

THE CONSTITUTION IS DEAD. LONG LIVES THE TREATY OF NICE?*

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Introduction

June 2005 is perhaps going to be described in history books as a black date in the process of European integration. Just over one year after people across the continent celebrated the biggest ever enlargement of the EU and the reunification of Europe, all the enthusiasm suddenly seems to be gone. The outcome of the French referendum on the Constitutional Treaty on 29 May 2005 came as a first blow to the new phase in European integration which was underway since the inception of the work of the Convention in February 2002. But this time, the result was nothing close to the outcome of the French referendum on Maastricht. While in the former case, the result was basically a draw (with roughly 51% in favour and 49% against), the vote on the Constitutional Treaty was a clear victory of the "no" camp, having mobilised 55% of those who turned up to cast their ballots against the document. The results of the Dutch referendum were even more astonishing 62% of Dutch voters opposing the new treaty and mere 38% in favour is by far the worst outcome of any EU-related referendum in any country, and it came from a founding member which had

been always considered to be one of the driving forces behind the project.

This article will not look into the reasons why the French and the Dutch voters decided to vote against the Constitutional Treaty. It will rather look into examining the feasibility of different scenarios how to proceed further with the Treaty whose fate is at doubts now. It will also try to assess the likely consequences of the current constitutional crisis in the EU, which in a certain way links back to the reasons for the refusal of the Treaty. The main argument of this article is that it would be politically impossible as well as illegitimate to try to save the Treaty in its entirety, as well as to try to "salvage" certain elements of it by introducing them by the backdoor tactics, although it might seem uncontroversial and necessary. What is needed most of all is a new quality of European leadership, which will be able to face the challenges posed by the recent developments in the EU and find an effective response to them. If the Treaty is not adopted, the EU leaders in order to restore the trust of citizens in the European project, have to show that the EU is able to deliver even under the current framework, in areas

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such as foreign policy or anti-terrorism. This might require a large degree of trust among the member states but perhaps a far greater degree of internal differentiation in the EU than we see nowadays.

Imminent questions after the failed referenda - to go on or not to go on?

The failure to ratify the Constitutional Treaty in two countries of the EU posed an immediate question how to tackle the issue in those countries who have not yet ratified. At the moment of the Dutch no vote, ten countries out of 25 have already completed the ratification process, with one country (Spain) having already held a non-binding referendum in February 2005. Luxemburg furthermore joined this list in July 2005 after a positive outcome of a referendum, making the overall number of ratifying states eleven.

But quite clearly, according to the amendment procedure included in the current treaties as well as in the Constitutional Treaty, the new treaty cannot come into force but by unanimous ratification in all the member states according to their own constitutional provisions. Thus those who argued that the ratification should not go on claiming that it would be impossible to adopt the new text if it was already refused in two countries. One of the first leaders to bury the treaty soon after the French and Dutch votes was the Czech President Klaus, a well-known opponent of the document and actually the only head of state in EU-25 being outrightly opposed to its adoption. Most of the other EU leaders, however, were far more cautious so as not to bury the treaty immediately. The prime ministers of some countries that were supposed to hold the referenda and had already announced the dates issued statements that the referenda would be postponed, namely United

Kingdom, Ireland, Denmark and Poland. That was the least that could be done to calm down the stormy waters of the European public opinion. Almost immediately after the results of the French and the Dutch votes came out, the opinion polls across Europe started to show a considerable drop in support for the Constitutional treaty, a phenomenon which is evident notably from the latest Euro barometer 63 poll published in July 2005. The crucial decision had to be taken by the EU leaders at the June 2005 summit, to which the issue of continuing ratification obviously remained one of the crucial points.

