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EDITORIAL COMMENTS

The failure to reach agreement on the EU Constitution – Hard questions

The failure of the Intergovernmental Conference ("IGC") that came together in Brussels, at the level of Heads of State or Government, on 12 December 2003, to reach agreement on an amended version of the Draft Treaty prepared by the Convention on the Future of Europe, was, at the very least, a serious setback to the ambitious project of establishing a constitutional text incorporating the whole of the primary law of the European Union. We shall not know for some time whether the project can be salvaged. The Irish Presidency has indicated that it will prepare a report on the Draft Treaty for the March 2004 meeting of the European Council, and has not excluded the possibility that the text may be brought back for consideration by the Heads of State or Government in June. Nevertheless, the view is widely held that a speedy resolution of outstanding problems is unlikely, owing to the forthcoming general election in Spain and elections to the European Parliament in the summer – to say nothing of the upheaval that the enlargement of the Union from 15 to 25 Member States is certain to cause within the institutions over the coming months. Against this not very promising background, some hard questions need to be asked.

A first question, part historical and part rhetorical, is this: how was such a breakdown allowed to happen? The IGC was only convened in October 2003. It would have been perfectly natural for the Heads of State or Government, at their meeting in December, to have reviewed progress to date, and made an honest effort to resolve outstanding issues; and, if they failed, then to accept that discussions would have to continue through the winter at official and ministerial level, with a view to winding things up at a meeting early in the spring. Why was such store set by concluding the IGC in December, and why did the failure to achieve this improbable goal appear so damaging?

The powerful – and understandable – desire of the Italian Presidency to score a negotiating success, and win the prize of a second Treaty of Rome, can only be part of the answer. A large portion of blame must attach to those in the governments of certain Member States, and in the Union's institutions, who kept insisting that it was wrong for the IGC to meddle with the substance of a text which had won the consensus of the Convention. That argument – strongly urged throughout the autumn of 2003, piling on the pressure to reach

a result in December – was evidently spurious. A first reason for saying this is that the consensus achieved by the Convention text was a qualified one. It is clear from statements that were made at the final session of the Convention that the Draft Treaty was acceptable to some of its members only as a basis for negotiations within the IGC: if the understanding had been that the text must be swallowed virtually whole by the IGC, there would have been no consensus. Secondly, the work of the Praesidium and the Convention was focused almost entirely on the provisions of Part One of the proposed Constitution, and on the issue as to the incorporation of the Charter of Fundamental Rights as Part Two. The complete text of Part Three was presented to the Convention almost at the eleventh hour, and many of its 342 Articles received only cursory examination. That would not have mattered, if Part Three had simply reproduced the detailed substantive and procedural provisions of the existing Treaties, but in reality it amends very many of them. The implications of such amendments needed to be considered with an attention they certainly did not receive from the Convention. There has, for instance, been a major shift in what may be described as the "economic constitution" of the Union, with the downgrading of price stability, and the acceptance of full employment as a fundamental objective. Third, and most importantly, none of the members of the Convention had a popular mandate to produce a new constitution for the Union. The only way that legitimacy can be given to the outcome of the Convention's deliberations is through the IGC process, leading to the endorsement by democratically accountable governments of a text which they are willing to recommend to their parliaments and/ or peoples for ratification in accordance with their respective constitutional requirements. So there needed to be a substantive IGC, which should not have been placed under an artificial time constraint.

A second hard question is why the weighting of Council votes was allowed to become a make-or-break issue at the Brussels meeting. It ought to have been obvious that the advantage Spain and Poland had (admittedly, quite undeservedly) won in the Nice negotiation, in terms of the allocation of Council votes, could not possibly be given away in the present political conjuncture – more particularly in view of the fact that a hard-fought referendum had recently taken place in Poland on the terms of its accession to the EU. Absurdly complicated though the Nice voting arithmetic may be, there was nothing in the Laeken Declaration to suggest that its replacement by a more straightforward QMV rule should be a priority for the Convention. Nor is the politics of the dispute easy to comprehend. While the tough negotiating stances of the Spanish and Polish Governments on this issue were to be expected, the intractability of the French and German Governments seems hard to understand. After all it was President Chirac himself who chaired the Conference at which

the Council voting rule – now presented as incompatible with a well-functioning Union – was negotiated. As for the German position, it is hard to see why so much importance should be attached to the difference between the population threshold of 63 per cent, which can be invoked under the rule agreed in Nice, and that of 60 per cent proposed in the Convention Draft. Though, perhaps, one should not be too cynical: the explanation may lie in an altruistic desire, on the part of both Governments, to improve decision-making.

