

# Scenarios for escaping the constitutional impasse



The European Union's constitutional treaty remains central to whatever realistic scenario one might imagine, argues **Philippe de Schoutheete**, who was for many years the doyen of the EU diplomatic corps in Brussels. He assesses the options now open to policymakers

When confronted with a situation that is both critical and complex it is generally advisable to go back to basics. Now that precisely such a situation has arisen in the European Union with the rejection of the constitution by French and Dutch referenda, what are the basics?

A first point – aptly made by Tøger Seidenfaden in the Spring issue of *Europe's World* – is that referenda do not represent a “higher form” of democracy. Representative democracy is not such a bad legitimisation mechanism, the basic values of post-war western democracies in the period defined, incorporated and defended by the UN, NATO and European treaties, none of which were approved by referenda. If the European Coal and Steel Community treaty had been submitted to a referendum in 1950, it would most certainly have failed in France, Belgium and the Netherlands. Five years after the war, public opinion was not ready to accept any treaty implying durable links with Germany. Its foundation was nevertheless an act of wisdom worthy of

mature democracies. Countries that practice referenda are no more democratic than a country like Belgium where they are prohibited by the constitution. Nevertheless, the trend in favour of referenda on European treaty issues is strong and will not go away.

A second point is that international relations are based on the assumption that governments will ratify and implement the treaties they have signed. Treaties are to nations what contracts are to business: if you don't respect your signature, your credibility disappears. Why negotiate a new text with a government that has shown itself incapable of implementing the previous one? This point does not seem always to be understood, notably in France where part of the “Non” campaign in the referendum was based on the false assumption that a “plan B” would appear from somewhere, or that a new treaty could easily be negotiated. An interesting parallel is to be found in Michel Dumoulin's biography of Paul-Henri Spaak. In June 1954, Spaak, as the Belgian Foreign

Minister, was pressing France for speedy ratification of the European Defence Community treaty, but French Premier Pierre Mendès France suggested modifying the text. Spaak reacted angrily, saying that "it was not for France to modify a treaty which she had signed with others". When such an incident occurs, time has to elapse and leaders change before fresh discussions can take place.

A third point, perhaps easily forgotten, is that the treaty we are talking about is neither the result of abstract academic debate nor a technocratic conspiracy by unelected civil servants. In all its essential parts, it is the result of 18 months of debate in a constitutional Convention that was almost entirely composed of elected politicians. They were not "representatives" in the sense of having been elected for that precise purpose (as Seidenfaden would like to see happen in future), but they were representative in the sense that they were drawn from a wide variety of political forces and reflected the diverse views prevalent in member states, candidate countries and EU institutions. They spent three months listening to all sorts of opinions expressed by civil society, and then with an unprecedented degree of transparency debated for more than a year before finally coming to a large degree of agreement. The Praesidium, somewhat optimistically, chose to call it a consensus, and in a moment of euphoria the text was called a constitution.

The fact was that both "consensus" and "constitution" were the result of negotiated compromises between left and right, big and small, rich and poor, members new and

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By **Pawel Swieboda**

## I share the analysis but debate the prescriptions

**T**he constitution is ill, long live the constitution!" is Philippe de Schoutheete's message. I share his optimism, but several caveats need to be made. We need a better understanding of the rapid melt-down of public support for the constitutional treaty in early 2005, and referring to the unpopularity of the leaders or to economic unease does not suffice. For the first time, tens of millions of people in founding member states voted against the European icon. What is more, a culture of resistance to change has developed within Europe just as the EU was positioning itself as a missionary of reform.

I would also be very cautious about dismissing referenda as a "higher form" of democracy. The founding fathers were able to proceed without any wider public debate, but today's reality is different. Citizens have an overwhelming degree of democratic choice, and it is still on the rise, so the problem lies more in consistency. When used at random, referenda produce shockwaves to the system. People can rightly argue, as they did in France and the Netherlands, that they had not been consulted for too long and therefore wished to register their discontent.

Nor am I entirely convinced by de Schoutheete's assertion that "international relations are based on the assumption that

old, federalists, sovereigntists and eurosceptics, net payers and net receivers, national institutions and European institutions. That those compromises are highly relevant to political life in Europe has been confirmed by the fact that a majority of member states, representing a majority of the population of the Union, has ratified that treaty. The two referenda have obscured that historical background and those facts, but they are, nevertheless, facts.

