

**IN PRAISE OF THE EUROPEAN CONSTITUTION:
A political economics perspective.***

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1. Introduction

The European Constitution has passed in June 2004 the hurdle of the European Council after the failure of the December 2003 Rome summit. It is less clear how the Constitution will be ratified in the different member states of the European Union. Referenda are planned in various countries. I have been following the process starting from the Laeken declaration to the final text of the Constitutional Treaty (CT: I will refer to it as the European Constitution in the text) and written with some colleagues a report on the challenges facing Europe and on the desirable features a European Constitution should have (Berglof et al., 2003). The adopted Constitution is very different from the one I would have dreamed of. In particular, I thought that it would be better to have a presidential system for Europe rather than a parliamentary system. The Convention clearly chose for the parliamentary path, as I will explain. However, when reading the Constitution, I was positively surprised to find that there were quite a few safeguards against the drawbacks of a parliamentary Europe. On the whole, I think that the convention delegates have done a very good job at designing this Constitution, given the constraints of writing a Constitution in the European context, especially the various political constraints to further European integration in various Member states. The version of the Constitution adopted by the European Council is less good in many respects, (including in some key areas such as qualified majority) than the one drawn up by the Convention and has generated some disappointment but it is not drastically different from the Convention draft and there are reasons to be quite optimistic about Europe if the Constitution is adopted.

With hindsight, the simple existence of a European Constitution appears as a very unlikely event. The prospect of the enlargement of the European Union to 25 had raised fears that the EU would simply become a large free-trade area and that the post-WWII European project of peace on the continent via a closer political integration may never materialize. Europe had lost its historical opportunity in the aftermath of 1989, claimed the pessimists. The Nice Treaty had made decisions on voting weights in the European

Council and on the number of seats in the European Parliament after enlargement. It seemed inevitable that decision-making would become much more difficult in the enlarged EU (Baldwin et al., 2001). However, a seemingly unimportant event, the institution of a Convention to establish the Charter of Fundamental Rights, was to have deep-reaching consequences. The Belgian presidency prepared a declaration, the Laeken declaration, destined to renew the impetus for reform and to move farther ahead than the bland Nice outcome. The most revolutionary act would prove to be the abandoning of the traditional instrument of the intergovernmental conference and the decision instead to mandate a Convention to prepare these reforms. Intergovernmental conferences are always composed of country representatives who have in mind only the interests of their country. This leads often to quite inefficient bargaining. The convention was to be composed not only of representatives of national governments but also of members of the European Parliament and of members of national parliaments. Even more interestingly, it included representatives from the accession countries. Members of the Convention were to act not as country representatives but as conventioners trying jointly to prepare a draft Constitution. Despite a very strict deadline and a sometimes idiosyncratic presidency by the aging former French president Giscard d'Estaing, the Convention fulfilled its task. The IGC that took place in the fall of 2003 could not make any progress over the work of the convention.

The big question I would like to address is: What is the historical importance of this Constitution? Will it really create institutional stability? Will it provide an effective and democratic decision-making mechanism at the European level? Will the institutions stemming from the Constitution deliver the public goods needed at the European level? These are all very important questions. My general answer to those questions is: Yes, but with a great deal of uncertainty. I will argue that the Constitution has all the necessary ingredients for a historical success similar to that of the US constitution. However, I will also argue that it does not contain *guarantees* of success. The reason is *not* that a good Constitution is never a condition for guarantee of success but that the Constitution contains sufficient ambiguities so as to allow for developments in different directions, including good but also less good scenarios. These ambiguities are the reflection of the

political constraints in Europe. In that sense it would be futile to criticize them as ill-designed. One must however be aware that they leave a lot of room for uncertainty and that there will most likely be many battles over the interpretation of the Constitution after its adoption. Nevertheless, even the worse case scenarios one can imagine are still better than the status quo of the Nice Treaty.

While it is difficult to define with uncertainty what is an optimal Constitution for Europe, my overall assessment is that the Convention has done a very good job. More importantly, I think that the current Constitution has the potential to last the test of time, the most important test for any Constitution.

From a methodological point of view, I will take the political economics perspective when analyzing the Constitution. Instead of analyzing the allocation of competences within Europe, I go one step beyond and look instead at the allocation of powers within the institutions, trying to predict how this allocation of powers will affect the allocation of competences. This is why most of this paper is devoted to analyzing the allocation of powers resulting from the Constitution.

In section 2, I will go over the main elements of the Constitution. In section 3, I will comment on how the Constitution is likely to work in the long run. When doing so, I will go over the many ambiguities in the Constitution and how they might evolve. I will also argue that it constitutes a definitive improvement over the current status quo. In section 4, I will use the methodology of political economics analyze to what extent the Constitution will help provide the necessary public goods at the European level.

2. A Primer on the Constitutional Treaty.

The Constitution is composed of four parts. The first part is short but is the most important. It defines the objectives of the Union, clarifies its competences, defines the powers of the main institutions and the main rules of functioning. Part II is the charter of

fundamental rights that was proclaimed at the Nice summit but did not have the force of Law. The inclusion of the Charter is a natural step given the importance of fundamental rights in democratic Constitutions. Part III contains a lengthy catalogue of the Union competences but also more detailed provisions than part I about the functioning of the Institutions and the European budget. Part IV contains various protocols including important ones on the application of the subsidiarity principle and on the role of national parliaments in the European Union.