A third question is whether the formula of a Convention followed by an IGC was really such a good idea. There are several reasons why, with the benefit of hindsight, doubts may be felt on this score. Was the Convention – and, above all, the Praesidium, including among its 13 members two Commissioners and two MEPS, but only three government representatives – appropriately constituted? After all, the Draft Treaty purports to be establishing a Union "on which the Member States confer competences to attain objectives they have in common" (Art. 1(1)). Similarly, it is said that the "principle of conferral" means that "the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution" (Art. 9(2)). If the Member States are the source of the competences enjoyed by the Union, which exists in order to further their common objectives, they ought surely to be in control of constitution-making. It will not do as a justification that the Convention was working to a brief which had been laid down by the European Council, because the terms of the Laeken Declaration were evidently exceeded. Thus the Declaration looked forward to the possibility that the "simplification and reorganization", for which it called, "might lead *in the long run* to the adoption of a constitutional text in the Union" (emphasis added). What the authors of the Declaration treated as a speculative aim for the long term, was transformed by the Convention into its *raison d'être.* That a dispute over changing the QMV rule agreed in Nice should have been allowed to break out, is indicative of a worrying failure by those running the Convention to grasp national political realities: it is inconceivable that a Presidency would have put before an IGC, in which the protagonists were all represented and speaking with equal voices, a proposal so loaded with political dynamite. Though it has to be admitted that IGCs, too, can be messy – as Nice dramatically demonstrated.

And what of the working methods of the Praesidium? There is some evidence – necessarily anecdotal – that the drafting process was strongly driven by a small group surrounding the President, and some other members of the Praesidium felt they were not given a sufficient opportunity to influence the shape and contents of the text. An illustration has recently been provided in a Fabian Society pamphlet published by Gisela Stuart MP, who was one of the British Parliamentary representatives on the Convention, and was a member of

the Praesidium.[1] On the handling of the document containing the original outline of the constitution, which fixed the general shape and content of the future Draft Treaty, she writes that it was given to the Praesidium members "in sealed brown envelopes the weekend before the public presentation", and that they were not allowed to take the documents away with them. "There was," she says, "little time for informed discussion, and even less scope for changes to be made". If that gives an accurate picture of the course of events, it is disturbing, since the production of the outline in October 2002 was a key moment in the history of the Convention. The decision not to set up a working group on the institutions also seems curious. The explanation that this was too hot a topic for a working group to tackle surely will not do. The absence of a report from such a group – noting strong disagreements, if necessary – must have made it harder for ordinary Convention members to examine critically the proposals that came from the Praesidium. These are concerns that need to be taken seriously. They are not only of historical interest, since the Draft Treaty proposes that the Convention method be used for amendments to the Constitution (Art. IV-7).

A final question: should the peoples of the European Union look forward to agreement's being reached on a Draft Treaty, and sooner rather than later; or should they feel that they have had a lucky escape, and that the Union should hunker down under the Nice arrangements, and get on with the practical business of coping with enlargement? We are in no doubt that the former is right. The Convention process may have been flawed, and there are criticisms that can be made of the Draft Constitutional Treaty that came out of it – the breathing-space we have been given might profitably be used not only to resolve big political issues but also to make technical improvements. However, taken as a whole, the Draft Constitution, in the form it is likely to be given by the IGC, will go some considerable way towards supplying the legitimacy deficit in the Union order, and towards rendering an enlarged Union more governable. It is an unwieldy and a rather inelegant text, but one that is distinctly more user-friendly, as a statement of the primary law, than the present amalgam of Treaties and jurisprudence – not only for the Union's professional users, like the readers of this *Review*, but for all concerned citizens.

1. G. Stuart, *The Making of Europe's Constitution* (Fabian Society, London, December 2003).