataganas, X.A. 'The Treaty of Nice – The Sharing of Power and the Institutional Balance in the European Union – A Constitutional Perspective' Jean Monnet Working Paper No 1/01, p.13 <http://www.jeanmonnetprogram.org/papers/papers01.htm>.

⁶ for example tax policy for the British government or trade policy for the French government; the smaller states were categorically opposed to giving up 'their' one Commissioner per Member State

⁷ see also <http://www.cec.org.uk/info/pubs/briefs/bb/19.htm> and Monar J and Wessels W. (eds), *The European Union after the Treaty of Amsterdam*, London, Continuum 2001

⁸ Presidency Conclusions, Nice European Council Meeting, 7, 8 and 9 December 2000, paragraph II, Press Release: Brussels (8/12/2000) No: 400/1/00; Presidency Conclusion, Helsinki European Council, 10 and 11 December 1999, Press Release: Brussels (11/12/1999) No: 00300/1/99; Presidency Conclusion, Cologne European Council Meeting, 3 and 4 June 1999, paragraph IV, CFSP Presidency Statement: Cologne (4/6/1999) - Press: 0 No: 150/99.

the one hand it had important institutional and political issues to decide; on the other, because these issues were so important, it was unable to agree on a common denominator.

Second, there was the increasingly inflexible positions which Member State governments insisted upon taking. It is important to note that 'in an IGC, each player carries a good deal of psychological baggage with him/her: perceptions are already skewed towards other players in expected ways which are generally known to all. The ability to surprise and gain tactical advantages is accordingly relatively limited and fraught.'⁹ This baggage was accumulated over the last two IGCs in two ways. First, the list of issues that remained unsolved has become longer and second, the position of Member States' governments has become more inflexible. This is a reinforcing process as after Amsterdam the different positions of the Member States governments were openly analysed. Therefore, for a government to compromise on these positions would have meant to give in to the pressures exercised by others. Thus, the longer the negotiations went on and the more Member State governments publicised their official positions the more unlikely it became that a compromise could be found. Additionally, governments were concerned with the need to return home claiming to have achieved a result which was particularly beneficial to their respective country. Although the IGC's closed-door mentality meant that the public was not fully aware of the extensive negotiations and horse-trading that went on in private, in Amsterdam and Nice there were simply not enough horses left to achieve a compromise that made everyone a winner. Deadlock was inevitable.

Third, the division between the Member States increased. Even traditional alliances, foremost the Franco-German axis, were no longer working as effectively as they used to.¹⁰ Due to the rising stakes neither the German nor the French government (who held the Presidency of Council) was willing to make a compromise that threatened their influence in Europe. The Franco-German 'slow-down' meant that the most effective partnership, on which European integration had relied and depended on since the Union was founded, was no longer able to lead the way out of the complicated negotiation process that unfolded in Nice.¹¹ The range of issues the Heads of Government/State could not agree on remained the same. Alliances hardly changed as larger and smaller countries were facing each other with respect to the reallocation of votes in the Council, the modification of the decision-making procedures (double or triple majority in the Council) and

⁹ Lodge, J. p.351.

¹⁰ See also Yataganas, X.A. p.6.

¹¹ BBC news, Tuesday, 30 January, 2001, Franco-German alliance 'still special', <http://news.bbc.co.uk/1/hi/world/europe/1144562.stm>; see also Yataganas, X.A. p.36.

the future composition of the Commission. Moreover, poor and rich countries were arguing about policies (structural funds) and agricultural countries were opposing any enlargement of QMV in the area of the common agricultural policy (CAP). The negotiations soon reached a deadlock and the compromises made in the last minutes were far from satisfactory.¹²

Finally, the influence of European institutions was kept at a minimum. The Commission was denied a role as an official mediator, which is left entirely to the host country, which holds the Council Presidency. This is an important issue to consider because the Commission, as well as the European Parliament, would be in an ideal situation to the role of a mediator as they are independent from the 'national taboo areas'. Although the Commission has been able to play a considerable role, especially under the Presidency of Jacques Delors, when it comes to the crucial issues and late night bargaining, even the Commission is reduced to a simple spectator. Normally, 'the Commission's influence would consist of three main sources: its near-monopoly on the technical expertise of the nature of treaty reform, a gate-keeper position *vis-à-vis* non-governmental interests, and close co-operation with both Council Secretariat and Presidency in the preparation of versions of Draft Treaty'.¹³ This means that the Commission plays a mainly administrative and technical role. It is, however, not involved in the actual negotiations about factual treaty changes. It is left out of political decisions and can only try to exert influence by proposing its own suggestions and solutions. These, however, have no official status within the intergovernmental negotiations.

