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Bargains and Rhetoric in the Convention on the Future of Europe

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Abstract

While acknowledging that the European Convention was merely dominated by strategic behaviors, like former treaty changes, this paper examines the role played by arguments in the process. It first shows that the Laeken mandate comprised rules which could be used by the majority of the conventioneers to promote a deliberative norm. It then analyses, using Perelman's *Treaty of argumentation*, the different kinds of arguments used by the conventionneers to solve incompatibilities, and stresses the major role played by the "rhetoric of simplification". It concludes that, although these formalist arguments proved inefficient where questions of power were at stake, the potential long-term effect of this deliberative process should not be neglected.

Coping with constitutional incompatibilities

Bargains and Rhetoric in the Convention on the Future of Europe

Paul Magnette

The ink is scarcely dry on the "constitutional treaty" written by the Convention on the Future of Europe, and yet controversies about the meaning of this experience have already begun. There are those who, adopting a 'realistic' point of view, see it as a classic form of intergovernmental bargain, which does not alter the Union's structure significantly :

> 'Despite its highly charged rhetoric, the constitutional convention (…) is unlikely to achieve much more (than the treaties of Amsterdam and Nice). The most ambitious proposals still under discussion – modest expansion of qualified majority voting, creating a forum for national parliamentarians, restructuring the European council – merely consolidate decade-long trends' (Moravcsik 2003: 38).

Others, however, emphasize the importance of the legal changes proposed by the Convention: merging the treaties, suppressing the pillars, generalizing codecision and qualified majority voting in legislative matters, incorporating the Charter… all this amounts to a substantial qualitative leap if not to a constitutional revolution (Maduro 2004). In turn, this legal transformation might change the political meaning of the EU and contribute to its legitimization.

In this paper, I will argue that these two lines of analysis are not contradictory. It is difficult to deny that the Convention was merely a new bargain between member states, largely governed by classic forms of mutual concessions, based on a narrow calculation of costs and benefits. But the deliberative nature of the process should not be neglected. My argument will be that this Convention can be understood as an experience of 'negotiation under the shadow of rhetoric'[1].

In the first part of this paper, I will show that the Laeken mandate which created the Convention was very open: being the result of a compromise between member states, it contained rules and procedures which made deliberation possible, if not certain. In the second part, I will examine how the majority of the conventioneers have institutionalized a 'deliberative setting' in order to counter-balance the logic of bargaining. In the third part, I will emphasize signs that, in some instances, rhetoric strategies contributed to forge agreements. I will particularly insist on the importance of 'practical' and 'logical' ways of reasoning in this discussion, and on the importance of the leitmotiv of 'simplification'.

1. An ambivalent mandate

Although a number of political leaders described it as the symbol of the victory of a new 'constitutional doctrine', the Laeken Declaration, which created the Convention and raised a long list of questions its members would have to address, was the result of a classic intergovernmental compromise. The opportunity for such an innovation had been created by the recent context[2]. Since the beginning of the 1990s, the EU had been dominated by an 'overwhelming constitutional agenda'. The Maastricht treaty had been judged unsatisfying by some member states who had required another IGC five years later; the Amsterdam treaty, in turn, was considered incomplete by some governments and yet another IGC had been foreseen for the end of the decade; at Nice, in December 2000, the governments agreed again

[1] 'Rhetoric' is not understood here in pejorative terms. I use the word with its classic meaning to describe the praxis of arguing in public.
[2] On the genesis of the Convention, see (Magnette 2004).

that their consensus was minimal and that other reforms would be necessary before the next wave of enlargement. In this context, the argument according to which the process of the IGC itself was partly responsible for these repeated failures gained political ground. This context in itself did not produce any solution, but it convinced some governments that an original initiative had to be taken, and prepared the other ones to accept some modification of the IGC process[3].

In the meantime, the Convention (originally called 'body') set up to codify the fundamental rights protected in the EU had concluded its work without major tensions, and respecting the deadline. Contrasting with the climate of the Nice Summit, it soon offered the blueprint of an alternative. The Belgian delegation, supported by its Benelux partners, obtained a declaration claiming a 'debate on the finality of the Union' during the Nice Summit. Though the Belgian Prime Minister, M. Verhofstadt, did not know precisely at that time what he would propose to his colleagues during the Belgian presidency, it was clear that he would suggest something inspired by this precedent.

M. Verhofstad's government put the Laeken Declaration at the top of the priorities of the Belgian presidency, during the second half of 2001. He soon realized that he could rely on the support of the Commission and the European Parliament, who expressed their support for another Convention in different reports (Barbier 2002), as well as that of some governments of the small states and of Germany. Chancellor Schroeder's support can easily be explained by domestic concerns: promoting a European constitution, in a country where citizens remain strongly pro-European, was a good way to compete with the Christian-democrat opposition and to come back to an issue largely monopolized by the Green party led by the charismatic and avowedly federalist Minister for foreign affairs Joschka Fischer. The position of the small countries can also be explained, in part, by national ideological contexts. But it also corresponds to their interest: at Nice, they had realized that IGCs remain governed by big bargains where the large states are often able to impose their views or at least to veto those proposals which go against their interest. A preparatory body that would put all the actors on an equal foot, deliberate publicly, and include MEPs and commissioners offered the negotiators of the small countries more possibilities to forge alternative coalitions and to reduce the impact of the veto. The large states, on the contrary, Britain, France and Spain particularly, were rather reluctant to accept such a new process.

In this context, M. Verhofstadt used three tactics to forge a compromise. First, he resorted to classic bilateral negotiations and personal contacts with heads of governments (the famous 'confessionnel') to reduce oppositions step by step and avoid the formation of a skeptical front. Secondly, he presented the 'broad debate' he advocated as a mixed process, combining a Convention, a Forum of civil society organizations, and national debates; the confusion this created on the presidency's strategy probably helped reduce the opposition of those who feared a Convention[4]. Finally, and most importantly, he insisted that this Convention would only be a 'preparatory body' and that decisions about treaty reforms would fully remain in the hands of the governments. The least enthusiastic governments – afraid to loose control of this process, but also simply fearing the impact the launch of a 'constitutional' debate could have on their national opinions – conceded that it was difficult to refuse a 'broad debate', and

[3] Uneven dynamics of institutional reform produce incomplete contracts, which generate frustrations; these frustrations, in turn, pave the way for further reform aiming at rationalizing the polity (Olsen 2002).

[4] The text of the Laeken Declaration itself reduces the potential impact of the Convention when it states that ' *together with the outcome of national debates on the future of the Union*, the final document (drawn up by the Convention) will provide a starting point for discussions in the Intergovernmental Conference '.

therefore tried to make sure that they could, in any hypothesis, control it and reduce its impact. During the bilateral discussions with the Belgian presidency, they focused on the content of the Laeken declaration[5] and tried to limit the impact of the Convention by requiring strict deadlines and a 'cool enough period' between the end of the Convention and the IGC, and by suggesting that the Convention's role should be limited to identify options that would then be settled by the governments themselves during the IGC. At the Laeken Summit, they again discussed the text of the Laeken declaration rather than the creation of the Convention itself, and concentrated their negotiation on the nomination of the Convention's Chairman.

