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### **The Convention on the Future of Europe: Extended Working Group or Constitutional Assembly?**

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## The Convention on the Future of Europe: Extended Working Group or Constitutional Assembly?

Christine Reh and Bruno Scholl

### Introduction

“We are a Convention. We are not an Intergovernmental Conference because we have not been given a mandate by Governments to negotiate on their behalf the solutions which we propose. We are not a Parliament because we are not elected by citizens to draft legislative texts. [...] We are a Convention. What does this mean? A Convention is a group of men and women meeting for the sole purpose of preparing a joint proposal. [...] It is a task modest in form but immense in content, for if it succeeds in accordance with our mandate, it will light up the future of Europe”.<sup>1</sup>

In his speech inaugurating the Convention process on 26 February 2002 in Brussels, Convention President VALÉRY GISCARD D’ESTAING raises three issues: first, he refers to the Convention’s nature and method; second, he talks of the Convention’s aim and output; and, third, he evokes the Convention’s historic and symbolic significance. All three aspects have been amply discussed in the past two years by politicians and academics analysing whether the Convention’s purpose and instruments differ fundamentally from those of previous reform rounds; whether the input into and output of the Convention process qualitatively improves European Treaty revision; and whether the Convention as an institution lived up to its symbolic and

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<sup>1</sup> V. GISCARD D’ESTAING, *Introductory Speech by President Giscard d’Estaing to the Convention on the Future of Europe*, SN 1565/02, Brussels, 2002.

normative load, reflected in comparisons with “Philadelphia” or references to a “constitutional moment”.<sup>2</sup>

Albeit acknowledging the intricate link between the Convention’s method, output and symbolism, we are particularly interested in the *process* of constitution-making, in “constitutional politics” as “creating and modifying EU fundamental and/or foundational rules and institutions”.<sup>3</sup> More specifically, looking back after the Convention submitted its Draft Constitutional Treaty and the Intergovernmental Conference (IGC) to follow was successfully concluded, we aim to assess the nature and institutional quality of the Convention as the latest innovation in EU Treaty reform, revisiting analogies (often all too easily) drawn at the beginning of the Convention process and reaching from “a second Philadelphia” to a “hidden IGC”. We will thus tackle Giscard’s question - what does it mean to be a Convention? - drawing on several of the qualifying cues provided in the above-quoted speech: the nature of the Convention’s mandate, its relationship with the subsequent governmental negotiations and the mode of (s)electing its delegates.

A first, theoretical part will consider the method of constitutional politics in a wider theoretical context, linking ontological and normative assumptions about the European integration process with possible assessments of the most appropriate and legitimate mode of Treaty reform and constitutional change. We will then define the two comparative categories used to assess the Convention’s nature and institutional quality - “working group” and

<sup>2</sup> L. HOFFMANN, “The Convention on the Future of Europe: Thoughts on the Convention Model”, *Jean Monnet Working Paper* 11/2002. Available at <http://www.jeanmonnetprogram.org/papers/02/021101.pdf>; CH. REH and W. WESSELS, “Towards an Innovative Mode of Treaty Reform? Three Sets of Expectations for the Convention” in *Collegium* 24, 2002, pp.17-42; L. HOFFMANN and A. VERGÉS-BAUSILI, “The Reform of Treaty Revision Procedures: The European Convention on the Future of Europe” in T.A. BÖRZEL and R.A. CICHOWSKY (eds.), *The State of the European Union Volume IV: Law, Politics and Society*, Oxford, Oxford University Press, 2003, pp.127-146; J. JARLEBRING, “Tacking Stock of the Convention: What Added Value Does the Convention Bring to the Process of Treaty Revision?” in *German Law Journal*, 4:8, 2003, pp.785-799; P. MAGNETTE, “Coping with Constitutional Incompatibilities: Bargains and Rhetoric in the Convention on the Future of Europe”, *Jean Monnet Working Paper* 14/2003. Available at <http://www.jeanmonnetprogram.org/papers/03/031401.pdf>; J. SHAW, “Postnational Constitutionalism in the European Union” in *Journal of European Public Policy*, 6:4, 1999, pp.579-597; J.E. FOSSUM and AUGUSTÍN MENÉNDEZ, “The Constitution’s Gift: A Deliberative Democratic Analysis of Constitution-Making in the European Union”, *Paper presented at the 2004 Maastricht Forum on European Integration*, 19 November 2004, Maastricht; A. MAURER and D. GÖLER, “Die Konventsmethode in der Europäischen Union: Ausnahme oder Modell?”, *SWP-Studie* 44/2004. Available at [http://www.swp-berlin.org/produkte/swp\\_studie.php?id=3917&PHPSESSID=d31d4bd15ad06302a40ed6eeb6534a26](http://www.swp-berlin.org/produkte/swp_studie.php?id=3917&PHPSESSID=d31d4bd15ad06302a40ed6eeb6534a26).

<sup>3</sup> C. CLOSA, “Improving EU Constitutional Politics? A Preliminary Assessment of the Convention”, *Constitutionalism Web-Papers*, Con-Web 1/2003, p.1. Available at <http://les1.man.ac.uk/conweb/>.

“constitutional assembly” - embed them in their historical context, their use in the political praxis and the kind of associations they trigger. The empirical analysis to follow will draw on six “constitutive steps” discussed by JON ELSTER as definitive of a constitutional assembly.<sup>4</sup> We will then build on and specify ELSTER’s steps - including convocation, selection of delegates, official mandate, formal constitution and delegates’ credentials, procedural rules and ratification - to develop a set of criteria, that allows us to delimit the features characteristic of a working group as distinct from those characterising a constitutional assembly. In order to understand more fully what happened between February 2002 and June 2004, these criteria will be systematically checked against the Convention process and the IGC that followed with regard to, first, the underlying political rationale, second, the Convention’s working methods, and, third, its substantive constitutional output.

A similar procedure, we argue, allows a fuller analysis of the much-quoted “Convention method” than has hitherto been attempted, and thus permits to tackle a question at the heart of the current reform round: does the Convention resemble a genuine constitutional assembly more than a mere preparatory group or has the EU - once again - developed a *sui generis* mode of building and changing its Constitution? Put differently, does the Convention process present us with a “qualitative leap” in the method and output of European reform or are we looking at one more, yet by no means final, step in Europe’s long-term and incremental process of constitutionalisation?

## **I Theorising and Contextualising the Convention Method**

### **A. *The Method of Constitutional Politics and the Ontology of Integration***

Any attempt to answer the above question by assessing the Convention’s nature and by categorising its defining characteristics has wider implications: different normative expectations (both hopes and fears) about the Convention’s place in the European integration process inevitably stem from

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<sup>4</sup> J. ELSTER, “Arguing and Bargaining in Two Constitutional Assemblies” in *University of Pennsylvania Journal of Constitutional Law* 2, 2000. No page numbers.

different underlying theoretical and normative assumptions about the nature of the Union itself. With the Convention's categorisation thus inextricably linked to issues of political power and legitimacy, the *method* of constitutional politics chosen will depend upon what is defined as the *object* of change: are we reforming the Treaties of an essentially international (and thus intergovernmental) entity, or are we amending (and building) the Constitution of a Union that is becoming increasingly "statal"?

Indeed, the conclusions drawn in the academic debate about Europe's "ontological conundrum"<sup>5</sup> not only impact on what is normatively required from the polity's political and institutional set-up, but also influence how the political praxis of reforming its fundamental rules and institutions is assessed. This *problématique* is not as novel as may seem: in the early days of European integration already, discussions centred around the type of integration as well as around the method of political change. Instead of proceeding through "normal diplomatic channels" European Union was to be brought about by the population, propagated ALTIERO SPINELLI, a leading Federalist, and called for an elected constituent assembly to prepare a Constitution that would then be submitted to national parliaments.<sup>6</sup>

In reality, as is well-known, European Union has been brought about - and reformed - along a different route. Indeed, the "first debate" in integration theory dealt mainly with the "nature of the beast"<sup>7</sup> and, albeit providing very different answers regarding the political and institutional forces driving the process, both intergovernmentalism<sup>8</sup> and neo-functionalism<sup>9</sup> sit well with what has become known as the "IGC mode" of reform. Anchoring the Union firmly in the realm of the international with Member States remaining the "Masters of the Treaties" and legitimacy indirectly stemming from elected national governments, intergovernmentalists could subscribe to an IGC's institutional

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<sup>5</sup> D.N. CHRYSOCHOOU, *Theorizing European Integration*, London, Sage, 2001, p.2.