Compared to the Commission, that at least plays a role in the preparatory phase of IGCs, the role of the European Parliament has been even more minor. The EP only held an observatory position. There have been informative meetings between IGC delegations and the President of the Parliament, but the EP's impact on actual negotiations has been minimal.¹⁴ Although it produces papers and opinions they are not given the same attention than proposals originating from the Commission. During the 2000 IGC, the EP President, Nicole Fontaine, was able to meet with

¹² See also Wessels W., 'Nice Results: The Millennium IGC in the EU's Evolution', in *Journal of Common Market Studies*, Vol.39, No.2, pp.197-219 and Gunter Pleuger: 'Der Vertrag von Nizza: Gesamtbewertung der Ergebnisse', in: Mathias Jopp/Barbara Lippert/Heinrich Schneider (ed.): *Das Vertrakswerk von Nizza und die Zukunft der Europaischen Union*, Berlin 2001, page 9-15., esp. page 9.

¹³ Christiansen T. and Jørgensen K.E., 'Negotiating Treaty Reform in the European Union: The Role of the European Commission', in *International Negotiations*, 1998, p.450.

¹⁴ See also Yataganas X.Q. 'The Treaty of Nice: The Sharing of Power and the Institutional Balance in the European Union – A Continental Persepctive', in *European Law Journal*, Vol 7, No3, 2001, pp.242-291.

representatives of the ministerial sessions that prepared the Nice Summit. Admittedly that was an improvement in the EP's position, but, prior to the Conference meeting of Heads of Government/State there was again only an informal meeting and exchanges of positions. During the 2000 IGC negotiations the Parliament was able to send two observers to the Group of Representatives. Which meant that they had no right to vote or exercise official influence. Although this was a major improvement of the EP's status compared to previous IGCs it still proves that the European Parliament has not been able to become an equal and fully recognised participant within the IGC process. In the following it will be argued that giving the EP an official status in the IGC is a possibility to increase legitimacy and the Convention could be the ideal framework to do exactly that.

So, EU institutions were formally part of the process, yet not able to exercise any official powers. The IGCs, due to their purely intergovernmental approach to treaty reform, denied the European institutions the role of an independent mediator, necessary to bring the different interests of the Member States governments within the reach of an efficient compromise: 'Whereas the initial agenda of the IGC may be influenced by EU institutions (notably the Commission and the European Parliament), the outcome is a mediated negotiated compromise, supported by a consensus of the Member States'.¹⁵

Intergovernmental Conferences have proved to be a vital part of the European Union's integration process. Especially the negotiations concerning the European Monetary Union, which were successful due to the Franco-German leadership and in 1991 the active support of Commission President Delors. However, as an intergovernmental institution, the conference has encountered great difficulties during the last two IGCs in dealing with issues that relate to the constitutional order of the Union which potentially imply shifts in the Union's power structure. The inflexibility of the participants makes the task of finding a compromise more difficult as the different delegations can only act within their specific 'area of acceptability' and have certain 'boundaries' they can not cross (e.g. QMV for taxation was completely taboo for the British government).¹⁶ The will to embrace new approaches and the desire to make compromises in all areas of concern is very low. Therefore, the IGC-model, it seems, has come to a dead-end as far as 'big politics'

¹⁵ Lodge, J p.349.

¹⁶ Speech by the Foreign Secretary, Jack Straw at the Royal Institute of International Affairs - 27th July 2001, <http://195.166.119.98/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029392709&a=KArticle&aid=1013618389397>.

are concerned. The integration process is currently deadlocked which is, in turn, aggravated by the looming enlargement, which demands substantial institutional and political changes. The Convention's President, Valéry Giscard d'Estaing made an excellent point in his Discours he described the IGC (and the problems which are connected with it) as: ' [...] an arena for diplomatic negotiations between Member States in which each party sought legitimately to maximise its gains without regard for the overall picture.'¹⁷

II The Convention's Framework

For the purposes of this paper it is important to understand the general framework within which the Convention is working. First, the Laeken Declaration made sure that the Convention consists of representatives from a wide range of institutions and the possible number of alliances is very large. As a British Labour MEP, you could be joining forces with the EP-delegation, with the parliamentary delegation (including representatives from national parliaments), the social democratic delegation or with the other British representatives. There are many more ways of liasing and forming alliances than in an IGC, where only representatives from (currently) fifteen national governments join the negotiations. In an IGC group, government representatives might join forces with other nationals but individual representatives will not 'belong' to different camps of interest. The decision concerning the kind of outcome the Convention will arrive at depends on how the alliances will form, which force will be the strongest and how much of a compromise the different players are willing to make.

