

THE INSTITUTIONS UNDER THE NEW DRAFT CONSTITUTION

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Against the background of the preceding broad-ranging discussion on “constitutionalism” and the “constitutional moment,” we turn in a somewhat more focused way to the question of “the institutions” under the draft constitution. I even understand this narrower topic in a somewhat narrow way, namely in terms of the structure and functions of those institutions that have specifically been established at the EU level to pursue the purposes contemplated by the treaties and, now, the constitution. I thus leave aside a range of subjects that are closely linked to the institutions in this particular sense, but that are nevertheless distinct from them. These include such “institutional” questions as competences,¹ citizenship,² the Charter of Fundamental Rights,³ the merger of the pillars, the role of national parliaments,⁴ and the Union’s legal personality.⁵ However, I still intend to come around incidentally, at the end, to the larger questions of “constitutionalism” and the “constitutional moment,” where we have now left off.

Four questions seem to me to arise. First, which are the “institutions” that appear to have focused the Convention debates? Second, what was it hoped that the draft constitution’s treatment of the institutions would achieve? Third, how well were those purposes achieved? Finally, to what extent do the institutional provisions of the draft constitution advance the larger constitutional project that we have been discussing?

The first question is readily answered. Most interesting to the Convention, understandably, were the “political” institutions, so to speak: the European Council, the Council of Ministers, the European Parliament, and the Commission, together with the newly-minted Minister for Foreign Affairs. Not particularly scrutinized or debated were the judicial institutions, even though the Nice Treaty of not so long ago presaged some substantial changes in that domain. Neither did the presumably non-political bodies – notably the European Central Bank or the Court of Auditors – come in for reexamination. Despite their potentially political role, the Union’s purely consultative bodies (like the Committee of the Regions or the Economic and Social Committee) and its myriad “specialized agencies” likewise largely escaped the Convention’s attention. None of this is surprising, for, to the extent that the principal subtext of the draft constitution was political legitimacy and democracy, it was the conspicuously political institutions that mattered the most.

What then was it hoped, or does it appear to have been hoped, that the draft constitution’s treatment of the institutions would achieve? Here, we may usefully distinguish between the institutions viewed individually, on the one hand, and collectively, on the other. Taken on its own terms, each of the institutions, it was said, needed to be both “strengthened” and made more “democratically legitimate.” Viewing the institutions from a more collective point of view, the convenors had the following in mind: (a) to maintain a credible system of checks and balances, (b) to maintain a system of “multi-level” or vertical constitutionalism, (c) to present

¹ Draft Treaty establishing a Constitution for Europe, CONV 850/03 (18 July 2003), arts. 9-17.

² *Id.*, art. 8.

³ *Id.*, art. 7(1), Part II.

⁴ *Id.*, art. 9(3), Protocol on the Application of the principles of Subsidiarity and Proportionality.

⁵ *Id.*, art. 6.

a more visible and effective “face” to the external world, and (d) to project, overall, a reasonably simpler and more coherent institutionally architectural design. Let me now consider the matter from both these institutionally individual and institutionally collective points of view.

Rendering an institution stronger seems to me to mean rendering it both better defined by way of purpose or function and, as so defined, more effective. On the other hand, rendering it more democratically legitimate must mean making it either more representative or more politically accountable, or both. How do the institutions, under the draft constitution, fare according to these criteria?

On these scores, one would have to say that the European Council fares quite well. It would not only be made into a conspicuously integral institution of the Union,⁶ but its functions would finally be codified, in terms of giving the Union its general impetus and political direction and priorities.⁷ While it is probably not entirely accurate to say flatly, as the draft does, that the European Council does not legislate,⁸ that language has the merit of underscoring that the European Council ought not be thought of principally as a legislative organ, even though its cousin, the Council of Ministers, certainly may. We will also later return to the uncertainty surrounding the notion that the European Council should ensure the external representation of the Union on issues concerning Common Foreign and Security Policy, albeit without prejudice to the newly created Minister for Foreign Affairs. But on the whole, I think, the European Council gains a clearer as well as much more prominent profile, not only by acquiring some very broad and explicit authority in the common foreign and security policy⁹ and in the area of freedom, justice and security,¹⁰ but also by becoming a veritable “head of state,” if you will.