<sup>6</sup> A. SPINELLI, "The Growth of the European Movement Since the Second World War" in M. Hodges (ed.), *European Integration: Selected Readings*, Harmondsworth, Penguin, 1972 [1957], pp.43-68 at p.62.

<sup>7</sup> TH. RISSE-KAPPEN, "Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union" in *Journal of Common Market Studies*, 34, 1, 1996, pp.53-80 at p.53.

<sup>8</sup> S. HOFFMANN, "Obstinate or Obsolete? The Fate of the Nation State and the Case of Western Europe" in *Daedalus*, 95, 3, 1966, pp.862-915.

<sup>9</sup> E.B. HAAS, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957*, London, Stevens, 1957.

set-up - with the European Council as ultimate authority, the Commission as an “honest broker” and a working group style of preparation and pre-negotiation allowing for limited public and parliamentary input.<sup>10</sup> Neo-functionalists, on the contrary, focusing analytically on transnational problem-solving and supranational entrepreneurship, as well as on legitimacy flowing from effective policy outputs and a shift of loyalties to the new centre, might not consider the IGC mode the most institutionally appropriate, yet have seen their substantive predictions confirmed in the incremental growth of supranational competences at various IGCs.

With deepening legal and political integration - and the Maastricht ratification crisis in particular - the academic discourse on the nature of the Union began to change, paralleled by an increasing dissatisfaction with the established praxis of Treaty reform. Political scientists studied the EU less as an international entity catering for restricted functional needs: on the one hand, the European Union was seen as a political instance *sui generis*, a system of “multi-level governance” escaping traditional analytic categories,<sup>11</sup> while, on the other hand, the “comparative politics turn” approached the Union, via statal categories, as a “political system”.<sup>12</sup> Legal scholars agreed that the European order had evolved from international law - creating relationships between states - into a “constitutionally and institutionally sophisticated”<sup>13</sup> legal system that confers rights and obligations on citizens and private parties and restrains public power in a way that is similar to a nation state.<sup>14</sup> At the same time, it was vividly debated whether the Union

<sup>10</sup> A. MORAVCSIK, “Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach” in *Journal of Common Market Studies*, 31, 4, 1993, pp.473-523; A. MORAVCSIK and N. KALYPSO, “Explaining the Treaty of Amsterdam: Interests, Influence, Institutions” in *Journal of Common Market Studies*, 37, 1, 1999, pp.59-86.

<sup>11</sup> G. MARKS et al., “European Integration from the 1980s: State-Centric v. Multi-Level Governance” in *Journal of Common Market Studies*, 34, 3, 1996, pp.341-378; M. JACHTENFUCHS and B. KOHLER-KOCH, “Regieren und Institutionenbildung” in M. JACHTENFUCHS and B. KOHLER-KOCH (eds.), *Europäische Integration*, Opladen, Leske + Budrich, 2003, pp.11-46.

<sup>12</sup> S. HIX, *The Political System of the European Union*, Basingstoke, Macmillan, 1999.

<sup>13</sup> S. WEATHERILL, “Is Constitutional Finality Feasible or Desirable? On the Cases for European Constitutionalism and a European Constitution”, *Constitutionalism Web-Papers, Con-Web*, 7/2002, p.4. Available at <http://lles1.man.ac.uk/conweb/>.

<sup>14</sup> P. CRAIG, “Constitution, Constitutionalism, and the European Union” in *European Law Journal*, 7, 2, 2001, pp.125-150 at p.126.

already has or should have a Constitution<sup>15</sup> and what exactly are the particularities of Europe's "multi-level", "post-national" or "plural" constitutionalism.<sup>16</sup> In political praxis too, almost 50 years after SPINELLI's call for a European constituent assembly, JOSCHKA FISCHER's Humboldt Speech of May 2000 eventually brought constitutional *finalité* back onto the agenda.

This link between changing assumptions about the Union's nature and a more critical assessment of the reform praxis can hardly surprise: if we are essentially dealing with constitutional change rather than with Treaty reform, the classic way of piecemeal engineering, combining closed negotiations on the technical and ministerial level with attention-catching final summits<sup>17</sup>, may indeed seem problematic with regard to both process and outcome. The 2000 Nice Summit in particular brought the pitfalls of Intergovernmental Conferences to light, sparking wide-ranging criticism of the un-transparent and opaque nature of their preparation and negotiation.

It was against this background that the Convention on the Future of Europe was set up - at the intersection of divergent (academic) views about the nature of European integration as well as different (political) positions on the most legitimate way to reform the Union. Accordingly, any attempt at labelling or categorising the Convention should lay open its theoretical "baggage" and admit to subscribing - if only implicitly - to a particular stand on the nature of the Union's legal system and the process of integration.

## **B. The Comparative Categories in Their Political and Historical Context**

When we use established terms in attempts to heuristically grasp hitherto unknown phenomena we engage in an exercise beyond denoting and

<sup>15</sup> J.-C. PIRIS, "Does the European Union Have a Constitution? Does It Need One?", *Jean Monnet Working Paper*, 05/2000. Available at <http://www.jeanmonnetprogram.org/papers/00/000501.rtf>; J.H.H. WEILER, "In Defence of the Status Quo: Europe's Constitutional *Sonderweg*" in J.H.H. WEILER and M. WIND (eds.), *European Constitutionalism Beyond the State*, Cambridge, Cambridge University Press, 2003, pp.7-23.

<sup>16</sup> I. PERNICE, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?" in *Common Market Law Review*, 36, 1999, pp.703-750; J. SHAW, *supra* footnote 3; N. WALKER, "The Idea of Constitutional Pluralism" in *Modern Law Review*, 65, 2002, pp.317-359.

<sup>17</sup> M. GRAY, "Negotiating EU Treaties: The Case for a New Approach" in E. BEST et al. (eds.), *Rethinking the European Union: IGC 2000 and Beyond*, Maastricht, EIPA, 2000, pp.263-280 at pp.267 *et seq.*

naming. Given that a political concept cannot be separated from its use in the political praxis,<sup>18</sup> by assigning a “label” to a novel facet of social reality, we simultaneously suggest a specific context and tradition, thus calling into play a range of associations and connotations, as well as normative expectations. This certainly holds true for the two concepts guiding our empirical analysis, namely working group “versus” constitutional assembly, each of which carries very particular and partially contradictory associations and expectations.

In the following, we will define a working group according to its function and output-based legitimacy, rather than its composition. A working group, usually a relatively small-scale body, will be established to fulfil a specific and clearly defined task, which frequently includes the preparation and pre-negotiation of decisions to be taken at a higher political level. This, in turn, implies that for ultimate decision-making a working group depends on a “principal”, which has set it up as an “agent”, and that the group’s power, influence and legitimacy flow from knowledge and expertise rather than from its representativity or accountability. Furthermore, a working group will always operate in a clearly delimited and pre-structured context, does not create a political space, and moreover its style of interaction within this context is expected to follow a logic of problem-solving.<sup>19</sup>

Yet, when looking at the reality of both Community decision-making and constitutional politics, we quickly realise that a plethora of heterogeneous empirical examples may be associated with the “working group category”. A classic example from EC decision-making is the group of national civil servants, which pre-negotiates the technical details of EU legislation before passing its results on to the Committee of Permanent Representatives (COREPER) and ultimately to the Council of Ministers. Here, expectations revolve around technical expertise, efficient problem-solving and a deliberative decision-style.<sup>20</sup>

When it comes to European constitutional politics, examples can be drawn from both preparation phases prior to and decision-making processes during

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<sup>18</sup> Q. SKINNER, “Meaning and Understanding in the History of Ideas” in *History and Theory*, 8, 1969, pp.3-53.

<sup>19</sup> O. ELGSTRÖM and CH. JÖNSSON, “Negotiation in the European Union: Bargaining or Problem-Solving?” in *Journal of European Public Policy*, 7, 5, 2000, pp.684-704.



Intergovernmental Conferences. Thus, although national governments have traditionally retained a substantial share of agenda-setting and preparation for themselves, more often than not in the history of EU reform the choice of issues, the definition of problems and the generation of alternative solutions have been delegated to groups or committees. Set up as pre-IGC “think tanks” these varied in political weight but have always bundled expertise and floated ideas. Including the Spaak, the Dooge or the Delors committees (preparing Rome, the Single European Act and Maastricht respectively) and groups providing reports such as the “Reflection Group” (Amsterdam) or the “Group of Wise Men” (Nice) they have operated with different degrees of impact and success, yet with a clear purpose: to pin down the problems to be solved, to define them and to propose a set of solutions.<sup>21</sup> Similarly, once the IGCs of Maastricht, Amsterdam and Nice had been launched, a substantial element of the negotiations was delegated to the - relatively unknown - “Group of Government Representatives” which pre-negotiated all issues under discussion at the bureaucratic and technical level and which, in view of both its function and composition, was a working group in all but name.

