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From Nice to the Constitutional Treaty: Eight Theses on the (Future) Constitutionalisation of Europe

I. A Constitutional Moment

Who now remembers Europe's Constitutional Treaty? There was however a relatively easy road from Nice to the Laeken Declaration and then to the work of the Convention and the drafting of the first document in the history of European integration risking the "Constitution" banner on its front page, even if it finally had to be modestly renamed as a "Treaty establishing a Constitution for Europe". Compared to the draft Constitution prepared by the European Parliament in the follow-up to the Maastricht Treaty, whose promoters were quickly branded as old fashioned federalists, the momentum surrounding the elaboration of the Constitutional Treaty was a happy one. The discussion about a Constitution for Europe and the debate on the future of Europe became a significant political issue and it was even made – by *Jürgen Habermas*, particularly – intellectually fashionable. It seemed suddenly as if the destiny of the European continent – the big question marks about Europe's identity, its specific response to the challenges posed by globalisation, the defence of its values and the promotion of its ideas of citizenship and mixed economies – had to be necessarily linked to the fate of the final results of the Convention.

There was indeed a 'Constitutional Moment'.[1] Although *Valéry Giscard d'Estaing*, the president of the Convention itself, had dubbed it the European Philadelphia, the Convention certainly lacked some essential elements in order for it to be officially considered a constitutional convention; above all, the lack of enthusiasm of some member states' Governments with the process and, as time would demonstrate, also a perceived strangeness by European citizens. Nevertheless, with the hindsight of later years, this constitutional moment signals a certain higher level of constitutional audacity, in a sense a departure from the well-trodden paths of Community history. Issues such as human rights, European values, the "European social model", the characteristic interaction of the European construct between unity and diversity in its relations with member states, the question of the democratic deficit, the role of Europe in the world, or the "*telos*" ("*finalité*") of the Union, were brought for the first time openly to the fore, together with more technical matters – a renewed institutional structure, a clarification of the division of competences between Brussels and the national

1 *Weiler* (2002).

capitals, the inclusion of the Charter of Fundamental Rights with binding validity, the recognition of a single legal personality for the Union and the dismantling of the 'pillars' approach, the comprehensive extension of the Community method to justice and home affairs, the establishment of a larger institutional capacity in foreign policy and defence, etc. – all topics which had been at the heart of the Laeken Declaration.

The idea of a Constitution regained its progressive-integrationist connotation. There was no final result as to which should be the final picture of the integration process – rather, the process of integration / constitutionalisation itself was redefined as the main goal of European unity – but the emphasis in the two Preambles (to the Constitutional Treaty itself and to the Second Part, containing the Charter of Fundamental Rights), as well as in the introductory articles of the text, on civic-republican values, and on the moralistic self-elevation of the Union to an organisation promoting human rights, the rule of law and democratisation in the world, reaffirmed to what extent enlargement had helped in the last fifteen years to shape the new role of the European Union in terms of a vast project for expanding democracy, respect for fundamental rights and economic stability towards the outer concentric circles of an ever increasing number of countries.

Thus, the significant further step in the dynamic of constitutionalisation of the Union which the Constitutional Treaty implied appeared explicitly tied up with what sometimes has been called "Europeanisation", or in other words, the extension of the positive results of European integration towards the Balkans, the former Soviet republics and the South Mediterranean countries, as well as to other parts of the world thanks to the complex array of external agreements put in place.

The second consequence of the turn to constitutionalism was a strengthened foundation of the legitimacy of the Union upon two clearly defined elements, its citizens and its member states, a notion of 'double legitimacy' which has not however been retained by the Lisbon Treaty. Together with the possibility of participation in the legislative process granted to national parliaments through the early warning mechanism and the introduction of a somewhat limited citizens' initiative to advance legislative proposals, the recognition of the primacy of European law over the national legal orders and the constitutionalisation of the symbols (flag, anthem, Europe Day) would undoubtedly have reinforced European citizenship and

would have helped to reduce the perceived democratic shortcomings of the Union.