I will only review the main elements of the Constitution that are of importance basing myself on the version adopted by the European Council of June 2004.¹ Article I-2 defines the values of the Union: human dignity, liberty, democracy, equality, the rule of law, respect for human rights, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. These values are the basis for admission of new members but also the basis for possible exclusion of member states. Among the Union's objectives in article I-3, there is the mention of a social market economy, social progress and explicit reference to equality between men and women and to the protection of children's rights. Article I-4 explicitly mentions the prohibition of discrimination on grounds of nationality in the application of the Constitution, an article that will certainly have widespread repercussions in the future.

Article I-5a declares the primacy of EU law over national laws and the obligation of Member States to fulfill their obligations resulting from the Constitution or the Union Institutions' acts. One can be sure that the latter clause will be used in future legal disputes between the EU and Member States.

Article I-6 gives the Union a legal personality. The Union will thus be able to sign Treaties with other nations. This also paves the way for direct representation of the Union in international organizations, a step that would undoubtedly give the Union more weight at the international level.

¹ It will need some cleaning up in the numbering of the articles as some articles have for example been scrapped but the numbering has remained unchanged.

Article I-9 defines the principle of subsidiarity: “in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States (...) but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level. The principle of proportionality is also defined: “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution”.

Article I-11 defines three categories of competence: 1) exclusive competence, 2) shared competence under the primacy of EU law, implying that EU law suppresses national competence to legislate; 3) supportive measures, “carrying out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas”. No harmonization of Laws is allowed in the latter category. The promotion and coordination of economic and employment policies is explicitly mentioned as well as the “competence to define and implement a common foreign and security policy, including the progressive framing of a common defense policy”.

A very important article is article I-17, the Flexibility Clause that allows an extension of EU powers proposed by the Commission within the objectives of the Constitution by unanimous decision of the Council and consent of the European Parliament. Note also that under the subsidiarity principle, national parliaments will be consulted on all such changes.

Article I-18 defines a single Institutional Framework for the EU, thereby abolishing the “three pillar system” of the Amsterdam Treaty.

Article I-19 defines the role of the European Parliament. It shall co-legislate with the Council and elect the President of the European Commission. It shall not exceed 750 members, with a minimum of 6 from each Member state and a principle of degressive

proportionality with a maximum of 96 seats for any Member state. The decision on the specific composition of the EP is left to a unanimity decision in the Council on an initiative from the European Parliament.

Article I-20 on the European Council states that its decisions shall be taken by consensus instead of unanimity.

Article I-21 defines the role of the president of the European Council: elected by qualified majority of the Council (and recallable by the same procedure) for two and a half years, renewable once. His main role is that of chairing Council meetings and driving forward its work but also of external representation of the Union “without prejudice to the responsibilities of the Union Minister for Foreign Affairs”. Initially, both Chirac and Blair had insisted on giving executive power to the Council chair. Chancellor Schroeder had even agreed to the idea. The Constitution clearly circumscribes the power of the European Council chair. His role is closer to that of the president of Germany than to that of a French president now. However, the 6 month rotating presidency of the European Council is abolished. This was opposed by the small countries. The outcome is thus a compromise between both positions. We will argue in section 3 that this is an efficient compromise.

Article I-22 defines the role of the Council of Ministers and specifies that the general decision rule shall be qualified majority.

Article I-23 defines the General Affairs Council, the Foreign Affairs Council and other Council configurations. The COREPER is also defined. Deliberations and voting on legislative acts in the Council shall be in open meetings. The European Council shall decide on the presidency of Council configurations on the basis of a principle of equal rotation. The Foreign Affairs Council shall be chaired by the Union Foreign Minister (article I-27.3).

Article I-24 defines the rule for qualified majority: 55% of Member States (at least 15 countries) and 65% of the population². However, a proposal can be blocked by four Council Members. This was the most controversial article that initially provoked opposition from Spain and Poland and led to a breakdown of the negotiations under the Italian presidency in 2003. The current article, with the higher majority threshold but also the possibility of a blocking minority, is the reflection of a compromise in the European Council.

A very important “deepening clause” in the Constitution (previously I-24 and now IV-7a) is that the European Council can decide by unanimity (*and* after a “cooling off” period of 6 months *and* consultation of the EP *and* informing the national parliaments) to use the ordinary legislative procedure when the Constitution requires a special procedure and to use the normal qualified majority in areas where the Constitution specifies unanimity rule. This procedure will not require ratification or referenda. The Constitution thus gives powers to the European Council to change by unanimity the legislative procedure and voting rule on a given topic. As we will argue below, this will be a very important tool allowing the EU to evolve gradually without having to change the Constitution. This clause has nevertheless been somewhat toned down by the European Council. Article IV-7a states that defence and decisions with military implications are excluded from the clause and also that any national parliament can veto a decision (within 6 months) taken under that clause.

Article I-25 defines the power of the European Commission. The Convention proposed a limit of 15 Commissioners: the Commission president, the Union Foreign Minister and 13 Commissioners based on a system of equal rotation between the Member States with non-voting Commissioners from other states. The current draft states that after 2014 there shall be a limit of two thirds of the number of member states (16 with 25 Member states), unless the European Council decides to alter this figure by unanimity. The Commission shall represent the demographic and geographic range of the EU and

² Proposals not emanating from the Commission or the Union Foreign Minister require a supermajority of 72% of member states and 65% of the population.

there will be equal rotation between Member states with the difference between the total number of terms between any pair of countries never more than one.