Contrary to these examples, all taken from the process of European integration, when illustrating constitutional assemblies we refer to historical cases of nation state building. Labelling the European Convention as a constitutional assembly thus also implies going beyond the classic differentiation between the nation state and the evolving European construct. We do not seek to repeat the detailed account of historical constitutional conventions provided earlier in this volume<sup>22</sup> or to challenge the conclusion that such bodies are a rather uncommon feature of national constitution making in Europe. Nonetheless, the classical cases of constitution building by such assemblies - the Philadelphia Convention of 1787 in the United States or the *Assemblée Constituante* of 1789 to 1791 in France - have served as reference points for debates on the quality of the European Convention, as Convention President GISCARD underlined from the start.

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<sup>20</sup> J. LEWIS, “The Methods of Community in EU Decision-Making and Administrative Rivalry in the Council’s Infrastructure” in *Journal of European Public Policy*, 7, 2, 2000, pp.261-289.

<sup>21</sup> Contrary to the above definition of working groups, these committees had very comprehensive mandates, with free thinking rather called for than prevented. Nevertheless, in all cases any real impact of the results depended upon re-opening or approval by the Heads of State and Government.

Following DIPPEL's synthesis, we can define a constitutional assembly broadly as "an elected body acting under the commission of and beside an existing legislative body for the sole and express purpose of drafting or revising a constitution afterwards to be presented to the people for their approval or rejection".<sup>23</sup> The problems of linking this definition too closely to the term convention become obvious when looking at two more recent cases in Europe. The "Constitutional Convention of Herrenchiemsee" was a committee of experts preparing a first draft of the Western German *Grundgesetz*, which was then delivered to the so-called "Parliamentary Council" before being ratified. The Convention that prepared the Charter of Fundamental Rights of the European Union, on the other hand, by no means drafted a complete new constitutional text nor did it act under the commission of an existing legislative body. In brief, trying to subsume a wealth of historical cases within one definition risks that our comparisons and conclusions become overly general.

In the following, we therefore propose to set aside the historically loaded term convention and to instead use the two dichotomous categories of working group and constitutional assembly as heuristic tools for our empirical analysis. In view of the breadth and complexity of European Treaty reform, as well as the historical associations, the two categories will be broken down into a set of refined criteria, allowing a systematic assessment of the European Convention's nature and institutional quality, rather than a broad-brushed opposition of the "Convention method" and the "IGC mode". In the following sub-section a similar set is elaborated to serve as a conceptual foil for the empirical analysis, which will discuss whether the European Convention was a genuinely novel form of constitutionalising the EU and how far it remained an integral part of previous reform processes.

### **C. Six Constitutive Steps: Criteria to Analyse the European Convention**

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<sup>22</sup> H. DIPPEL, "Conventions in Comparative Constitutional Law" in D. HANF (ed.).

<sup>23</sup> H. DIPPEL, *supra* note 23.

For our empirical analysis, we will follow JON ELSTER who, drawing on the classic cases of constitution making in the US and France, proposes that the above-mentioned six “constitutive steps” are characteristic of a constitutional assembly in general terms.<sup>24</sup> In the following, we will briefly outline these steps and highlight the differences in view of the above-defined working group and constitutional assembly, before moving on to apply the derived criteria to the European Convention in order to, finally, judge that body’s nature and institutional quality.

### 1. *Convocation*

In characterising the “convocation-phase” ELSTER begins by pointing to the circumstances under which constitutional change and the convocation of a constitutional assembly are likely. In contrast to working groups which, as noted above, are appointed for a defined functional purpose and operate in a delimited political space on a day-to-day basis, constitutional assemblies will be convoked during a period of crisis, when general revisions of societal rules are both more desirable and more probable than in normal times. Consequently, constitutional assemblies will usually face severe time pressures, on the one hand limiting “the range of the possible”, while on the other opening a window of opportunity to realise fundamental change in a “constitutional moment”.<sup>25</sup>

Formally, working groups and constitutional assemblies have a common starting point when it comes to convocation: both are convoked by an external authority, since they are not permanent institutions in their own right. However, in contrast to a working group, where the hierarchy between the convoking and convoked body remains clearly in favour of the former, the relation between the convoking and the convoked authorities will be less clear-cut in the case of constitutional assemblies. Elster calls this the paradox of constitutional assemblies as “[o]n the one hand, it seems to be a general principle that if X brings Y into being, then X has an authority superior to that

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<sup>24</sup> J. ELSTER, *supra* note 5.

<sup>25</sup> B. ACKERMAN, *We The People*, Cambridge, MA, The Belknap Press of Harvard University Press, 1991.

of Y. On the other hand, if Y is brought into being to regulate, among other things the activities of X, Y would seem to be the superior instance".<sup>26</sup> He concludes that in the historic American and French cases the assemblies ultimately got the upper hand over their creators, an aspect further developed when discussing the criterion of an assembly's mandate. Thus, a struggle about superiority between a convoking and a convoked authority or - in political science terms - between the principal and the agent may serve as a first criterion to differentiate a constitutional assembly from a working group.<sup>27</sup>

## 2. *Selection of Delegates*

The second step - selecting delegates for the novel body - equally concerns decisions taken by authorities other than the convoked body itself. In the case of constitutional assemblies delegates usually are not selected by the authority that has convoked the body, but by other institutions.<sup>28</sup> Working group members, on the other hand, may be selected by the convoking authority itself (as was the case with the Group of Wise Men) or by each convoking member (as is the case with government representatives in IGCs). However, not only can the selecting authorities differ between working groups and constitutional assemblies, so can (and do) the criteria for selection. Whereas working group members are mostly chosen on grounds of expertise or seniority, selection criteria for constitutional assemblies are based on representativity - also reflected in their more comprehensive membership. Delegates to constitutional assemblies are elected either directly for the purpose of serving in that body or indirectly by the elected authorities of which they are members.<sup>29</sup> Thus, selection on the basis of expertise and/or

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<sup>26</sup> As the pages in our version of ELSTER's article are not numbered, precise references cannot be given here.

<sup>27</sup> For a discussion of principal-agent theory in relation to the European Union see M.A. POLLACK, *The Engines of European Integration: Delegation, Agency, and Agenda-Setting in the EU*, Oxford, Oxford University Press, 2003.

<sup>28</sup> In France, the *Assemblée* was convoked by the King whereas the delegates were selected by the estates; in the US, the Philadelphia Convention was convoked by the Continental Congress, while its members were selected by the single state legislatures.

<sup>29</sup> J. ELSTER, *supra* note 5; H. DIPPEL, *supra* note 23.

governmental affiliation versus a popular or parliamentary mandate further differentiates a working group from a constitutional assembly.<sup>30</sup>

### 3. *Mandate*

ELSTER's third step refers to the mandate given to the body as a collective as well as to the individual delegates. Additionally, the modes of interpreting and implementing these mandates by the body and its delegates will vary. Thus, a working group mandate is limited in scope, most of the time restricted to finding common ground among the delegated members, to defining problems and to tabling options among which decision-makers can choose. The mandate of a constitutional assembly, on the contrary, is usually wider by definition, covering the reorganisation (or foundation) of a society's constitutional basis.<sup>31</sup> However, ELSTER also notes that mandates given to constitutional assemblies are by no means unrestricted, with the creating authorities always trying to keep certain institutions or issues out of bounds for discussion. Nevertheless, in contrast to working groups, constitutional assemblies are not only convoked to settle basic societal conflicts and questions, they are also expected to come up with a fully-fledged solution rather than with options or recommendations.

Another decisive difference relates to the internal perception and implementation of the external mandate. Whereas there is (supposedly) little ambition within a working group to overthrow authority and to "shirk" by taking independent decisions, constitutional assemblies may, as ELSTER puts it, very well "rebel against the creators and [...] the rebel will typically succeed". Hence, the level of ambition and (dis-)obedience *vis-à-vis* the official mandate is a further criterion, as is the interpretation of delegation, with a working group likely to remain an agent and a constitutional assembly likely to topple this role and to go beyond the will of the principal.