To stop the ratification process would equally require a unanimous agreement of the EU-25 leaders. Unilateral suspension of ratification could be interpreted as acting against the purpose of the new treaty, required from the signatories under general international law and the Vienna Convention on Treaty Law. But to reach the consensus on the termination of ratification at this stage would probably be problematic because of several reasons. The first is the position of the countries that have already ratified. One of the first comments of the Spanish PM J. L. Zapatero was that the ratification should proceed, because the Spanish "yes" vote does not weigh less than the French "no" vote. Very similar voices could be heard from the other capitals that ratified. Their fear was largely motivated by the fact that this rather comfortably accomplished ratification through Parliament could suddenly become complicated if there are substantive changes or if the issue is brought back to the table again. It was also pointed out by the proponents that, despite the negative votes in both France and the Netherlands, majority of the people who had a say actually voted yes (including the Spanish

vote), and so did a majority of countries. One of the main proponents of the continuation of the ratification was President Chirac. The failure to secure a “yes” vote now creates a pressure on the French and Dutch governments, who can be now blamed for any hindrance in the progress in European integration, and considerably decreases their bargaining position at the European playground. If France and the Netherlands remained the only recalcitrant countries (which might not be the case if the ratification continues), their influence in the EU would probably be diminished for a long period of time.

But the main argument for the proponents of continuing ratification was Declaration n. 30, attached to the Constitutional Treaty, stipulating that if by October 2006, problems with ratification endure in one fifth of the member states, the matter will be referred to the European Council. This implies that all the member states are supposed to have a try in ratification, and only after the end of this period, possible problems would be tackled. However, neither in the Treaty nor in another form was it made clear in what way the European Council could deal with the issue nor possible scenarios remained at the level of speculation.

The European Council meeting in June 2005 failed to give efficient responses to the constitutional crisis in the EU. The crucial decision not to halt the ratification at this stage was taken, but a clear way to get out of the crisis was not communicated. Instead, the EU leaders decided somewhat misleadingly to head for a “reflection period”, but the length and contents of this initiative remain obscure. It was not suggested whether the reflection period would be managed in a synergic way at both

EU (Commission, Parliament, Council initiatives) and national or even lower levels. The key commitment of the re-run of the referenda in France and the Netherlands was not made either, and under current political climate could not have even been expected. Thus, the key outcome of the meeting was that the leaders postponed the uncomfortable decision for a later time. This demonstrates a clear lack of leadership and vision in the EU to tackle the imminent problems with enough innovation and courage.

Possible scenarios of dealing with the constitutional crisis

It does not take much imagination to think about possible ways to tackle the current impasse. Let us explore them one by one, suggesting possible opportunities and pitfalls for their viability.

Continuing ratification

The first possibility is to continue with the ratification as if nothing had happened. In fact this is what the EU leaders suggest to do, only having acknowledged that the original deadline of November 2006 for the entry into force will not be met. The main pitfall of the scenario is that it is absolutely unsure what the outcome is going to be. It might help us to identify how deep the crisis is, if there are more countries that refuse the treaty, and this is quite likely, at least in case of the UK but perhaps others (Poland, Denmark, Czech Republic). But even if the referenda pass in all the other countries that are about to hold them, without the French and the Dutch yes the treaty cannot come into force. Thus, this scenario would have to count on the fact that the votes in the two countries will be repeated. This can realistically happen in France only after the presidential election in

2007. In the Netherlands perhaps before, but it is not very likely, as the Dutch government will probably try to use the positive spin-off if the French are more likely to vote yes with the new leadership. This will be, in many ways, the most optimistic scenario for many in Europe in terms of its effect, because it will save the Treaty in its entirety, and preserve a fragile and well-struck compromise without having to think about alternatives. But it will leave Europe seriously wounded in terms of public opinion terminating the period of permissive consensus on European integration. The period of uncertainty, while Europe is waiting for the French and the Dutch to vote again, would apart from paralysing the political and decision-making processes - send a very negative signal to the European public, suggesting that EU referenda are intelligence tests with only one correct answer. The public discontent with the EU would deepen, leading to even more Euro scepticism and cleavage between the citizens and political elites. Moreover, the likelihood that the votes will be repeated, especially in France, is very low according to many experts.