The fact that the symbols and the formal enshrining of primacy were among the trade-offs demanded by a not-insignificant number of member states' Governments in exchange for the acceptance of the Reform Treaty certainly has to be seen as a minus in the overall evaluation of the final outcome of the process initially launched through the famous *Joschka Fischer*'s speech at Humboldt University in Berlin on the occasion of the commemoration of the fiftieth anniversary of the *Schuman* Declaration in the year 2000.

However, if an assessment of the nearly ten years of constitutional debate is required, the evidence that much of what had been achieved by the Convention remains in the final Lisbon Treaty (once it is ratified by all member states) clearly demonstrates that the constitutional moment was certainly productive. The enforcement of the Charter of Fundamental Rights, the recognition of the single legal personality of the Union, with the parallel overcoming of the different treaties' and pillars' structure, and – last but by no means least – the establishment of the European Council as an institution of the Union, are to be considered as among the most relevant achievements of the process.

Finally, once the constitutional fatigue prompted by the intricate details of the elaboration and adoption of the new Treaty has been overcome, quite a number of the new issues, initiatives and proposals which were discussed in the context of the Convention and the subsequent IGCs – and which were not included in the final Lisbon text – will most likely reappear in the future. And there may well come a time in which one of the most salient obstacles to a successful constitutionalisation of the European Union, namely the reluctance to take the step towards majority voting in the ratification of any Treaty reform, is finally superseded.

II. The reshuffling of the institutional balance of power

Compared to the Nice Treaty, the Constitutional Treaty implied a significant shift in the functional division of powers of the Union.

At the centre of the renewed institutional structure emerged the European Council, with its stable presidency and robust political and legal powers. The European Council became another institution of the Union, whose competences are aimed at its strategic leadership and external representation. Consequently, no legislative function was attributed to it. However, for the first time, the European

Council was able, according to the provisions of the Constitutional Treaty (and now also of the Lisbon Treaty), to adopt decisions which, when taking legal effect against third persons, may be controlled by the Court of Justice. Together with the already existing possibility of legal scrutiny by the Court of the procedural rules of the European Council, the formalisation of the workings and the decision-making of this formerly exclusively political body marks significant progress towards constitutionalisation and indicates that the Heads of Government attach an increasing importance to assuring control over the decisional process of the Union.

The European Council appears now at the apex of the institutional hierarchy, taking decisions by qualified majority voting on the appointment of its own President and the Ministry of Foreign Affairs, on the establishment of the number and competences of the different Council formations, on the appointment of the President of the Commission before ratification by the European Parliament, and on the decision on the number of members of the Commission and the rotation system to be followed for their nomination after 2014.

The formal recognition of the central role of the European Council in the institutional architecture of the Union is reinforced by its 'supra-constitutional' control of member states through the procedure on severe violation of common values (Article I-59 in the Constitutional Treaty, again Article 7 in the Lisbon Treaty). Although neither the Constitutional Treaty nor the Lisbon Treaty introduced new changes in a provision which had been initially inserted in the EU Treaty in Maastricht, and later reviewed – as a consequence of the experience gained through the Austrian case – in Amsterdam, the reinforced competences of the European Council, accompanied by its watchdog function on the orthodox application of 'the European values' by member states, shows the transformation of the European Council from a purely political and diplomatic body, whose original inspiration was to serve as a meeting opportunity for the Heads of Government and as a source of overall strategic impulse, to a crucial decision-making body, whose political responsibility *vis-à-vis* the citizens of the Union and the other institutions – formally restricted to a report by its President to the European Parliament at the conclusion of his / her mandate – will certainly require further development in the future.

Another relevant institutional novelty of the Constitutional Treaty was the creation of a President (or Chair) of the European Council for a period of two and a half years, who may be re-appoin-

ted for another similar period, replacing the system of rotating presidencies every six months, which is generally perceived as notoriously inefficient.