Second, the Convention was given a relatively broad and open mandate: 'in order to pave the way for the next Intergovernmental Conference as broadly and openly as possible, the European Council has decided to convene a Convention composed of the main parties involved in the debate on the future of the Union. In the light of the foregoing, it will be the task of that Convention to consider the key issues arising for the Union's future development and try to identify the various possible responses.'¹⁸ The IGC-model, as exercised in 1996 and 2000, is no longer able to provide efficient and effective solutions to the constitutional challenges currently facing the Union. In response, the Heads of Government/State decided at the Nice Summit to call

¹⁷ Introductory Speech by President Valery Giscard d'Estaing to the Convention on the Future of Europe, 26. 02. 02, SN 1565/02, <http://European-convention.eu.int>.

¹⁸ The Laeken Declaration, SN 300/1/01 REV 1, Annex I, II. Convening of a Convention on the Future of Europe, Forum, page 25. <http://European-convention.eu.int/pdf/LKNEN.pdf>.

for another IGC in 2004 and it requested the 2001 Laeken to introduce a convention which would take over the preparatory work for that next IGC.¹⁹ The Laeken Summit produced a declaration²⁰ which called for a Convention to be formed dealing with the issues the Union has to solve if it wants to work in a more efficient and democratic manner. The Declaration states that ‘they [the European citizens] want the European institutions to be less unwieldy and rigid and, above all, more efficient and open.’²¹ It is mainly an accumulation of questions which require answers if the Union is to be able to function properly and to have a democratic and legitimate structure. The questions were straight forward, open and broad and did not indicate any political preferences. Nevertheless, the Heads of Government/State at Laeken were, of course, careful enough not to set loose an uncontrollable body which might come forward with proposals too far from the *status quo*. As soon as the Convention got under way, national governments and Heads of Government/State begun to come forward with certain ‘ideas’ or ‘suggestions’ produced by their offices or even co-produced with other national leaders. The Franco-British initiative regarding the Presidency of the Council is one example.²² The Heads of Government/State are making sure that they do not loose control over the Convention and they are also trying to encourage its members into taking viewpoints rather closer to their own.

Third, to make sure that the Convention’s work does not drift from its original purpose, the Laeken Council has attached several ‘safety features’: its leadership was selected carefully by the Laeken Summit.²³ Valéry Giscard d’Estaing is an elderly statesman with an ingrained intergovernmental approach to the Union. It is worth highlighting that the difference between the President of the first Convention on Fundamental Rights, Roman Herzog, and the President of the current Convention on the Future of the Union, Giscard d’Estaing, could not be more dramatic. Although both have been presidents in their respective countries; while Giscard d’Estaing has been a full-time politician, at a regional and national level in a unitary state, Roman Herzog is a lawyer and a former constitutional judge in a federal state. It is no coincidence that the federal judge is not heading the constitution that proposes a future constitutional framework for the Union. Considering his age and expertise, he is expected to have certain ideas about how the European Union should look and is unlikely to change his mind on issues that he has been concerned with for over 40 years. Although Giscard d’Estaing is committed to the cause of the

¹⁹ Declaration on the future of the Union, No.: 3 and 4, Official Journal of the European Community, C 80/85, 10.03.2001.

²⁰ The Laeken Declaration, SN 300/1/01 REV 1 <http://European-convention.eu.int/pdf/LKNEN.pdf>.

²¹ The Laeken Declaration, SN 300/1/01 REV 1 <http://European-convention.eu.int/pdf/LKNEN.pdf>.

²² see also Die Presse, *Frankreich und Grossbritannien wollen EU-Präsidenten installieren*, 17.05.2002.

