

The European Convention Method in Hindsight

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PETER NORMAN, *The Accidental Constitution, the story of the European Convention*. Brussels: EuroComment, 2003, 406 p. ISBN 9077110054

KLEMENS H. FISCHER, *Konvent zur Zukunft Europas. Texte und Kommentar*. Baden-Baden: Nomos Verlagsgesellschaft, 2003, 542 p. ISBN 383290171X

ETIENNE DE PONCINS, *Vers une Constitution européenne. Texte commenté du projet de traité constitutionnel établi par la Convention européenne*. Paris: Editions 10/18, 2003, 528 p. ISBN 2264038179

VALÉRY GISCARD D'ESTAING, *La Constitution pour l'Europe*. Paris: Editions Albin Michel, 2003, 396 p. ISBN 2226142010

JEAN-LUC DEHAENE, *De Europese uitdaging. Van uitbreiding tot integratie*. Leuven: Van Halewyck, 2004, 237 p. ISBN 9056175645

More or less concurrently, a motley array of books has been published about the European Convention and the evolution of the constitutional treaty. In this essay on the European Convention, I will use *The Accidental Constitution* by the British investigative journalist, Peter Norman, mainly because it is an excellent work with an absorbing narrative and an in-depth analysis of the French and British vision. Norman describes the areas of tension with a blend of humour and detail, which keeps the reader turning the pages. Having conducted countless interviews, Norman is a mine of information on what goes on in the corridors of power (e.g., the Hilton dinners organised by Inigo Méndez de Vigo). He turns the spotlight on largely unknown figures, such as Antonio Vitorino, Andrew Duff, Alain Lamassoure (a one-man idea factory), Lamberto Dini and Johannes Voggenhuber.

Another publication on the same subject, but particularly useful for lawyers, is *Konvent zur Zukunft Europas* by Austrian diplomat and academic Klemens H. Fischer. This book offers a commentary (more of an analysis really) on the wording of the articles in the draft Constitution for Europe and comes with a CD-Rom containing no fewer than 13,100 texts from the European Convention and the meetings of the European Council, which are referred to in the footnotes. Each chapter is elaborated with quotations taken from Churchill. One useful aspect is that the analysis contains many (cross-) references to other relevant articles in the constitutional treaty.

Another worthwhile book for lawyers is *Vers une Constitution européenne* by Etienne de Poncins, French diplomat and member of the Secretariat of the European Convention. The commentary in this book is preceded by a 40-page introduction and tables and lists of the names of the European Convention members. The analysis of the articles in the draft constitution is somewhat sharper, a bit closer to the edge, than in Fischer's book. Each article is followed by a brief sketch of the core issue. The author addresses every topic, which has been under discussion, even the incorrect translation of the quotation from Thucydides – a colossal *faux pas* which has continued to haunt the intergovernmental conference (De Poncins, p. 77). What is missing in this book is commentary on the constitutional rights, which form the second part of the treaty. The reader can, however, find this in the book by Fischer (p. 197-242).

In *La Constitution pour l'Europe*, 'founding father' Valéry Giscard d'Estaing presents his own vision of the European Constitution in 77 clear and concise pages, followed by all the draft articles. It is interesting to see how much of the text – including the preamble – is traceable to political compromises. Though edifying, *La Constitution pour l'Europe* fails to reflect critically on the final opus of the European Convention (probably for political reasons, as the Treaty was still to be signed) and offers no insight into Giscard's relations with figures like Dehaene and Amato or influential heads of government like Blair (not even during the talks at 10 Downing Street). There is a little more critical reflection in *De Europese uitdaging: Van uitbreiding tot integratie* by Jean-Luc Dehaene, Vice-President of the European Convention and former Prime-Minister of Belgium. Dehaene provides a valuable chronicle of the European Convention, but he too is sparing in his assessment of people; this is unfortunate as his criticism of Prodi and Berlusconi and his relationship with Giscard d'Estaing merit further elaboration. At the end of the book Dehaene presents a federalist vision of the Common Foreign and Security Policy, drawing attention to its absence at critical moments. He feels it would have been better to speak of 'joint action' in the second pillar. When the European Constitution comes into effect, the Common Foreign and Security Policy will fall within the competence of the Union (and will no longer be just a question of co-ordinating intergovernmental competencies), though it will not come under the jurisdiction of the Court of Justice (III-376 Constitution for Europe). Dehaene envisages an EU which is a 'global player', has a seat on the Security Council and speaks with one voice. It is an idealistic vision and an inspiration for federalists. An intriguing Freudian slip appears in the footnotes, when Dehaene refers to Norman's book as *The Accidental 'Convention'* (Dehaene, p. 232, n. 44).