The text of the Laeken Declaration bears the marks of this negotiation. First, the rather federalist blueprint written by the Belgian government's advisers[6] was counter-balanced by much more skeptical questions raised by the most reluctant governments (Britain and France). As a result, the Laeken Declaration is the most open text ever adopted by the European Council. In terms of competencies, it envisages to strengthen the EU's common foreign policy and defense policy, to adopt a 'more integrated approach to police and criminal law cooperation', to step up economic policy coordination, 'intensify cooperation in the field of social inclusion, the environment, health and food safety'… But on the other hand, it also states that 'in coordinating the economic, financial and fiscal environment, the basic issue should continue to be proper operation of the internal market and the single currency, without this jeopardising the Member States' individuality' and that reasserting the EU's competencies could also lead to 'restoring tasks to the Member states', who should moreover be 'provided guarantees that their spheres of competence will not be affected'. In terms of institutions, the Declaration asks if the President of the Commission should be appointed by the European Council, by the European Parliament or directly elected by citizens; it envisages to strengthen the European Parliament, but also the Council and to give a role to national parliaments. In other words, each government managed to have its own priorities mentioned in the Declaration.

The process of the Convention itself, as defined by the Laeken mandate, also witnesses this compromise. The Declaration first states, when it creates the Convention, that this is done 'in order to pave the way for the next Intergovernmental Conference'. It also stresses the Convention's duty to report to the European Council, 'thus enabling Heads of State or Government to give their views'. It very emphatically recalls that the final document of the Convention will provide 'a starting point for discussions in the Intergovernmental Conference, which will take the ultimate decisions'. It was clear, from the wording of this mandate, that the Convention was formally nothing more than a preparatory body, and that the governments' power was not formally altered by this process. During the negotiation of the Laeken mandate, a conflict opposed those governments which wanted the Convention to write a full-fledge 'constitution' that would then simply be rubber-stamped by the IGC, to

[5] The French and British delegations insisted that the diagnosis of the Union should be less pessimistic, and a sentence mentioning the ' deadlocks of unanimity ' be suppressed. They also asked the re-formulation of a question concerning the direct election of the Commission's President – because they found the initial sentence sounded like a positive answer; and required the introduction of other questions, concerning the re-nationalisation of some policies and the strengthening of the Council. This process explains why the Laeken declaration is the most open document ever adopted by the governments.

[6] The draft of the Laeken Declaration had been written by Franklin Dehousse (professor of EU law at the University of Liège and a member of the 'Westendorp Group' which had prepared the 1996 IGC) and Koen Lenaerts (professor of EU law at the Katholiek Universiteit Leuven and judge at the Court of First Instance). The Belgian government had also set up an international Wise committee (made of Giuliano Amato, Jean-Luc Dehaene, Jacques Delors, Bronislaw Geremek and David Miliband) whose members had commented on this draft.

other governments which argued that the Convention should simply identify options and not seek to form a compromise. There again, the Laeken Declaration left the question open: it says that 'it will be the task of the Convention to *consider* the key issues arising for the Union's future development and to *try* to identify the *various possible* responses' (emphasis added). It adds that the final document 'may comprise either different options, indicating the degree of support which they received, or recommendations if consensus is achieved'.

This text is a perfect illustration of the mechanism of resolution of conflicts through 'ambivalent agreement', i.e. 'agreement based on preference differences and belief differences that cancel each other' (Elster 1998b: 101). Some could believe that the Convention would reach a consensual agreement that would profoundly transform the Union and that, given the strength of the consensus, the governments would be forced to ratify their text; others could think that the Convention would only identify options that would be just one of the 'starting points for discussion' of the IGC.

2. Fostering deliberation

Within the Convention, a large majority soon emerged to promote an ambitious interpretation of the Laeken Declaration. The most reluctant governments seemed to be disadvantaged by the structure of the process: they had to face MEPs, commissioners, representatives of the small states which supported the Convention, as well as the members of their own domestic opposition – while the representatives of the candidate countries remained very cautious until the signature of the accession treaty. The representatives of those governments and institutions which had supported the idea of the Convention managed to convey a 'constitutional ethos' and to avoid the reduction of the Convention to a vast 'wise committee'. As this body had been created to prevent the forms of sub-optimal bargaining that were supposed to be inherent in the process of intergovernmental negotiation, many members argued, the very raison d'être of this Convention was to forge an alternative method[7]. The classic dichotomy opposing 'bargaining', based on a narrow defense of stable preferences, and 'deliberation' defined as a rational exchange of arguments seeking to reach the 'common good', seems to have structured the conventioneers' image of their own role.

Conveying the social norm of impartiality

The Chairman of the Convention, former French President Valéry Giscard d'Estaing, immediately followed this path and emphasized the normative dimension of the Convention in his introductory speech. He invited the members to 'embark on our task without preconceived ideas, and form our vision of the new Europe by listening constantly and closely to all our partners'. One step further he added that 'the members of the four components of our Convention must not regard themselves simply as spokespersons for those who appointed them' and that if each member would remain 'loyal to his or her brief ', he or she also had to 'make his or her personal contribution'[8]. This is, he argued, the key of the 'Convention spirit'. In a quasi-habermassian jargon, he concluded: 'If your contributions genuinely seek to

[7] Opening the Convention, Jose Maria Aznar argued, on behalf of the European Council, that ' Nice is the reason why we are here today. ' Partly re-writing the history, he added that ' Immediately thereafter, the Heads of State and Governments convened the Convention that is starting now, in the knowledge that *the new stage calls for new forms of operation and deliberation* in order to continue to create "more Europe" ' (emphasis added).
[8] Jose Maria Aznar, as President of the European Council, had on the contrary argued that the members had to follow the views of the organs they represented.

prepare a consensus, and if you take account of the proposals and comments made by the other members of the Convention, then the content of the final consensus can be worked out step by step here within the Convention'. This, he added, is the crucial difference between the Convention and a classic IGC, he defined as 'an arena for diplomatic negotiations between Member States in which each party sought legitimately to maximize its gains without regard for the overall picture'[9], paraphrasing, this time, the classic definition of bargaining. Later on, he often recalled this principle of independence and mutual listening when the positions tended to crystallize along national, institutional or party lines[10].

Institutionalizing a 'deliberative setting'

Moreover, the working methods of the Convention, partly imposed by the governments and partly defined by the Convention – or its Praesidium – institutionalized this 'social norm' and created a 'deliberative setting'. First, President Giscard soon defined the 'final outcome' of this process. The Laeken declaration had left this crucial question open. Knowing that a vast majority of the Convention was willing to reach an ambitious agreement, Giscard affirmed during the first session that they should try to achieve 'broad consensus on a single proposal (…) (that) would thus open the way towards a Constitution for Europe'. The idea that its role would be limited to identifying options, which would then be settled by the IGC, was abandoned from the very beginning – although it remained an option in case the members could not agree. This was a major decision, because it determined the organization of the Convention's work, and even the kind of arguments raised during the discussions. The first Convention had, under the impulsion of its Chairman, decided to work 'as if' the result of its deliberations would be legally binding; in doing so, they favored formal discussions molded in legal terms – rather than vague debates on the EU's values and principles – and a neat organization of the Convention's calendar around quite clearly identified thematic issues. This decision was, retrospectively, interpreted by some key actors of this first Convention as its most important rule (Braibant 2001). Drawing the lessons of this precedent, Giscard made the same choice. This, in turn, led to the setting up of working groups to study the subjects which appeared, in the course of the discussions, to be the most sensitive questions and it facilitated a rapid agreement on the 'skeleton' of the 'constitution'. More generally, it probably convinced the members that, to be efficient, they should focus their arguments on precise points, and mold them in quasi-legal terms.

