

Many roads lead to Rome. But which one leads to the European Constitution?

Some views about the Constitutional Treaty process

To get to Rome from Rome, logically speaking you would have to go round in a circle. Do this, though, and you won't actually proceed very far, treading on the same spot. Even so, between the signing of the Treaties of Rome in 1957 and the passing of the European Constitutional Treaty in Rome in 2004, a lot of ground has in fact been covered.

Following the failure of the Constitution to be ratified by two member states, the European project is threatening to end up in infinite orbit. At the moment, it really is a case of the EU going round in circles as it enters a phase of reflection about Europe's future. If, in the Netherlands, little is now heard about the Constitution, in France – where both the left-wing and the right-wing camps consider it more or less defunct – the final downward spiral is looming.

It is in this phase that the EU Office of the Friedrich-Ebert-Stiftung (FES) – within the framework of its usual discussion rounds – acts as a forum to provide representatives of national governments and ministries from both national and European parliaments as well as from other European institutions with the opportunity to cast some light on perspectives facing the European Constitutional Treaty:

Voices in the European Parliament – firm in content, flexible in form

The Constitutional Treaty was signed by all of the EU state and government leaders in Rome on 29 October 2004. For many representatives, especially those sitting on the Constitutional Affairs Committee of the European Parliament, the situation is thus a clear and rational one – i.e. *pacta sunt servanda* ("contracts are to be respected"). As a consequence, 15 + 2 member states have already ratified the Constitution as a whole either by parlia-

mentary means or by calling a referendum. That "+ 2" refers to Rumania and Bulgaria who, as candidate members, have already taken the constitutional clauses into account as part of their accessional preparations. For this large majority of the member states, then, any subsequent amendment to the Treaty would be the equivalent of relinquishing rights already acquired and agreed. On the other hand, following the "non" and the "nee" from France and the Netherlands, a few countries have decided to postpone the ratification process until further notice. But the ratification period as such continues regardless.¹

Most members of the European Parliament now see little room for manoeuvre with the substance of the Constitution – at best some cosmetic surgery to the form – and prefer to cite the principle of "firm in content, flexible in form". This is only because the current version of the Constitutional Treaty is seen as the best compromise after the lengthy mediation procedures by the Constitutional Convention. Any renewed attempts to improve will only lead to a compromise worse than that already negotiated. Besides, the ratification carousel would be set spinning afresh, as each and every amendment to the Treaty would require agreement by all members. A Europe *à la carte* with each member state picking its favourite passages would be singularly inappropriate for such a significant constitutional project. The EU needs to remain a unitary entity with values, rules and treaties recognised by everybody and applied to everybody equally so that the EU stays strong both internally and externally.

The broad approval (500 for, 137 against and 40 abstentions) that European Parliament gave to the EU Constitution on 12 January 2005 was not a

¹ The EU Constitution has already been ratified by Austria, Belgium, Cyprus, Estonia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxemburg, Malta, Slovakia, Slovenia and Spain. Waiting to ratify are: Czechia, Denmark, Finland, Ireland, Poland, Portugal, Sweden and the UK.

contractual necessity. That being the case, it is now relying on another lever to exert pressure. What is necessary is the approval of the European Parliament for the accession of new countries to the EU. And Parliament sees the European Constitution as the only correct way forward for the further development of the EU's constitutional and democratic capacities, if future enlargements are to work reasonably well. Which is why one hears voices in Parliament threatening to withhold approval for further expansion in the event of no progress being made on the constitutional issue. The fact that, with the accession of Rumania and Bulgaria, most member countries and the European Commission consider enlargement mechanisms more or less frozen anyway will of course reduce that leverage effect. However, it would also give time for the Constitution to be implemented on a solid basis.

The costs of a "non-constitution" – costs which would impinge on numerous areas within the EU (e.g. foreign policy, migration, terrorism and energy) – can be put forward as a good argument for the project to be completed. Although such costs are more difficult to quantify than those, say, of the single market or monetary union, the number of areas in which the EU's room for action *without* a constitution remains restricted and which, as a result, affect each and every citizen should be high enough to win over critics of the project.

There are even some MEPs who derive positive aspects from the "constitutional crisis". After all, they say, the crisis has led to a renewed discussion about social issues and about the very essence of the different economic and social models to be found in Europe.