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<sup>30</sup> For a discussion of representation as a political concept in relation to the Convention see J. POLLAK, "The Convention on the Future of Europe: New and Shining?", *EIF Working Paper*, 7/2004.

<sup>31</sup> J. HABERMAS, "So, Why Does Europe Need a Constitution?", *EUI Policy Papers on Constitutional Reform of the European Union*, 2001/02. Available at <http://www.iue.it/RSCAS/e-texts/CR200102UK.pdf>.

Similarly, delegating institutions will always try to limit their delegates' scope for action. In EU working groups these limitations result from well-known national negotiation instructions, while less formalised groups are bound by (minimum) targets beyond which the delegate cannot go. For constitutional assemblies, ELSTER distinguishes three kinds of bound mandates: "Instructions about how to vote on specific issues, instructions to refuse to debate specific issues, and instructions to withdraw from the assembly in case certain decisions are made." However, similar to potential disobedience of the entire body, he observes that formally given mandates have limited impact on the individual delegate. Again, the self-confident ignoring of given limitations by both assembly and individual delegate seems to be constitutive of constitutional assemblies.<sup>32</sup>

#### 4. *Verifying Delegates' Credentials and Formal Constitution*

The fourth step in ELSTER'S scheme, the verification of credentials and the process of the body's formal constitution, proposes that in times of crisis and fundamental change it is by no means certain that those present in a constitutional assembly accept each other as equal and valid counterparts, especially where the authorities that convoke and select do not coincide. Although contested credentials need not be a defining criterion for constitutional assemblies, in a mere working group the delegates' credentials are unlikely to become an issue. With regard to its formal constitution, the difference between a working group and a constitutional assembly is mainly symbolic. Whereas the formal constitution of a working group is merely a necessary step before work can begin, the formal constitution of a constitutional assembly is much more directed to the public and is aimed at verifying the body's historical importance and dignity. The degree of symbolism used in the act of constitution may thus serve as another criterion when defining the nature and institutional quality of the European Convention.

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<sup>32</sup> See also DIPPEL in this volume, referring to "revolutionary" and "constitutional" conventions. While DIPPEL agrees with ELSTER that the Philadelphia Convention overstepped its mandate, he considers this an unlawful and inappropriate example for the Convention on the Future of Europe.

## 5. *Definition of Procedural Rules*

The definition of procedural rules is chosen by ELSTER as a fifth constitutive step because procedures “affect the transformation, expression and aggregation of preferences that can be crucial for the final outcome”. After convocation, a novel body thus has to agree on its decision-rules and working procedures, as well as on the internal division of competences. Whereas working groups typically rely on externally given rules or informal procedures and usually decide by consensus or even unanimity in closed settings, constitutional assemblies dispose of more leeway to determine the internal organisation of their work, including a decision about when to conclude their sittings in relation to external time pressures. Depending on its size the assembly might also choose to establish sub-groups and decide how the results of these are linked to the plenary. Overall, one would expect a constitutional assembly to work according to a parliamentary mode with public debates, voting and majority decisions.

## 6. *Ratification of Results*

Finally and perhaps most importantly, the question of how to ratify the results has to be settled. In a working group this question clearly lies outside that body’s scope and it is entirely up to the convoking authority to decide how to handle the results. In a constitutional assembly, on the contrary, the issue of ratification is intrinsically linked to the question of superiority. Various choices can be made with regard to the procedure that links the assembly’s result with its entering into force. The result can either be approved by the convoking authority (such as the King in the French case), or by the delegating authorities (such as the state legislatures in the US). In principle, such a procedure consolidates the superiority of the outside authorities over both the constitutional assembly and, ultimately, over the new political and legal order. Alternatively, the result can be directly conferred to the sovereign by superseding or circumventing any other external authority. This can be organised in various ways, e.g. via specifically created ratifying institutions

(such as ratifying assemblies, as in the US case) or via constitutional referenda. For constitutional arrangements foreseeing various levels of governance, the question of how many sub-units have to agree to the final outcome also needs to be settled. The decisive issue, however, remains whether the assembly subordinates its outcome to a decision (and possible re-opening) by the convoking authority or presents its result to the organised sovereign as a “take it or leave it” solution.

|   | Constitutional Assembly  | Working Group  |
|---|--|--|
| <b>1. Convocation</b>                           | <ul style="list-style-type: none"> <li>- in a perceived crisis</li> <li>- by outside authority</li> <li>- inherent struggle about superiority</li> </ul>               | <ul style="list-style-type: none"> <li>- on a day-to-day basis</li> <li>- by outside authority</li> <li>- unquestioned hierarchy/principal-agent-relation</li> </ul> |
| <b>2. Selection of delegates</b>                | <ul style="list-style-type: none"> <li>- by outside authority (II)</li> <li>- popular/ parliamentary representation</li> </ul>   | <ul style="list-style-type: none"> <li>- by outside authority/ component parts</li> <li>- governmental representation/ technical expertise</li> </ul>                |
| <b>3. Mandate</b>                               | <ul style="list-style-type: none"> <li>- fully-fledged solution</li> <li>- high level of ambition and disobedience to mandate (individual &amp; collective)</li> </ul> | <ul style="list-style-type: none"> <li>- common ground/ options</li> <li>- adherence to mandate (individual &amp; collective)</li> </ul>                             |
| <b>4. Credentials &amp; formal constitution</b> | <ul style="list-style-type: none"> <li>- credentials contested</li> <li>- symbolic inauguration</li> </ul>   | <ul style="list-style-type: none"> <li>- credentials unquestioned</li> <li>- functional opening</li> </ul>   |
| <b>5. Procedural rules</b>                      | <ul style="list-style-type: none"> <li>- self-determined</li> <li>- public deliberations</li> <li>- voting/ qualified majority</li> </ul>                              | <ul style="list-style-type: none"> <li>- externally given</li> <li>- secrecy/ in camera setting</li> <li>- unanimity/ consensus/ minority reports</li> </ul>         |
| <b>6. Ratification of results</b>               | <ul style="list-style-type: none"> <li>- “take it or leave it” solution</li> <li>- direct transfer to the organised sovereign</li> </ul>                               | <ul style="list-style-type: none"> <li>- further negotiation on the results by outside authority</li> <li>- no popular involvement</li> </ul>                        |



## II. The European Convention: Towards a Constitutional Assembly?

In the following, the above-established abstract criteria, characterising either a working group or a constitutional assembly, will be applied to the Convention on the Future of Europe as an empirical test case. In considering the political rationale and historical context of the Convention, its function and composition as well as the outcome and impact of the Convention process, we will explore whether and where precisely the balance tilts towards either comparative category, each of which not only indicative of the Convention's quality but also conveying distinct assumptions about the nature of constitutional change in Europe and the integration process as such.

### A. Convocation: The Laeken Summit and the Laeken Declaration

Following our above discussion of constitutive criteria, the first of these, convocation, boils down to two dimensions: history (are we dealing with a "constitutional moment" in times of fundamental crisis or with a distinct reform purpose in a delimited political space?) and hierarchy (is the convoking authority clearly superior or can we expect struggles about who gains the upper hand?). To tackle both points we need to look at, first, the political climate prior to and during the 2001 Laeken Summit as the convoking moment, and, second, at the Laeken Declaration as the convoking document.

Despite widespread public and political disillusionment with both the outcome and method of the 2000 IGC, the Irish "no" to Nice in June 2001, and mounting pressure for large-scale institutional reform prior to EU enlargement, little indicated a genuine crisis in Europe at the end of 2001. Although the Nice Treaty was widely perceived as sub-optimal<sup>33</sup> few commentators suggested that the Union would cease to function when operating under the new rules. However, the wording of the Laeken Declaration suggested a historical moment in Europe - "the Union stands at a crossroads, a defining

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<sup>33</sup> W. WESSELS, "Nice Results: The Millennium IGC in the EU's Evolution" in *Journal of Common Market Studies*, 39, 2, 2001, pp.197-219.

moment in its existence”<sup>34</sup> - and it convoked the Convention to provide solutions to pressing problems.