The second major decision made by the Presidium concerned the 'decision-making' rule. There again, Giscard affirmed during the first session – with the overt or tacit support of a vast majority of the members – that such an assembly could and should not vote. It could not vote, he explained in a press conference, because all member states were on an equal foot – so that a majority of votes could be a tiny minority of the population. It should not vote, he

[9] In the same vein, see his opinion published by *Le Monde* on 23 July 2002: 'Il ne s'agit pas de rouvrir, de manière précipitée, d'anciens débats, comme la querelle entre fédéralistes et intergouvernementalistes, ou la rivalité entre la Commission et le Conseil, qui se sont brisés sur les écueils d'Amsterdam et de Nice, mais de faire avancer le groupe pour vérifier s'il peut découvrir, en fin de parcours, une solution globale commune'.

[10] In a press conference after the session of 22 March, Giscard said he found it 'normal que les grandes sensibilités européennes harmonisent leurs points de vue ' while however warning against any 'structuration excessive' of the Convention. (AE 23 mars 2002). On 12 July, after many members had presented their argument as their state's position, he recalled 'qu'il ne s'agira pas de s'exprimer d'un point de vue national (…). Nous attendons des conventionnels une expression européenne'.
In his opinion published by *Le Monde* on 23 July 2002, he said about the representatives of the governments: 'Leur situation comporte une certaine ambiguïté: participent-ils en tant que personne aux travaux et aux interrogations de la Convention, ou viennent-ils y exprimer le point de vue des gouvernements qui les ont désignés? Après un premier flottement, il m'a semblé que leur caractère de ''conventionnel'' s'affirmait'.

argued, because 'there is no doubt that, in the eyes of the public, our recommendation would carry considerable weight and authority if we could manage to achieve broad consensus'. This sentence was the most applauded of his whole discourse – as he subtly noticed during the next session. He added, again during a press conference, that 'consensus does not mean unanimity'. In other words, as had been the case in the first Convention, a small minority would not be in a position to prevent the large majority of the Convention from adopting a common position – albeit the precise size of this minority remained unclear. This principle was also crucial. When the members know that, if they can't build a large front, their opposition will not be taken into consideration, they are encouraged to look for compromises that can be acceptable by the vast majority, even if this obliges them to depart from their initial preference. Only those minorities who could threaten to veto the 'Constitution' during the successive IGC – the governments of the large states or a coalition of small states – could influence the outcome, while the very hostile Eurosceptic front, though well organized, knew from the very beginning that it could not prevent the formation of a 'consensus'.

The rules of the Convention, defined by the governments and interpreted by the members, remained remote from the ideal-type of a deliberative constitutional forum. The Convention was not a decisional body, and the members knew they had to anticipate the reactions of the governments that would renegotiate the treaty during the IGC. The members were not fully independent either, as they had not been elected and had to account to those who had nominated them; their capacity to adapt their behavior according to the arguments made by their partners was therefor limited. Moreover, most of them represented bodies and institutions whose behavior would be regulated by the new 'constitution': they could thus be tempted to defend corporate interests rather than an abstract 'common good'.

Some features of this process however favored a deliberative approach. First, the Convention took place in a very relaxed context, not under the shadow of rebellion and war: it was thus protected from the pressure of force and passionate opinions which make rational argumentation difficult or impossible. Secondly, the mixed composition of the Convention could make the debates more open and fluid than those of an IGC: as a large array of interests and ideologies was represented, the members could examine a larger set of options; as the veto was not formally possible, and as new players were present, they could form new types of coalitions. Thirdly, the process was supposed to be public: the members could thus be induced to disguise their interests into impartial views, and thereby promote rational styles of arguing[11]. On the other hand, the existence of more discrete forums (Presidium, working groups, components, ad hoc meetings…) offered opportunities for compromise. A priori, a deliberative approach was thus possible, if not certain.

Arguing under the Shadow of the Veto

Apparently, the deliberative setting played a certain role. First, the Convention seemed to remain sheltered from external pressures. True, the Chairman was sometimes accused to follow the views of the governments which had nominated him and to whom he frequently reported. But most conventioneers acknowledged that they had generally been able to organize their deliberation on their own, without being subject to overt pressures from the European Council, or from the Presidium. Those who frequently criticized the Presidium, and

[11] Elster argues that a deliberative setting can 'shape outcomes independently of the motives of the participants. Because there are powerful norms against naked appeals to interest or prejudice, speakers have to justify their proposal by the public interest'. This, in turn, tends to *alter* their preference: 'the proposals will be modified as well as disguised' (Elster 1998b: 104).

the indirect pressures of the government, finally recognized that the process had not been vitiated by these pressures. Secondly, fixed coalitions could sometimes be observed, but in most cases, the majority of the conventioneers adapted their position to the issue[12]. On socio-economic issues, a quite neat left-right opposition dominated the discussions – though a nationalist left tended to oppose further integration, while a more federalist right was inclined to accept more integration. On institutional matters, intergovernmental and federalist visions reemerged, before being overshadowed by the revival of the latent opposition between large and small countries. Given these divisions, the final compromise had to aggregate a large array of interests and visions, and could not simply combine the basic preferences of three or four major actors. Finally, if some members sometimes ignored the social norm of impartiality[13], in most cases, the conventioneers 'played the game' of honest deliberation: they used warnings rather than threats and disguised their interests as impartial views seeking a compromise. In so doing, they seemed to pave the way for a real dialogue, 'which is not supposed to be a *debate*, in which the partisans of opposed settled convictions defend their respective views, but rather a *discussion*, in which the interlocutors search honestly and without bias for the best solution to a controversial problem' (Perelman and Olbrechts-Tyteca 1969: 37).

Whether the conventionnels tended to transform their position when they presented them as impartial views, as hypothesized by Elster, remains to be seen. In many instances, the hypocrisy of the speakers did not seem to affect their behavior, and this seemed to be clearly understood by the other participants. In a paradoxical intervention, Giscard insisted on the importance of the principle of impartiality while at the same time recognizing its purely formal nature:

> 'Je voudrais juste rappeler un point d'éthique de la Convention, Monsieur Ponzano. Il ne s'agit pas d'une négociation entre les Institutions, le Parlement européen et les gouvernements. Chacun parle en son nom. Par exemple, en ce qui concerne les membres de la Commission, *on sait qu'ils sont membres de la Commission lorsque Monsieur Barnier ou Monsieur Vitorino s'expriment*. Mais ils n'expriment pas le point de vue de la Commission. La Commission s'exprime par des canaux appropriés en tant que telle. Nous sommes ici à une réunion de Conventionnels où chacun s'exprime en son nom comme va le faire à l'instant Monsieur Fischer.'

The conventioneers indeed often talked in their own name, not on behalf of their country, party or institution, and they probably did so to avoid the opprobrium associated with the naked expression of their interests. But this did not prevent them, individually, from defending their own interests, and collectively from resorting to bargains as well as to deliberation.

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[12] The flexibility of the conventioneers largely varied. At one end of the spectrum, a Belgian Socialist MP could be very flexible : he could support his socialist colleagues from other countries on economic policies, be with his fellow citizens and the MEPs on the election of the Commission's President by the EP, then be with other national parliamentarians (against MEPs) when the role of national assemblies were discussed and with representatives of other small states on the reform of the Council presidency. By contrast, at the other end of the spectrum, a British conservative MP would usually be against MEPs and commissioners, small countries and left-wing parties on all issues.

[13] See notably this very clear and blunt answer to the President of the Commission, Romano Prodi, by the representative of the British government, Peter Hain on 5 December 2002 : 'There is no prospect at all of common foreign and security policy being communitarised, as proposed by the Commission. There is no prospect at all of that except in those areas where it already exists. (…) Frankly, there is no prospect of the Commission agenda being accepted by the British Government or, from what they have said, by the Governments of France, Spain, Italy, Sweden and Ireland, at least not in this respect.'