Voices in the German Parliament – attempting to meet all the different expectations

In the Bundestag, the general view is that any renegotiation of the EU Constitution or perhaps several of its parts would simply not be realistic, even if splitting it up and leaving out the controversial third section might boost chances of acceptance, especially in France. Such cherry-picking, by which certain aspects are ratified separately without taking on the Constitution as a whole, would be sure

to trigger insurmountable procedural consequences (already discussed at EP level) for all the countries that have already ratified, not to mention a loss in substance. What is more: countries such as Finland or Portugal, where the present version of the Constitution still has to be ratified, would be voting on a Treaty already known not to be the version which will ultimately come into force.

Moreover, the member states do not agree on which elements of the constitution count as "important" and which, therefore, would come up in terms of separate ratification. Indeed, the clarification of this question would mean a renegotiation of the Constitutional Treaty as a whole.

Another wrong track, one hears, would be an opt-out clause leading to the Constitution being ratified by all the member states but, also, to individual countries not recognising one or several aspects of the Constitution. The reasons for the rejection of the Constitution in corresponding member states are very heterogeneous: different countries would have to be released from very different parts of the Constitution. This, of course, would not do justice to the spirit of unity which the Constitution embodies nor to its far-reaching symbolic value.

If the text of the Constitution is to remain, a still-to-be-defined procedure implementing successive changes to the constitution from Nice through to the Constitutional Treaty might

be conceivable as a goal. After all, many parts of the Constitution are already anchored in current legislation: a good 80% of the controversial third section already overlaps with existing arrangements in the Treaty of Nice. Further agreement exists as to some of the new parts while other sections – such as the Charter of Fundamental Rights – already exist outside the treaties and can be counted to the general substance. However, the danger of an incremental approach is that the wrong signal could go out, namely, that the dilapidated construction of the Treaty of Nice *is* supportable and that completing the journey to a Constitution is no longer necessary.

In the Bundestag, then, in attempt to find a solution to the dilemma, people are wondering about a "supplementary declaration of social and national identity". By which is understood greater allow-

The 4 Sections of the European Constitution

I. The fundamental principles

- Central statements as to the values, objectives, competencies and institutions of the EU
- The way the European institutions work and collaborate with one another
- Responsibilities within the EU and its member states: exclusive EU competencies, shared competencies and supplementary competencies for the EU.

II. The Charter of Fundamental Rights

- Basic rights and freedoms for EU citizens

III. The policies and functioning of the EU

- This section fleshes out the first section: specifying the political spheres one by one, detailed objectives, information about cooperation between the EU and the member states
- A compilation and simplification of existing contracts

IV. General and final provisions

- Stipulation as to the coming into effect of, the validity of and amendments to the Constitution

ance for social aspects with regard to the EU's existing competencies and a systematic assessment of the social compatibility and social follow-up costs from EU projects. In this way, there would be no transfer of socio-political competencies to the European level, a process which many member states view critically since they fear any harmonisation pitched at a low a standard. Nevertheless, the socio-political substance of the EU would be enhanced and the exclusively competition-oriented character of the EU would be relativised in the eyes of many.

In a further part of any declaration regarding national identity, attention could be paid to various cultures and traditions no matter how configured: national, regional or other. The formulation itself would explicitly give each member state, each region or even the individual citizen adequate room for interpretation in terms of what is to be taken into account within the framework of national identity. If, in addition, the possibility were to be created of staking a claim to identity via litigation where necessary, then this would increase awareness that disputes within the EU do not automatically mean a crisis and that they belong to political and democratic normality. With heterogeneity across Europe thus clearly predicated, it is possible to see a way out of the confrontation arising from the many different expectations made on the Constitutional Treaty.

All the same, what needs to be made clear at the onset is that, just as any amendment to the Constitutional Treaty has to be accepted and ratified by all the member states, so too must any supplementary binding declaration.