The main function of the President will be to drive forward the work of the European Council, ensuring better preparation and continuity, and to favour cohesion and consensus among its members, but the President will also provide the external representation of the Union in foreign affairs and defence.

The figure of the President was already conceived in the Constitutional Treaty as inherently ambiguous. The door was left open for either an activist President with real powers – who in such case will have to cope with complex interaction with the other members of the European Council (acting Heads of Government, unlike him or her) as well as with the High Representative and the President of the Commission – or, alternatively, for a 'Chair' with exclusively formal capacities.

As to the institutional triangle formed by the Council of Ministers, the European Commission and the European Parliament, the establishment of qualified majority voting within the Council as the general rule and of the co-decision procedure between Parliament and Council as the ordinary legislative procedure, together with the substantial expansion of the policy areas subject to co-decision and qualified majority voting, meant a substantial improvement in terms of more efficiency and transparency of EU legislation.

The strengthening of participation by the Parliament in the legislative procedure was accompanied by a useful clarification of the internal hierarchy of norms, whereby the Commission saw its role as the main executive body of the Union reinforced.

The Constitutional Treaty also foresaw the emergence of two new players, whose efficiency within the implicit inter-institutional arrangements governing the Union will however need to be tested in the not too distant future.

The first innovation regards the flamboyant figure of a Minister for Foreign Affairs (renamed, in the Lisbon Treaty, the High Representative of the Union for Foreign Affairs and Security Policy), who, bestowed with a rather ambivalent 'double hat' function in his / her capacity as both Vice-President of the Commission and permanent President of the Foreign Affairs Council, raises a number of questions as to the proper institutional setting and the ultimate effects of the presence of this figure within two institutions whose traditional nature relates, respectively, to an intergovernmental origin

in the case of the Council, and to the most characteristic representation of the supranational interest in the case of the Commission.

Assisted by the newly created Diplomatic Service of the Union and able therefore to determine the strategic goals of the Union in foreign policy (and eventually also in the security and defence areas), should the High Representative in addition be able to employ the human, technical and financial resources of the Commission in trade, commercial policy and humanitarian aid and development, in real life this complex figure may well face significant difficulties in day-to-day interaction, not only with the other members of the Commission (taking into account, in particular, the external dimensions of most Community policies) and its President, but also with the President of the European Council (responsible of the external representation of the Union "without prejudice to the competences of the High Representative", according to Article I-22 of the Constitutional Treaty, now Article 15 of the Lisbon Treaty), as well as with the individual Foreign Affairs Ministers of the member states.

The second innovation regards the new method of participation of national parliaments in the legislative process through the 'early warning' system, which, according to the language of the Constitutional Treaty, allowed two thirds of national legislatures to oppose a legislative proposal of the Commission based on subsidiarity objections. Although the negative vote of these national legislatures will not prevent the Commission from going ahead with the proposal, the system is based on the assumption that the political pressure exercised by a number of national parliaments over the Commission in a particular case would compel it to follow the position expressed by them. National legislatures were also granted the possibility, in case of conflict, of recourse to the European Court of Justice.

The politically most sensitive issue and the one which also obtained the widest media attention was undoubtedly the new voting system within the Council of Ministers. Here, whereas the Convention had proposed a relatively simple double majority mechanism, based on the vote of 50% of member states and 60% of the aggregated population, thus significantly departing from the three-tier system which had been negotiated with great difficulty in Nice, the Constitutional Treaty finally adopted a scheme, which was supposed to enter into force in 2009, that foresaw a majority of 55% of the member states, provided theses countries represented 65% of the total EU population.

The Constitutional Treaty also introduced a number of voting safeguards, particularly for those sensitive areas (such as foreign and security policy or some aspects of economic policy) where the legislative proposal does not originate at the initiative of the Commission.