Enhancing the European Council’s efficiency was also a central concern of the drafters, and I think they may have gone a long way toward achieving that goal by having it choose by qualified majority voting a prominent individual as its President (and effectively as the president of the European Union itself) and letting him or her serve for a period of 2 ½, and possibly 5, years.¹¹ This longer term would represent a great improvement over the situation under the six-month rotating presidency of the European Council that we know today. The very lengthening of the presidential term would not only enable the Presidency to accomplish more (and with greater continuity), but would also allow it to be held, for that very reason, to greater account. Nowhere will this matter more than in CFSP, over which the President of the European Council is to “ensure the external representation of the Union.”¹² Efficiency and democracy have not, however, been taken to extreme in the case of the European Council, nor should we expect them to have been. The European Council will still, we read, normally have to reach its decisions by consensus,¹³ and it will continue to do so largely behind

⁶ Id. art. 18.

⁷ Id., art. 20(1).

⁸ Id. art. 20. In fact, European Council “decisions” are expressly contemplated by Articles 39(3) and (7) in the common foreign and security policy area. “Decisions” are expressly identified as among the Union’s “legal acts.” Id., art. 32(2).

⁹ Id., arts. 39(2), (3), III-194, III-196.

¹⁰ Id., art. III-159.

¹¹ Id., art. 21(1).

¹² Id., art. 21(2).

¹³ Id., art. 20(4).

closed doors. For a plainly intergovernmental institution such as it is, neither of these “lapses” in efficiency or democracy should of course occasion surprise.

It is also difficult to conceive of the European Parliament as anything but strengthened by the draft constitution. By definition, further empowering the Union’s most “democratic” branch not only strengthens that institution, but also advances democracy within the Union. The Parliament already had the privilege of approving or disapproving the “college” of Commissioners and of exercising a right of censure of the Commission, and these privileges would continue.¹⁴ But now it would also elect directly, by a majority of its members, the Commission President,¹⁵ thus marking a signal advance in terms both of parliamentary influence and overall democratic accountability. The draft constitution also strengthens Parliament in terms of its clearer functional definition. Rather than being depicted chiefly as exercising “cooperation” or “co-decision” with the Council of Ministers, the European Parliament becomes visibly “a,” if not “the,” Union legislature.¹⁶

The Council of Ministers likewise emerges better defined as in part, despite its name, a squarely legislative body.¹⁷ The clear distinction drawn between the “Legislative Council” and “General Affairs Council” is designed precisely to do that, with the former underscoring the possibility of the Council’s evolving into a genuine legislative “Senate” – a legislative chamber composed of state representatives.¹⁸ The Council of Ministers’ effectiveness, like the European Council’s effectiveness, should be enhanced by a lengthening of the presidential term, although, in the case of the Council of Ministers, the draft contemplates a presidential term of only “at least” one year (rather than 2 ½ years, once renewable), and still only on an “equal rotation” basis.¹⁹ Its effectiveness should also be enhanced by a streamlining of the qualified majority voting mechanism: a majority of the states representing, in the aggregate, at least 3/5 of the EU population.²⁰ Even democratic gains may be expected in this unlikely institution. When acting in a legislative capacity, the Council is now to meet in “open” session,²¹ and the very fact of strengthening its Presidency and simplifying its decisional process may have the result, practically, of rendering it more politically accountable.

The one specific institution about which question marks may be raised is the Commission. True, the Commission President’s election by the European Parliament already, and importantly, enhances the Commission’s democratic nature. But, at the same time, the single Commission reform that is being proposed in the name of efficiency – viz., a reduction in the number of voting Commissioners and creation of a tier of non-voting Commissioners – comes at a heavy price in terms of democratic representativeness, for, while this system too is to operate on an “equal rotation” basis, at any given time a number of Member States simply will not have presented a slate from which a Commissioner is drawn.²²

¹⁴ *Id.*, art. 25(5).