The view from German government circles — little room to manoeuvre “at the helm”

In January 2007, Germany takes over the presidency of the EU for the statutory six-month period. A European Summit Meeting has been scheduled for June 2007, with the constitutional project on the agenda. The German government thus has a special role to play in the restarting of the constitutional process. It even has the mandate to deliver a report recommending ways out of the constitutional crisis at the end of its presidency. Berlin, by the way, likes to emphasise the necessity of a Constitutional Treaty. To what extent the German presidency will actually make progress on this point is a moot point, all the more so when one recalls that France is electing a new president in 2007 and that the constitutional issue will play a role in the election campaigns there. And even if the German government has asked France not to formulate any preconditions, we will not know – until the decision of the electorate is final – in which corridor France intends to move on the constitutional question.

The German government considers it a priority that the political substance of the Constitutional Treaty be upheld. To do so, it will conduct exploratory talks with those countries still planning to hold referendums. Yet they are not blind to the problem that any equilibrium important for the compromise achieved will be upset if individual parts of the Treaty come to be left out in the hope of making the rest of it more acceptable to various constitutional rejectionists.

Also under discussion as an aid towards making steps forward in the constitutional process is what is known in French as a “passerelle” or bridge. Already anchored in the Treaty of Nice as law, it allows political arenas in which the member states have hitherto decided on a unanimous vote basis (justice and internal affairs, foreign and defence policy) to be decided on a majority vote basis. This would limit single-state vetoes in favour of a more European-wide approach – as, in fact, sections of the Constitution provide for. But this mechanism has to be first unanimously passed by Council and ratified by the member states, a process which some sceptics see as potentially lengthy as the ultimate ratification of the Constitution.

One hears from German government sources that the best qualification for a period of presidency is to hold back with one's own interests, the final aim being the continuity of previous and subsequent following presidencies. That sounds, though, as if expectations are being played down and that routine rules. In the worse case, it implies a passive interpretation of the EU presidency in the sense of “sitting up front” and dampens any hope that the German government – despite little room to manoeuvre at the wheel – wishes to turn in a visionary or active EU presidency beyond that of business as usual. Yet a chance is there for the taking: the 50th anniversary of the Treaty of Rome on March 2007, on which date a substantive forward-looking declaration could inject the European project as a whole with a new lease of life.

Uncertainty as to definite changes!

For the moment, only a few appear willing to pull the emergency brake on the Constitutional Treaty for once and for all. How could they anyway since the train was brought to an effective standstill by the nay-voters in France and the Netherlands? Returning to that metaphor of an airliner waiting in orbit, one could put a positive spin on the situation and claim that at least something moves during that encircling process. Basically, at the end of the day, it's all a question of getting things rolling again. Most people seem agreed on this. But just how quick the drive should be is not exactly clear here and now. Which is why, for the sake of caution, one should gear up for the long term. For, despite all the technical procedures, the trust of

the citizens in the European Project, a trust undoubtedly needed – and not merely in France and the Netherlands – will not be (re)gained overnight.

In those places where the route to the Constitution is blocked for the time being, the challenge will lie in finding possible bypasses via side roads to the Constitutional Treaty. A u-turn back down a dead-end street is also out of the question: that would mean that the large majority of countries that have already ratified the Constitution (and who, to do so, put in a lot of persuasion) would not be able to reap the harvest of their efforts. That would be of little use to the ideal of European cohesion. Equally unhelpful would be some kind of blockade on the part of France, the knock-on effects of which would be grist to the mill of further critics and opponents. Observers in France are puzzled that some European supporters of the Constitution still cling to the hope of submitting the Treaty – possibly unchanged – to the vote again. For both the political left and political right consider the constitutional project to have been consigned to the scrapheap of history. Yet what a France forced into a corner is capable of, we know from the era of the "empty chair politics" – i.e. when, for a six-

month period in the 1960s, France paralysed the decision-making process in the Community by simply not attending various EC meetings.

It is therefore essential that some agreement be reached as to which passages in the Constitutional Treaty are controversial and which may be viewed as common objectives. This is because official positions as to exactly what parts of the Constitution need to be changed have hitherto not been forthcoming, say critical voices both in the German Bundestag and the European Parliament.

Procedurally speaking, the next move has to come from the heads of state and government since neither the European Parliament nor the Bundestag nor the parliaments that have already ratified can exercise any direct influence on current status. As the basis for a roadmap to the Constitution, the European Summit meeting in June 2007 must finally clarify the crucial points – by integrating all the many thought processes that the EU's reflection phase has recently triggered in many different places and at many different levels.

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