This is largely due to the institutional status of the Convention. Formally free, it was nevertheless politically submitted to the governments. The members have never forgotten that they were just a preparatory body, and that their compromise would be renegotiated by the governments in the next IGC. They knew, and often publicly stated, that if they reached a very ambitious compromise, but did not take into account the governments' positions, they would be disavowed by the IGC. On each and every subject, the British government drew lines in the sand: it very clearly indicated, through his representative within the Convention, the limits it would not be ready to bypass. President Giscard implicitly encouraged this attitude, by giving Peter Hain a key position in the debates – so that some observers called him the 'shadow President' of the Convention. The conventioneers were induced to anticipate the IGC, and this limited their ambition. Deliberation took place under the shadow of the veto.

Beyond this external pressure, the conventioneers' capacity to deliberate was also limited by the features of the Convention itself, and first and foremost by the lack of common references among its members. 'The indispensable minimum for argumentation appears to be the existence of a common language' (Perelman and Olbrechts-Tyteca 1969: 15), but this is very difficult in a multi-national and multi-lingual assembly, because 'the terms used, their meaning, their definition, can only be understood in the context of the habits, ways of thought, methods, external circumstances, and traditions known to the users of those terms' (ibid: 513); 'translation will always somewhat alter the original text' (ibid: 407) and it will loose the 'particular modes of expressing social communion' (ibid: 164) inherent in the language of a social group. Language is not just a technique allowing communication, it also comprises implicit references to the group's self-understanding, which are crucial because 'all discussion presupposes adherence at the outset to certain theses, failing which no argument is possible' (ibid: 54). This is not to say that argumentation is impossible among persons who do not share a common language and a set of references. But the strength of arguments will be proportional to the strength of the common language. In a multi-national and politically very varied assembly, arguments usually do not prove strong enough to counter-balance the weight of interests.

3. Reducing incompatibilities: diplomatic, logical and practical approaches

In some cases, however, arguments could play a certain role within the Convention. First, the 'social norm' built by the majority of the members fostered this deliberative approach : since voting was excluded, and since bargaining was presented as a violation of the Convention's principle, the members were encouraged to argue, or at least to feign arguing[14]. Secondly, on some issues, they managed to forge a language which helped them solve incompatibilities through exchanges of arguments.

Chaïm Perelman argued, in the 1950s, that actors facing strong incompatibilities can resort to three rhetoric strategies, in order to overcome their division. First, they can adopt a 'diplomatic' approach, which consists in trying to invent procedures 'for preventing an incompatibility from arising or for postponing the moment of decision until a more

[14] Elster argues that 'When a group of equal individuals are to make a decision on a matter that concerns them all and the initial distribution of opinion falls short of consensus, they can go about it in three different ways : arguing, bargaining and voting. I believe that for modern societies this is an exhaustive list' (Elster 1998: 5).

convenient time' (Perelman and Olbrechts-Tyeteca: 198). Secondly, they can follow a 'logical' approach, in which 'the primary concern is to resolve beforehand all the difficulties and problems which can arise in the most varied situations, which one tries to imagine, by applying the rules, laws and norms one is accepting' (ibid: 197). Finally, they can make 'practical' arguments, seeking to resolve concrete problems. The members of this Convention's discourses can be interpreted through this typology: it helps explain why and how the actors can sometimes solve their incompatibilities through arguments.

Bargaining under the shadow of rhetoric

The conventioneers have sometimes resorted to a 'diplomatic' approach. This has been a constant attitude among governments since the very beginning of European integration. Agreeing on an ambivalent concept or on a flexible wording, leaving room for different interpretations and thereby preventing the emergence of overt opposition, is a well-known constitutional device (Sunstein 2001). Sometimes, the authors of a constitution even agree to leave controversial issues out of their agreement, so as to avoid incompatibilities (Holmes 1988). In many instances, the decisions of the Convention can be understood in these terms: the controversy on Europe's 'religious heritage' is a good example of an incompatibility which was 'solved' by being left outside the compromise. More importantly, the major institutional compromise of the Convention can be seen as an instance of a 'diplomatic agreement': it was made possible because the most intergovernmentalist members could think that the European Council – and thereby the weight of the governments – would be strengthened, while the most federalist members could hope that, in the future, a President of the Commission supported by a parliamentary majority would become the core of the institutional system. Since its concrete impact remains unpredictable, the compromise could be accepted by all the major parties.

However, spreading out the incompatibility in time, 'in the hope that later circumstances will be such that the choice can be avoided or the decision taken within a better understanding of the issues' is a risky strategy, because it 'can create new and more serious (incompatibilities) in the future' (Perelamn and Olbrechts-Tyteca: 200-201). The principal merit of this approach is that 'it encourages a continuation of the dialogue' (ibid: 134). But this strategy was, by itself, in contradiction with the very raison d'être of the Convention. This new method had been created precisely because of the frustrations generated by former incomplete and/or ambivalent agreements. It was supposed to make a discussion on the EU's 'finality' possible, so as to reach a solid agreement that would close the era of the 'overwhelming constitutional agenda'. The majority of the members of the Convention shared this vision and considered that their role was precisely to go beyond an 'overlapping consensus'. The diplomatic approach was thus seen as a last chance, where clearer and more integrated agreements did not seem possible.

The 'practical' approach was the dominant style adopted by the conventioneers[15]. On most issues, during the plenary sessions but also within the working groups, the meetings of the

[15] Some members sometimes, but very rarely, used passionate rhetoric trying to play on the audience's emotion. They mentioned the history of their country, their memories of independence or humiliation, and the pride or fears these experiences had left. This was partly directed towards external targets: a Eurosceptic member evoking his people's sense of sovereignty, in Danish, cannot hope to move his colleagues; but he knows that his words might be echoed in the national press. This kind of argument could also have more internal objectives: recalling the memory of the Soviet Empire and the trauma it has produced within the 'occupied' countries, can be an argument aiming at explaining why one is afraid to abandon too much national sovereignty; in other words, the purpose of such an argument can be to strengthen mutual understanding and pave the way for

components or the parties, the members tried to explain their position in terms of concrete impact, not by referring to abstract concepts or to emotions. Two forms of practical constitutional discussion can be distinguished[16]. Empiricism is based on induction from historical experience: it follows a tradition, inspired by Burkean politics, which believes that prejudice encapsulates a 'truth' established on the ground of past experience. Pragmatism, on the contrary, is based on hypothetical experimentation: illustrated by Madisonian rhetoric, it evaluates a fact or an event 'in terms of its favorable or unfavorable consequences' (ibid: 266). These two practical patterns of thought are built on common premises. They are based on concrete situations, not on abstract principles; they assess an option in terms of efficiency, not in terms of values; they look for ad hoc solutions, rather than general devices; and they require from the speaker a capacity to rethink his 'concepts and rules in terms of real situations and of the decisions required for action' (ibid: 198).

With very few exception, most of the debates of the Convention were initially built on that sort of argument, and many of them were solved through practical reasoning[17]. This can be explained in part by the attitude of the members, and in part by the constraint of the process. On the one hand, many members were sincerely seeking to reach integrative solutions. Most of them agreed that the very raison d'être of the body of which they were members was to bypass the shortcomings of the past, and they were inclined to try and overcome divisions based on misunderstandings, prejudice, national ideologies or interests. On the other hand, the process put them under pressure. The variety of their views and languages, and the unpredictable nature of many issues, made a 'logical' approach very difficult in most instances. Moreover, the 'social norm' of impartiality rendered the naked expression of interests difficult. This is the reason why, in most cases, the French or British representatives first tried to explain why a reform suggested by others would not be 'efficient', and only resorted to implicit vetoes when this practical reasoning had not convinced the other members[18]. On many issues, the final solution was forged though classic forms of bargaining, but only after a long period of 'practical' reasoning. One example can illustrate this. A vivid controversy opposed those who defended the preservation of the rotating Presidency – merely small states – to those who pleaded for a permanent President of the European Council – the largest states. In their arguments in favor of the status quo, the representatives of the small states did not mention their own interest, and did not refer to a 'Community orthodoxy', but made typically practical arguments. Outside the Convention, but in connection with its debate, the Irish Minister for foreign affairs, Brian Cowen, stated: 'I accept that the current

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compromise. Although this cannot be empirically demonstrated, there are signs that some federalist members have become more flexible because they have understood the roots of their colleagues' reluctance. But the most frequent type of argument used in the Convention – and during parallel discussions – was clearly 'practical', aiming at resolving concrete problems.