¹⁵ *Id.*, arts. 19(1), 26(1).

¹⁶ *Id.*, art. 9(1).

¹⁷ *Id.*, art. 22(1).

¹⁸ *Id.*, art. 23(1).

¹⁹ *Id.*, art. 23(4).

²⁰ *Id.*, art. 24(1). The fraction changes to 2/3 rather than half of the Member States when the constitution does not require a measure to be based on a Commission proposal (or when the European Council is not acting at the initiative of the Minister for Foreign Affairs).

²¹ *Id.* art. 49(2).

²² *Id.*, arts. 25(3), 26(2).

More fundamentally, an opportunity was also missed, I am afraid, to give the Commission greater definition in the public eye. While the Commission's function remains essentially the same, viz., to ensure the application of EU law²³ and to represent the Union externally outside the CFSP area,²⁴ it also remains the case that European citizens are unlikely to understand in any real sense what that means, or indeed what the Commission (which already is encumbered by the seeming contradiction between being effectively named by Member States and being sworn to act wholly independently of them) therefore really is. As we shall see, the clarity and coherence of the independent Commission also stands to be lessened by its having as its vice-president, *ex officio*, a Minister for Foreign Affairs who is at the same time a member of, and in many ways responsible, indeed subject, to a perfectly intergovernmental European Council.

Problems really begin to emerge, however, when the institutions – which appear largely, though not entirely, to have become stronger and more democratic when viewed individually – are viewed collectively. The difficulty does not lie with the Union's multi-level, or vertical, constitutionalism. Nothing in the institutional arrangements under the draft constitution would seem to disturb the authority of the Member States within the Union architecture. The states remain principally responsible for the implementation and enforcement of EU law and policy.²⁵ Their national identity continues to be guaranteed.²⁶ An examination of the competences articles²⁷ suggests that the states have lost little and possibly actually gained. The “conferral” and subsidiarity principles are reinforced,²⁸ and the latter in particular is strengthened through an oversight mechanism involving the national parliaments.²⁹ And even the draft constitution's “primacy” clause³⁰ takes care to state that primacy obtains only insofar as the Union institutions “exercise[e] competences conferred on [the Union],” thus underscoring its conditionality and of course leaving the *Kompetenz-Kompetenz* question entirely open.

More doubtful is the draft constitution's overall effect on checks and balances. For any number of reasons, outlined in other contributions to this volume, the European Council emerges as much the most strengthened institution. The European Council's prerogatives will truly have grown, and it will, notwithstanding the draft constitution's assertion that the European Council does not legislate, have competence to enact binding measures.³¹ Thus, even after an ostensible merger of the pillars, it may determine by “decision” the Union's strategic interests and objectives for all of the Union's external activities,³² not just CFSP,³³ and it will have responsibility for establishing the strategic guidelines concerning the Union's area of freedom, security and justice.³⁴ The European Council may also in large part claim the Minister for Foreign Affairs – who is after all the Commission vice-president – as its agent. Meanwhile all of the European Council's actions, including its legal acts, will lie outside the realm

²³ Id., art. 25(1).

²⁴ Id.

²⁵ Id., art. 10(2).

²⁶ Id., art. 5(1).

²⁷ Id., arts. 9-17.

²⁸ Id., arts. 9(1), (2).

²⁹ Id., art. 9(3), Protocol on the Application of the principles of Subsidiarity and Proportionality.

³⁰ Id., art. 10(1).

³¹ Id., art. 20(1).

³² Id., art. III-194.

³³ Id., arts. 39(2), (3), III-196.

³⁴ Id., art. III-159.

of judicial control.³⁵ It may claim the Minister for Foreign Affairs as its agent. The European Council Presidency will enjoy a longer term and more externally visible presence than its Commission counterpart, while, as noted, the Commission will find itself weakened in several respects by its system of rotating voting membership. Thus, for all the institutional gains of the European Parliament and, to a decidedly lesser degree, the Council and Commission, they risk being substantially disadvantaged vis-à-vis the European Council by the institutional changes that the draft constitution would bring.