The new voting provisions devised by the Convention and later modified by the IGC effectively signalled one of the most important changes in relation to Nice and to the philosophy that traditionally lay behind the Council voting system, which since the Treaty of Rome had relied heavily on specific features of the member states, the size of the population being just one important element among others for determining the number of votes of each member state in the Council of Ministers. After the Convention, more weight was given to the population, based on the assumption that stronger proportionality in relation to the population also meant more democracy, thus somewhat diffusing the state-based nature of the Council.

Similarly important was the decision to streamline the working of the Council formations, establishing a clear distinction between the General Affairs Council and the Foreign Affairs Council (which should be presided over by the Minister for Foreign Affairs) and creating for the other Council formations a system of rotation according to which teams of three member states would assume the presidency of the various Council configurations for periods of eighteen months.

The Constitutional Treaty also introduced into the Treaty the distinction between legislative and executive functions of the Council, which had been decided by the Heads of Government at the meeting of the European Council in Seville, and it confirmed that meetings in which the Council deliberates and votes on legislative proposals would be open to the public. Somewhat surprisingly, these innovations of the Constitutional Treaty, aimed at improving the functioning of the Council, were not elevated to the level of primary law by the Lisbon Treaty.

As to the Court of Justice, neither the Convention nor later the IGCs were willing to discuss the larger reforms that a number of qualified observers and the Court itself had suggested were required. Thanks to the Constitutional Treaty, a clear reduction of the policy areas which continue to fall outside of the jurisdiction of the Court (now basically limited to foreign affairs and defence) was attained, and the jurisdiction of the Court for the delimitation of competences and fundamental rights cases was confirmed. But the

annulment action for individuals before the Court, although made slightly more flexible, was not extended, and other very relevant issues, such as the internal organisation of the Court, formed now by 27 judges, or the link with national courts, were not substantiated.

Significantly enough, the Commission did not attract much attention during the Convention. As will be recalled, the Commission made some attempts to stage a parallel scenario (the "Penelope" initiative), openly hinting at its uneasiness with the constitutional text as it was being negotiated by the different parties.

In the end, the Constitutional Treaty did include some minor modifications concerning the European Commission. Apart from the reduction of the size of its members (which was supposed to be put in place after 2009), the Treaty provided a clarification concerning the nomination of the President of the Commission, for which formal consideration must now be made of the results of the elections to the European Parliament. More powers were also given to the President, allowing him or her to dismiss individual Commissioners and to nominate Vice-Presidents without the prior acceptance of the Commission's *Collège.*

There remain few doubts that after the Constitutional Treaty (and also the Lisbon Treaty), simplification – one of the main objectives of the Laeken Declaration – has now become a misnomer.

In fact, the renewed institutional design leaves open quite a number of different options as to its future. It has still to be proven that the European Council will be able to fulfil the strategic and political functions assigned to it, particularly considering the likely difficulties in the day-to-day relations among the President of the European Council, the High Representative and the President of the Commission – not to forget the interactions with their national counterparts, the Heads of Government and, in some cases, also the national Ministers, especially the Foreign Affairs Ministers.

The management of the dualist nature of the High Representative will require a high degree of diplomatic and political acumen, while its ambivalent characteristics also raise a number of questions as to the future development of the EU system. Taking into consideration a possible – conceivably quite distant – convergence in the future of the functions of the two Presidents (of the Commission and of the European Council), the consequence of a progressive shifting of the executive functions that are today in the hands of the Commission in the direction of the European Council may well be a model implicit in the Constitutional Treaty and for which the com-

plex figure of the High Representative (if successful) might serve as a precursor.

Does this necessarily mean that among the consequences of the institutional architecture delineated by the Constitutional Treaty a reinforcement of the tendency towards stronger intergovernmental features of the EU is unavoidable?

Nothing is actually yet written in stone. The strengthening of the position of the European Council may actually imply a paradoxical (dialectical) result: it will most likely have a downgrading effect on the current position of the Commission, but it will also probably advance a certain 'federalisation' of the European Council (and of its members, the Heads of the national Governments).