[16] This typology is inspired by Sartori's distinction between 'rationalist', 'empiricist' and 'pragmatic' constitutional thoughts (Sartori 1965). Sartori restates the old Tocquevillian idea that European minds are primarily rationalist (with the exception of the empiricist British), while Americans tend to be 'pragmatic'. In the same vein, see (Olsen 2002b).

This contrast was used by the conventionnels themselves, to explain (and soften) the opposition between the UK and the other countries. In an opinion published by *Le Monde*, the French and British commissioners Michel Barnier and Chris Patten argued : 'La pensée française se rattache à Platon, la pensée anglaise à Aristote. Là où la France procède par déduction, le Royaume-Uni procède par induction – et ces approches philosophiques différentes se retrouvent dans leurs traditions juridiques, droit romain ou « common law ». Là où la France est théorique, le Royaume-Uni est empirique.', Michel Barnier and Chris Patten, 'Europe : l'autre moteur', *Le Monde,* 4 February 2003.

[17] See notably the debates on the distribution of competence and on subsidiarity, on the role of national parliaments, and large parts of the debates on the Area of Freedom, security and justice.

[18] Many instances of this 'shift of register' can be found in the debates on defense, external action, social Europe, institutions…

system of rotation will require some adaptation. The concern about discontinuity in a Union of twenty five or more is a legitimate one. But let us start from realities, not caricatures. Rotation is not a kind of leftover from a smaller and simpler Union. It is not a "feel-good factor" for member states whose confidence needs a boost. The rotating presidency has endured for 50 years, through successive enlargements, because of what is has brought in terms of ownership, vitality, renewal and solid achievement. And there is the added benefit that its automaticity avoids a diversion of energies into campaigning for office.'[19] On their side, the partisans of a permanent Presidency also argued in terms of efficiency (continuity, coherence, logistic aspects…). The final compromise, forged in the last hours of the Presidium's meeting in June, balances the interest of the large an small states, and is also influenced by 'democratic concerns' shared by a large part of the members. It was built through classic exchanges of concessions, facilitated by promises and threats. But one cannot exclude that the long practical debate that had preceded this late bargain had in part paved the way for the agreement: many members publicly stated that they accepted the compromise because they had changed their mind after the discussion, or because at least they understood the positions of the other members. In so doing, they might simply pay tribute to the 'convention's spirit', but they might also acknowledge the effect of this ethos.

Beside this practical pattern of thought, logical (or rationalist) arguments have also played an important role in these debates. A priori, one could assume that a rationalist mode or argument would be impossible in such a divided assembly. This approach indeed assumes that 'one can clarify sufficiently the ideas one uses, make sufficiently clear the rules one invokes' and that 'the unforeseen has been eliminated, that the future has been mastered' (ibid: 198). This kind of rhetoric does not form part of our contemporary culture: modern constitutionalism has abandoned the faithful philosophy of history such an approach would require. Moreover, in a multi-national and politically divided assembly, the agreement on the meaning of words is too fragile to allow such a rationalist discussion. However, the largely shared legal doctrine, with its concepts and grammar, offered a functional equivalent to a more ambitious logical reasoning. Lawyers – and politicians trained as lawyers – are deeply imbued with these formal notions and modes of reasoning (Weiler 1999; Cruz Baquero 2003). Moreover, the insistence on the 'constitutional' nature of the Convention's task, combined with the legal background of most conventioneers, fostered arguments molded in legal terms.

Resorting to that sort of argument, in a highly divided forum, offers three advantages. First, it provides a jargon which is largely shared by the members, and can be a negative equivalent of a 'common language'. Secondly, lawyers – like theologians – tend to forge their arguments on the basis of widely accepted, if not uncontested, texts: this provides deliberation with a set of common written references. Thirdly, and most importantly, law is by definition a means to build compromise: 'Legal progress consists of the development of techniques – which are always capable of improvement – that make it possible to reconcile conflicting claims.' (ibid: 414).

Channeling arguments: the leitmotiv of simplification

In the context of this Convention, the notion of 'simplification' soon became the label of the minimum compromise the members could reach, and the conceptual tool used to forge it. In his introductory speech, on 28 February 2003, Giscard had announced this theme and used it to advance a double conceptual link. From a procedural point of view, he explained the complexity of the present Union by the nature of the intergovernmental process which had

[19] Brian Cowen, Speech at the European Policy Centre, Brussels, 3 April 2003.

governed reforms of the Union so far: 'The decision-making machinery has become more complex, to the point of being unintelligible to the general public. Since Maastricht, the latest treaties have been difficult to negotiate and have not met their original aims: discussing within the Institutions have often given precedence to national interests over considerations of the common good'. From a normative point of view, he argued that a simplified treaty would make the Union more legitimate: 'We shall have to respond to the request for simplification of the treaties, with the aim of achieving a single treaty, readable by all, understandable by all'. The subliminal message to the conventioneers was clear: if you avoid reproducing the logic of bargaining that led to sub-optimal compromise in the past, you will be remembered as those who turned the Union into a democratic polity. In other words, Giscard tried to influence the members' attitude by providing them with a realistic yet ambitious mission.

This argument was also conveyed by the Secretariat, which worked under the Presidium's initiative. In several notes it prepared to serve as a basis for discussions on the reform of legal instruments and procedures, the members of the Secretariat emphasized the large number and diversity of existing norms and decision-making mechanisms. They made statements that would normally not be expected in a 'descriptive note', such as: 'these procedures are so complex that they are difficult to understand. Their course can often only be followed by specialists. Citizens demand greater simplicity. They want to be able to grasp what is at stake, and to know how the Union makes legislation'[20]. Pretending to raise questions to open the debate, these reports actually made irrefutable statements: 'Is this increase in the number of instruments a factor of legal uncertainty, and one of the reasons for the opacity of which the Union stands accused? (…) Is the lack of a coherent system of decision-making procedures and their great diversity an additional cause of complexity and opacity?'[21].