According to article I-26, the president of the Commission will be proposed by the Council, deciding by qualified majority taking into account the elections to the European Parliament. The EP must elect him by majority. The Council shall appoint the other members of the Commission, jointly with the president-elect on the basis of the proposals of the Member states. In other words, Member states shall choose their commissioner. This is a step back from the Convention draft that stated that the President of the Commission shall choose each Commissioner from a list of three persons put together by each Member State. The Constitution draft nevertheless still gives the Commission President the right to ask a Commissioner to resign, including the Union Foreign Minister.

Article I-27 defines the role of the Union Foreign Minister. He is appointed by the Council with the agreement of the President of the Commission and can also be fired by the Council. He will make proposals for foreign, security and defense policy for which he will receive mandates from the European Council. He will be one of the Vice-presidents of the Commission.

Article I-28 defines the Court of Justice which is composed of the Court of Justice, the High Court and specialized Courts. Both the Court of Justice and the High Court shall have at least one judge per Member State.

Article I-32 clarifies the different legal acts in an exhaustive way.. A European *Law* shall be binding and of general application. A *framework law* shall have binding results but implementation is left to national authorities. A European *regulation* is a non-legislative act for implementation of legislation and may be binding in its entirety or only in its results. A *decision* is a non-legislative act that is binding but only to who it is addressed. *Recommendations* and *opinions* have no binding force.

The general legislative procedure, defined in article I-33 is the following: the Commission proposes, the EP votes by simple majority and the Council votes by qualified majority.

Article I-39 identifies procedures for Foreign Policy. Proposals can come from a Member State or the Union Foreign Minister. Decisions will generally be taken by unanimity in the Council and implemented by the Union Foreign Minister. Laws and framework laws are excluded. Here also, the Council may however decide to switch to qualified majority.

Article I-40 defines procedures for defence policy. Only national capabilities can be used. Unanimity is required for decisions. There is a clause of obligatory aid and assistance if a Member State is the victim of an aggression. For Justice and Home Affairs, article I-41, Member States have right of initiative. Article I-42 contains a solidarity clause in case of a terrorist attack or a natural disaster. Military resources made available by Member States may be used in that case.

Article I-43 defines the rules for enhanced cooperation. One third of member states must participate in an initiative with the authorization of the European Council. Only participating states vote on decisions within an enhanced cooperation. The usual qualified majority rules apply except that supermajority is required if the proposal does not come from the Commission or the Union Foreign Minister. Decisions under enhanced cooperation are not part of the *acquis*.

Article I-52 to 55 are related to the budget. The budget shall be balanced. The Union's budget are to be financed from its own resources. A law, to be approved by all Member States, shall limit these resources. There will be a multi-annual framework and annual ceilings for each expenditure category. The annual budget will be approved by the EP and the Council of Ministers (here also a unanimity decision may allow the Council to decide by qualified majority).

Article I-58 defines conditions for suspension of membership rights. The Council must first decide by unanimity that a Member State is seriously breaching the values of the Union. The decision to suspend a Member State of voting rights is by qualified majority and so is the decision to revoke a suspension. The EP must approve by majority of two thirds and majority of its members. A suspended Member continues to be bound by its obligations to the Union. Article I-59 defines the right to exit the EU.

Part II includes the Charter of fundamental rights of the EU. Part III includes a lengthy catalogue of the existing competences of the EU. It is mainly a codification of the status quo but articles III 166-168 mention an integrated management of borders, a common asylum policy and a Common immigration policy.

Title VI of part III elaborates on the functioning of the EU. Article III-232 establishes that elections to the EP should follow a uniform procedure. Following article III-234, the EP may request by absolute majority an initiative from the Commission. Article III-243 sets the rules for a motion of censure of the Commission as a whole. It requires a two third majority of the EP representing a majority of members. There is no censure of individual commissioners by the EP.

The appointment of judges to the European Court of Justice will be slightly less politicized than the current situation. The appointment of judges will be staggered with a partial replacement of judges every three years. Judges will be appointed for a period of 6 years renewable. Governments will still appoint the judges but a panel of seven experts, 6 chosen by the president of the Court and one by the EP, will review their suitability (article III-262). The panel members will be chosen among former members of the Court of Justice, members of national supreme courts and recognized experts. Decisions by the High Court may be reviewed by the European Court of Justice (III-263). The latter will review the legality of EU legal acts and have the power to interpret the Constitution (III-274).

Article III-289 relates to the ECB. The Governing Council will be composed of the Governors of Central banks of Euroland together with the 6 members of the Executive Board. The Constitution does not however stipulate voting rules within the Governing Council.

3. Evaluating the Constitution.

The first question I want to ask is to what extent the Constitution is simply a codification, and obviously a welcome simplification, of existing Treaties or does it go further than that and represent an improvement over the current functioning of EU institutions? Taking the status quo as benchmark is a more useful way of evaluating the Constitution compared to any idealized benchmark. Indeed, we have no solid theories telling us how to compare and thus rank the suitability of constitutions for Europe. A comparison to the status quo is both easier and more convincing than to a dubious “optimal” constitution.