It was patently clear that the accession of ten new states in 2004 – marking the reunification of Europe after fifty years of the east-west divide – would have profound implications for the organisation and political image of the European Union. Free movement of persons and goods in such a wide area was bound to usher in new opportunities and responsibilities. After reunification, Germany was prepared to exchange its strong mark for the EURO, but did anyone fully realise that enlargement would upset the population balance between large and small states? The partially unsuccessful negotiations around the Treaty of Amsterdam (1997) showed that the heads of government were nowhere near readiness to set up the new Europe. Scarcely any progress was made regarding decisions by qualified

majority, the weighting of votes in the Council of Ministers or the composition of the European Commission. The threat of a large and unwieldy European Commission was still hovering. The later attempt at institutional reform in Nice (2000) also turned into a trade-off. In the weighting of votes, population size played no role between Germany and France and a somewhat arbitrary role between the Netherlands and Belgium (Giscard d'Estaing, p. 11; Dehaene, p. 23).

The process leading to the EU Charter of Fundamental Rights in the same year was, however, a success. This took place via a Convention (from December 1999), comprising not only government representatives but also parliamentarians from the member states and delegates from the European Parliament and the Commission – in other words, elected representatives, who were more politically focused than diplomats. Could the Charter of Fundamental Rights at the regional level close the gap between human rights and popular sovereignty, enhancing transparency and the legal certainty of the citizens of Europe? Under the leadership of Roman Herzog, the Charter was drawn up in legal form and could, as such, have been directly incorporated in the Treaty – though it was clear from the start that it would not become binding during the European Council Summit in Nice (December 2000). Though initially presented as no more than a codifier, the first Convention turned out to be much more creative than anyone had expected; in fact, it was a concrete source of inspiration – on a par with the American Convention in Philadelphia in 1787 – for the second European Convention (De Poncins, p. 11). The Charter of Fundamental Rights could also be seen as a stronger basis for the external policy of the EU.

Joska Fischer's lecture at the Humboldt University in Berlin on 12 May 2000 – 'skilfully timed, and lifting the debate to a new level' (Norman, p. 12) – also formed a source of inspiration for the development of a European Constitution. In 2001 the Declaration of Laeken came into being under the Belgian Presidency and, even then, with involvement by Jean-Luc Dehaene and Giuliano Amato. The aim was to create a more democratic, transparent and efficient Europe, which would, at the same time, bring stability in the new, multi-polar world. Several points raised by Joschka Fischer, Tony Blair and Jacques Chirac were also addressed (Norman, p. 19). The agenda should cover more than just the four issues of the Nice Summit: a more precise delineation of powers between the EU and the member states in line with the subsidiarity principle, the status of the EU Charter of Fundamental Rights, simplification of the treaties without changing their content, and the role of the national parliaments. The social partners, the NGOs and the academic community should be explicitly involved in the operations of the European Convention; in short, a bottom-up approach. Dehaene managed to save the NGOs from reliving the disillusionment of the First Convention by involving them across the board in the activities (Dehaene, p. 71). The Declaration of Laeken raised a series of sometimes confusing questions for the European Convention (Norman, p. 21). This is where the path towards the European Convention began, led by Giscard d'Estaing, who had been appointed President by the European Council, with the lawyer Amato and the experienced negotiator (also with NGOs) Dehaene as Vice-Presidents. According to Norman, they proved a very effective team.

Valéry Giscard d'Estaing (1926), former French President and founder of the European Council in the 1970s, was a man of experience, authority and great charisma. He was the only member of the Convention who had fought in WWII. Giscard wanted small conference rooms with a wide distinction between '*les conventionnels*' and support workers. He wanted to develop an *esprit de corps* among the members and was not afraid to make salary and accommodation demands in the interest of the Convention. In short, he was a person who commanded respect. One of his greatest gifts was his sense of timing, both in dividing the Convention into phases (starting with the listening phase) and in chairing meetings, setting agendas and seeking publicity, a case in point being the postponement of the start of the European Convention from the scheduled date of Friday 1 March 2002 to the more media-friendly date of 28 February 2002 (Norman, p. 42). Like a dedicated centre forward, Giscard was prepared to go it alone, if necessary. When meetings lasted too long, he simply got up and left and, says Dehaene (p. 95), sometimes the meetings were more productive and exciting because of this. Giscard d'Estaing was a skilful politician, who made sure that the scoops were always for the European Convention and not for the European Council or the European Commission. He maintains that it is pointless to compare the future Europe directly with the USA (assimilation by a common language); Europe will have to work things out for itself (Giscard d'Estaing, p. 19). Regional devolution of internal and economic policy and the co-ordination of foreign policy need to be bolstered in the EU, but not without due respect for the national sovereignty of the larger members in particular (Germany, France, the UK, Spain and Poland, collectively accounting for 75% of the EU population). Giscard d'Estaing makes no bones about this in his book. He sees the European Union as based on the dual nature of its citizens and states, but the importance he attaches to equality between EU citizens places the larger states at an advantage on the basis of population size (Giscard d'Estaing, p. 24, 73). And, because of its external relations and joint defence, Europe needs leadership and a phone number. This is why Giscard d'Estaing was in favour of the idea of a European President and – in a cumbersome construction – an EU Minister of Foreign Affairs who would be appointed by the European Council but who, as Vice-President of the European Commission, would still need endorsement by the European Parliament.