This language soon became the object of a consensus. During the first months of the Convention's proceeding, many members hoped that deep transformations remained possible. But as conflicts of interpretation and oppositions of interest became ever stronger, the quest for simplification begun to be seen as a common purpose. This was possible because, in spite of all what divided them, the awareness of the Union's complexity, the desire to make it simpler and the belief that this would make it more acceptable were shared by all groups in the Convention. The most federalist and the most skeptic members disagreed on everything, except on that. First, Giscard's idea that the complexity of the Union was the result of the decade-long logic of intergovernmental bargain – with its implicit corollary that the Convention should be able to do better – was echoed by members from all horizons, especially by national parliamentarians[22]. Second, Giscard's argument that simplicity means

[20] CONV 162/02, 24 July 2002, p. 2.
[21] CONV 50/02, 15 May 2002, p. 2-3.
[22] See notably, Borrell Fontelles (Spanish socialist MP) : 'La realidad es todo lo contrario de la armonía de un templo griego. Es una mezcla no ya barroca sino superlativa, de diseños sucesivos, hechos al gusto de los tiempos para hacer frente, en cada caso, a un problema diferente, coyuntural, que luego quedan estructuralmente anclados en el conjunto, sin que nadie se acuerde de hacer limpieza y eliminar aquellos elementos que, en su día, fueron creados porque eran necesarios para salir del paso. Quedaron incrustados en un sistema que ha ido convirtiéndose en algo tan proteiforme que necesita una profunda revisión.', 12 September 2002.
Giuliano Amato (Italian Socialist MP, Vice-President of the Convention) : 'La ragione dell'attuale confusa complessità è quella che il Presidente ha ricordato nelle sue parole iniziali: la nostra Europa è cresciuta negli anni attraverso strati successivi e ciascuna negoziazione, ciascun rinnovo di Trattato ha portato o la sua procedura o il suo strumento o la sua modificazione di procedure esistenti, e ogni strato si è sommato ad altri. Qualcuno ha scritto che l'architettura europea è come l'architettura delle antiche cattedrali delle nostre città che, iniziate in un secolo, sono proseguite nel secolo successivo e poi sono state completate in un altro secolo ancora, e quindi culture e stili architettonici diversi compaiono in un unico prodotto. Sono belle da guardare oggi. Ma

legitimacy was also supported by a large array of members[23]. The representatives of the candidates countries, with the referendum of ratification in mind, particularly insisted on this aspect[24].

The strength and limits of formalism

In this climate, the Working groups set up to study the legal personality of the Union and the simplification of the instruments and procedures worked rapidly, without being affected by internal tensions. It is worth noting that the second group was considered so innocuous that only three representatives of the governments – of which two were from candidate countries – participated in its work. Both groups were chaired by Giuliano Amato, former head of the Italian cabinet, professor of public law and vice-president of the Convention, who managed to impose formal reasoning in these discussions. Amato had soon suggested to approach the question of simplification by analogy with national constitutional systems:

> 'Perché in Europa le leggi si chiamano regolamenti, quando in tutti i nostri paesi i regolamenti sono atti che stanno sotto la legge? Perché non chiamiamo i regolamenti, regolamenti e le leggi, leggi? Perché non ci domandiamo, tutte le volte che è scritto decisione quadro ma è in realtà una legge, perché non la chiamiamo legge? Perché, a questo punto, non chiamiamo il procedimento legislativo, procedimento legislativo? Ecco, un modo di semplificare è quello di chiamare una cosa nota con il nome noto con cui i cittadini la chiamano, e non chiamare una cosa nota con un nome ignoto o che addirittura significa un'altra cosa' (12 September 2002).

> 'Qui ci siamo basati sui criteri che la vita europea già conosce da anni, che sono criteri che hanno un senso in base a quanto ricordavo sul rapporto con il tasso di legittimazione democratica che gli atti devono esprimere: l'atto legislativo è quello che esprime una nuova scelta politica, che fornisce elementi essenziali per una disciplina che non gli preesistono: è l'atto quindi che innova politicamente. Un atto che contiene norme che riflettono una scelta politica che si trova in un atto precedente non è un atto legislativo, non ha bisogno di esserlo: esegue delle scelte. Un atto che definisce la scelta è un atto legislativo' (05 December 2002).

This formal mode of reasoning, which has long dominated discussions on the EU's institutional framework (Kohler-Koch 2000), was echoed by many other members[25]. It has

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l'Europa non è da guardare, l'Europa deve funzionare e questi strati successivi, questa logica incrementale hanno determinato, alla fine, un grande bisogno di semplificazione.', 12 September 2002.

[23] See notably the British conservative MP Kirkhope on 12 September 2002 : 'Simplifying the European Union by clearly defining responsibility would make it much more accountable and therefore more legitimate. Making it more accountable would reduce the apathy which plagues us, and this in turn would increase democracy in the EU. This should be the aim of our Convention, and simplification like this a vital means of achieving it'.
Peter Hain (Representative of the British Labour Government) : 'Mr President, I am not an expert in the minutiae of European Union legislation, nor am I a lawyer. Like many of the people I represent, I struggle with complexities of the directives, regulations and decisions, without knowing which have direct effect, or when or whether they involve consultation or codecision. I was handed a guide to codecision today and it looks like this, on both sides in very small print. (nota : he shows a long leaflet describing the procedure) We must make Europe easier to understand, otherwise how can it be legitimate?', 23 May 2002.

[24] See M. Korcok (Conservative representative of the Slovak government): 'From Slovakia's point of view, as a prospective member of the European Union, the question of simplification is of particular importance because there is a clear and direct link between simplification, credibility and comprehensibility.', 05 December 2002.
J. Figel (Conservative representative of the Slovak parliament): 'The issue of clarity is especially important for the candidate countries who are newcomers to the policy-making process in the European Union', 24 May 2002.

played a double role. On the one hand, it played a negative role, precluding the creation of new institutions, on the ground that it would be contrary to the largely accepted objective of simplification[26]. On the other hand, this argument helped reduce the number and the variety of norms and procedures: Amato convinced the members of his working group, and later on the plenary, that a simpler hierarchy of norms, inspired by national constitutional traditions, should replace the existing EU system. He also imposed the idea that a correspondence should be established between the nature of a norm and the procedure followed to adopt it: a 'legislative act' should be adopted by co-decision, the Council acting by QMV. This implied generalizing these procedures to some fields from which they had been deliberately excluded in the past. The rationale for this change was not that QMV would be more efficient, or that the EP might improve the quality of the decisions, but the quest for simplification. This confirms Joseph Raz' (2002 : 156) hypothesis that 'A good deal of legal development (and this includes constitutional development) is autonomous. (…) The decision actually taken is chosen out of habit, or out of respect for the constitutional practices and traditions of that country'. Here, arguing clearly counter-balanced bargaining.

This form of formal reasoning was not, however, uncontroversial. Many members, aware of the impact such a quest for simplification might have on their interest, soon criticized this form of argumentation. Some emphasized that complexity was often needed in terms of efficiency, because the variety of the issues required a variety of procedures and norms: 'One of the good things about our present system, said Peter Hain, is that we have the potential to identify individual solutions to individual problems and I do not want to make the system more rigid' (23 May 2002)[27]. More precisely, he indicated the limits of this formal logic of simplification:

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[25] See P. Glotz (representative of the German government, socialist) : 'Ich denke, in unseren Staaten hat sich ein Modell herausgeschält, das einen großen Wiedererkennungswert bei den Menschen hat und das für mehr Klarheit sorgen würde: die Gewaltenteilung zwischen Exekutive und Legislative. Deutschland empfiehlt daher, das Verhältnis zwischen Rat, Europäischem Parlament und Kommission dem Modell der klassischen Gewaltenteilung anzunähern', 12 September 2002.
Lopez Garido : 'La simplificación equivale a democracia, porque apuesta por la división de poderes frente a la confusión de poderes en que hoy vive la Unión Europea, por una distinción clara entre legislativo y ejecutivo; porque apuesta por que la Unión Europea tenga una sola personalidad jurídica y desaparezca la complejidad de los tres pilares; porque hace una mención a la participación de las regiones y de las ciudades en el procedimiento legislativo, en la llamada fase ascendente; porque le da al Parlamento Europeo la última palabra en la aprobación de los gastos, y creo que esto es muy importante, pues convierte al Parlamento Europeo en un verdadero Parlamento -el origen de los parlamentos es la aprobación, precisamente de los gastos, y si no hacen eso no son un verdadero parlamento-, y porque apuesta también por una mayoría cualificada como forma de tomar decisiones en el Consejo.', 05 December 2002.