In theory, the system could evolve in the direction of more convergence between the supranational and the intergovernmental institutions of the Union, or it could definitively degrade the Commission to a role of qualified Secretariat of the Council / European Council. However, it is likely that, as so often in previous periods in the history of European integration, the EU may not develop along unidirectional lines (either intergovernmental or supranational), but rather by creating its own specific model whereby sovereign states are further 'integrated' while at the same time they reassert themselves as crucial actors of the integration process.

Within this latter scenario, the experiment with the ambivalence of the High Representative may well play a quite interesting anticipatory role, in the same way as the programme of decentralisation of competition policy in favour of the national antitrust authorities in recent years – to take just one example from a very different area, but with parallel results – has proven to be the best way to bind national administrations with a dense network of daily integration under the reinforced authority of the Commission.

III. The lack of a global strategy in Foreign Affairs and Security, if not resolved, may impair the new, important institutional innovations introduced in this area, whose efficiency remains to be tested

The time of the Convention coincided with one of the most difficult crises in transatlantic relations since the end of World War II. The aftermath of the Iraq conundrum has however strengthened the need for the US to act together with the Europeans. *Vis-à-vis* other countries, the EU provides international legitimacy, but the moralistic aspirations of the Union are not matched by its strategic prowess

and operational capacities, which are well below the expectations that the Union has raised and the responsibilities in the international arena that it is expected to effectively assume.

As an essential component of the principles and common objectives of the EU, the Constitutional Treaty emphasised the commitment of the Union to international norms, to the development of International Law, and in particular to the respect of the principles enunciated in the Charter of the UN (Arts. I-3 and I-8 of the Constitutional Treaty, now Art. 3.5 of the Lisbon Treaty. There was also a redefinition of the goals of the Union from the perspective of the objectives pursued by the UN and which today form a specific body of UN doctrine (and parlance): peace, security, sustainable development, mutual respect among peoples, just and free commerce, the eradication of poverty, and protection of human rights (especially the rights of children).

Although the Lisbon Treaty reduced the rhetorical grandeur which had prevailed among the members of the Convention at the time of drafting these introductory articles, and labelled the international commitments of the Union as "a contribution" – rather than trying to overburden the Union with the role of protagonist in the protection and promotion of international law – there persists an identifiable imbalance between the ambitious objectives set for the Union, the new institutional arrangements in Foreign Affairs and Security, and the absence of clear strategic positions which would be effectively followed by all member states in their foreign relations.

It is clear, however, that the Constitutional Treaty was able to advance quite substantially in the clarification and precision of the legal framework, particularly in the area of defence. Besides the above-mentioned institutional innovations of the Diplomatic Service and the High Representative, as well as the important achievement of a single legal personality for the Union, the Constitutional Treaty foresaw a category of acts of the Council itself and of the European Council in this area with the name of "decisions", which replaced the old typology of common strategies, common positions, joint actions and decisions. There was also the formalisation within the Treaty of the Neighbourhood Policy as a new policy instrument, which was granted its own legal basis, in parallel to the other existing categories of external agreements, and the Union also obtained a specific competence in humanitarian aid. However, as already mentioned, no progress was made as to submission of the decisions

(which are not legislative acts) adopted in foreign affairs and security to the scrutiny of the Court of Justice.

The most significant changes as compared to the Nice Treaty were introduced in the defence area. The Constitutional Treaty broadened the scope of the – so far mostly successful, but still very limited – Petersberg missions, refining its goals and recourse to civil and military resources, and including the fight against international terrorism as an overall objective of these missions. The final objective of a "common defence" as the end result of an incremental common policy in security and defence, which should then be decided unanimously by the European Council, was for the first time legally enshrined in the Treaty.

