

Overcoming the Constitutional Crisis

Janis A. Emmanouilidis

Paper delivered to the
symposium of the European Parliament on

The future of the constitutional process of the European Union

13/14 October 2005, Brussels

Provisional draft – not to be quoted!

Center for Applied Policy Research (C•A•P)
Bertelsmann Group for Policy Research
Maria-Theresia-Str. 21
D-81675 Munich

☎ +49 (0)89 – 2180 1336
☎ +49 (0)89 - 2180 1329

janis.emmanouilidis@lrz.uni-muenchen.de

www.cap.lmu.de

Overcoming the Constitutional Crisis

Janis A. Emmanouilidis

The European Union (EU) is stuck in a severe crisis. The double No in France and the Netherlands to the Constitutional Treaty (CT) is not the source of the problem, but rather the product of a much more profound crisis of legitimation and orientation.

The EU and its member states have not (yet) been able to provide the citizens with convincing answers to two fundamental questions: (i) What do we need the EU for – what is its added value beyond the already achieved level of integration? And (ii): Where is the EU of 25 and more member states heading to in the future?

No European Constitution – whatever its quality – can answer these fundamental questions all by itself. The EU's basic document can merely set the politico-institutional framework. It would have been illusionary to expect that the Constitutional Treaty could have provided the cure for the current European malaise.

In spite of these limitations, however, there is a danger that the current constitutional crisis might have long-lasting negative effects on the future EU. This will be the case, if the crisis is not followed by a substantial reaction, but rather by resignation, piecemeal engineering or inertia.

Four months after the referenda in France and the Netherlands the political class still seems to a large extent paralyzed. The reflection phase has not produced any substantial results, not even a substantial debate beyond political rhetoric. The wider European public is either not taking notice of the current crisis or even worse does not care about it.

The European Union and its member states cannot afford to ignore the current situation. It would be a mistake to continue with business as usual. But what should be done? In order to figure out a convincing solution, one needs to answer three basic questions:

- (1) Should, or rather can the Constitutional Treaty be salvaged?
- (2) What can be done, if ratification and the entry into force of the Constitutional Treaty fail?
- (3) How can the EU reconnect to its citizens against the background of the current crisis?

Salvaging the Constitutional Treaty – a matter of political realism and not of wishful thinking

If it were a matter of wish, the Constitutional Treaty should be salvaged. The document worked out by the Convention and the Intergovernmental Conference (IGC) is by no means perfect. However, with the Constitutional Treaty the EU and its member states have for the first time in history agreed on a single basic document, tying the member states closer together than ever. After the failure of Nice, the Treaty includes a wide series of substantial reforms improving the enlarged EU's efficiency, transparency and legitimacy. On the grounds of this positive balance sheet it seems obvious that the Constitutional Treaty should be salvaged.

However, in the end the salvation of the Constitutional Treaty is not a matter of wish, but an issue of political realism. From the latter perspective the salvation of the Constitutional Treaty seems highly unlikely. The Constitutional Treaty is not “dead”, but it has fallen into a deep coma. And a look at some of the preconditions necessary for revitalizing the Constitutional Treaty, indicates the unlikelihood of a cure:

- **(1) Wide support throughout the EU:** The political and intellectual elites in all member states would have to strongly support the Constitutional Treaty. The political class would have to credibly convey to the European electorate that there is no alternative to ratification. However, in the months following the double “No” in France and the Netherlands the topic has not been on the top of national agendas. And as time progresses the decision-makers seem more and more less willing to fiercely support the Constitutional Treaty.
- **(2) Strong gesture from the “yes-camp”:** A successful continuation of the ratification process preconditions a convincing signal from the 14 member states which have already ratified the Constitutional Treaty.¹ These countries – representing 235 million of the EU’s 454 million citizens (51,8 per cent) – would have to jointly call upon the remaining nine member states² to also ratify the Constitutional Treaty. However, one can also witness a certain degree of constitutional fatigue in the member states of the “yes-camp”. This fatigue has reached both the political leadership and ordinary citizens, where the percentage of people not supporting the Constitutional Treaty is rising.
- **(3) A boost from the nine remaining member states:** The Constitutional Treaty can only be salvaged if more member states soon decide to continue their national ratification process even after the “No” in France and the Netherlands. The Luxembourg example has shown the way, but one country will not be enough – other member states would have to follow. Positive votes in the remaining nine EU countries – six of which will (probably) hold a referendum – would give the ratification process a significant political boost. However, the political elites in these countries do not seem eager to tie their political fate to the fate of the Constitutional Treaty. This tendency increases over time. Especially, if the politicians in charge are not the ones who adopted the Constitutional Treaty in the IGC.
- **(4) A second referendum in the “No-camp”:** The countries in which the Constitutional Treaty was initially rejected in a first attempt would need to have a re-vote. This will in the end most probably not only include France and the Netherlands. In case the national ratification processes continue, it seems rather likely that other EU countries will also vote against the Constitutional Treaty. However, a second referendum in more than one EU country will be difficult to manage. Especially as the reasons behind a negative vote differ (significantly) from one country to the other, which will make it difficult to find a one-fits-all recipe.