[26] This argument was often used to reject Giscard's idea to create a 'Congress'. It also served against other suggestions made to strengthen the role of national parliaments, as for example on the question of the control of subsidiarity. See Mendez de Vigo (Spanish EPP MEP, member of the Praesidium and chairman of the working group on subsidiarity) : 'Some eminent members of our working group thought that a new body would be useful to monitor the application of subsidiarity. But, as our task is to simplify procedures, it was decided that the creation of new bodies would simply go against this ideal, and so the idea was ruled out.', 03 October 2002.
The same argument was often raised when the reform of the Presidency of the Union was discussed, in order to avoid the creation of a new President of the European Council. See notably Miko Kiljunen (Finnish socialist MP) : 'There is that danger now that – and I say this partly jokingly – we are aiming to copy the Presidential institutions of the United States, the Peoples' Congress of China and the Political Bureau of the former Soviet Union.*(Laughter and applause)* Our aim was to make the Union's decision-making structure more simple, efficient and democratic. I am afraid that we are now going in the wrong direction. We are creating new overlapping institutions', 24 April 2003.

[27] This argument was often but not exclusively made by British representatives. See also, B. MacDonagh (representative of the Irish government) : 'There are too many procedures and they are too complex, but in seeking to streamline and simplify we should recognise that an internal market issue, a foreign policy issue or a police cooperation matter may well be most effectively addressed in different ways. The desire to rationalise and

> ‘I support your promotion of codecision and qualified majority voting as general principles for legislation. But (…) the constitutional text needs to note some very important exceptions. I could not support the extension of qualified majority voting to cover social security. (…) Similarly, as we consider using codecision in place of other procedures, we must examine each case on its own merits.’ (05 December 2002).

Others added, like John Mac Cormick, that complexity is often the price to be paid for democracy :

> ‘simplification is not always univocally a virtue. After all, democracy is, in an important sense, a complexification device. If we were to let the Commission or the Council take all the decisions quickly and speedily without telling anybody, it would work quicker and it would often produce clearer results. But they would be less acceptable results. The point is that the citizen must have the right to be consulted, and that takes time. As a Member of this Parliament one knows that it can take quite a long time for interest groups and interested individuals to get in touch and say "what are you going to do about this?". So it is not that it would be a great thing to have a simple procedure; we want complex procedures and we do not want excessively speedy procedures. People must have time to make their opinion be known.’ (12 September 2002).

The limit of the rhetoric of simplification was even more obvious when it was used beyond the question of norms and procedures. Several members used this argument to foster claims which went well beyond the task of clarification. A Eurosceptic member like the Conservative MP David Heathcoat-Amory, used it to require less integration : ‘the *acquis communautaire* must be included in any simplification drive. It is no good again promising simpler measures for the future unless we tackle the complexity of the past at the same time’ (12 September 2002), while the federalist French MEP Alain Lamassoure used the same label to promote more integration : ‘Il s'agit d'une proposition qui est inspirée par cette volonté de simplicité qui nous a animée et qui devrait, en dépit d'une apparence paradoxale, être de caractère consensuel. Il s'agit de supprimer totalement la procédure de l'unanimité’ (05 December 2002).

The quest for simplification and the formal reasoning lost their appeal, and generated distrust. Some denounced ‘false analogies’ that would obscure rather than clarify the Union[28]. Others objected, like the Conservative MP David Heathcoat-Amory, that this concept was being used as a Trojan horse :

> ‘Is a working party on simplification the right place to make quite big changes to the institutional balance? That is what the report does. The proposals for delegated acts to

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simplify – which I fully share – should not leave a trail of trampled sensitivities or forgotten subtleties.’ (13 May 2002)

P. De Rossa (socialist member of the Irish parliament): ‘I say clarifying, not simplifying, because I think there are limits to simplification. We cannot, in a multi-national, voluntary organisation of national states committed to diversity, with our own histories, our own cultures and languages, simplify issues beyond a certain level. Complex instruments are necessary in order to make decisions which are satisfactory to all our Member States.’ (24 May 2002).

[28] Seracino-Inglot (representative of Malta government) : ‘Mr President, I certainly agree that European supranational legislation should not use language that conflicts with the language generally used at nation state level, but I would also guard against supposing that the model of state legislation is very useful for legislation at the supranational level.’ (12 September 2002).

be operated by the Commission certainly go much further than the current situation. Also, codecision is advocated for new areas such as policy coordination in national economies, the statutes of the European Central Bank and banking supervision of national banks. These are all new and important. Also, QMV is recommended for new areas which are already subject to codecision. Those areas are not listed but I can assure the group that they are important. They are about the rights of residents, social security for migrant workers and the rights of the self-employed. My point is simply that we have not had a debate in plenary about the institutional balance. Instead, we are using these working groups on other subjects to make these decisions. That is the wrong way round. We urgently need a plenary debate about the institutions rather than pretending we are only discussing simplification.' (05 December 2002).

These conflicts of interpretation revealed the limit of the rhetoric of simplification. It offered a minimum consensus on the diagnosis, and provided the members with a 'noble task' when the risk of failure was high. Many members emphasized the political importance of this task to give a high profile to their own role[29]. But if this language 'rescued' the Convention when it appeared that it would not contemplate a constitutional revolution, its practical impact remained limited. True, the fusion of the treaties, the suppression of the pillars, the generalization of the co-decision and QMV in legislative matters, the incorporation of the charter, are important legal and symbolic changes, especially when one remembers the intensity of the conflicts generated by theses issues during the former IGCs, and the strength of the reluctance of some governments. It should not be forgotten, however, that these elements of simplification have only been possible because the Presidium has carefully listened to some members' critics and accepted exceptions. More importantly, the rhetoric of simplification has not significantly fostered other crucial reforms, such as the repartition of competencies or the institutional framework.

The meaning of simplification

The compromise reached in the final document of the Convention amounts to an important simplification of the Union's basic law. Yet the impact of this transformation in terms of legitimacy remains uncertain. The argument of those who, like Giscard and many others, state that the Union will per se be more democratic, because its 'constitution' will be clearer, so that students and people in the street will read it is obviously overstated. The commonsensical critics raised by the most skeptic members of this Convention against the rhetoric of simplification encapsulate some truth that would not be denied by political scientists. First, as stated by David Heathcoat-Amory, democracy is basically about inputs:

[29] Giuliano Amato made this point very often, notably to draw attention of the representatives of the governments on this task they tended to ignore. He was echoed by many members.
D. Lopez Garido (socialist member of the Spanish parliament): 'La labor de simplificación de los procedimientos es una labor política, no una labor técnica. Es una decisión fundamentalmente política.' (13 May 2002).
B. Mac Donagh : 'Simplification is, in a sense, a technical issue. It is about procedures and instruments. But its purpose is profound and political. The subtle challenge of simplification lies at the very heart of this Convention', (13 May 2002).
Gianfranco Fini (representative of the Italian government): 'la discussione sulla semplificazione degli strumenti e delle procedure non è una discussione tecnica, è una discussione che ha davvero una forte valenza politica, perché in qualche modo la percezione e l'adesione del cittadino europeo all'Unione dipende in molti casi da come viene compreso ciò che, da un punto di vista legislativo, l'Unione fa', 12 September 2002.

> ‘Simplifying the Treaties is not the same as making them democratic or conferring democratic legitimacy. Even if we do manage to put the text into better language and to set out the powers more clearly, that will not in itself cure the democratic deficit. In order to do that, we must take decisions nearer to the voters, giving people a sense of ownership over those decisions and a feeling that they can influence them and make real choices.’ (23 May 2002).