Renegotiation of the treaty

The next option that comes to the fore is a renegotiation of the text (either full or partial) and adoption of a new one, or amendments to the existing one. This scenario is even more unrealistic. Everyone who has followed the process of the Convention and through IGC knows that the final document presents a very fine and fragile compromise, and starting the negotiation exercise from scratch would be almost impossible at least at this stage. Renegotiation of parts of the text would not provide an immediate solution either.

Firstly, unlike in the Danish case on Maastricht in 1992 or in the Irish case on Nice in 2001, the reasons for the refusal of the treaty in France and in the Netherlands are much less clearly identifiable. Therefore, adopting some amendments that could comfort the French or the Dutch voters, or just attaching to the text a declaration like in the case of Ireland on Nice does not seem to be an option. Moreover, what might respond to the concerns of citizens in one country (e.g. more emphasis on “Social Europe” in France) will almost certainly increase opposition to the text in other states in this case for instance the UK or the Netherlands. Secondly, one must not view the Constitutional treaty as a sum of different provisions but very much as a package deal. Thus opening up certain provisions would equal opening of a Pandora box, because the agreement of some governments with certain arrangements was seen as a trade off with others.

Dividing the treaty into two documents (“Constitutional Treaty Light”)

Another option that was floated around recently is the idea of splitting the actual text of the Constitution into two parts. This notion was officially articulated by the cabinet of Polish president Kwasniewski but was also taken up by some MEPs and it was in fact discussed already during the Convention. The arguments behind this relate mainly to the fact that it was not the constitutional part of the new treaty (i.e. Part I and Part II) but the policies part (Part III) for which the citizens in France and in the Netherlands refused the document. As especially Part I is seen as crucial for the efficient functioning of the EU-25+, the idea is that by adopting only the first two parts (including Charter of Fundamental Rights

Part II), a large and in fact most important part of the Constitutional Treaty will be saved while for the more controversial provisions, status quo will be preserved. Moreover, this would respond to the concerns often articulated in various debates that the current Constitutional Treaty is too long, illegible and ordinary citizens will not be able to understand it. The new, truly constitutional text would meet these expectations. Alluring, as this may seem compared to the previously envisaged scenarios, it still poses considerable shortcomings. Firstly, the ratification process would have to be stopped and a new treaty adopted, which still leaves us with the problem of those countries that already ratified. But secondly, and perhaps more importantly, following this scenario would mean that the EU would actually fail in one of the main goals highlighted in the Laeken declaration, i.e. in consolidation of the existing primary law and simplification of the whole legal and institutional framework. One can probably hardly imagine the mess emerging from adopting a new “constitutional” treaty alongside the existing treaties (Treaty establishing EC and EU). Amendments to the current treaties would certainly be needed in any case, albeit they might seem only technical in nature, because Part I creates to large extent a new framework and new terminology. Conversely, Part I bears many references to Part III that would have to be omitted. But sometimes the Constitutional Treaty completely turns around the logic of the EU functioning. For instance while current treaties stipulate that unanimity is the basic rule for decision making in the Council and the application of QMV has to be explicitly acknowledged, the Constitutional Treaty builds on a completely reversed premise QMV is the rule as long as the treaty

stipulates that unanimity applies. It goes similarly for the legislative procedures and involvement of the Council and the European Parliament. Thus the idea that it would be possible just to “cut out” Part I and II and adopt it alongside the current treaties is grossly naive. Furthermore, the EU leaders would hardly escape the temptation to introduce changes in the EU policies once the issue is open, because the Constitutional Treaty did make some important improvements there, namely in Common Foreign and Security Policy (CFSP), European Security and Defence Policy (ESDP) and in the area of Freedom, Security and Justice.