Union, he is not likely to turn it into a ‘Superstate’ with a clear cut federal constitution. His Presidency is therefore predictable and unlikely to slip out of his hands or those of the European Council. It seems the Council has calculated correctly. Giscard d’Estaing, so far, has stayed in the background and seems to consistently navigate the Convention into moderate waters. The statements and reactions coming from him and his Secretariat do not suggest a strategy that would be too radical for the European Council.²⁴ Even the recently released ‘skeleton treaty’,²⁵ by Giscard d’Estaing has not stirred up too much controversy, even in the UK. He is therefore very successful in assuring the broadest possible support for the final document, which is a prime pre-condition for the IGC to adopt the Convention’s proposal.

The limitation of time attached to the mandate is another safety feature to prevent the Convention producing a document at odds with the general ideas of the European Council. A period of 12 months is a very short period of time to produce a document that potentially gives answers to all the questions posed by the Laeken Declaration; bearing in mind that this document should also be able to serve as European’s first constitution.²⁶ In addition, apart from the President and his two substitutes, all other convention members have ‘other jobs’ to do. This means that their concentration will not be entirely devoted to the convention, instead it will be split between their work in Brussels and back home. Only the participating MEPs (up to a point) and the members of the three person Presidency are in a situation where they are able to concentrate their full attention onto the Convention; which gives them a distinct advantage over the other members.

However, there is one group in the Convention that is very keen on an effective treaty reform and holds traditionally a more ‘radical’ viewpoint than the Council, which is the European Parliament delegation. The Heads of Government/State may have underestimated its potential impact on the final document for the EP Delegation might prove to strong for the ‘safety features’ attached to the Convention’s framework. There are 16 MEPs taking part in the Convention and they have a considerable advantage over other delegations. They are based in Brussels, they have their internal and external networks and resources based there and they are used to working as a collective – usually together with the Commission and against the Council. They have therefore a

²³ see also EU Observer, *How the 15 agreed on Giscard d’Estaing*, 17.12.2001.

²⁴ EU Observer, *Giscard likes reform fever in EU institutions*, 22.06.2002, <http://www.euobserver.com/index.phtml?sid=9&aid=6752>.

²⁵ CONV 369/02.

²⁶ Interestingly, the Convention’s timeframe has been extended so that the final document can now be expected by June 2003. Yet, this change has been informally decided by the Convention itself rather than the heads of European governments.

distinct advantage over all the other possible alliances. Their position is by definition much more powerful due to institution as well as infrastructure reasons. National parliamentarians or government representatives might not ever have been to Brussels and find it difficult to join forces with other parliamentarians they have never met before. The EP Delegation is a coherent group used to working together. Also, the European Parliament, as argued above, has thus far been left out of the IGCs and so has had little impact on the constitutional changes of the Union in the past decades. This is not due to lack of interest but due to the fact that the Council did not allow any other institution to form part of the ‘treaty-reform-team’. The MEPs, with their primary interest being by definition the workings of the EU, are highly motivated to take a very active part in this future-shaping convention. This is the job they have been waiting for ever since the first EP elections back in 1979. Moreover, the internal divisions within the EP delegation are minimal and their common vision of a future EU much more defined than, for example, among national MPs or government representatives.²⁷ Moreover, MEPs will be able to devote a more substantial amount of time and thought to the Convention than their national counterparts and the government representatives. Observing the first months of the convention, it is clear that it is the EP delegation who have exercised most pressure on Giscard to come forward with his ideas and set a clear agenda.²⁸

A fourth characteristic of the framework of the Convention is the fact that it meets in public. As the Convention is composed of representatives from a wide range of different institutions and interests and it meets in public and is scrutinised by civil society, academia and the press, the kind of ‘horse-trading-based’ negotiations – typical for an IGC – are not possible. Not only are there many more players involved in the Convention than there ever were in the IGC – not necessarily in terms of numbers but in terms of the different institutions they represent – but also, the Convention meets in public and publicises its documents and papers, opening up the Convention to the European citizens and making itself as an institution considerably more transparent and representative. As it represents so many institutions and its members are scrutinised back in their home countries²⁹ it is much closer to the European citizens than a Intergovernmental Conferences. Furthermore, the Laeken Declaration itself emphasised that a Forum should be established which gives civil society the opportunity to contribute to the discussion on the Future of Europe. ‘In

²⁷ see, e.g., European Parliament, Lamassoure Report, A-0133/2002.

²⁸ see, e.g., Der Kurrier, *Voggenhuber probt den Aufstand im Konvent*, 21.05.2002.