What conclusions can we draw from these considerations? First that it would be madness to launch a new full-scale negotiation process of the sort that, through the Convention, led to the present constitution. There is no reason to suppose that a new negotiation would arrive at a result fundamentally different to the one reached in 2004. Contradictory interests, views, ideologies, concepts and prejudices determined the result of that exercise, and these do not change rapidly. And who can guarantee that a new treaty, probably quite similar to the present one, would be easily ratified? We cannot run the risk of another major failure.

Similarly, the idea of cherry picking this or that part of the treaty should be treated with extreme caution, at least in the short term. Each element of the treaty is the result of mutual concessions, linking one article to one or more others. The idea that some parts can be implemented in isolation

is, for the most part, naïve, though there may be some exceptions.

We need time; certainly more time than the single year allowed for in the European Council's decision of June 2005. Time to see new political leaders come to power. Time to fully recognise the weaknesses of the present system of European governance, which every new presidency makes the more obvious. Time, hopefully, to benefit from an upturn in economic activity and a decrease in unemployment. Time to take a few concrete initiatives on points which concern European citizens, and bring these initiatives to successful outcomes. In short, we need time to overcome the atmosphere of collective angst and depression that is a partial explanation at least of the two failed referenda.

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This leads us probably to 2008, perhaps even later as suggested by a recent manifesto from the London-based Centre for European Reform. But what then? A new generation of political leaders, facing internal and external challenges to the prosperity, social structure and influence of the European Union, will have to debate how to strengthen the weak system of European governance they have inherited. In the first instance they will have to consider whether it is at all possible, in a Union with 27 or more members, to adopt quasi-constitutional texts similar to the recent treaties (Maastricht, Amsterdam, Nice, and the constitution itself) and apply

significant across the board reforms of the institutional structure. They may come to the conclusion that in such cases referenda are inevitable in a large number of EU countries, and that the risk of losing at least one of them for whatever local reason means the exercise is counter-productive and should no longer be attempted. This opinion is certainly gaining ground at the moment. Or the next generation of EU leaders may come to the opposite conclusion, that although referenda will always be risky their number and their scope can be limited and the chances of winning them increased through this or that practical arrangement, and that therefore we should not abandon the concept of broad and ambitious treaties.

If the second opinion were to prevail, the constitutional treaty would become the object of renewed interest. It is a relatively well balanced and coherent text and it has the great advantage of being on the table, while all other solutions would have to be negotiated from scratch. To make it more acceptable to this or that constituency, declarations and protocols could be added to it, as was the case when past treaties ran into difficulties. Its name might also be changed, because the concept of a "constitution" has in various countries been part of the problem. A more ambitious change would remove Part Three of the treaty, dealing with policies, from the rest so as to underline the institutional character of the text. This last change is more difficult than many people believe, not only because of numerous cross references in the present text, but also because some policies are considered by some countries

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governments will ratify and implement the treaties they have signed". It is obvious that no government wants to go through the torment of picking up the pieces after a failed ratification attempt, but the question of legitimacy is going to be a vital test of the relevance of the European project in the 21st century. The vote on the constitution therefore served as an element of a new European system of checks and balances, and there will be more to come.

It is true to say that the Convention was the most democratic experiment in European history, and its months of debate generated an enormous stock of ideas. At the same time, there were evident failures in the way the Convention functioned. The work of the Praesidium was clearly far from transparent. The other trap to be avoided was that of glorifying things by calling the document a "constitution". This was a mistake because it created both exaggerated expectations and excessive fears.

As for prescriptions, I would agree that the last thing the European Union needs is to restart negotiations all over again. It is no surprise that French opponents of the treaty who preached renegotiation of the constitution have disappeared from the political scene. There is no appetite for that among the public.

I believe an attempt to solve the problem should be made at a relatively early stage, perhaps as soon as the new political landscape shapes up in mid-2007. My reasoning is threefold. First, even on ice the constitution will lose any remaining freshness,

as sacrosanct and worthy of the most exalted location in the treaties. However, the exercise is technically feasible and some discreet preparatory work is already being done. All these different arrangements should be the object of a political agreement between member states before the convocation of a new intergovernmental conference (IGC). The understanding should be that no subject other than those previously agreed upon would be debated in the IGC. This is probably the only way to avoid opening Pandora's box and debating anew every single article of the treaty. The approach suggested above is neither easy nor without risks, but it remains realistic as long as the initial assumption, namely that the ratification process can succeed, turns out to be correct.