Informal introduction of some elements (Nice Plus)

Another scenario, which gets close to the one previously described, would reckon on the informal introduction of some elements envisaged in the Constitutional Treaty. The idea is that certain provisions could be adopted under the current framework without having to amend the applicable treaties. The argument in favour of this solution could be that certain practice already works this way in the current EU for instance, the so-called financial perspectives are basically an inter-institutional agreement between the Council, European Parliament and the Commission. Also the European Defence Agency was established without a clear treaty mandate. However, it is doubtful which elements could be introduced in this “cherry-picking” manner. The ones that are most often referred to are for instance EU foreign minister, External Action Service, team presidency, deliberation of the Council in public while legislating or the early warning mechanism for national

parliaments. While this scenario also seems quite feasible, it is doubtful whether it can actually propose answers to the most imminent questions. The new mechanism of QMV as well as its extension to other policy areas was often described as indispensable for an efficient functioning of the EU, but they would certainly need treaty amendments. Moreover, trying to introduce some provisions informally might give the impression that the EU leaders are trying to introduce certain elements of the Constitutional Treaty by the “backdoor” tactics. Also what was described as a package deal would be unravelled again, thus the obstacles relating to the adoption of the provisions mentioned would almost certainly bring along new round of negotiations, likely to happen in a very non-transparent way. This could provoke a negative backlash from the European public opinion, leading to even greater alienation of the citizens from the elites. Therefore, if this option were to be viable, a coherent strategy of how to communicate these changes to the European citizens would have to be developed.

Everything stays as it is (Nice scenario)

The last scenario envisages that none of the above-described options could be agreed upon, and the European Union would have to continue under the framework set by the Treaty of Nice. While on one hand this option seems rather uncontroversial, it can hardly provide a long-term solution. It would almost certainly lead countries that want more integration in certain areas to co-operate outside the treaty framework, especially if they find the current provisions on the enhanced co-operation too stringent. But much depends

also on how workable the EU is going to be under Nice. It has not been in force long enough to make accurate judgements, but it seems that even after the enlargement, the catastrophic scenarios that all the decision making would collapse did not prove right. If the EU leaders and member states are unable to agree on any better framework by adopting a new treaty, the European Union is likely to experience a far greater degree of internal differentiation than we see nowadays, and indeed even scenarios about EU completely re-founded can become a reality. The impact of these developments are very difficult to assess, however, they are likely to be detrimental for the EU, as we know it today.

Lessons from the crisis?

From what has been said, it seems that there is actually no obvious way out of the current crisis without serious obstacles or pitfalls. Still, it does not mean that the effect has to be disastrous for the EU. But it has to be taken seriously by the political elites in the member states. Any attempts to play the situation down would not help finding an efficient response to it.

As for the lessons that are to be drawn from the current crisis, what seems to be clear is that that the period of permissive consensus, which Europe experienced throughout the whole post WWII history, is probably gone. European integration is no longer a matter of elites, who can drive the project forward, occasionally asking the citizens to legitimise their decisions, either ex ante or ex post. Paradoxically, it was the Constitutional Treaty, which was supposed to create a far better framework for involvement of citizens in EU politics and make Europe more comprehensible to

them. And it was the citizens who turned this initiative down. The simple conclusion would be that the European leaders failed to communicate the benefits of the treaty well to the electorate. This could be partially true. In Lithuania or Hungary the adoption of the treaty passed virtually unnoticed, without any public debate. In Spain relatively few people bothered to vote, and most of those who turned up did not know what the treaty was about anyway. On the contrary, in France where the people voted against, a very profound debate touching virtually all the levels of society took place. Thus the simple lack of communication cannot explain the public opposition.

Part of the explanation might be the fact that citizens are simply not able to distinguish between “European” and “national” issues. In France it was the French government who was “selling” the Treaty, not the Commission or the European Parliament. Obviously, it is difficult to cast ballot for something proposed by the government that one despises. This nationalisation of the debate was very much fostered by the fact that not many “European” stakeholders appeared in it. This kind of public involvement is highly unlikely to add to the legitimacy of European project.

