

Europe's constitution

Your darkest fears addressed, your hardest questions answered

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This weekend, in Greece, the 15 leaders of the countries of the European Union will be presented with a draft constitution for the EU. The document has been drawn up over the past 18 months by a convention presided over by Valéry Giscard d'Estaing, a former president of France. It has caused controversy, confusion, hope, outrage and boredom. This article is an effort to clear up the confusion

What is happening and why?

Various explanations are offered for exactly why the EU needs a constitution now. Some argue that with the Union due to swell from 15 to 25 countries next year, a radical overhaul is required. Others point out that successive treaties between the EU countries have created a mass of overlapping legal texts which need to be consolidated into a single document. Those who want an end to the growth of the EU's powers saw the creation of a constitution as a way to draw a final line. But the federalists, who want those powers to expand, also pushed for a convention, as a further step towards the "ever closer union" promised in the 1957 Treaty of Rome, which started the process of integration.

Many federalists seem pleased with the 200-pages-plus constitution that has resulted. Some are calling it the biggest leap forward for the EU since the Treaty of Rome. But the whole thing could still be revised by the national governments of the EU, meeting in an inter-governmental conference (IGC) beginning in October.

Is this the creation of a European state?

Tricky. Eurosceptics, who like to tick off all the different ways in which the EU is acquiring the characteristics of a state, certainly have some new things to add to their list. Even before the convention, the EU had a flag, an anthem, a currency, a central bank, a supreme court, a parliament, a president (of the European Commission), a *euro*100 billion (\$117 billion) budget and a nascent military force. The convention has now proposed that it should have a constitution, a formal legal personality, a bill of rights (the Charter of Fundamental Rights), new powers over criminal law and immigration, a foreign minister and another president (of the European Council). There is also quite a big expansion of the EU's power to make legislation by majority vote, and therefore further erosion of national sovereignty.

On the other hand, in some respects the constitution is creating the form of state institutions without providing the substance. Thus the so-called foreign minister has no power to make policy over the heads of national governments, who retain vetoes over the making of EU foreign policy and control of their own armed forces. The EU will not be able to raise taxes nor, probably, harmonise them either. Thus two of the central features of a state—the power to raise taxes and to go to war—remain outside the grip of “Brussels”.

Isn't the very creation of a constitution massively significant in itself?

Arguably. In the words of one of the convention's most senior members, “What we are doing is moving off a treaty track and on to a constitutional track, and we will now roll forward on that track.” But even this senior figure admits to doubts, because in fact this is a “constitutional treaty”, which, like any other international treaty, has to be ratified by every national government. And the federalists seem to have lost a crucial battle on future constitutional changes. They wanted all such changes to be made by majority if four-fifths of states agreed. But this move was blocked. All future constitutional changes will still have to be made by unanimous agreement of all the countries of the EU, although they would no longer have to be ratified by national parliaments. So this still looks more like a treaty between states than a constitution for a single state.

Which policies will be most affected?

Everybody agrees on this: justice and home affairs. At present, all attempts at the integration of criminal and immigration law can be blocked by any single country. Under the constitution, EU policy on refugees and asylum—and therefore some aspects of immigration policy—will be decided by majority vote. Countries which currently take in a lot of refugees, in particular Britain, are keen on this, since they see it as a way of spreading the burden more evenly around the Union.

But the EU would also extend its reach deep into criminal law. The constitution provides for the harmonisation of criminal law and sentencing for certain serious crimes with cross-border implications, such as corruption and drug-trafficking. The EU

would also establish minimum rules on matters of judicial procedure, such as the admissibility of evidence, the rights of the accused and so forth. All this would be done by majority vote. The Dutch, British and Irish are very wary of this, since they fear that the end-point would be a common EU criminal-law system. There is also a proposal to create a European Public Prosecutor who could have crimes against European law tried in national courts. However, the prosecutor would be set up only if there was unanimous agreement to proceed, which seems unlikely. A separate proposal suggests that Eurojust, which co-ordinates national prosecution services and already exists, might also bring prosecutions.

So what is the situation on tax?