The Convention was particularly concerned with laying the foundations for extending the civil and military operational capacities offered by member states to the Union. Following the broader consensus attained within the group of Convention members participating in the deliberations on the Defence chapter, the Constitutional Treaty expressed the formal commitment of the member states to subsequently improve the military capacities of the Union. As the main instrument for the setting of the required capacities, to promote harmonisation of industrial defence policies, propose multilateral projects and favour technological research, the former protocol on the European Defence Agency was included in the Treaty and the functions of this body were more precisely defined.

Another relevant innovation of the Convention was the creation of a specific form of enhanced co-operation among a limited number of member states in defence, which received the name of "permanent structured co-operation", basically open to all other member states, subject to the fulfilment of certain conditions. Those member states willing to subscribe to more binding commitments with respect to further military capacities for specific missions were supposed to establish among themselves a permanent structured co-operation.

The Treaty also formalised the solidarity clause – adopted by the Council in the aftermath of the Madrid and London terrorist attacks – whereby member states obliged themselves to supply assistance and help to any other member state suffering armed aggression in its territory, and this "in conformity with Article 51 of the UN Charter", as well as with other security obligations of member states, including NATO.

The future will show whether the new institutional mechanisms of the Constitutional Treaty, together with the instruments laid down for enhancing the military and civil operational capacity of the Union, will be sufficient to underpin the ambition of the Union to act as an efficient and responsible global player. As the Convention made clear, posited in an international scenario in which China, India, Russia, Brazil and other large countries are assertively seeking a new global assignment of functions world-wide, the capacity of the Union to act coherently and purposefully on the international stage will be crucial for the development of European constitutionalism in the years to come.

IV. If the direct consequence of the terrorist attacks in New York, Madrid and London was a substantial communitarisation of matters relating to the Area of Freedom, Security and Justice, this may well have been achieved to the detriment of the further development of other policy areas

Even if the *securitization* of the policy debate was not as acute in Europe as it was in the US, it nevertheless left behind a clear imprint on the Constitutional Treaty, to the prejudice of the two other dimensions – freedom and justice. However, the perceived demand for security on the part of European citizens made it possible for all the remnants from Nice within the third pillar to be brought under the umbrella of the Community method.

The Area of Freedom, Security and Justice received more clearly defined objectives, it was recognised as a space of shared competence between member states and the Union institutions, and it was subjected to the Court's jurisdiction. The policies concerning border controls, asylum and immigration were given more precise lines of action; thus, border controls were defined as aiming at the establishment of an integrated system for management of the external borders of the Union, the goal of a common European asylum system was neatly outlined, and the basic tenets of a common immigration policy were determined. While the principle of burden-sharing among member states for the reception of refugees and displaced persons in the case of massive population fluxes was tentatively accepted as part of the common asylum policy, there was however no recognition of a Union competence in relation to national immigration quotas. Nor was any provision included which would permit the harmonisation of national legislation in this area.

As regards judicial co-operation in civil matters, the Constitutional Treaty did not introduce significant innovations when compared to Nice. It made explicit the possibility of adopting measures for the approximation of national legislation and it slightly expanded the list of – *numerus apertus* – matters which may be the object of the Union competence in this field.

In the areas of judicial and police co-operation in criminal matters, the main achievement of the Constitutional Treaty was to generalise the community method. This effectively means that the Council will now decide – with certain limitations – by qualified majority voting (including such relevant subjects as the harmonisation of criminal procedures and the approximation of national legislation on crimes), the Parliament will be fully involved through the ordinary legislative procedure (co-decision), and the right to propose legislation goes back to the Commission, limiting the possibility of member states initiating legislation to a joint proposal by a minimum of a quarter of member states (currently, seven countries). Qualified majority voting was also foreseen for the development of Eurojust and Europol, while unanimity continues to be the rule for the decision to establish a European Prosecutor. Nor did the Convention make any progress in the much discussed alleged need for adopting a European Civil Code, or at least a European Civil Code on Contracts.[2]

The redirection of nearly all of the old justice and home affairs pillar within the first pillar was a remarkable constitutional achievement of the Convention and the Constitutional Treaty, which has also been confirmed by the Lisbon Treaty. It remains to be seen whether the implementation of the new provisions in this field may have spill-over effects on other areas, such as Foreign Affairs and Security, taking into account the lesser degree of division between external and internal security that the fight against terrorism has brought with it.