Still, even the French case cannot provide a definite answer to the motives for the lack of public consensus. In the Netherlands, the debate was much less “nationalised” and in many ways it was about Europe and about the place of the Netherlands in it. One of the explanations is that the Constitutional Treaty actually does not address the issues that the Dutch would like to see debated where Europe is heading and where it is going to stop.

These conclusions pose serious

challenges to the European leadership, as they put qualitatively new questions, which have not been tested, and it is very difficult to find parallel situations in the past. It is nonetheless clear that if there is to be a treaty-based integration, it has to go beyond rather narrow-minded thinking of national boundaries, policies and interests. For instance, the idea that the new treaty could be approved in a Europe-wide referendum was turned down as something “unacceptable” in terms of national sovereignty. While this can be understood, because it would twist around the idea of the EU being based on a consensus of member states, what could have been easily implemented was for instance an agreement to harmonise the dates of referenda on the EU constitution. A parallel can be found with the EP elections while the framework is completely set by the member states, the dates are harmonised through their agreement. This would provide for a better interconnection of the individual country debates and their “Europeanisation” (as opposed to “nationalisation” in the French case). Apart from that, it would avert the current paralysis where the political decision-making is largely stuck because of an enduring constitutional impasse. Nobody dares to assess how many more countries can vote against, and whether the French or Dutch will get a second chance. The failure to agree on this simple measure just shows how much the EU leaders think in their narrow national frameworks. In this respect, the current crisis might be a useful wake up call but it might also come too late.

Similarly, the Dutch example shows that the Constitutional Treaty actually failed to address the issues that are really of citizens’ concern i.e. the questions of what the EU should and should not do and how much Europe we need in different policy

areas. Too much time in the Convention and IGC was wasted talking about institutional arrangements which would improve efficiency, without actually addressing what and why this and that should be done more efficiently. The EU policies were debated during two single sessions of the Convention, yet transposed into by far the most extensive part of the Constitutional Treaty. It is obvious that the EU would have, sooner or later, to get down to discussing these issues that were left aside. There is no guarantee that a wide-ranging consensus would be reached when it comes to issues such as the degree of (financial) solidarity in Europe, either among countries or among citizens. But it should have already happened during the Convention. If Europe is going to proceed this way, it would certainly need another forum of this kind in the (perhaps near) future, which would, however, interlink much better with the civil society.

Consequences

The consequences of the current crisis depend on many variables; including how long the crisis is going to last and what is going to be the outcome. But some estimates can be done as to the short-term prospects for the developments at the European stage.

Firstly, and perhaps most obviously, the appetite for any further enlargement is going to diminish considerably. And this is not only because in France and the Netherlands the “no” votes were often interpreted as the votes against enlargement, including the previous one in May 2004. The European Union is faced with unprecedented situation when it failed to enlarge and reform simultaneously. The

Constitutional Treaty was seen as a way of creating a more efficient and workable framework for EU-25+, and the prevailing political consensus is that the status quo provided for by the Nice Treaty is not satisfactory in the long run. The likely victims of the “enlargement fatigue” are not countries who have already signed the accession treaties, i.e. Bulgaria and Romania, albeit their membership might be postponed. It relates mostly to the other countries clearly on the track of EU membership, namely Turkey and Croatia. The launch of the accession negotiations with Turkey will be the first litmus test of the sincerity of the EU to take further enlargements seriously, despite some specifics surrounding the Turkish case.