Federalists badly wanted to make progress here, but there are only hints of it. Corporation taxes could eventually be harmonised by majority vote, but only if countries first agreed unanimously to take such a vote. And the EU could possibly move, by unanimity, to give itself its "own resources"—ie, tax-raising powers. Mr Giscard d'Estaing probably felt this was the least he could give the conventioners, but his people expect opposition from the British, Irish, Spanish and Poles to eliminate any hint of majority voting on tax during the negotiations that begin in October.

And on foreign policy and defence?

Confusion reigns on foreign policy. Asked recently if the constitution lets foreign-policy decisions be made by unanimity or majority vote, the convention's spokesman refused to answer and invited journalists to work it out themselves. It seems to be unanimity. The European Council, which groups together heads of government, could go to a majority vote on a foreign-policy proposition put to it by a newly created foreign minister, but only if it had unanimously asked the foreign minister to make such a proposition. Any country that thought it might be out-voted on a tricky topic, such as Iraq, would presumably refuse to sanction such a request.

The position is less ambiguous over defence. Everybody agrees that no country can be compelled to go to war by a majority vote of EU members. However, there is a suggestion that the EU should aim for "the progressive framing of a common Union defence policy." This alarms countries with a tradition of neutrality, such as Ireland and Austria, as well as those who believe NATO could be undermined. Another provision would set up a European Armaments Agency, to encourage (though this is not said explicitly) EU countries to buy their weapons in Europe rather than from America.

Any move to economic government?

Not much. There is lots of griping on the convention floor that monetary union has not been followed by genuine economic union—whether through tax harmonisation or tougher fiscal rules or tax-raising powers. Some also wanted to create a European finance minister, like the proposed European foreign minister. None of this has happened. But the Euro-group—the currently informal clutch of countries that use the single currency—will take on a formal legal identity and exclude countries who keep their currencies from decisions on, for example, enforcing fiscal rules. The EU budget will still have to be decided by unanimity, which should be fun in 2006.

What about this single legal personality business?

Both federalists and Eurosceptics attach a lot of significance to this. Hitherto, the EU did not formally exist. Now it will, and will be able to sign treaties in its own right that bind all members. Some hope that it will ultimately be able to take a seat on the UN Security Council, replacing Britain and France. But it is difficult (to put it mildly) to see the British or French agreeing to this. The EU already had implicit legal personality in international trade negotiations, where it has long negotiated as a block. Having a formal legal personality also implies that the EU can now claim to have powers independent of those granted by sovereign states. However, after some determined British re-working of the first draft, it is now very much underlined that all EU powers are granted to it by the member countries, rather than vice versa.

What about the Charter of Fundamental Rights?

Federalists are very proud of the incorporation of a bill of rights into European law. As one senior figure in the convention argues, "It was the Bill of Rights that created American identity. They were Americans and so they had rights. It will be the same with Europeans." The British, who had previously argued that the charter (negotiated at a previous convention) should have no legal force, gave in very early on this one. The charter will now be part two of the constitution. Simply agreeing to a bill of rights is a big legal change in countries such as Britain and Ireland, where rights have been established by precedent and case law. And more practical fears are surfacing, too. The charter mentions wide-sounding social rights—the right to strike, the right to a job, the right of workers to be informed and consulted, even "the right to a free [job] placement service". The British feared that these social rights would be a backdoor way of re-regulating their labour market. The Irish, and some central European countries, also worry about that.

However, the British, Irish and others like to think they have safeguarded their position in two ways. First, the charter makes clear that its provisions apply only to European law, not to domestic law. But since European law is constantly widening its scope, and since social laws are made by majority vote, this still leaves a chink in the armour. So the British, backed by the Irish and Dutch, have worked in a change to the charter's preamble. This says that the European Court must pay "due regard" to an interpretive text, underlining that the charter creates no new rights. However, many lawyers doubt that a reference as weak as that will have any impact on the court.

And the supremacy of EU law?

Article 10 says "The constitution and law adopted by the Union's institutions shall have primacy over the law of the Member States." Some maintain that this has been the case ever since the Treaty of Rome; indeed, if it were not so, the internal market would be unenforceable. But others argue that the supremacy of EU law has been established and accepted only through case law, and that it represents a qualitative change to enshrine the idea as a constitutional principle.

Are any powers repatriated to the nation-states?