By baptising the body it convoked a “Convention”, the Laeken Declaration not only referred to the “Charter Convention” of 1999/2000, indeed considered by many as the most immediate example for the Convention on the Future of Europe, especially with regard to its composition and working methods.<sup>35</sup> The constitutional connotations were obvious, especially with the European Parliament demanding prior to Laeken a Convention to prepare and propose a European Constitution and the Finnish Prime Minister, PAAVO LIPPONEN, calling for a Convention to launch a European “constitutionalisation process”.<sup>36</sup> Additionally, the Laeken Declaration itself evoked historical associations by - for the first time ever in a European Council document - explicitly using the term “Constitution”.<sup>3738</sup>

Yet, overall, the Laeken text stood in the tradition of “semi-permanent Treaty revision”<sup>39</sup> rather than heralded an exercise in nation building similar to 18th century North America and France or more recent constitution making in times of societal crisis. This is particularly evident when looking at the Convention’s three main tasks - “better division and definition of competences”, “simplification of the Union’s instruments” and “more democracy, transparency and efficiency”.<sup>40</sup> While certainly comprehensive, these mandates suggested reform and revision rather than constitutional foundation, with the EU clearly a pre-existing and delimited political space.

<sup>34</sup> *Laeken Declaration on the Future of the European Union: Annex 1 to the Presidency Conclusions*, SN 300/1/01, REV 1, Laeken, 2001, p.19.

<sup>35</sup> F. DELOCHE-GAUDEZ, “The Convention on a Charter of Fundamental Rights: A Method for the Future?”, *Notre Europe Research and Policy Paper*, 15/2001. Available at <http://www.notre-europe.asso.fr/IMG/pdf/Etud15-en.pdf>.

<sup>36</sup> *European Parliament Report on the Treaty of Nice and the Future of the European Union*, 2001/2022(INI), Brussels, 2001; P. LIPPONEN, Speech at the College of Europe, Bruges, 2000. Available at <http://www.valtioneuvosto.fi/vn/liston/base.lsp?r=496&old=754&k=en>.

<sup>37</sup> *Laeken Declaration*, *supra* note 35, p.25.

<sup>38</sup> Another historical example is the European Convention proposed to elaborate a Constitution based on the “Herman Report” in 1994, which, however, never saw the light of day, cf. R. HOCHWIESER, *Legitimität kraft Verfassung: Inwieweit kann eine Europäische Verfassung das demokratische Legitimitätsdefizit der EU verringern oder beheben?*, Frankfurt/Main, Peter Lang, 2001, p.52.

<sup>39</sup> B. DE WITTE, “The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process” in P. BEAUMONT et al. (eds.), *Convergence and Divergence in European Public Law*, Oxford, Hart, 2002, pp.39-57 at p.39.

<sup>40</sup> *Laeken Declaration*, *supra* note 35, p.21 et seq.

With regard to our second indicator - clear-cut hierarchies - the Laeken Declaration did not automatically pre-programme a struggle between the European Council as convoking authority and the Convention as a convoked body. Rather, the Heads of State and Government confidently claimed decision-authority: the Convention's final document, together with the outcomes of national debates, were to serve as "the starting point for discussions in the Intergovernmental Conference, which will take the ultimate decisions",<sup>41</sup> a formula indicating "tactical hesitation to make the Convention's output the *a priori* dominant, let alone exclusive, textual basis for the IGC".<sup>42</sup> Thus, although the Laeken Declaration called forth potent constitutive associations, formally it set up the Convention as a preparatory committee for the IGC to follow.

However, keeping in mind ELSTER's conclusions about the gradual emancipation of constitutional assemblies, the European Council as convoking authority appears to have been all too well aware of possible superiority struggles. While only one of the Declaration's many reform questions (indirectly) tackled the role of the European Council itself, many safeguards were included to underline governmental authority. By limiting the length of proceedings, demanding regular reports from the directly appointed President and downgrading the Convention's result to a mere "starting point", the European Council clearly hoped to pre-empt possible attempts to overthrow existing hierarchies.<sup>43</sup> The Convention thus found itself facing the dilemma of many a classic constitutional assembly - making a decision as to whether to serve its assigned purpose or to rebel against its creator.

### **B. Selection of Delegates and the Convention's Composition**

Unlike the step considered in the previous section, the selection of the Convention's delegates much more openly reflected the goal of moving beyond the well-known intergovernmental mode of Treaty change, by broadening involvement in the process. Taking up our categories, the central

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<sup>41</sup> *Laeken Declaration*, *supra* note 35, p.25.

<sup>42</sup> CH. REH and W. WESSELS, *supra* note 3, p.26.

<sup>43</sup> P. MAGNETTE, *supra* note 3, pp.5-6.

criteria to consider with regard to selection and composition are the Convention's size and, more importantly, the question of whether delegates were selected on the basis of technical expertise and governmental affiliation or, rather, according to popular or parliamentary representation.

Compared to previous preparatory groups and committees, the principles for selection laid down in the Laeken Declaration clearly aimed to extend the Convention's legitimacy basis. Following the formula of the Charter Convention, the Heads of State and Government, first and foremost, decided to dramatically increase the parliamentary dimension, both national and European. Thus, about two thirds of full members had parliamentary origins, leaving the government and supranational representatives in a clear minority.<sup>44</sup> The European Parliamentarians played a particularly prominent role due to their Brussels experience and resources.<sup>45</sup> A broader basis also resulted from the Convention's sheer size: together with the alternates for each full *conventionnel*, the Chairman, the two Vice Chairmen and observers, the Convention amassed more than 200 delegates, outnumbering Philadelphia by far, bigger than many national Parliaments and certainly on a different scale from any working group.<sup>46</sup>

However, it would be highly misleading to consider only the "parliamentary plenary". The composition of the Convention's influential Presidium reflected an entirely different logic. Here, once again, governments tried to reign in the Convention's ambitions by setting up a rather large steering body, where compared to the plenary governmental delegates were over-represented. Furthermore, and in contrast to the overall selection pattern, both the President and the Vice Chairmen were directly appointed by the convoking authority, a procedure reminiscent of how working group members have traditionally been selected.

Besides, it is not only the selection of delegates and a body's composition that matter, but also who is pulling strings in the background. Thus, despite the initially free and open mandate granted to Convention delegates by

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<sup>44</sup> *Laeken Declaration*, *supra* note 35, p.24 *et seq.*

<sup>45</sup> J. POLLAK, *supra* note 31, p.2. Available at <http://www.eif.oeaw.ac.at/downloads/workingpapers/wp7.pdf>.

<sup>46</sup> P. NORMAN, *The Accidental Constitution: The Story of the European Convention*, Brussels, EuroComment, 2003, p.38.

parliaments, governments and other delegating authorities, representativity did not entirely trump either the role of expertise or the bound mandates characteristic of a working group. A key instance of the relevance of expertise is the Convention Secretariat, bringing together staff from the Council, Commission and European Parliament - many of them veterans of the IGC *ancien régime* - with the experienced British diplomat and negotiator JOHN KERR at their head. The Secretariat played a powerful role in the Convention process, able to draw on experience and knowledge accumulated in previous rounds of reform. Also, all but one of the Convention's internal working groups employed expert hearings, with the groups working on subsidiarity, the Charter, legal personality and simplification all calling MICHEL PETITE and JEAN-CLAUDE PIRIS, Director Generals of the Commission's and Council's legal services, and moreover both IGC veterans.<sup>47</sup> The importance of expertise on the one hand and governmental control on the other continued well into the Convention's decision-process (indeed, the nearer the hand-over to the IGC, the more important became governmental representatives and influence) and into the follow-up (where the "Piris Group" of legal experts worked on the Draft Treaty both prior to and during the IGC).

Overall, even though the plenary was numerically dominated by parliamentarians, the Convention's composition followed a logic of institutional representation, aiming to reflect a broad spectrum of views and expertise. Whereas the main goal of ensuring open discussion and deliberation echoes previous preparatory committees, the strategy of ensuring an inclusive debate through broad membership (albeit by no means exactly representative of citizens, parties or gender) was clearly novel and supports those that consider the Convention method to be a genuinely new reform mode.<sup>48</sup>

### **C. The Convention's Formal Mandate and Its Interpretation**

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<sup>47</sup> J. JARLEBRING, *supra* note 3, footnote 21.

<sup>48</sup> Although the number of women in the Convention was very low at 17 female members and 23 alternates (cf. P. NORMAN, *supra* note 47, p.38), as were numbers of regional and legal representatives, when taking a more differentiated view of representativity, this "does not *necessarily* mean that these kinds of identities, interests or expertise were not *represented* in the Convention at all. It goes without saying that formal presence alone neither guarantees nor excludes 'proper' representation in the whole meaning of the concept" (cf. J. POLLAK, *supra* note 46, p.13, italics in the original).