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2 A detailed comparison between the Constitutional Treaty and the Nice Treaty is provided by the published research conducted by the Instituto de Estudios Europeos, Universidad CEU San Pablo and directed by *Méndez de Vigo* (2007).

V. The Convention debates showed quite remarkable differences among member states with regard to their views on economic governance and on the social dimension of Union policies, making these two areas in which no significant innovation was introduced in the Constitutional Treaty

The Convention work took place in a period of relative stable economic and financial conditions. However the lack of consensus of member states on the level of economic co-ordination and on progress towards economic union, and particularly the stark differences in perspectives on social policy, confirms these two policy areas as especially resistant to further constitutionalisation.

To be sure, there has so far been only very limited discussion on what should be the appropriate level of constitutionalisation of monetary and economic union. The provisions within national constitutions dealing with economic and monetary governance are usually quite sparse. However, given the multileveled constitutional structure of the Union, there are sufficient arguments to support the need for a formalisation at the constitutional level of the basic norms regulating the economic-monetary architecture of the Union.

No proposal representing any significant change in the co-ordination of economic policies and on the internal market emerged from the discussions within the Convention. The Constitutional Treaty (and also the Lisbon Treaty) saw some enhancement of the Commission's role in the decision-making leading to the adoption of broad economic policy guidelines and on the procedure on excessive deficits. There was also a general Declaration on the Stability and Growth Pact attached to the Treaty. But some of the most obvious issues, such as the confusion surrounding the external representation of the Economic and Monetary Union (with competences now divided between the Commission, the Council and the European Central Bank) were not tackled at all. Further, no formalisation or further development of the Eurogroup, which would be consistent with the real situation where the most important decisions concerning Economic and Monetary Union are being taken within this informal body, was put forward.

Many other issues, which have regularly been targeted as the main objectives for a more ambitious reform of EMU, were also not dealt with by the Convention. This applies particularly to the discussion on the establishment of EU sector regulators, in such areas as finance, telecommunications, energy or even competition. Nor

did the Convention address one of the foremost menaces to the consolidation of the internal market, namely the different degrees of market liberalisation within member states and the (sometimes aggressive) responses given by national governments to individual attempts to advance transnational corporate integration.

The Convention and the Constitutional Treaty were equally silent regarding the economic and financial consequences of globalisation for the Economic and Monetary Union, and particularly regarding the effects of the emergence of new economic powers and their challenge to the international economic-monetary regime created after World War II. There was no foresight at all in laying down a regulatory framework at the EU level for such new phenomena, for instance, as the massive investments coming from sovereign funds and their repercussions on the free trade principles of the internal market.

If these topics were consciously neglected, others which would have also required the attention of the Convention, like the much debated question of the quality of legislation, were simply not on the agenda. The Constitutional Treaty did however score quite highly on competition policy, compared to the somewhat despairing results of the Lisbon Treaty.

VI. The Constitutional Treaty did not take a position on the issue of increased complexity and difficulties of internal management of the European Union, but it removed important obstacles to the functioning of enhanced co-operation

The general provisions of the Constitutional Treaty on enhanced co-operation were basically equivalent to the Nice provisions. The only significant change was the amendment of the minimum number of participating member states, which was modified from eight to one third.

Another significant innovation was the extension of enhanced co-operation to the Common Foreign and Security Policy, and no longer only for the implementation of a joint action or a common position.

Establishing enhanced co-operation in foreign affairs and security requires as a pre-condition a unanimous decision by the Council. However, member states participating in a specific enhanced co-operation may decide to act within the framework of the enhanced co-operation based on qualified majority voting, although this provision is not applicable to defence or military matters.