In his first 'skeleton' for a new Constitution in October 2002, Giscard d'Estaing used, for pedagogic reasons, the phrase 'administer certain competences on a "federal" basis', but had to withdraw this later because the UK, the northern states and Eastern Europe did not take kindly to the 'F word'. The incident was enormously hyped up by the media and, by making a blatant concession together with Blair, Giscard d'Estaing shrewdly managed to keep British populism under control (Giscard d'Estaing, p. 34): the Union acts on the basis of competences conferred by member states. The possibility of seceding from the Union was also set out. On 22 April 2003, Giscard d'Estaing – provocatively – referred to the European Council as 'the highest institution in the Union' (see Norman, p. 343-349). Two days later, he watered this down a bit. All the same, he did strengthen the position of the European Council as the second institution, and a permanent president is also on the cards (Giscard d'Estaing, p. 54-58). It was entirely characteristic of Giscard d'Estaing to produce that Chinese tortoise to illustrate the proverb 'more hurry, less speed', but it did not mean that he was not worried about finishing the job (Giscard d'Estaing, p. 14).

Splitting the Convention into phases – with the institutional issues at the end – was part of his master plan (Fischer, p. 47), but there was no alternative than to working within the timescale imposed by the European Council. The aim was to present a document at the Council meeting in Thessaloniki at the end of June 2003. In July 2002 Giscard d'Estaing announced that it was the Convention's ambition to produce texts which would lead to consensus – so no options – in order to exert maximum influence at the intergovernmental conference. This approach was much broader (and some thought, formally, even a bit dubious) than in the Declaration of Laeken (Fischer, p. 31). The administrative set-up needed reorganisation. Transparency was needed about the fundamental principals underlying the exercise of government powers, at the same time raising the issue of limited government. Hence, the fundamental rights would be indispensable. The intention was clearly to come up with a document that the European Council in Thessaloniki could not ignore (Dehaene, p. 78-79, 145). In the period between 28 February 2002 and July 2003, this European Convention succeeded in drawing up a draft treaty establishing a constitution for Europe. It consisted of an amalgamation and rearrangement of existing treaties in the hope of arriving at a coherent and transparent whole – for EU citizens as well. Eventually, the intergovernmental conference, after failed attempts by the Italian presidency (Dehaene, p. 149), approved the Constitution for Europe in a new Treaty of Rome (18 June 2004; CiG 87/04, 6 August 2004). Now it is time for domestic parliamentary and public approval procedures.

What conclusions can be drawn from working with a European Convention? All the authors stress that a crucial role was reserved for the presidium, which came together almost every week and presented the texts to the meeting, after which the members submitted thousands of amendments. Under the presidium was a secretariat – the powerhouse of the Convention – consisting of experienced writers of treaties, headed by Sir John Kerr from the UK, a skilled diplomat, and the Italian Annalisa Gianella. Giscard d'Estaing described Kerr as one of the most brilliant men he ever met (Norman, p. 38). Kerr's influence and the assertiveness of the British representatives, Hain and Scotland, prompted some countries (France and Germany) to send more heavyweight delegates. This resulted in the so-called 'invasion of foreign ministers' and was an indirect endorsement of the success of Giscard d'Estaing's strategy. Relations in the presidium were harmonious. No national standpoints were allowed. The meetings did, however, take place behind closed doors (Norman, p. 4). Interestingly, the two representatives of the European Commission, Barnier and Vitorino, were given very little room to manoeuvre by their boss. Giscard d'Estaing was furious at Commission President Prodi for allowing the Commission's own draft treaty – code named Penelope and an influential document in terms of content – to leak out, an incident which hardly demonstrated respect for the work of the Convention.

The working groups (each with approximately 30 members) under the chairmanship of a presidium member proved successful. This applies especially to the group on the legal status of the Union – encompassing, in effect, the amalgamation of the treaties and the integration of the European Communities and European Union (De Poncins, p. 93) – but also to the group on the integration of the EU Charter of Fundamental Rights in the Treaty and the relationship with the national Parliaments (essentially a national problem,

but national Parliaments were allowed to present a yellow card if they believed that European legislative proposals were in breach of the subsidiarity principle) (Fischer, p. 19). Compromises were reached in these working groups, which were later accepted by the entire Convention. Dehaene says (p. 69): 'People sometimes commented that they were amazed that I could listen to these expositions for hours on end, but my answer was simple: I found it riveting'. Much to the displeasure of the Commission, which prefers to work with objectives, the European Convention distinguished between exclusive competences, shared competences and areas of supporting, co-ordinating or complementary action in the Union (Art. I-12, I-13, I-14, I-17 Constitution for Europe). The clause in Article 308 EC was extended to cover the entire sphere of action of the Union.