If the selection of delegates and the Convention's composition tilts the balance of analysis towards a constitutional assembly, the mandate granted by the European Council at Laeken suggests a different reading. When defining our set of criteria in part 2, we concluded that next to the formal mandate given to both the aggregate body and its individual members (free and fundamental in the case of a constitutional assembly, bound and functional in a working group), the interpretation and implementation of that mandate is crucial to the high degree of self-confidence and disobedience indicative of a fully-fledged constitutional assembly.

This last point is particularly relevant in the Convention case, as the Laeken mandate was relatively vague in its procedural-institutional instructions, and this imprecision reflected a plurality of substantive positions and divergent conceptualisations of the integration process and the Convention's role therein. Nonetheless, despite the Declaration's 61 heterogeneous questions, from a formal point of view the mandate came across as functional, albeit fairly open-ended, for the aggregate body and the individual delegate: the Convention was called to "pave the way for the next Intergovernmental Conference as broadly and openly as possible" and to present "different options" or "recommendations if consensus is achieved".<sup>49</sup>

At the same time, the three main tasks touched upon in section 3.1, albeit comprehensive, smack of reorganisation and reform rather than the creation of a novel legal order and "symbolic depth"<sup>50</sup> - a point underlined by frequent references to the Union's Treaties as the basis and object of discussion. Taken together with the traditional role of the IGC as ultimate decision-authority, the mandate thus suggested a functional rationale, similar to that underlying previous preparatory groups and committees, established in order to efficiently set an agenda by means of open discussions and to facilitate intergovernmental bargaining through pre-negotiation. Politically, on the other hand, the Convention formula was intended to meet public criticism of the IGC method without abolishing IGCs themselves - an aspect cleverly instrumentalised by the Convention itself so as to bolster its position and authority.

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<sup>49</sup> *Laeken Declaration*, *supra* note 35, pp.24-25.

<sup>50</sup> J. HABERMAS, *supra* note 32, p.4.

To an extent, however, the Laeken mandate can also be read as an authorisation to fundamentally reform the (developing) European polity - reorganising competences, simplifying the Union's instruments and tackling issues of democracy, transparency and efficiency. Even the Union's value basis and fundamental rights were on the agenda - all in all a mandate that left scope, not only to think "out of the box"<sup>51</sup> but indeed to fundamentally transform the EU's constitutional basis.<sup>52</sup> The explicit mentioning of a European Constitution as possible (long run) outcome, as well as the possibility of changing amendment and ratification procedures equally underlined that there was no furthest limit to the Convention's discursive scope in terms of the subjects it might tackle or the conclusions it might reach. This factor is similarly apparent when we consider the relative discretion enjoyed by most delegates *vis-à-vis* their principals.<sup>53</sup>

Looking to the second criterion - self-confidence and disobedience - a paradoxical situation is observed, with the Convention process ricocheting between free preparation and bound decision-making. On the one hand, the Convention not only took up the challenge of tackling most of the Laeken questions, it also dealt with issues not directly asked - or indeed avoided - in Laeken, such as financial aspects or the role of the European Council. Apart from this content-related "breaking free", a power struggle between the creator and its creation emerged in the terrain of internal organisation. Whereas GISCARD was able to shift the foreseen starting date of the Convention, debates about when to conclude its work and about the time lapse between the Convention and the following IGC continued throughout the Convention process, intensifying in the spring and early summer of 2003.<sup>54</sup> Eventually, the Convention managed to extend its mandate by half a year and successfully pressed for a final session even after the first part of the Constitutional Treaty had been handed over to the European Council in Thessaloniki on 19 and 20 June 2003.

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<sup>51</sup> E. PHILIPPART, "The Convention on the Future of the EU", *CEPS Policy Brief No. 11*, Brussels, 2002, p.52.

<sup>52</sup> L. HOFFMANN and A. VERGÉS-BAUSILI, *supra* note 3, p.134.

<sup>53</sup> L. HOFFMANN and A. VERGÉS-BAUSILI, *supra* note 3, p.138.

<sup>54</sup> L. DINI and A. DUFF, *The Convention and the Timetable of the Intergovernmental Conference*, CONV 626/03, Brussels, 2003.

On the other hand, for these changes the Convention had to “ask permission” from the European Council as its principal. Even more astonishing, the more certain the Convention became that it would present to the Heads of State and Government not a schedule of options but rather a single legal document (thus confidently over-reaching a working group mandate), the more the IGC as the ultimate authority cast its shadow over the preliminary decision-process and restricted the range of the possible (with the Convention thus implicitly acknowledging its role as a subordinate agent). GISCARD in particular was certainly influenced by anticipating his former colleagues’ maximum levels of tolerance and acceptance<sup>55</sup> (cf. Göler/Marhold 2003, 321) - a classic behavioural pattern according to principal-agent theory (cf. Pollack 2003). At the same time, it was GISCARD who insisted right from the very beginning that the Convention could only succeed if it delivered a consensus-based single document that the IGC would find it difficult to amend (cf. Giscard 2002). His call in the opening speech for a single text labelled a “Constitution” not only triggered the first spontaneous applause in the Convention plenary (cf. Norman 2003, 47) but became the (symbolic and practical) cornerstone of the entire process.

In sum, any analysis of the Convention’s mandate and how it was interpreted by that body, its President and delegates will be ambivalent. While, first of all, functional in tone, the mandate also lent itself to a wider and more symbolic interpretation and was stretched to the utmost limits by the Convention, which, however, never formally challenged the European Council’s superiority.

#### ***D. Verifying Delegates’ Credentials and Formal Constitution***

Symbolism rather than legal basis plays an important role in the fourth step of Elster’s categorisation, namely the question of formal constitution and the verification of the delegates’ credentials. A working group is likely to remain a much more “secular” and “sober” affair, while a constitutional assembly will pay tribute to the task of transforming a community’s most basic rules. The

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<sup>55</sup> D. GÖLER and H. MARHOLD, “Die Konventsmethode” in *Integration*, 26, 4, 2003, pp.317-330 at p.321.



dignity of the constitutional process will be further underlined by questioning and debating the delegates' credentials, whereas these are usually taken for granted in preparatory groups.

The Convention's opening ceremony clearly reflected an ambition to celebrate high symbolism. Not only the European Council President but also the Presidents of the European Parliament and Commission gave speeches to the packed Brussels hemicycle, emphasising the important task and historic burden of the process ahead.<sup>56</sup> Mixing emotion and pathos, VALÉRY GISCARD D'ESTAING strongly underlined that his task was not to lead a mere preparatory group. Careful, however, not to refer to Philadelphia - as he had regularly done in the preceding months - he stressed the importance of Europe's global role, and painted the consequences of the Convention's failure in bleak colours: "[...] each country would return to the free trade system. None of us - not even the largest of us - would have the power to take on the giants of the world. We would then remain locked in on ourselves, grimly analysing the causes of our decline and fall".<sup>57</sup>

However, while it is easy to concede that the Convention's official opening and President Giscard's speech in particular created a mood of symbolic moment - albeit less so than did the closing ceremony - public awareness did not follow suit and two months after the Convention's launch only 28% of citizens interviewed in an official poll claimed to have heard of the process.<sup>58</sup> Chances of creating greater visibility and awareness may have been lost at the beginning with the choice of Brussels as a permanent working seat rather than rotation among national capitals, and with the adoption of consensus as decision-mode, rather than more media-attracting vote procedures, as will be discussed below.

When it comes to the verification of delegates' credentials the picture is similarly mixed. Prior to the Convention's start, controversy flourished about Giscard's intergovernmental leanings and his age,<sup>59</sup> about the purely intergovernmental selection of the Convention's President and Vice

<sup>56</sup> *Speeches Delivered at the Inaugural Meeting of the Convention*, CONV 4/02, Brussels, 2002.

<sup>57</sup> V. GISCARD D'ESTAING, *supra* note 2.

<sup>58</sup> *Standard Eurobarometer 57*, European Commission, October 2002. Available at [http://europa.eu.int/comm/public\\_opinion/standard\\_en.htm](http://europa.eu.int/comm/public_opinion/standard_en.htm).

<sup>59</sup> P. NORMAN, *supra* note 47, p.27 *et seq.*

Presidents as well as about the Presidium's composition. Additional debates arouse about who was to chair the Convention's internal working groups. Nevertheless, most delegates were appointed without major discussions, and few nominations initially attracted public attention. An interesting exception, with regard to delegates' credentials, equality and mutual recognition, was the situation of members from the then candidate countries. For the first time invited to fully participate in reforming the Union they were about to enter, they did not enjoy completely equal status with the "EU insiders". The Laeken Declaration not only precluded them from preventing "any consensus which may emerge among the Member States",<sup>60</sup> they were also denied equal rights with regard to the use of their own language and - notably - membership in the Presidium. After initial irritation, however, their status was upgraded: Alois Peterle was invited into the Presidium as a permanent observer, and interpreters could be brought to the plenaries, allowing representatives of the accession countries to speak in their mother tongues.<sup>61</sup> In practice the limitation with regard to the final decision did not matter, as there was no formal voting in the Convention and the Draft Constitution was accepted by broad consensus.