Secondly, democracy is basically about outputs, as pointed by Peter Hain :

> ‘Complexity is an issue of course, but most people are not worried about exactly how we make laws nationally or in our regions. What matters to them is whether the resulting laws make sense, whether they deliver, and how they can make their own voice heard.’ (12 September 2002).

Should we then conclude that ‘simplification’ is an argument found by people who have spent hundreds of hours deliberating about the EU’s future and who, because they realized they could not overcome their divisions, presented ‘simplification’ as a noble task so as to preserve their self-esteem? Maybe. But we should not neglect the importance of forms and processes when we think about the EU’s legitimacy. In this respect, the Convention might contribute to improve the democratic legitimacy of the EU. First, we know that form matters in Western civic cultures. A simpler treaty, which looks like a constitution and uses terms which are part of the citizen’s usual political language, might be better accepted. The Union often described as a monster, a Byzantine polity, a sui generis legal system… might become less exotic. It will be seen as a federal polity, although not a copy of the US system (Nicolaïdis and Howse 2000). This might, in turn, make it more acceptable, and could even improve the citizen’s ‘enlightened understanding’ – considered by Dahl as one of the key conditions of a democracy. On the other hand, the analogy might also revive the phantasms of those who fear a European Superstate. Some members of the Convention have warned their colleagues against the risk of this quest for simplification, even in its modest linguistic dimension[30].

Secondly, and more importantly, we should not underestimate the importance of *confirming* a constitutional agreement. The Convention has not altered the Union’s structure significantly. But representatives of its member states, of the EU institutions and of the candidate countries, (some federalists, others eurosceptics, some leftists, others liberals and conservatives) have deliberated on all issues related to the EU, examined all possible reforms, expressed the largest spectrum of arguments ever made about the EU, for more than a year and in a public forum. They have disconfirmed the skepticism of those who thought that constitutionalizing the EU would be impossible or dangerous because it would reveal deep conflicts and break subtle balances (Weiler 2001; Craig 2001). This confirmation changes the nature of the agreement, even if it does not alter its content. Those who criticized it on the ground that they had had, at the time of adhering, to take the whole package without having the opportunity to renegotiate the acquis, have lost a key argument. The Union’s new treaty is nothing more than a compromise between the ordinary elites of the beginning of twenty-first century Europe, but compromises are strong agreements:

[30] J. Oleksy (socialist member of the Polish parliament): ‘‘I am not fully convinced by the proposal to change the name of regulations and directives into ‘laws’ and ‘framework laws’. The former names have been deeply anchored in the Union legislative concept. ‘Laws’ and ‘framework laws’ are perceived more as national measures. They are inevitably linked with the states. The Union is not a state and has probably a very long way to go to become one.’, 05 December 2002.

> ‘At the theoretical level, it is the compromise solution to incompatibilities which calls for the greatest effort and is most difficult to justify because it requires a new structuration of reality. On the other hand, once it is established, once the concepts have been dissociated and restructured, compromise tends to appear as the inescapable solution and to react on the aggregate of concepts into which it is inserted’ (Perelman and Olbrechts-Tyteca: 415).

If this is true, and experience tends to show that it is, the Union will become more solid and better accepted because the reassertion and confirmation of the ‘constitutional compact’ by the Convention – followed by the IGC and the national ratifications – will have strengthened the foundations of the compromise.

Conclusion

The Laeken Declaration was an ambivalent agreement: it offered opportunities to those who thought that the IGC process had reached its limits, while giving guarantees to those who wanted to preserve the rights they have always had under an intergovernmental process. As a result, the rules of the Convention remained remote from the ideal-type of constitutional deliberation, but they did not prevent the conventioneers from arguing and building agreements on rational grounds.

A majority of the members were willing to invent a ‘conventional’ process that would be different from an IGC. The MEPs and the commissioners, who had been excluded from previous treaty changes, had an obvious interest in defending this process. The representatives of the small states also thought that they could maximize their interest in this new forum. The veto was not formally possible, all members were put on an equal foot, and the mixed composition of the body made new coalitions possible: all these elements tended to dilute the weight of the big states, which had dominated former treaty changes.

This explains why the majority supported an ambitious interpretation of the Convention’s task, and imposed rules which were supposed to foster deliberation, and make classic bargains more difficult. Without express opposition from the most reluctant members, the majority of the conventioneers soon decided to do ‘as if’ they had to write a full-fledge constitutional treaty; they agreed to decide by consensus; and they conveyed a social norm rendering crude bargains illegitimate. This was not enough to engender a pure and perfect deliberative process. The members knew that the IGC would revise their proposal, and tended to anticipate the reactions of the governments – who let them know to what they wouldn’t agree. Since they had not been elected but nominated, they never acted as purely free and equal members: though they disguised their interests into impartial views, they never abandoned the defense of their interests.

In spite of these constraints, the members often adopted a deliberative approach. The social norm of impartiality, combined with a sincere willingness of many members to reach an integrative agreement, led them to resort, in many instances, to a ‘practical’ style of problem-solving. The members often tried to reduce dissonance by mutual explanation; they proposed ad hoc solutions to many issues; and based their arguments on pragmatic or empiricist grounds that could be understood by the other members. Several important questions raised by the conventioneers could be solved, in large part, by such an approach (distribution of competence, subsidiarity, role of national parliaments…).

Beside this 'practical' approach, a more formalist (or logical, or rationalist) pattern of thought also governed many discussions. The 'constitutional ethos' forged by the majority of the members favored discussions molded in legal terms. The legal background of many members, and their inclination to reason in formal terms on 'constitutional' issues, strengthened this trend. The Presidium, with the support of the Secretariat, encouraged this type of reasoning on many issues (legal personality, status of the charter, fusion of the treaties, simplification of the norms and procedures…). This type of argument had the advantage to be based on common references (including written references, such as the treaties and jurisprudence), and to favor analogies with national constitutional devices, with which the members were familiar. This kind of arguments proved strong enough to force some powerful members to make important concessions: in spite of their initial unwillingness to alter the status quo, and with a still very hostile public opinion, the British governments accepted, with exceptions, to abandon 'guarantees' it had long defended (pillars, ad hoc decision-making rules, non-status of the charter…).

In many instances, however, these two rational styles of arguing did not prove strong enough to help the members overcome their divisions. On some major issues, the difference of visions between the members remained so strong that other modes of agreement-building were needed. In some cases, the members resorted to the classic avenue of 'diplomatic' agreements: they excluded controversial subjects (religion) or forged compromise that remained vague or unpredictable, so that each party could give his own interpretation of the outcome. In these cases, the agreement remains an 'overlapping consensus': the parties agree on the norm, but not on its motivation. In other cases, classic bargains reemerged. Where some members believed that their vital interests were at stake, they used threats – disguised as warnings – to preserve the status quo, or formed coalitions of big powers to impose their view (unanimity maintained in many fields; institutional compromise). But some big members did not prove able to veto reforms to which they were strongly opposed (Spain and Poland on the weighting of votes), because they could not form coalitions, and did not want to be seen as those who precluded the formation of an agreement.

It remains very difficult to establish a clear typology of the approaches adopted by the members to reach agreements: in most cases, the agreement was reached through a mix of practical and logical arguing, threats and mutual concessions. But it cannot be denied that, in many instances, the norms governing the conventional process favored argumentative approaches which counterbalanced the weight of classic bargains: a pure strategic approach could not explain why the British government, facing a still very Eurosceptic opinion, accepted to make important concessions it had always refused in the past (suppression of the pillars, merging of the treaties, quasi-generalization of QMV and codecision, incorporation of the charter, codification of the primacy of EU law…) and which might prove very important in the future.

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