²⁹ see House of Commons, Gisela Stuart and David Heathcoat-Amory, *Convention on the Future of Europe – First Progress Report from the UK National Parliament Representatives*, 30 April 2002 and House of

order for the debate to be broadly based and involve all citizens, a Forum will be opened for organisations representing civil society [...]. Their contributions will serve as input into the debate.’³⁰

The Convention will have to deal with legal and political issues and its composition and links to the citizens puts it in an extraordinary position to do that. Under these conditions the Convention is much more likely to produce a legitimate document which will receive widespread support across Europe than either of the IGCs in Amsterdam and Nice were able to. The ICG-model, due to the lack of individual accountability, openness and transparency in the negotiation process, suffers from the same democratic-deficit that characterises much of the Union’s institutional order. The 2004 IGC will have to consider the Convention’s findings and proposals, and it will remain up to the IGC to decide which parts – if any at all – it will accept and implement in a possible new treaty or even a constitution. The Laeken Council has attached several ‘safety features’ to the Convention, however, the findings of the Convention will have a big legitimacy-advantage and possibly the support of a considerable part of civil society as well as representatives of the EP, national parliaments, the Commission and even national governments (of the Member States and all accession states). Under these conditions it may prove more difficult for the Heads of Government/State to turn down the outcomes of the Convention than to accept them.

III How can the Convention be successful?

The Convention has been asked to produce a document, treaty or constitution, that not only copes with the constitutional questions arising from the enlargement process but that also paves the way for a new institutional structure that is closer to the citizens and is built on a more democratic and legitimate foundation. Every government participating in the 2004 IGC will have a veto and can thus prevent the Convention’s proposals from being implemented. Yet, it is crucial to note that striking down the suggestions and solutions provided by the Convention without providing an acceptable alternative – acceptable to all national government representatives and the Heads of Government/State – will be almost impossible for any government. It should be remembered that the very existence of the Convention is due to the fact that the previous Intergovernmental

Commons, Gisela Stuart and David Heathcoat-Amory, *Convention on the Future of Europe – Second Progress Report from the UK National Parliament Representatives*, 20 June 2002.

³⁰ The Laeken Declaration, SN 300/1/01 REV 1, Annex I, II. Convening of a Convention on the Future of Europe, Forum, page 25. <http://European-convention.eu.int/pdf/LKNEN.pdf>.

Conferences were not able to produce such a compromise. Nevertheless, to produce a document that will be successfully implemented as the first European constitution, the Convention will have to fully satisfy three different interest groups. Its own members, civil society, and the 2004 IGC. The question therefore is, how can the Convention secure the support by all three of these players?

First, the final document to be produced by the Convention will have the potential to serve as the first European constitution; it therefore has considerable symbolic weight. The chance to produce the first European constitution, and hence to secure a chapter in the history books, will provide the Convention with significant motivation to produce a coherent document.

To produce a document that receives unanimous support will be extremely difficult as there are, due to its composition, a large number of different interests and ambitions dominant among the Convention members. Yet, there are only two real main currents: the President – supported by his Secretariat – and the European Parliament Delegation. Although some government representatives, foremost UK's Peter Hain³¹ and Germany's Peter Glotz³² (who has, following the German federal elections, been replaced by Germany's Foreign Minister, Joschka Fischer, in October 2002) have also made a considerable impact and submitted important papers and ideas. Still these inputs mostly derive from single persons and do not have the same impact than the contribution by the two main 'camps', the Praesidium andx the EP Delegation.

The impact of a document that receives almost unanimous support among the Convention members is clearly much greater than that of a document that secures only the support of a simple majority. The Laeken Declaration makes it clear that the final document 'may compromise different options, indicating the degree of support which they received.'³³ In broad terms, a common compromise would mean that the Convention needs to present a document that is neither too radical to scare off the Danish or British convention members, nor too conservative to miss out on the support of the German and Belgian ones. This compromise would most likely be achieved if the two driving forces, the EP Delegation and the President, work together and agree on a common position. The problem may be that MEPs tend to be more ambitious and would

³¹ See Convention documents CONV 345/1/02 REV 1; CONV 345/02; CONV 277/02; CONV 178/02; CONV 88/02; CONV 66/02.

³² See Convention documents CONV 277/02; CONV 178/02; CONV 177/02; CONV 88/02.