3.1 A cleaned up intergovernmental institution or a parliamentary confederation?

A first careful read of the Constitution indeed gives the impression that it is nothing more than a welcome codification of the existing consensus at the European level. It fulfills the task of simplifying the multiple Treaties but does not propose really any drastic changes. There is clearly no drastic change in the catalogue of competences of the Union. A careful status quo has been maintained. There is no question of eliminating the common agricultural policy or of any drastic step forward on defense. The same thing can be said about maintaining the unanimity rule in controversial areas. No fundamental change has occurred there.

This should however not come as a big surprise. The process by which Member States agree to cease partial or total sovereignty to the European Union has been very

gradual, always requiring unanimity. There is as yet no unanimity on tax harmonization or defense and the Convention was not going to create that unanimity. A bolder proposal might in all likelihood have backfired. It is thus rather reasonable to see that the Constitution provides for a status quo on competences and on areas where unanimity is required.

However, the important, and very interesting step, is the adoption of procedures making it possible to change *both* the *competences* of the Union *and* the voting procedure. The Constitution rightly recommends unanimity for such changes and this constitutes an adequate protection of national sovereignty. However, without these flexibility clauses, any minor change to the EU competences or to the voting rules would have required a lengthy procedure of Constitutional change, requiring a Convention to be established and a lengthy process of ratification on a country by country basis. This would involve an extremely high transaction cost. Within a bit more than 10 years, the EU has gone through three new Treaties (Maastricht in 1992, Amsterdam in 1997 and Nice in 2000). Each of these Treaty changes has required lengthy preparation. Problems were met with the ratification such as the Danish rejection of the Maastricht Treaty and the Irish rejection of the Nice Treaty. Moreover, these Treaties, especially the last two, were more of an improvised patchwork and the result of nightly marathons between heads of state rather than a serene and consistent elaboration. It is clear that with a Europe of 25 countries, these transaction costs would have further increased in an exponential way, possibly jeopardizing all future options for further European integration. Not only has the Convention brought great improvements in terms of depth and consistency of its draft but it has managed to reduce future transaction costs within the framework of the same Constitution. The Convention has achieved this without sacrificing national sovereignty. The changes brought by the Council to the Convention draft (giving one national parliament a veto on measures decided under the “deepening” clause plus the exclusion of defence from the clause) went in the direction of further protecting national sovereignty. Nevertheless, they still keep the transaction costs low compared to the status quo. Given the evolutionary nature of European integration, this flexibility of the Constitution is a key element. If the Constitution is adopted, transaction costs for further

integration will have been much lowered. Given the protection provided by the unanimity requirement, there is no good argument to maintain these unnecessarily high transaction costs. If anything, I would claim that this is one of the most important achievements of the Constitution: it has provided both mechanisms for further deepening of European competences while protecting national sovereignty.

This evaluation is strengthened by the provisions in the Constitution on enhanced cooperation. Indeed, they make it much easier for a subset of countries to initiate joint competences. The Council still needs to approve such initiatives but only by a qualified majority. The Constitution also rightly stresses that enhanced cooperation cannot threaten or weaken the Single Market. Enhanced cooperation shall be done with the existing institutions. Facilitated enhanced cooperation is also likely to affect the process of integration. In effect, it allows a subset of countries to experiment with a new dimension of integration while allowing other countries not to participate but also denying the latter a veto power over the experiment. The inclusion of enhanced cooperation is probably a constitutional innovation. I am not aware of similar clauses in democratic constitutions.

Let us now review other aspects related to decision-making within the EU.

A first issue concerns the European executive. The most important one is obviously the question of the head of the Executive. Initially, both Jacques Chirac and Tony Blair, then backed by Manuel Aznar, made a proposal focusing mainly on replacing the 6 month rotating presidency of the Council with a president elected from within the Council by qualified majority for a period of at least two years, renewable. This proposal was criticized on several grounds. It was rejected by the smaller countries who thought that they would lose their 6 month turn to chair the European Council as it was more likely that an elected president would be a politician from a bigger country. But it was also criticized for strengthening the power of the Council at the expense of the Commission. It was argued that this could weaken European institutions as the Council represents countries and thus mainly national interests whereas the Commission represents pan-European interests. Strengthening the Council at the expense of the

Commission might then weaken European integration altogether. The alternative favored by European federalists but also by representatives of small countries was to strengthen the Commission by making it more democratically legitimate. The German government was in favor of such an alternative and argued in favor of the election of the president of the Commission by the European Parliament after the elections to the latter. A French-German compromise, the so-called Chirac-Schroeder compromise, was proposed in January 2003 by the two heads of state. It crudely combined the two proposals: a Council president elected by the European heads of state and a president of the Commission elected by the European Parliament. The proposal was unanimously criticized both in the Convention and throughout Europe for putting forward a two-headed executive. This was seen as a recipe for sharp and unnecessary conflicts between the Commission and the Council resulting possibly in dysfunction and discredit for the European institutions. This potential conflict would not only follow from the fact that both presidents would be claiming executive responsibility. It would be further sharpened by the likelihood that both presidents would most likely be from different ideologies. Hix, Noury and Roland (2003) have shown that because elections to the European Parliament are the equivalent of US midterm elections, this leads usually to a European Parliament that is right wing when the Council is to the left and vice-versa. In other words, under the Chirac-Schroeder proposal, the president of the Council and of the Commission would most likely be of opposing ideologies which would further sharpen their rivalry. German Foreign Minister Joschka Fischer proposed a smart way of fixing the problem by proposing the “double hat” idea whereby the president of the Commission chairing the meetings of the European Council³. This however left open the ambiguity of how the double-hatted president would be selected: elected by the Council or by the European Parliament?