¹ The Constitutional Treaty has been ratified in the following 14 member states: Lithuania (3.5 million), Hungary (10.1 million), Slovenia (2 million), Italy (57.3 million), Greece (11 million), Slovakia (5.4 million), Spain (41.5 million), Austria (8.1 million), Germany (82.5 million), Latvia (2.3. million), Cyprus (0.7 million), Malta (0.4 million), Luxemburg (0.4 million) and Belgium (10.3 million).

² The Constitutional Treaty has not been ratified by the following nine countries: Czech Republic (10.2 million; facultative referendum), Denmark (5.4 million; obligatory referendum), Estonia (1.3 million; parliamentary ratification), Finland (5.2 million; parliamentary ratification), Ireland (4 million; obligatory referendum and parliamentary ratification), Poland (38.2 million; possibly facultative referendum), Portugal (10.4 million; facultative referendum), Sweden (9 million; parliamentary ratification) and the United Kingdom (59.3 million; consultative referendum and parliamentary ratification).

- **(5) No alternative to ratification in all member states:** Even if the ratification process continues, one of the greatest deficits of the constitutional construction will still remain: The entry into force of the Constitutional Treaty presupposes ratification in all member states. This was a highly difficult requirement from the outset. Following the “No” votes in France and the Netherlands and the negative sentiments this has caused throughout Europe, this precondition has become a hurdle almost impossible to take.

Looking for a second-best alternative: A Treaty Amending the Treaty of Nice

The above list of complex preconditions necessary for a salvation of the Constitutional Treaty indicates the unlikelihood of a rescue. There is thus a need to think about alternatives. But what are the options and which alternative seems to be the best?

The following three options should not be considered:

No-Option 1: Wait-and-see approach: This option foresees that the ratification process should be put on ice – at least for two or three years. The ratification process should continue when the overall political and economic climate in the EU and the member states has improved. This option in particular assumes a change of political leadership in France and the Netherlands as a prerequisite for the continuation of the national ratification procedures.

This wait-and-see approach is flawed by the fact that the Constitutional Treaty will lose its attractiveness as time passes by. Constitutional dynamism will evaporate. Moreover, in case the political and economic climate should actually improve, the opponents of the Treaty will argue that experience has proven that the EU does not need this Constitutional Treaty. On the other hand, in case the political and economic framework conditions do not evolve positively, the likelihood of a positive outcome of the ratification process will deteriorate even more.

No-Option 2: Renegotiation of the Constitutional Treaty: According to this option the ratification process should continue after some marginal changes to the Constitutional Treaty. This theoretical alternative is no viable option either.

The reasons behind the “No” in France and the Netherlands were not identical. And the reasons in those two countries will not correspond to the reasons behind a possible future “No” in other member states. So which provisions of the Constitutional Treaty should be changed? Or which additions can be made? Changes in one area might be perceived positively in one member state but negatively in another. Moreover, the chances are high that minor changes to the Constitutional Treaty will lead to a substantial re-opening of the entire document – with negative consequences for the overall quality of the Constitutional Treaty.