³³ Laeken Declations SN 300/1/01 REV 1 <http://European-convention.eu.int/pdf/LKNEN.pdf>.

prefer a more integrationist, even federal version, whereas Mr. Giscard d'Estaing is probably more committed to a more intergovernmental solution. However, the common goal of these two 'camps', namely to produce the first European constitution, is likely to provide the much/needed incentive to agree on a compromise acceptable to them and the Convention at large. This is underlined by Giscard d'Estaing's remarks that the Convention should aim at producing a final document which is endorsed by an overall consensus of the members. This, however, does not mean that it has to be based on unanimity.³⁴

Second, the Convention will have to integrate the ideas and suggestions brought forward by civil society via the Forum. This might prove to be an excellent source of fresh input; especially since this sort of official link between the EU and civil society has never existed before. Although the designs and concepts provided by the Forum participants might not always be identical with the opinion of the majority of the Convention members, establishing a close co-operation and incorporating some of them into the final document would add to the credibility and legitimacy of the Convention and its output. It is therefore crucial that the Convention is able to incorporate some of the thoughts and ideas provided via the Forum, although it might add to the already difficult situation of finding a common denominator among the Convention's diverse membership. Yet, if the Forum approves the final outcome of the Convention's work, the latter will have achieved something the Union has failed to do so far – to get involved with its citizens in the integration process and bring the Union closer to them.

Moreover, the support of the Forum and the wider European public might also depend on whether the Convention will be able to make sure that its final document is more accessible than the current – highly complicated – treaties. The issue of language is central in bringing the Union closer to its citizens. People who understand exactly what the EU is about, where its competences lie and how its institutions function and interact are more likely to be supportive of it. Therefore, it might prove to be a successful approach if the new document were divided into two parts. The first one would contain the principle structures of the Union, referring to the composition and competences of its institutions and their interconnection. The second part would deal with the detailed decision-making procedures and explications of policies.³⁵ This idea would make the document much more accessible for European citizens and so might trigger greater interests and

³⁴ See footnote 17.

³⁵ Pernice has suggested such a 2 part treaty in 'Pernice, Ingolf, *De la constitution composée de l'Europe*, RTEurope 36, 2000, pp. 623-647 see also EU Observer, *Non-paper on Basic Treaty*, by the Convention's Secretariat, 15.06.2002; Convention document CONV 250.

support from the public, the press and so put considerable pressure on the Heads of Government/State to adopt it at the 2004 IGC.

Third, the Convention is only supposed to carry out the preparation work for the 2004 IGC and without its unanimous support for the Convention's proposal, all efforts have been in vain. The Convention's main task, which will dominate the final drafting of the Convention's proposals, is to satisfy the Intergovernmental Conference by presenting a document that gives clear answers to the questions asked in the Laeken Declaration. On the one hand, the Convention could present a rather uncontroversial document, which is consensus based and does not upset the more Euro-sceptic governments, which will be present in 2004. On the other hand, the Convention could put pressure on the IGC to guarantee its support. It could try to manoeuvre the Heads of Government/State into a situation where they cannot refuse the Convention's suggestions due to the large support that it receives throughout its own members, civil society and the press.

The Convention will aim to achieve a compromise between these two. The final document will not be an easy pill to swallow for the Intergovernmental Conference but it will not be totally unacceptable. In addition, the Convention will try everything it can to secure enough support throughout the Union to raise the pressure on the 2004 IGC. As argued above, presenting a coherent document not containing any alternative suggestions (from which the IGC could potentially pick and choose its favourite versions) will be of the highest priority. Therefore, a unilateralist approach by either the EP Delegation or the President would probably fail to secure the support of the Heads of Government/State in 2004. Also, co-operating closely with the Forum will increase the pressure on the IGC as it adds legitimacy to the Convention's final document.

In addition, the Convention members and foremost its President, Valéry Giscard d'Estaing, will be motivated to see the Convention's outcome being implemented. He would become the 'Father of the European Constitution' – a prospect which is likely to make sure that he will lobby the Heads of Government/State hard and to put public pressure on them to accept the Convention's final document. Of course, other Convention members will try the same but the lobbying power of Giscard d'Estaing will be very significant as he is the one the Heads of Government/State initially chose to preside over the Convention. Given that he was offered the task of chairing the Convention how could the IGC refuse its outcome if it is strongly supported by the man they put in place to supervise the process?

Therefore, if the Convention strikes the right balance, between producing a consensus based document that receive widespread public support, and is able to successfully lobby the 2004 IGC, its output stands an excellent chance of becoming the first European Constitution. Despite the potential difficulties to secure sufficient support it can be expected that the Convention will produce a document that eventually will be accepted and implemented by the next Intergovernmental Conference in 2004. Not all Convention members will feel they have achieved a solution which matches their high ambitions; but it will be far more successful and effective than the failed attempts from the 1996 and 2000 IGCs.