But the greatest concern surrounding the institutions, viewed collectively, relates to the question whether the Union will, as a result of the constitutional changes, present a more visible and effective “face” to the external world, at the same time as it presents a simpler and more coherent architectural design to those whom it is meant to govern. As for the first, we can only have severe doubts. While a convenient embodiment of the Union’s external face, the Minister for Foreign Affairs occupies a precarious position. He or she is named (and potentially dismissed) by the European Council acting by qualified majority, upon approval by the Commission President,³⁶ and remains subject in the common foreign and security policy area to the mandates of both that body and the Council of Ministers.³⁷ Subject to that restraint, the Minister does get to chair the Council of Ministers when the latter sits in its Foreign Affairs Council formation, albeit only for purposes of “flesh[ing] out” the common foreign and security policy as shaped by the European Council.³⁸ Yet, he or she also becomes *ex officio* External Relations Commissioner and vice president of the Commission, responsible in that capacity for the Union’s external relations outside the common foreign and security policy field.³⁹ As a member of the Commission, he or she may be subject, like any Commissioner, to dismissal by the Commission President,⁴⁰ thus rendering him or her uniquely dependent on two bodies – the European Council and the Commission Presidency – for his or her continuation in office.

Of perhaps still greater concern are the implications of the draft constitution’s institutional provisions for the simplicity, coherence and overall intelligibility of the Union’s architectural design. As is commonly noted, and puzzled over, we will have a double-headed Presidency consisting of concurrent Presidencies of the European Council and the Commission, each claiming its own brand of representativity. We will also lose the historical congruence between the Presidency of the Council (a third and at least relatively high-profile presidency) and the Presidency of the European Council. They will carry different lengths of term. The rotating President of the Council, being the representative in that body of his or her state, will surely have a vote in the Council, while the President of the European Council will do no more than preside, and will not vote. Like the Minister for Foreign Affairs, the “presidential” configuration of Union is bound to confound Europeans who are understandably still seeking to grasp the nature of the beast.

³⁵ *Id.*, arts. III-270(1), III-282. However, it remains theoretically possible that European Council acts could be the subject of preliminary references to the Court of Justice under Article 274.

³⁶ *Id.*, art. 27(1).

³⁷ *Id.*, art. 27(2).

³⁸ *Id.*, art. 23(2).

³⁹ *Id.*, art. 27(3).

⁴⁰ *Id.*, art. 26(3).

It is not to be excluded, then, that while each of the Union's principal political institutions has been in some senses importantly defined and strengthened, as well as made more democratic, the whole has not gained in coherence and intelligibility, and has possibly even lost. If other salient features of the draft constitution – for example, the statement of Union values,⁴¹ incorporation and constitutionalization of the Charter, the grant of legal personality to the Union, an enhanced conception of Union citizenship, and an end to the pillar system – will contribute importantly to the gradual development of a sense of European political community, the same cannot be said of the institutional architecture.

The Member States of the European Union can continue, if they wish, to have intergovernmental conference after intergovernmental conference on institutional issues, although the risk of IGC fatigue is not to be underestimated. But I am less confident that it can continue to have constitutional convention after constitutional convention on those issues, without wearing out the attention of the European people and their capacity for political and psychological mobilization. Even if the detailed procedural rules of the game may still have to change over time, as may the multitudinous programmatic details that are still to be found in the draft constitution's voluminous Part Three, it would have been desirable to bring the Union's basic political and institutional architecture for once into a more coherent and durable design, as well as into sharper focus. This would have been desirable, even if the framers are not writing a "transformative" constitution, as if in a "constitutional moment," but merely a text designed to perform the consolidating function that we rightfully expect of a constitution, or even just a constitutional treaty.

⁴¹ *Id.*, art. 2.