Apart from enlargement, the progress in the other areas of the EU external action can prove problematic, too. The Constitutional Treaty was expected to improve considerably the viability of EU foreign policy, not least of its defence branch, and it made some major improvements in this respect, including the EU foreign minister, EU External Action Service, modest extension of QMV on foreign policy issues or easier conditions for enhanced co-operation. Thus the desire of many European citizens to see a more coherent EU foreign policy might face many obstacles arising from the deficiencies of the current framework. There is still a chance that despite the failure to adopt the Treaty, certain measures can be implemented, with all the risks and pitfalls described previously. But the EU aspirations to be a global actor might prove too ambitious and the desire to put the EU on equal footing with the United States only wishful thinking. Perhaps the EU needs to realize that before it wants to engage on a global scene, it has to prove that it is capable of engaging and

delivering in areas in which the member states can agree, such as those of primary interest for the EU the Eastern and Southern neighbours and the Middle East. This would require a large degree of consensus building, but if the EU succeeds, it might help substantially to restore its credibility among the citizens as well as among those countries directly concerned.

Internally, the failure to adopt the constitution poses uncertainty about the homogeneity of the EU integration. It is doubtful whether under the current framework the EU can integrate further on the treaty basis, because the negotiation in the EU 25+ format turns out to be increasingly difficult, and so does the subsequent ratification in all the member states. Perhaps the EU will need to find a far greater degree of flexibility. It might be implemented in the existing treaty framework, e.g. by means of introducing enhanced co-operation among certain countries. But in case the current rules are found too stringent, the countries might decide to proceed outside the treaty framework and start co-operating outside the EU, like they did for instance in case of Schengen, hoping that they will serve as "avant-garde", with the rest following suit at a later stage. Greater flexibility should ultimately be accepted as part of the complicated reality of the future EU development and not something that necessarily has to be detrimental. Adversely, if more heterogeneity in the EU is accepted by the member states, the appetite for further enlargement can paradoxically increase again, because it will not be viewed as something imperilling the very substance of the European project.

The failure to secure the adoption of a hard-struck compromise on the Constitutional Treaty would also likely

result in a general paralysis of decision-making in the EU, not on a technical, day-to-day basis but in terms of the likelihood to agree on big goals and projects. These require a large consensus of the member states which will be much more difficult to conceive. Already at the moment we can see a large degree of mutual distrust and different cleavages between big and small, older and newer, richer and poorer or more social and more liberal member states. The member states are going to be much more trapped by their domestic debates, where the controversy of some proposals such as the liberalisation of services or the financial perspectives is going to feature much more than until now. This in itself is not bad for a greater democratisation and legitimacy of the EU project but it will make the substantial progress at the EU-level much harder to achieve, which paradoxically again can lead to the failure of the EU to deliver tangible benefits and prevent the restoration of trust of EU citizens in it. Countries such as France will be much more cautious in agreeing to any project that could further intimidate the domestic electorate, such as the reform of Common Agricultural Policy or anything that might imperil the cherished European social model. Thus the "big projects" for Europe to engage in seem to be in the area of EU external policy rather than in the internal ones for instance anti-terrorism policy or foreign policy in general which are likely to be accepted less controversially by the citizens. But these areas require much more of the will of member states to work together as well as a large degree of mutual trust in terms of sharing sensitive information, due to the fact that they are still largely based on inter-governmental principles. To what extent this could happen under current circumstances is still doubtful.

Finally, the greatest short-term challenge for the European leaders in the upcoming future linking to all the points mentioned previously will be to restore the trust of citizens in the EU and try to bridge the enormous gap between the political elites and the Europeans. It is very difficult to give any guidance at this stage. However, it seems clear that this time the initiatives cannot remain at a proclamative level but should bring forth some concrete proposals. These might for instance provide for measures that would include engaging the national parliaments in the debate on controversial pieces of EU legislation, such as the service directive or anti-terrorism measures. The bodies such as the Forum on the future of Europe during the Convention, organised on a national basis, should become a regular platform for discussing various initiatives taken at the EU level. It could engage not only national bodies, but also for instance the Commission officials or members of the European Parliament. Undoubtedly, many other ways in which the national, regional and local levels would interact with the EU institutions can be envisaged.