I would argue that the Convention found a satisfactory solution to this problem. Indeed, the main danger, that of executive duplication, has been prevented. The Council president’s main role is to chair the Council’s meetings. He will also have a role of

³ This should not be confused with the other “double hat” idea that was effectively adopted by the Convention that is to have one “Foreign Minister” of the European Union holding de facto the post of Commissioner for external Affairs, currently held by Chris Patten, and that of the High Representative for Common Foreign and Security Policy, currently held by Javier Solana.

external representation but any mention of executive responsibility has been dropped. The president of the Commission will keep his powers and receive additional legitimacy from his election by the European Parliament. I think this is a good and efficient compromise for several reasons. First of all, the role of the president of the Council will be closer to that of the German president who is the head of state and has functions of representation but no real power.⁴ Second, abolishing the rotating presidency will lead to better focus in European Council meetings and better continuity. Third, nothing prevents the double hat solution with the same person being chosen for both jobs. This might be a practice that emerges from using the Constitution but it might also evolve otherwise. In both cases, the downside does not seem large.

A second issue concerns the selection of the president of the Commission, the most powerful person in the EU system. It is no secret that heads of government in larger countries like France and the UK had been reluctant to give more democratic legitimacy to the president of the Commission because this would have given him more power. Strong opposition was thus voiced in some quarters in particular to the idea of the president of the Commission being elected by the majority emerging from elections to the European Parliament. The wording in the Constitution quite clearly leaves ambiguity there. On one hand, the European Council will propose the president of the Commission but on the other hand, a majority in the Parliament must approve the proposal. This sounds like a continuation of the current status quo where *de facto* the European Council chooses the president of the Commission. The past few presidents Santer and Prodi needed approval from the European Parliament before assuming office. On the other hand, the Constitution includes the words “*Taking into account the results of elections to the European Parliament*” in mentioning the proposal powers of the Council. A first interpretation is that this does not mean very much and that the Council will propose

⁴ The mention of external representation may give the impression that the role of the president of the Council will be analogous to that of the French president. First of all, this is only an impression. The French president has powers to dissolve the parliament and to call for new elections that the president of the Council will not have. Moreover, he has strict prerogatives in foreign and defense policy whereas the president of the Council will only have external representation responsibilities. Second, the French president is less powerful than initially thought of in the design of the Constitution of the Fifth republic. Indeed, whenever there is “cohabitation” due to the majority in parliament and the government being from a different ideology than the president, then the latter has little power.

whoever it wants as Commission president as is currently the case. A second interpretation is that the Council will act as heads of state in parliamentary systems who choose a formateur who is usually from the party who has won the elections. This would mean that the president of the Commission will be mainly determined by the majority emerging from the elections to the European Parliament and not by the European Council. As one can see, these are quite different interpretations. The wording of the Constitution thus contains ground for conflict.

My evaluation is that while the wording of the Constitution seems non binding to the European Council, in practice the role of the latter will most likely evolve gradually to resemble that of current heads of state in parliamentary systems. The reason is that the need to secure a parliamentary majority makes it possible for a well determined majority coalition in the European Parliament to impose its will on the European Council. This is not guaranteed to happen because it depends on how well European parties are structured in the EP but it is made possible by the Constitution. In my view, it is only in case of disagreements within Europarties winning the European elections that the European Council could impose a Commission president of its choice. Note that the selection of the new president of the Commission in 2004, Jose Manuel Barroso, after the approval of the Constitution draft) was done by the European Council. The EP kept a relatively low profile on the choice of the Commission president. However, it was successful in blocking Barroso's initial choice for the composition of the Commission, because of a controversial choice of some commissioners, in particular the Italian commissioner. A majority could be found to vote against the proposed Commission. Barroso was therefore forced to withdraw and revise his proposal. This event is a clear indication that the European Parliament has matured and is able to muster strength if necessary. It remains to be seen in the future which of the two bodies, the Council or the EP will be the most active in the choice of the Commission president.

A third very important issue is that of the Union Foreign Minister. Here the solution adopted is indeed that of a double hat. A single person will combine both the responsibilities of the Commissioner for external Affairs and of the High Representative

for Common Foreign and Security Policy. This is a good solution from two points of view. First of all, the “double hat” will eliminate possible conflicts between the Commission and the Council of CFSP. Second, keeping the European Foreign Minister in close contact with the Council is very important to ensure the support from Member states for European mandates in that area.

I want to notice that the ambiguities created in the writing of the Constitution will automatically give a more important role to the European Court of Justice. Indeed, these ambiguities will create conflicting interpretations, each side of the conflict requesting the arbitration of the Court. The ECJ will thus have considerable power in solving such arbitrations. This leads me to make some remarks about the role of the ECJ. As stated above, the selection of judges will remain the same as is currently the case. Member states will propose candidates with the proviso that their expertise must be recognized by a panel of experts. It remains to be seen how this will work. Member states will have strong incentives to propose judges who are close to the political establishment of their country so as to have some country influence in the ECJ. I however do not think there is a danger of the ECJ not being independent enough. In a Europe of 25, no single executive of a country or even of a few big countries will ever be strong enough to significantly influence the Court. The real danger is that member states choose candidates that are well connected politically but possibly lack competence. The panel of experts will in all likelihood help screen away candidates who are not strong enough even though it will not have the power to choose the best ones.