In view of ELSTER's fourth step, the combined elements of the official opening and struggles about delegates' credentials and equality - especially regarding *conventionnels* from the applicant countries - thus support identification of the Convention as a constitutional assembly.

### ***E. Defining Rules of Procedure and Decision-Making***

As mentioned in section 2, rules of procedure and of decision-making in particular are vital for the process of expressing and aggregating preferences, and thus both implicitly and explicitly contribute to shaping final outcomes. Among various factors - internal organisation, the openness of proceedings or decision-rules themselves - in the preceding we singled out three as indicative of either working groups or constitutional assemblies: external versus internal determination of rules, secrecy versus openness and consensus versus

<sup>60</sup> *Laeken Declaration*, *supra* note 35, p.24.

<sup>61</sup> P. NORMAN, *supra* note 47, p.43.

voting. Before looking to the types of working methods and decision-processes followed in the Convention, any analysis thus needs to assess how free it was with regard to self-institutionalisation.

The Laeken Declaration laid down consensus as the principle decision-rule and pre-determined the strong role of the Presidium,<sup>62</sup> but overall it was vague with regard to both the internal organisation of the Convention's work and its decision-rules, leaving the body ample leeway to determine its own working methods. Heated controversies about these demonstrated how seriously the issue was understood by both Chairman and Convention members. Having set up the Secretariat, Giscard immediately embarked on preparing the rules of procedure with a first draft presented even before the Convention had started work. This draft met with fierce criticism from *conventionnels*, with the parliamentarians in particular feeling that the proposals would allow the Chairman and Presidium too much autonomy *vis-à-vis* the plenary.<sup>63</sup> After more than 340 amendments and the discussion of a revised draft, the rules were changed again, to be finally accepted without formal vote in the guise of the so-called "Note on Working Methods".<sup>64</sup>

In its rules of procedure, the Convention adopted a "parliamentary approach": debate took place in public and all documents were accessible via the Convention website.<sup>65</sup> Additionally, compared to Giscard's draft, the rights of the plenary were extended with regard to amending the agenda or setting up working groups, and the status of alternates was upgraded. Overall, this openness and transparency thus clearly broke - at least in principle - with the much bemoaned secrecy of IGC negotiations and instead reminded of the way the Charter Convention proceeded. The institutionalisation of working groups in the second phase further contributed to relatively free and un-prejudiced debates on delicate matters such as the Union's legal personality, the simplification of instruments and the reorganisation of competences.<sup>66</sup> Furthermore, the relatively open written rules left room for unwritten rules to emerge, e.g. the famous introduction of blue cards to facilitate debate and the

<sup>62</sup> *Laeken Declaration*, *supra* note 35, pp.24-25.

<sup>63</sup> P. NORMAN, *supra* note 47, p.43 *et seq.*

<sup>64</sup> *Note on Working Methods*, CONV 9/02, Brussels, 2002.

<sup>65</sup> *Note on Working Methods*, CONV 9/02, Brussels, 2002, Arts. 13-14.

<sup>66</sup> A. MAURER and D. GÖLER, *supra* note 3, p.17 *et seq.*

progressive equalisation of full members, alternates and observers. In the first two relatively uncontroversial phases of the Convention, these arrangements contributed to creating the “esprit de corps” that GISCARD had aspired to in his opening speech.

Both the degree and the type of institutionalisation in the Convention are thus atypical of working groups, which rely much more on informal and handed-down working modes and certainly do not debate rules of procedure in a similarly extensive manner. A good case in point is the above-mentioned “Group of Government Representatives”, traditionally pre-negotiating Treaty change, and relying exclusively on informal rules of procedure, in addition to the scarce provisions of Art. 48 TEU. Equally, working groups normally proceed in small-scale, in camera settings which would certainly not have fulfilled the Convention’s requirements of openness and transparency, although arguably secrecy may favour open exchange, in-depth discussions and deliberation more than public settings and publicity.<sup>67</sup>

However, when considering the Convention, it would be easy to underestimate the influence of decisions about personnel, on the one hand, and decisions about day-to-day proceedings, on the other. Indeed, the crucial decision about who would serve as Chairman and Vice Presidents was externally imposed by Laeken (with the Convention nevertheless free to choose the other members of the Presidium). Similarly, while the working group or IGC style of proceeding may have been abolished *en grand*, criticism of the Presidium’s and working groups’ closed meetings, the non-accessibility of Presidium minutes, and observations about the influence of the Convention Secretariat show that these more traditional organs may have continued to dominate on a daily basis, indeed even more than is usually assumed.

Furthermore, the choice of consensus as decision-mode also points to a persistence of working group procedures. The - very particular - definition of consensus in the European Convention was modelled on the Charter Convention, where it was for the President to judge when a consensus had

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<sup>67</sup> J.T. CHECKEL, “Why Comply? Social Learning and European Identity Change” in *International Organization*, 55, 3, 2001, pp.553-588 at p.563.

emerged among the different component parts.<sup>68</sup> In a similar vein, from the beginning GISCARD insisted that the Convention should not vote but rely on consensus only, with the rules of procedure reserving to the Chairman and the Presidium the discretionary power to identify consensus. This choice - seemingly underlining the importance of deliberation, open exchange and the need for agreement - is problematic for a body supposedly adopting the model or ambitions of a constitutional assembly. First, consensus has been atypical in processes of national constitution making where voting is the general rule.<sup>69</sup> At the same time, the possibility of voting is more than a decision-rule, also standing for a minority's willingness to adhere to the majority's decision, a pre-condition considered lacking at the supranational level and often problematised when discussing the appropriate democratic regime for the EU.<sup>70</sup> Second, and related to the question of public awareness, the choice of consensus was a double-edged sword when it came to media-attention: on the one hand the Convention only stood a chance of influencing the IGC if it submitted a document backed by consensus, on the other, "the interest of the media would be fairly limited even if it did reach consensus, since there would be no great conflict to report about".<sup>71</sup>

Once more, the balance seems mixed: officially and in its plenary meetings, the Convention adopted a parliamentary approach, clearly breaking with the "IGC tradition", while relics of the much-criticised method of preparing intergovernmental summits seem to have lived on in the Presidium's working modes, in the opaque formula of broad consensus and in continuing subordination to the European Council's verdict when deciding on the sensitive issue of timing.

## **F. The Convention's Output and Ratification of the Constitutional Treaty**

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<sup>68</sup> A. VITORINO, "The Convention as a Model for European Constitutionalisation: Speech Delivered 14 June 2001" in Walter-Hallstein Institut (ed.), *Die Konsolidierung der Europäischen Verfassung: Von Nizza bis 2004*, Baden-Baden, Nomos, 2002, pp.40-52 at p.51.

<sup>69</sup> C.C. JILLSON, *Constitution Making: Conflict and Consensus in the Federal Convention of 1787*, New York, Agathon Press, 1988.

<sup>70</sup> J.H.H. Weiler, "Problems of Legitimacy in Post 1992 Europe" in *Aussenwirtschaft*, 46, 1991, pp.411-437 at p.418.

As a final - and crucial - criterion to assess the Convention's nature, we need to consider its results and the process of ratification, paying particular attention to the quality of the outcome in view of the mandate, the relationship between the Convention and the subsequent IGC and the ratification and amendment procedures for the newly established Constitutional Treaty. Three questions will be of particular interest: first, did the Convention draft a fully-fledged document or make recommendations only?, second, was there much re-opening and further negotiation?, and third, in how far will citizens be involved?