IV Can the Convention-model complement the IGC-model?

With the difficulties the IGC-model has suffered in Amsterdam and Nice and with the potential success of the Convention looming, it has to be considered whether the Convention-model could amend the IGC-model on a permanent basis.

The only argument against the institutionalisation of the Convention-model is that it would add a new layer to the already complicated institutional Legoland of the Union of today. Already it is difficult to understand the decision-making process and the competences and interconnections between the European Parliament, the Commission and the Council, nevermind the working procedure of an Intergovernmental Conference. To add to all this a Convention which will be created only on an *ad hoc* basis will make things even more complicated and incomprehensible for the wider public. The composition of its members is seemingly based on a mathematical equation that is difficult to decode. The members of the Convention represent 32 different institutions; with representatives from 15 different national governments, 15 different national parliaments (not considering the fact that, for example, Germany sends parliamentarians from two different Chambers), the Commission and the European Parliament. And this is not even counting the members representing parliaments and governments from the accession countries. Therefore, it may be questionable whether adding this new body to the institutional structure of the European Union will be counterproductive or not.

Considering the difficulties and problems the IGC-model has been faced with, particularly in Nice, the Convention has the potential to overcome these and be the preparatory instrument for future Intergovernmental Conferences. Referring back to the difficulties IGCs are potentially facing (see *I The Limitations of the IGC-model*), it can be argued that amending the IGC-model

with the Convention these difficulties may be overcome. It is true that the significance of issues will not be reduced because they are handled by a Convention. However, Convention members do not represent national governments in the same way that IGC participants do. Therefore the stakes are less high for the actual participants. They are less under pressure from official government lines than representatives negotiating in IGCs and they are more likely to present their own personal opinion and thus are able to take some pressure off high-stake issues. The Convention is not a clearly shaped arena with strictly arranged groups and alliances like it is so often the case during IGCs. This allows Convention members to take a much more flexible approach to the negotiations. They are taking part to find an effective and efficient solution acceptable to the large majority of participants. They are not there to push through 'issues of national principle' to improve the position of individual national governments in the European Union.

The issue of alliance is really a non-issue at the convention. As argued before the number of possible alliances is much higher and therefore it is likely that several leading alliances will emerge. These alliances are much more open and flexible than those to be found in IGCs. Convention members can be – and often are – part of several groups. This also is likely to facilitate the negotiations and will help to produce satisfactory results. In addition, the influence of the European institutions could be greatly enhanced if the IGC-model was amended by the Convention-model. Both the Commission and the European Parliament have sent representatives to the Convention; the Committee of the Regions, the Economic and Social Committee, the European Social Partners and the European Ombudsman have all sent observers. The influence the European institutions are able to take in the Convention is likely to further benefit the outcome and to ensure that the Convention presents the 2004 IGC with an effective and efficient proposal.

The problems the IGC-model has been facing will not disappear by amending it with the Convention-model but it will facilitate the IGC's work for it provides the IGC with proposals that have received the approval of representatives from over 40 different institutions from throughout the Union. Member State governments will be able to settle critical issues – despite high stakes – thanks to the legitimacy advantage of the Convention. Its outcome cannot be regarded as biased to any (group of) Member State(s) nor to the EU institutions due to its diverse composition, which has been agreed upon by the participants of the IGC themselves. As Paul Magnette points out: '[...] the governments agreed because, since the process was highly unforeseeable, they

could all think that they would be able to maximise their interests – and otherwise they would still have the opportunity to minimise their costs during the following IGC'.³⁶

Furthermore, in many respects the Convention can be considered to be an ideal mix of politics, law and citizen participation, which might be the key to future constitutional changes in an EU with a political, economic, and possibly even military framework. First, the Convention is a highly transparent and open institution. The admittedly complex composition of the Convention can also be regarded as one of its greatest strengths. It means that there is a much improved linear connection between the citizens and an official EU body. Consisting of MEPs, national parliamentarians and national government representatives the Convention is much closer to the citizens than an IGC. This is helped by the fact that the Convention holds its meetings in public and makes its working papers and documents freely available. Transparency and accountability – issues the Convention is supposed to reinforce in the Union – have a prime position in the Convention's working attitude. Already, we see members of the Convention travelling through Europe and taking part in conferences and public debates, or publishing their opinions and thoughts in national newspapers³⁷. Convention members are actively trying to establish a link with citizens which can only be welcomed and which has been absent from the IGC-model.