There is another reason why the ECJ will in my view have an important role. Despite the streamlining in legislative decision-making provided by the Constitution, legislative decision-making will still obviously be characterized by more hurdles than usual legislative decision-making in parliamentary democracies. This means that in areas where legislation is ambiguous and where this ambiguity cannot be removed by refinement of existing legislation due to legislative hurdles, the Court will be left with the role of interpreting legislation.

Overall, while not providing drastic changes to the functioning of the EU, I would argue that the Constitution provides for a significant increase in efficiency. There has been a clear simplification in the number of legal tools. The transaction costs to modify the competences of the EU have been reduced significantly. The role of the European Parliament has been increased. Co-decision will now be the normal legislative method. This provides a good balance between pan-European interests represented in the EP and national interests represented in the European Council (article III-234). Moreover, the EP can now request from the Commission to make legislative proposals. The president of the Commission will be elected by the European Parliament after elections to the latter and will derive more legitimacy from that selection. These are fundamental aspects of a parliamentary system that are being introduced. There will be a Foreign Minister present both in the Commission and the Council, a clear improvement.⁵

The increased efficiency provided by the Constitution will give more power to all three bodies (the Commission, the Parliament and the Council) and will not increase the power of some bodies at the expense of others. This is not a zero-sum game but a positive-sum game. Even though one may think that the relative power of the European Council will shrink relative to that of the two other bodies, one should note that the generalization of qualified majority voting and the lower threshold for achieving a majority strongly increase the decision-making power of the Council, and of the legislative Councils (even though it remains to be seen how often the “blocking minority” instrument will be used).

There are undoubtedly quite a number of weak spots in the Constitution. One of the weaker spots in my view is the rule for the choice of the Commissioners. National governments will continue to appoint the Members of the Commission. I see no good

⁵ One should however not expect revolutionary improvements in the short term in European Foreign Policy. No mandate will be given to the Foreign Minister for foreign policy initiatives for which there is no unanimity. The Constitution would for example not have changed anything to the European division on the Iraq war in 2003.

rationale for that rule. A balance of national representations will be present in any case in the Commission. The president of the Commission should have the power to compose his team as he sees fit. This will lead to a more cohesive team. Right now, he can only force them to resign. The current rule creates possibilities for unnecessary hurdles in the formation of the Commission. On the other hand, the rule could evolve to become harmless over time if countries cater to the Commission president in the choice of candidates but I do not see that happen in the medium run.

A big question looming behind the whole discussion on the Constitution is how likely it is to be ratified. The answer to that question depends to a great deal on how one views the likely outcome in case one or two countries refuse to ratify the Treaty. It is indeed quite likely, though not inevitable, that there will be a negative referendum outcome in the UK and maybe in another country like Denmark for example. One view is that the whole project fails if one country refuses to ratify the Constitution. The other view is that the Constitution will be adopted by the countries ratifying it and that a special solution will have to be found with respect to the countries that did not ratify, as long as it is only the case for a small number of countries. It is not my purpose to discuss here the legal implications of these two possible outcomes. Politically, I think it is unlikely that the Constitution will be blocked if only one or two countries refuse to ratify it. In the Convention draft, it was explicitly stated that if four fifth of the countries ratified the Constitution but some did not, the matter would then be referred to the European Council, which indicates that a political solution would have to be found. In the draft approved by the Council, this article has been scrapped and replaced by one referring to ratifications of amendments to the Constitutional Treaty. In terms of the dynamics of ratification, it is better if ratification is decided first in the countries that are in favor of the Constitution, leaving to the end decisions in the most eurosceptic countries. Non ratification would then more be seen as a possible exit from the European Union rather than as a decision to kill the Constitution. Such a dynamic was present in the ratification of the US Constitution by the early American states.

The Constitution represents a move towards a Parliamentary Europe. The reason is that the Parliament will elect the president of the Commission and have the power to censure the Commission, two of the most important characteristics of a parliamentary regime. The move towards a parliamentary Europe is likely to significantly enhance accountability of the Commission relative to the status quo. Elections for the Parliament will become elections for the Commission just like parliamentary elections in member states are elections for the government. Elections to the Parliament will thus gradually become less a sum of “national protest votes” as has been the case in the past. Indeed, the European electorate will find after a few elections that it has the power to determine the political orientation of the coalition. The electorate will also have the power to punish Europarties that would have misbehaved in power.

More power to the European Parliament should have the effect of increasing cohesion of “Europarties” inside the parliament as suggested by the econometric evidence (Noury and Roland, 2002) which shows that voting cohesion tended to be stronger in votes where the Parliament wielded more power (co-decision as opposed to consultation). Representation of European socio-economic groups, capital, labor, middle class, etc... would thus be better assured. Electoral campaigns would put forward EU-wide issues of interest to the broadest categories of voters.