It has been argued already that by finding a broad consensus on a single text - the "Draft Treaty Establishing a Constitution for Europe" - the Convention exploited its mandate to the full. Early rejecting a low profile approach, the Convention was determined to avoid the fate of previous preparatory groups and committees, the "Reflection Group" prior to Amsterdam being a good example of high-quality debates and comprehensive suggestions that had very little impact on the subsequent IGC. Adopting an approach similar to the Charter Convention - preparing a *fait accompli* legal document - the Convention delivered a fully-fledged constitutional text that could have been ratified as it stood. This achievement of giving one answer to the 61 Laeken questions was celebrated in the Convention's final session with the playing of the European anthem and the solemn signature of the Constitutional Treaty by all *conventionnels* and was underlined by President GISCARD in asking the Heads of State and Government to rubberstamp the text without further changes.<sup>72</sup> And although, as is well-known, this is not what happened, it is notable that the European Council in Thessaloniki similarly emphasised the link between the Convention's output, the European Parliament and the European people when it called on the IGC to "complete its work and agree the Constitutional Treaty as soon as possible and in time for it to become known to European citizens before the June 2004 elections for the European Parliament".<sup>73</sup>

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<sup>71</sup> J. JARLEBRING, *supra* note 3, p.794.

<sup>72</sup> V. GISCARD D'ESTAING, *Closing Speech of Valéry Giscard d'Estaing, Chairman of the Constitutional Convention*, 76615.doc., Brussels, 2003.

<sup>73</sup> *Presidency Conclusions*, Thessaloniki European Council, 19 and 20 June 2003. Available at [http://europa.eu.int/futurum/documents/other/oth200603\\_en.pdf](http://europa.eu.int/futurum/documents/other/oth200603_en.pdf).

In terms of content, the Convention was indeed able to provide solutions to fundamental constitutional questions, left unresolved by previous IGCs. The Constitutional Treaty has been amply discussed and we will not go into detail here. However, we note that the introduction of a single legal personality and the abolition of the pillar structure, the clearer categorisation of competences, the role of national Parliaments in the new procedure to control subsidiarity, the simplification of the Union's instruments, the inclusion of the Charter of Fundamental Rights and, not least, innovations in the EU's institutional set-up such as the permanent European Council President and the European Foreign Minister all contribute to a comprehensive constitutional overhaul of the existing system without, admittedly, creating a genuinely novel order. Having proposed a legal basis "[r]eflecting the will of the citizens and States of Europe" (Art. I-1) the European Convention's output could thus well qualify as that of a constitutional assembly.<sup>74</sup>

At the same time, notwithstanding, from a substantive point of view, it is also possible to argue that the Constitutional Treaty in its present form has been shaped more by gradual constitutionalisation through the European Court of Justice, by incremental reform by IGCs and by the day-to-day policy-making of the Union than by the European Convention. Indeed, the latter engaged more in a "tidying up" of existing provisions than in creating a Constitution as envisaged before the process started— short, clear and accessible to the European citizen. Equally, the Convention hardly brought the evolutionary trend of European constitutionalism to an historic halt - there are numerous provisions for continuing constitutionalisation, such as those concerning the future size of the Commission (Art. I-26) or the simplified revision procedure (Art. IV-444). Furthermore, it was exactly those issues deemed most constitutional, and most political, that were re-opened by the Heads of State and Government at the 2003/2004 IGC, accompanied by power-struggles echoing Nice and leading to the (temporary) break-down of the negotiations in December 2003.

More than the Convention's substantive results, however, the methods by which the Draft Treaty has been dealt with in procedural terms recall previous

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<sup>74</sup> The numbering refers to that of the *Treaty Establishing a Constitution for Europe* as published in the Official Journal of the European Union, Brussels, 16 December 2004.

committees and working groups. It is true that the much-feared “firewall” of several months between the end of the Convention and the beginning of the IGC did not occur, nor was the IGC conducted according to the classic three-level negotiation model, with, instead, the political level strengthened and the Foreign Ministers playing an unprecedented role. Furthermore, the major part of the Constitutional Treaty as well as its basic structure was passed by the IGC unchanged. And yet, the Convention never fully stepped out of its role as an agent of the Heads of State and Government. The IGC cast its shadow over the negotiations in the Convention already and limited the range of the possible - a good example being the discussions about majority voting in foreign policy. Moreover, as mentioned above, the Heads of State and Government re-opened exactly the draft provisions on the most constitutional points - those relating to Europe’s institutional set-up as well as the vertical and horizontal distribution of powers, such as the number of Commissioners, the distinction between a legislative and an executive Council, the extension of majority voting, and the weighting of votes in the Council of Ministers.

Most importantly, the Convention never questioned the ultimate decision-power of the European Council as convoking authority, despite Giscard calling upon the IGC not to re-open the document. Intergovernmental negotiations followed and concluded the Convention’s work, and the Constitutional Treaty, signed on 29 October 2004, will be ratified according to the established procedure, Art. 48 of the *existing* Treaty on European Union. The Convention did not directly link up to the European people for ratification - which would have by-passed the Member States as “Masters of the Treaties” - and indeed left it to the European Parliament and some governments to raise the question of referenda. While more countries than usual (although by no means all) have decided to ratify by referendum, or to at least hold consultative plebiscites, proposals for a Europe-wide referendum were never seriously considered. Based on an act of will of the states rather than the people of Europe,<sup>75</sup> the mode of ratification thus serves as another indicator for the Convention process as one of reforming Treaties rather than of changing, let alone creating, a Constitution.

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<sup>75</sup> D. GRIMM, “Does Europe Need a Constitution?” in *European Law Journal*, 1, 3, 1995, pp.282-302 at p.291.



## Conclusion

The above analysis set out to draw systematic conclusions about the Convention's nature as well as its embedding in (or breaking with) previous processes and methods of EU reform. By introducing two heuristic categories - working group and constitutional assembly - each defined by six qualifying criteria, we attempted to free the analysis from straightforward comparisons, while nevertheless drawing on historical associations, institutional and functional characteristics, normative expectations, as well as the various public, political and academic discourses on the two concepts. In light of our criteria, based on JON ELSTER's six constitutive steps, the balance of the analysis is genuinely mixed: the European Convention was neither a second Philadelphia nor a second Reflection Group, it decidedly broke with some features of the much-criticised IGC method while preserving others, and it stretched a vague mandate to its limits while never fully overstepping the bounds of its designated role as an agent of the European Council.

As shown in the empirical analysis, several arguments support a reading of the Convention as a constitutional assembly, decidedly breaking with past reforms. Despite several attempts to broaden debate in preparatory committees, the agenda-setting and pre-negotiation stages of previous reform rounds had been characterised by functional mandates, clear-cut principle-agent relations and un-transparent negotiations. In contrast, the Convention's membership was significantly broader, and its parliamentary composition and working methods constituted a qualitative leap forward, both in terms of representativity and transparency. Similarly, the decentralised selection of delegates and the Convention's self-confident interpretation of a wide, yet predominantly functional mandate recall the conduct of a constitutional assembly rather than a classic working group or preparatory committee. Clever use of symbolism underlined the historic significance of the process from inauguration to closure, which, together with the Convention's policy of adopting a single legal document - introducing major changes in Europe's institutional set-up as well as the horizontal and vertical distribution of

competences - sets the Convention apart from previous modes of preparing and negotiating Europe's evolving Treaty base.

On the other hand, the Draft Constitutional Treaty as backed by consensus in the Convention was not simply rubberstamped by the Heads of State and Government, but was partially re-opened and fiercely re-negotiated. Albeit conducted along different lines from previous reform rounds, the 2003/2004 IGC ultimately underlined and affirmed the European Council's unquestioned authority. Similarly, when deciding on the procedure for the new Treaty's ratification no attempt was made to modify the fundamentally intergovernmental nature of this significant formality by, e.g., introducing majority provisions or establishing different ratification modes for different parts of the Treaty. In addition, the IGC *ancien régime* was assimilated into the Convention process in terms of both personnel and procedure, as seen in the strong role of Presidium and Secretariat, the opaque consensus rule, and the replacement of Convention members in the final negotiation phase by senior representatives so as to increase governmental weight and power.

In terms of both substance and procedure the Convention thus continued rather than broke with Europe's long-term, idiosyncratic reform process: evolutionary constitution building, mostly - yet not exclusively - controlled by governments and without a clear-cut *finalité*. Joining elements of Treaty change and national constitution making, mixing the intergovernmental, supranational and parliamentary, and defying international as well as state analogies, the Convention has itself become the epitome of conflicting views about the ontology of integration and the most appropriate route for (future) European reform. The multi-facetted Convention process combined with a trimmed down IGC may not have been the most effective, democratic or legitimate way of reform, nor does that choice of method indicate clear conclusions about the ultimate object of change (or vice versa) - yet, mirroring Europe's *sui generis* polity, only a similarly mixed mode may have proven viable. In this sense, the "final product" bears a telling name: after ratification Europe's set of foundational rules and institutions will be a "Treaty Establishing a Constitution for Europe".



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