No-Option 3: Muddling through and Nice-Plus approach: This option starts from the argument that the enlarged EU can continue to efficiently operate on the legal basis of Nice. This alternative includes the possibility that some innovations of the Constitutional Treaty could be implemented into practice through Inter-Institutional Agreements, by changing the Rules of Procedure of individual EU institutions or through the incorporation of certain reforms in the framework of future accession treaties.

The retention of the Treaty of Nice (“Nice forever”) is no feasible option in view of the EU’s already existing deficits with regard to democracy, efficiency and transparency. Most political decision-makers and EU experts agree that the Treaty of Nice is not the suitable framework for preparing a European Union of 25 and soon more member states to meet the future challenges.

In addition, the implementation of certain reforms in the absence of a ratified Constitutional Treaty (Nice-Plus) would come against a number of legal and political barriers: (i) Such a practice would create an intransparent and opaque patchwork of widely dispersed provisions. (ii) Individual innovations could fail to surmount the high hurdle of consensus among the member states since the usual package-deal method would be far more difficult to employ than in a large-scale intergovernmental conference. (iii) In many cases the implementation of major reforms laid down in the Constitutional Treaty cannot be done without a formal amendment of the current European Treaties (e.g., “double majority”, extension of majority decision-making in the Council, introduction of a single legal personality).

As the above options are either not viable or linked to a number of significant deficiencies, there is a need for another alternative in case the Constitutional Treaty cannot enter into force.

A pragmatic option would be to incorporate the core of the constitutional innovations into the existing Treaties. In the member states the controversies were not sparked off by the institutional and procedural core of the Constitutional Treaty. The considerable improvements with regard to efficiency, democracy and transparency have not been called into question. These central features ought to be preserved even if ratification should fail.

To apply this alternative it is necessary to identify the central reforms of the Constitutional Treaty and to bring them together in the shape of a treaty amending the Treaty of Nice. In a first step, a *Group of Wise Men* could single out the indispensable elements of such a treaty.

Changes laid down in an amendment treaty would refer to both the Treaty on the European Union (EU Treaty) and the Treaty establishing the European Community (EC Treaty). In the tradition of previous treaty revisions, the amendment treaty would have to be adopted by an intergovernmental conference and ratified in the member states on the basis of the respective national provisions.

The reform of the current Treaties on the basis of the main innovations contained in the Constitutional Treaty would affect the following core areas:³

- (1) the reform of the EU’s institutional system;
- (2) the development of the decision-making and voting procedures;
- (3) the reform and enhancement of the instruments of differentiated integration;
- (4) and a series of structural provisions.

(1) Reform of the institutional system

The central institutional reforms of the Constitutional Treaty should be incorporated into the current Treaties. This applies above all to the appointment of an elected President of the European Council, the introduction of a European Foreign Minister including a new administrative structure (European External Action Service), the establishment of a team presidency in the Council of Ministers, the appointment of a permanent president of the Euro Group, and the reduction in the size of the Commission and the strengthening of its President.

3 For a draft version of the amendment treaty see: Bertelsmann Foundation and Center for Applied Policy Research, *Treaty Amending the Treaty of Nice*, June 2005. Download under: <http://www.cap-lmu.de/publikationen/2005/vertrag.php>

The personalization of the European leadership architecture will make it possible to assign responsibilities on the EU level more clearly and to enhance the continuity, visibility and coherence of European policymaking.

(2) Development of the decision-making and voting procedures

If the EU wishes to keep its ability to take action and to enhance its democratic legitimation, it needs to reform the decision-making and voting procedures in both the Council of Ministers and the European Parliament, and assign a prominent role to national parliaments.

The introduction of the voting procedure of “double majority” constitutes a milestone in the development of the European Union. Applying the number of citizens and the number of states as a basis for decision-making in the Council of Ministers reflects the two strands of EU legitimation. Moreover, this voting procedure will make it more difficult for member states to form blockade coalitions and easier to form constructive majorities.

The extension of majority decision-making in the Council of Ministers from 137 to 181 instances is decisive for the problem-solving competence of an enlarged EU and should also be taken into account in a revision of the Treaty of Nice.

The rights of national parliaments (early warning mechanism) should be enhanced and elements of direct democracy (citizens’ initiative) should be introduced. Furthermore, the budgetary powers and the co-decision rights of the European Parliament in the legislative process should be strengthened (extension of co-decision).