1.1. Which public goods will the EU deliver with the Constitution?

What can we expect from the institutions emerging from the Constitution in terms of public good provision?

In order to answer that question, we take the political economics perspective (Persson and Tabellini, 2000). Instead of looking at the task allocation defined in the Constitution and analyzing it from the point of view of the classical theory of public economics and of fiscal federalism, we look at the institutions for decision-making and predict the kind of economic policy equilibria these institutions might produce. In other words, we look at

how given political institutions will tend to systematically deviate from a first best allocative optimum.

I will take as starting point the theory, expressed in Persson, Roland and Tabellini (2000) of parliamentary and presidential democracy. In a parliamentary democracy, the government has executive powers and acts as the agenda setter, initiating all major legislations and drafting the budget. However, its power is dependent on continued support in the legislature. A vote of confidence can bring down the government between two elections. In a presidential democracy with separation of powers like in the U.S.⁶, the president has full executive powers, but its agenda setting powers are smaller; the president has a veto right, but for domestic policy the power to propose typically rests with the parliament. Those who hold executive powers (the president) and agenda-setting powers (Congressional committees) typically keep them throughout the legislature. Thus, presidential and parliamentary regimes apply checks and balances to elected officials in very different ways. In a parliamentary regime, a coalition of representatives (the government) is invested with strong and comprehensive powers. But this coalition is subject to the constant threat of losing these powers if parliamentary support is lost. In a presidential regime with separation of powers, in contrast, no single office is invested with very comprehensive powers: the presidential and legislative branches are powerful in different and much more limited policy dimensions. But these powers are assigned once and for all throughout the legislature.

These institutional differences have implications for policymaking. The separation of powers of presidential systems implies more checks and balances on elected officials. This is likely to limit corruption and abuse of power. In a parliamentary system, in contrast, politicians in the legislative majority have an incentive to collude in order to prolong the life of the government. This collusion could then be exploited at the expense of voters at large. Moreover, in a presidential system office holders are separately and directly accountable to the voters, while accountability is more indirect for parliamentary

⁶ I do not consider presidential regimes where the president concentrates large executive powers, largely unchecked by the legislature as in Russia or in many Latin American countries.

regimes. This difference further implies stronger incentives to please the voters at large in a presidential system. Accountability is thus stronger in a presidential system. Electoral campaigns by the candidates would be held all over Europe which would encourage candidates to emphasize pan-European issues and contribute to the creation of a genuine European public opinion.

Presidential regimes have a downside as well. In a parliamentary democracy, policy has to be jointly optimal for a majority coalition; otherwise the government will lose parliament support and fall. This leads to “legislative cohesion” with stable majorities between coalition parties (assuming each party cares about a multitude of issues). It also creates an incentive for the majority coalition to spend on broad redistributive programs or general public goods that benefit many voters. In a presidential regime, instead, different officeholders are responsible for different dimensions of policy and are accountable to different constituencies, leaving them with only weak institutional incentives to come to an agreement. Narrowly targeted redistribution is the most efficient policy instrument for achieving their goals. Broad redistributive programs and general public goods are seen as a waste, as they provide benefits to many more voters than each single politician cares about. Hence, in a presidential system, redistribution is likely to take the form of narrowly targeted and selective programs or local public goods, with more limited provision of general public goods and broad redistributive programs. Presidential systems are thus generally less good than parliamentary systems at providing general public goods benefiting a large number of voters.

Summarizing, the choice between presidential and parliamentary form of government involves a trade-off between *accountability* and *public goods*. Presidentialism fares better on accountability (the agency problem between voters and politicians). But parliamentarism rates better in terms of the provision of public goods and on conflict resolution among the voters.

In the context of Europe, there are further trade-offs to consider. A big advantage of the presidential model is that the executive would be better able to react swiftly in times of crisis without facing the danger of a government crisis or inefficient wars of attrition within the executive (see Alesina and Drazen, 2000). Checks of the executive by

the Council and the Parliament also ensure representation indirectly via veto powers of these bodies. This is a very important advantage in the context of the challenges facing Europe. The big upcoming challenges in the post 9/11 world will indeed be internal and external security. A presidential model is better equipped to face these challenges than a parliamentary model, especially one with coalition governments. The latter argument is especially strong in the context of the EU. Even if the commission has increased powers, the constraint of having more or less one commissioner per country (less than one on average with a system of rotation), difficult to escape in the absence of direct elections of the European executive, would have negative effects. The commission would be a very “proportional” government. Even more importantly, given the heterogeneity of voter preferences across countries, any coalition in the commission would require more than one party, possibly 2, 3 or 4. Smaller parties would carry considerable holdup power within the Commission, as would country representatives threatening to resign. Such threats could be effective because they jeopardize the survival of the incumbent coalition and lead to a government crisis similar to those observed in parliamentary governments with large coalition governments in the past (the French fourth republic, the Italian first republic and post-war Belgium). One commissioner from a small party in a small country could thus hold up the Commission. A resignation (when the Commission does not give in) would necessarily lead to multiple cabinet reshuffles in order to maintain the fragile balances, undermining any executive powers the Commission may be given over areas, such as foreign and internal policy, where the ability to respond swiftly in crisis situations is critical.

Given these trade-offs, in Berglof et al. (2003), we argued that a presidential model might be better suited for the European Union because of its advantages in terms of executive swiftness and because of the disadvantages of coalition governments. Also a presidential regime with a directly elected president would be better in terms of accountability.