If, on the other hand, heads of government were to conclude that we should no longer attempt to draft major new treaties, but instead concentrate on solving one by one specific weaknesses or points of inefficiency in the present set up, then the time would come for the cherry pickers. And, again, the treaty would be a primary source because it deals in a balanced way with many recognised weaknesses and inefficiencies. One can imagine a protocol creating the post of foreign minister at the head of a joint EU external service; and another one, a little later perhaps, extending majority voting and parliamentary co-decision to some new

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policies; then a third protocol giving a degree of competence to national parliaments in the European decision-making process, and so on. Some countries might decide that such treaty amendments, because of their limited scope, did not justify holding a referendum. In those countries where a referendum would nevertheless be held, the debate could presumably be concentrated on the specific issue at stake, without wandering into speculation on, say, the ills of globalisation or the threat of Polish plumbers. Democracy is better served when public debate is concentrated on specific concrete decisions rather than on legal texts dealing with a great variety of issues.

And of course cherries can be picked in groups of different size. Some countries might want to adopt and be bound together by the defence provisions the constitutional treaty offers. Others might want to move forward in matters of justice and home affairs, as indeed some have decided to do in the treaty of Prüm. Belgium's Prime Minister Guy Verhofstadt has widely advocated, including in the pages of this journal, the idea of a political core based on the eurozone. A number of possibilities on reinforced co-operation are offered by treaty provisions, and beyond that experience shows that whenever a political will exists, legal experts will find a way to allow some to move forward.

An interesting point is that the constitutional treaty remains central to whatever realistic scenario one might consider. All over Europe, journalists, experts and politicians (including some government ministers who should know better) have pronounced it dead. But past experience shows that if they are sufficiently broadly based, balanced and coherent, such texts do not die. In fact, they cannot be killed! The Tindemans report, by former Belgian Premier Leo Tindemans, is a good example. On the basis of wide consultation in all Community countries, it proposed in January 1976 a number of relatively ambitious institutional reforms and new policies. It was poorly treated, and in the course of the year to the glee of some and the despair of others, several European Councils, acting with due politeness, pronounced it dead and buried. But to read that report today, practically every single proposal it contains has been put into application over the years. Not because some supranational demon is at work behind the scene, but because it gave a correct assessment of medium-term problems and potential solutions. In my view, this is also the case with the constitutional treaty. A more brilliant future may yet be in store for it, but even if its destiny is to follow in the steps of the Tindemans report, so be it. In the very long run, it doesn't make much difference. □

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## ADDITIONAL READING

*"The EU Constitution: The Best Way Forward?"*, Steven Blockmans, Deirdre Curtin and Alfred E. Kellerman, Asser Press, 2006, ISBN 9067042005

*"Travelling hopefully: Ethics, action, perspective for a revival of Europe"*, Philippe Herzog, Editions Le Manuscrit, 2006, ISBN 274 8170 849

*"Spaak"*, Michel Dumoulin, Racine, 1999, ISBN: 287 3861 622

*"Redefining Europe"*, Joseph Drew, Rodopi, December 2005, ISBN 90 4201 7651

*EurActiv - Constitution*: [www.euractiv.com/en/constitution](http://www.euractiv.com/en/constitution)

and the reflection period cannot be extended forever. Second, a fundamental review of the EU budget is due to begin in 2008-2009, so placing two major projects on the drawing board at once would be a risky exercise and should be avoided. Third, there are institutional issues in line with the Nice treaty to be solved before 2009. There will have to be a decision about a smaller European Commission, and the closer we get to that date, the greater the temptation will be to dream up makeshift solutions.

Cherry-picking is also an invitation for trouble. The compromise on the constitutional treaty was a comprehensive one and should be preserved as such. Introducing successive improvements would almost certainly mean that the cohesion of the Union is sacrificed and the different speeds would develop. This would come at a price. As for Philippe de Schoutheete's optimism that "such texts do not die", it will nevertheless need a helping hand. The European Union has to regain its appeal in the eyes of the citizens, and its old building blocks, including the single market, will not be enough in this rapidly globalising world. Therefore, a lot more has to be reinvented than just the constitutional treaty. □

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