(3) Reforming and enhancing the instruments of differentiated integration

In the enlarged EU the interests of the member states are becoming increasingly diverse. For this reason strategies of differentiated integration are of paramount importance. Blockades or the lack of political will in certain member states in the fields of monetary, internal and social policy were already in the past overcome with the help of differentiation, thereby promoting the process of integration.

The amendment of the current Treaties should take over the reforms of the existing flexibility instruments laid down in the Constitutional Treaty (enhanced cooperation) and adopt the new instruments especially in the area of Common Security and Defence Policy (Permanent Structured Cooperation, EU Missions, cooperation within the European Defence Agency).

(4) Structural Provisions

In addition to the institutional changes, the reform of the decision-making and voting procedures, and the development of the instruments of differentiated integration, certain important structural provisions of the Constitutional Treaty should form part of the amendments to the existing Treaties. These include

- the legally binding incorporation of the *Charter of Fundamental Rights* into the Treaty of Nice. A reference to the legally binding nature of the Charter – instead of the complete text – would suffice;
- the introduction of *competence categories* that describe the areas in which the Union possesses exclusive powers, the responsibilities shared by the Union and the member states, and the areas in which the Union may act only in a complementary or supportive manner;
- the incorporation of the so-called “*passerelle*” or *bridging clauses*, which will make it possible to improve the decision-making procedures in the Council of Ministers, the

co-decision-making powers of the European Parliament, or certain internal policies without convening an intergovernmental conference;

- the reform of the *treaty revision procedure*, so that future changes to primary law are not decided merely by government representatives behind closed doors, but are publicly debated and concluded in the framework of a Convention including also representatives of the national parliaments, the European Parliament and the European Commission;
- the adoption of the *solidarity clause*, according to which EU members assist each other in case a member state is subject to a terrorist attack or the victim of a natural or “man-made” disaster. This clause has already proved its worth in EU practice after the terrorist attacks in Madrid;
- the introduction of the *mutual assistance clause*, with which the EU states undertake to provide support in the case of armed aggression on the territory of a member state, if need be of a military nature.

These changes to certain provisions of the Nice–Treaty could preserve the central innovations of the Constitutional Treaty without embarking on a fundamental reformulation of European primary law. The restricted revision of the current Treaties by an intergovernmental conference will strengthen both the EU’s ability to act and its democratic legitimacy. At the same time it deliberately eschews a strikingly symbolic emphasis on the treaty-based nature of integration.

Beyond a treaty amending the Treaty of Nice – How to re-connect to EU citizens?

Amending the Treaty of Nice will not be end of history. No reform of the EU’s current treaty base will by itself suffice to reconnect the European Union to its citizens. On the other side, information campaigns and *ad hoc* European fora involving civil society – however important they are – will neither solve the problem.

In order to re-gain the peoples support for the European project one needs to improve both the content of and the structures behind European politics. Content and structure are two sides of the same coin: Focus on merely one side will be doomed to failure.

The European Union and its member states should both (1) strengthen the EU’s output legitimacy and (2) elaborate a Constitution worth its name:

(1) Strengthening the EU’s output legitimacy – defining a new project: Institutional and legal reforms will not suffice to reconnect citizens to the EU. Since Maastricht in the early 1990s the public has the impression that European politics is merely about institutional reform. The electorate, however, is interested in the content and output of EU policies and not in the underlying structures.

The experiences of the common market, the introduction of the Euro, Schengen and EU enlargement have shown that the European Union requires concrete projects to secure both dynamism and legitimacy.

The old grand projects are no longer attractive. Hence, there is a need for new projects, which are ambitious but at the same time concrete and realistic. The EU and its member states should not raise false expectations, which will eventually back-fire and increase public frustration with the EU.

Surveys clearly show that citizens particularly want the EU to deliver in the fields of economy and security.