Note however that the likelihood of a crisis in a coalition government in a parliamentary system depends to a certain extent on the rules for the vote of non-confidence. Here, research tends to show that the German style “constructive vote of non confidence” is more desirable (Diermeier, Eraslan and Merlo, 2002). Indeed, the

specificity of that rule is that a government can only be brought down if there is an alternative majority coalition available to govern. This has two advantages. First of all, this avoids protracted periods of government crisis (and lengthy negotiations for government formation with caretaker governments) which are often observed in countries with coalition government. Second, it makes it less easy to bring down a government since agreeing on an alternative majority is often very difficult. Germany has had few government crises thanks to this mechanism. Belgium, traditionally known for the short duration of its governments, has had no government crisis since this rule was introduced in the early nineties.

The Constitution does not include a constructive vote of confidence but the rule for a motion of censure is a two third majority. I think this considerably weakens the danger of a coalition crisis as I described above. In the long run, it makes it possible for the president of the Commission to use his executive powers swiftly in case of a security crisis. On the other hand, this also somehow weakens the incentive for legislative cohesion. On the whole, I would nevertheless say that a fine balance has been struck by the Convention. Even though I would have preferred a presidential solution (for better accountability and executive efficiency) the advantage of a parliamentary system in terms of public good provision should nevertheless still be seen as good news. In the European context, this means progress on foreign policy, immigration policy and defense. European legislating is less likely to resemble pork barrel politics as practiced in the US. From that point of view, an increase in the powers of the European Parliament should lead to a decrease in lobbying of European institutions, not more. In budgetary matters, amendments in the European Parliament tend to favor general rather than particularistic public goods (Noury and Roland, 2002).

A lesson I draw from this is the importance of traditions in institution-building. The political tradition in Europe is definitely one of parliamentary democracy. There exists no presidential democracy in Western Europe. In the debates of the Convention, advocates of the presidential model were always less numerous than those of the parliamentary model. Conversations I had with delegates in the Convention showed a clear risk aversion to try out institutions with which they were less familiar and a strong confidence in institutions that have worked relatively well in the national context. This is

a general lesson, I believe, for the political economy of reforms. It seems easier to change existing institutions, with which people are familiar, in a direction that is desirable from the point of view of the objectives of reform rather than to import institutions from abroad, let alone institutions that exist only on paper.

An important test of the Constitution will be to what extent the EU will be able to formulate policies for growth and to answer to the challenges put forward in the Sapir report. Europe's growth is lagging behind the US and important initiatives are direly needed in the areas of research, high technology and infrastructure, but also in terms of reforms that enhance factor mobility within Europe. My prediction is that the Constitution will equip Europe better for the adoption of such policies than the current institutions.

4. Conclusion.

To conclude, I think the European Constitution has a very good chance to pass the test of time. First of all, it continues striking a nice balance between pan-European interests and the national interest of member states but it will significantly increase efficiency of decision-making. This will happen via more reasonable voting thresholds, an increase in the transparency of decision-making by the simplification of instruments and procedures and improve accountability by linking the selection of the president of the Commission to the results of elections in the European Parliament. While one has observed a status quo in the allocation of competences, the Constitution considerably simplifies the rules for such changes in the future. Moreover, the rules for enhanced cooperation represent a constitutional innovation that could further add to this flexibility. European integration is a very gradual and evolutionary process. For now, defence remains a national prerogative and the Constitution does not make much progress in enhancing European defence. However, in several years, this may change. It is even very likely to change. The same can be said in other areas. Similarly, pressures to eliminate CAP expenditures will continue to mount and CAP may fade away in a not too distant future. More modestly, the number of areas over which there is unanimity relative to the

number of areas for which there is qualified majority voting in the Council is likely to vary nearly continuously over time. The Constitution allows changes in the allocation of competences to be made without going through extremely costly Treaty changes and ratification procedures. European integration can thus continue to proceed in an evolutionary way. The direction in which EU institutions are going is that of a parliamentary model where the executive emanates from a majority in the legislature. This is the logic behind the election of the president of the Commission by the European Parliament. The parliamentary model is less good than the presidential model with direct election of the president in terms of accountability and also in terms of executive effectiveness. Coalition governments are even less effective and prone to instability. It is however better at reducing pork barrel politics and at providing general public goods. However, the two thirds rule for a motion of censure should reduce potential instability. This is a good thing even though it entails a price in terms of reduced accountability. Overall, the choice of the parliamentary model shows the stickiness of traditions in the choice of institutions.

I have noted in several crucial areas (the presidency of the Council, the selection of the president of the Commission) that the Constitution contains ambiguous formulations that could be the cause of important conflicts in the future. However, this ambiguity is itself the result of political constraints. Ambiguous formulations appear as compromises between opposing views, delaying conflict into the future for the purpose of reaching an agreement on the Constitution today. Such ambiguity is difficult to avoid. It however highlights the fact that Constitutions appear less powerful than institutionalists like myself may think. How the Constitution will be interpreted will truly depend on the evolution of mindsets of politicians and voters in various countries. This shows that political institutions are not enough and that the evolution of values and beliefs plays a fundamental underlying role. Institutions cannot fully influence values and beliefs. History will tell how the Constitution will be interpreted and used.

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