Second, the Convention members are representative and can work very efficiently for they do not carry 'baggage' from previous negotiations. The vast majority of the members of the Convention are democratically elected as they are mostly members of national governments or parliaments;³⁸ while most participants of an IGC, apart from the national Ministers and the Heads of Government/State meeting at the final summit, are not directly democratically legitimised. They are mostly officials for which the ministers are ultimately responsible. A considerable part of the Convention's work is also done by unaccountable officials, most prominently the Secretariat with its head, John Kerr.³⁹ However, due to the Convention's inherently transparent character and the

³⁶ Magonne P., *Deliberation vs. negotiation*, paper prepared for the First Pan-European Conference of the ECPR Standing Group on the European Union – Bordeaux 26-28 September 2002.

³⁷ See for example <http://www.fedtrust.co.uk/conferences.htm>; *Le Monde Choisir une Europe sous influence américaine ou une Europe indépendante*; Interview with Michel Barnier, 23.05.2002, Giscard d'Estaing, V. *Le Monde*, La dernière chance de l'Europe unie, 23. 07. 2002; FT Interview with Valéry Giscard d'Estaing, 07. 10. 2002.

³⁸ The only exceptions would be the two Commission representatives, who have been nominated to their position rather than elected, and a few government representatives who are not formally part of their national governments; like the German government representative Peter Glotz who is a university professor in Switzerland.

³⁹ See, e.g. Bond M., *Kerrfully does it*; in *The Parliament Magazine*, issue 148, 28 October 2002.

fact that submitted documents are made public in the name of the Convention's members, the level of accountability is undoubtedly higher in the Convention than in an IGC.

Convention members hold their position only temporarily, which has the great advantage that they do not have to perform in a way that ensures their re-election or re-nomination. They can thus concentrate fully on finding the most effective solution. That stands in sharp contrast to the work of an Intergovernmental Conference where Heads of Government/State are grilled back home about their achievements during the IGC. Their personal performance will be measured by whether they have been able to 'win a deal' that benefits their country; and this is likely to have considerable impact on their popularity back home. Thus, the Convention-model combines accountability and transparency with the advantage of being relatively independent from political implications 'back home' which makes it potentially more open-minded and flexible and will hence facilitate finding an effective compromise.

Third, it should not be forgotten that the IGC would lose neither its competences nor its importance. The findings of the current Convention will have to be presented to the 2004 IGC and it is up to the latter to decide whether or not it will accept the findings, or at least in part. This arrangement is unlikely to change. The Member States' governments will make sure that they always have the final say (including a veto option) about the proposals coming out of any future convention. Therefore, the 'IGC-model' of 'big politics' will not be challenged or replaced but rather enriched by a new component which looks like it is able to fix the flaws that the current system has stumbled over during the last two IGCs. Of course the Convention may seek to persuade the Member States' governments to introduce a changed treaty amendment system whereby the IGC would be completely replaced by a simple convention-model. However, no institution is likely to transfer its powers and competences and transfer them to a different body. That will be also true for the IGC. It will not allow the Convention-model to completely replace the IGC in its function as principal treaty amendment body, yet the IGC might be willing to grant the Convention-model a permanent place alongside it.

Conclusion

Although IGCs have proved to be an remarkably successful forum for deepening the integration process and to give all Member State governments the opportunity to participate equally in negotiations, it seems as if the current constitutional issues and questions cannot be tackled in this way as 'institutional reform divided and continues to divide the Member States.'⁴⁰ The Convention is a new attempt to make the Union and its integration process more open and accountable. It seems to be more capable to solve the institutional and constitutional issues that the Union is currently facing than the IGC-model was in 1996 and 2000. The European Parliament Delegation and the President have emerged as the driving forces and if they are able to come up with a final document supported by both of them, the Convention is very likely to 'sell' its proposal to the 2004 IGC. The Union will continue to develop and with future changes in the national and international political, economic and/or security spheres it is also expectable that the EU will sooner or later face the need for further changes in its constitutional order. If this Convention on the Future of the Union will live up to its full potential by effectively producing Europe's first constitution, the 'Convention-model' could provide an efficient new model to solve institutional and constitutional challenges still laying ahead.

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⁴⁰ Lodge, J p. 348.