Again, enhanced co-operation poses a significant challenge to the further constitutionalisation of the Union. This is particularly so if the areas of development of closer co-operation among member states are, as may be expected: defence where as previously stated specific provisions for "permanent structured co-operation" were foreseen in the Constitutional Treaty; and the creation of a core of countries in relation to the Common Foreign Policy and Security.

VII. The Constitutional Treaty failed to address new concerns of citizens and to legislate for the future in increasingly relevant areas

It is likely that for some segments of the EU population the discussions of the Convention taking place in the European Parliament in Brussels and the successive texts of the Constitutional and the Lisbon Treaties remained quite distant and abstruse. A certain constitutional exhaustion may also have been perceived by the time of the second IGC and the difficulties for member state Governments to ratify the constitutional document. A more visible role for Europe in the global agenda may also have emerged more clearly from the debates of the Convention. The Lisbon Treaty attempted to cope with these shortcomings by extending Union competence to new policies, such as climate change, and by articulating more precise objectives in energy policy and energy supply. However, there was no advancement in other fields, also of explicit interest to citizens, such as social policy or the Neighbourhood Policy, particularly in the latter's relation to the open question of the limits of Europe.

VIII. The Constitutional Treaty did achieve significant improvements in the democratisation of the Union, but it did not substantially overcome the perceived lack of closeness to citizens

Does the final result of the attempted constitutionalisation amount to more transparency and efficiency, more simplification and flexibility, more closeness of the European project to European citizens? In other words, at the end of nearly ten years of European constitutionalism, have the initial goals of the Laeken Declaration been achieved?

The answers to these questions will certainly differ. Probably the most positive responses will relate to the advancement of more efficient – and possibly also more flexible – institutional arrange-

ments. Much has been achieved in terms of setting the stage for a streamlining of the activities of the Union and the functioning of its bodies. However, as previously mentioned, this alleged efficiency remains to be proven, and the final balance of the other objectives pursued – simplification and a closer proximity to citizens – seems to have obtained a less positive score.

What should be said about further democratisation? The new instruments – the popular legislative initiative, participation of national parliaments through the early warning mechanism, new provisions on subsidiarity with a better access of the regions to the Court, and new provisions concerning democracy in the Union – have to be tested, but they signal a clear attempt to promote democratic principles. Some of them, like the popular legislative initiative, have been very carefully (maybe too carefully) limited. Other positive means of fostering a closer proximity to citizens – such as symbols – were adopted by the Constitutional Treaty, but they fell by the wayside as pre-conditions for the *de-constitutionalisation* of the Lisbon Treaty.

The non-modification of the ratification and the revision method proved in the end to be one of the most significant weaknesses of the Constitutional Treaty. What has been retained is the simplified revision procedure of the two '*passerelle*' or bridging clauses, for the transition under certain conditions to qualified majority voting and for the transition to the ordinary legislative procedure, which can only metaphorically be referred to as 'revision' procedures.

As to ratification, a public debate on the Constitutional Treaty did take place, especially in those countries where the Treaty had to be ratified by popular vote. The referenda proved however to be a very ambivalent instrument in order to detect public opinion and allow the public to express their views on European affairs. As often stated, the two negative referenda in France and in the Netherlands became entangled with a number of many other different issues, at which conjuncture a protest vote crystallised, which was not necessarily directed against the Treaty. The negative results in France and in the Netherlands have tainted referenda with a negative connotation. They are now being perceived – rightly or wrongly – as very risky exercises and not as an inherently genuine expression of popular sentiment on European questions.

Certainly, the European Constitution cannot be the magic solution to all of Europe's problems, but the experiment in European

constitutionalism over the last nine years is of significant value. The Constitutional Moment was an attempt to make a more democratic, transparent, efficient and 'close to the citizen' European Union; the results will now have to be tested through the application and implementation of the Lisbon Treaty. European constitutionalism, for its part – like the integration process itself – continues to be an ongoing project.

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