Concerning economy: The experience with the Lisbon Process is proof that the EU has not been capable of delivering tangible results beyond the positive effects resulting from the common market. The Lisbon Process has by and large been a failure. The responsibility for this negative record lies predominantly with the member states and not with the EU as such, which is not equipped with the relevant competences. In view of the future, economic integration beyond the final completion of the common market seems highly unlikely. In spite of the superficial debates about a *gouvernement économique*, member states' governments are not willing to further give up their competences. Moreover, it seems highly questionable whether moves towards a higher level of economic integration is advisable from an economic point of view. As this is the case, future projects could merely concentrate on projects aiming at the completion of the common market – liberalisation of services, tax harmonisation etc. Projects of this kind are important in their own right. But they do not seem suitable to attract the attention of citizens.

Concerning security: Taking into account the expectations of citizens and the challenges to international and national security lying ahead, it seems reasonable to look for a new grand project in the fields of internal and external security. Both areas are already very dynamic, but activities are highly dispersed. There are no concrete visible grand projects. And this is the main deficit. Any attempt to formulate a grand project in the field of security would thus have to begin by defining a concrete goal (e.g. the build-up of an Integrated European Army), a concrete timetable (similar to the introduction of the Euro), concrete measures (similar to the common market programme) and a detailed communication strategy.

(2) Producing a Constitution II: The legal foundations of the EU should be fundamentally revised. The elaboration of a Constitution worth its name is independent of whether the Constitutional Treaty will be ratified or whether other options will in the end prevail. The new Constitution should be based on the Constitutional Treaty but eradicate its main deficiencies. A Constitution II should in particular include the following three features:

- *Constitutional simplicity:* A novel Constitution should tie the major provisions of primary law in a short, readable and concise constitutional document. For this reason, the EU's primary law should be divided into a first part including all fundamental constitutional provisions and, conversely, a separate body of primary law including all detailed non-constitutional elements. The constitutional part would by and large include Part I, II and IV of the Constitutional Treaty. The second part including the detailed non-constitutional provisions would resemble Part III of the Constitutional Treaty. However, in practice it will not suffice to pull Parts I, II and IV (CT) together in one document and to expel Part III (CT) from a new Constitution. A constitutional simplification will rather require major changes to Part III and a number of technical but also politically sensible changes of the remaining parts of the Constitutional Treaty (e.g. new ratification procedure). The non-constitutional part should be subject to an easier amendment procedure.
- *Novel ratification procedure:* The problems related to the ratification of the Constitutional Treaty are clear proof that the EU requires new rules determining the entry into force of its constitutional basis. As the level of integration is proceeding and as the number of member states is increasing, there is a clear necessity to introduce new provisions allowing a future Constitution to enter into force even if some member states have failed to ratify it. The provisions laid down in the Constitutional Treaty are insufficient.
- *Politisation of the EU-system:* Most importantly, future reforms should increase the level of politisation in the European Union. Citizens increasingly feel themselves as

being the object and not the sovereign subject of European politics. The electorate has the impression that it cannot influence decisions taken in Brussels – neither on the national nor the European level. This deficit cannot be eliminated through a (sporadic) stronger involvement of civil society or by the introduction of new European institutions (e.g. Congress of the Peoples of Europe). It will rather require systemic reforms.

The interest and participation of the European public will only increase if the opposition principle finds its way into European politics on the supranational, the national and the sub-national level. The development and public portrayal of alternative political concepts and ideas has the power to attract the attention of the electorate for European issues.

The introduction of the reforms laid down in the Constitutional Treaty would have been a step in the right direction. More qualified-majority voting in the Council and the increase of the powers of the European Parliament (EP) would have provoked more permanent and visible coalitions. The fact that the European Council would have been obliged to take into account the results of the elections to the European Parliament when electing the Commission President would have indirectly raised the powers of the electorate.

These reforms might have increased the level of politisation. However, a future Constitution II would have to go further. Most significantly, reforms would have to “force” European party families to overcome their heterogeneity and oblige them to define clear political alternatives. They will move in this direction only if the EU’s political system forces them to do so. In this respect a Constitution II needs to be more innovative. The direct election of the Commission President by the European Parliament would be a highly important element, as it would force European parties to nominate top candidates on the basis of a common programme. Such an innovation would substantially increase the level of politisation of the EU and thus re-attract the interest of European citizens and media in European politics.

The elaboration of a Constitution II will require yet another Convention and a subsequent IGC. This process will take years. Taken into account the present political situation in the EU and the member states, one can expect that such an enterprise will begin by 2007/08 – the earliest.