No. The Laeken declaration of December 2001, which set up the convention, raised the possibility that it might decide to repatriate certain powers. This has not

happened. However, the doctrine of “subsidiarity”, which is meant to be the safeguard against the relentless expansion of European Union power, is included. Article 9.3 says “the Union shall act only and in so far as the objectives of the intended action cannot be sufficiently achieved by the Member States” and can “be better achieved at the Union level”.

A separate protocol on subsidiarity states that the commission has to show how all its proposals are consistent with it and must substantiate this with “qualitative and wherever possible quantitative indicators”. National parliaments then have six weeks in which to object to any proposal on subsidiarity grounds. If one-third of national parliaments object, the commission is forced to review—but not necessarily withdraw or even amend—its proposals. Parliaments or member states can, however, appeal to the Court of Justice if they think the subsidiarity principle has been breached.

And what about this idea of a president for Europe?

This is a fine example of the difference between what insiders think significant and what outsiders do. Within Britain, the creation of a president of the European Council who—along with the foreign minister—will represent the EU on the world stage is often seen as a classic federalising move. The British government, however, fought fiercely for it and believes it to be anti-federal, since the European Council—which is made up of heads of national governments and tends to act by consensus—is seen as sympathetic to nation-states.

Many big countries—Britain, France, Spain, Italy—promoted the idea of a permanent president of the council, ostensibly because the current system of rotating presidencies is inefficient. Smaller countries, however, always suspected them of wanting to use the new post to turn the European Commission into a civil service and to run the EU as a *directoire* of big governments. Reluctantly, the small countries seem to have accepted the idea of a president of the council. But they have managed to crimp efforts to give him or her a big staff and have defined the job fairly tightly. Federalists are pleased that they have preserved the possibility of eventually merging the presidencies of the commission and the council, so creating a single president of Europe.

And the rest of the institutional stuff?

Probably the biggest single issue for the small countries was that every country should retain the right to have its own commissioner. The bigs generally did not want this, since they regarded it as a recipe for a huge and unwieldy commission. They also think the principle of one-state, one-commissioner discriminates against them. A botched compromise has emerged. There will be 15 commissioners with a vote and proper jobs and 15 non-voting commissioners with an office, a staff, a large salary and not much else. Countries will take it in turns, in strict rotation, to have one of the proper jobs.

Meanwhile, the real winner is the European Parliament. Even though senior members of the convention harbour grave doubts about its ability to command respect and attention in Europe, it nonetheless greatly expands its powers, gaining the right to get involved in many legislative procedures—justice, agriculture, the EU budget—from which it used to be excluded.

The final big issue was whether to balance the insane voting weights agreed upon at Nice in 2000—whereby, for example, Germany gets 29 votes when laws are decided (as do Britain, France and Italy) and Spain and Poland, each with half the population of Germany, get 27 votes. Unsurprisingly, the Spaniards are not keen to change this. The compromise is that the EU will move, by 2009 or 2012, to a system whereby a majority will be constituted by a simple majority of states equalling at least 60% of the population of the EU. This would pump up German power within the EU and deflate the power of small and medium-sized countries. The Spaniards, however, have made it clear that they will try to get this changed.

How final is this document?

When Peter Hain, the British representative, said that the constitution was a good “starting point” for governments to negotiate from, he was hissed. Most conventioners want governments to accept it with a minimum of changes. That is unlikely. The French, the Spaniards and the British have all made it clear that they want to unpick things. The IGC will probably run for six months.

What happens about ratification and referendums?

For the constitution to come into force, all countries will have to ratify it. But many will have referendums. The Irish and Danes are constitutionally obliged to; the French, Spaniards and Portuguese have all said they may have plebiscites, as have several of the central European countries that will join the Union in 2004.

The likelihood is that somebody will say no. And as a senior member of the convention puts it, “If 22 countries say yes and three say no, then we have a problem. Legally we cannot proceed; politically we cannot stop.” If only a couple of countries fail to ratify, the others might simply agree to dissolve the old treaties and form a new Union under the new constitution, in effect forcing the malefactors out of the EU. This would probably be illegal, but might be unstoppable anyway. If a larger group refused to sign up to the constitution, the document might be stillborn. Alternatively, the EU could divide into two groups, those who have ratified and those who have refused.

Is there any way out?

As it happens, there is. The constitution includes the first formal statement that a country can leave the EU. Two years' notice is all that is required.