One positive development is that the candidate states could participate fully in the talks and under the same conditions as the member states, i.e., they sent a government representative and two members of Parliament. They could not, however, block a possible consensus between the member states. Another auspicious sign was that these states (furnishing 39 of the 105 members of the European Convention) did not unite in a separate group, not even at the later intergovernmental conference. It was a tremendous learning experience for most of them (De Poncins, p. 23). The candidate states had to battle it out for a place in the presidium (Norman, p. 43). The European Convention, with members drawn from the European Parliament and the European Commission, was much more European than the average intergovernmental conference. The meetings were public and the documents were posted on a website. It was not a parliament where everyone had a vote. Eventually, the European Convention took decisions on the basis of a broad consensus – not unanimity – which was more of an unspecified large majority, always determined by the Convention President alone (Norman, p. 46). Co-operation grew quickly between the members of the European Parliament and the national Parliaments. The political parties took care of the horizontal ties in the ranks of the Convention and came with collective policy documents or amendments. When, towards the end of the Convention, some heads of government (from the smaller states in particular who formed a front with Spain and Poland and demanded strict equality for all member states, no permanent president, and one commissioner for each state) started causing a fuss about institutional issues, the parliamentarians closed ranks. Compromises were proposed: the option of commissioners without voting rights and a permanent president with very limited powers (based on consensus in the Convention in June 2003) were laid on the table. At long last, Giscard d'Estaing was able to present a draft treaty in Thessaloniki. He was given an extra month to sort out the details in the third part.

The Convention deliberately chose to address the institutional issues at a relatively late stage because by that time consensus on earlier issues would have created a sense of solidarity. Meanwhile, the heads of government were speculating about a permanent president, and Giscard d'Estaing spoke about his – ultimately unachievable – Congress of the Peoples of Europe, which would consist of national and European members of Parliament and form the future electoral congress for the President of the European Council. Many smaller member states were demanding one commissioner per state. Norman provides an enlightening account of the tensions between the large and small member states. The Belgian Prime-Minister Guy Verhofstadt was the first Benelux premier to cease opposition to the idea of a permanent president. Dehaene hints that Belgium's unremitting pro-

European stance was partly motivated by economic considerations: 'The Flemish industry sites are full of foreign companies which have settled in Belgium because of the common market' (Dehaene, p. 160).

Dehaene concludes that the mission of Laeken was more or less a success. He claims that the ambitious Constitution will make the EU more democratic and transparent, but these are just two of the three objectives (Dehaene, p. 113). Whether it will improve efficiency is open to question, because decision-making by a qualified majority has not been fully realised. There is, however, more clarity about the procedure. Decisions must be approved by a majority of member states, together representing 65 % of the population. The Commission will still be too big – at least until 2009. There are too many euro-parliamentarians and conflicts will probably arise between the President of the Commission and the European Council and the new Minister of Foreign Affairs. De Poncins offers some useful suggestions, recommending a Commission President in his or her forties with an economic background and a Council President aged around 65 with a cultural background (De Poncins, p. 140). It would be sensible to pursue a cautious personnel policy in this area in particular: 'In the long run it is the individuals who make the institutions' (Dehaene, p. 167).

It cannot be denied that, under Giscard d'Estaing's leadership, the European Convention delivered an outstanding achievement. Meanwhile, the introduction of the EURO on 1 January 2002 coupled with external pressure after 11 September 2001 and subsequent terrorist actions have triggered a 'sense of urgency' among the European heads of government. All the authors implicitly suggest that the work carried out by the European Convention has considerably strengthened the political legitimacy of the European Union. They may well be right on that count, but not everyone will agree with Giscard d'Estaing's conclusion that the European Constitution makes everything clearer for the citizen (Giscard d'Estaing, p. 76-77).

In keeping with the spirit of the Declaration of Laeken (December 2001), the European Convention wanted to simplify the treaties and reorganise them into a constitutional text, though it could have concentrated on retaining the existing texts – also a feasible option. It is in itself strange that it is now just as difficult formally to amend the third part, i.e., apart from a bridging clause or suchlike (Norman, p. 284) as the first two.

It is debatable whether the present product with hundreds of articles was actually what the authors of the Declaration of Laeken had in mind. That is, assuming the intention was really for the Constitution 'to find a place in people's hearts' and to be 'a constitution that the average secondary school child could take to heart' (Norman, p. 6, 67). For example, were the members of the European Family not entitled, perhaps on the basis of the doctrine of power sharing, to a somewhat leaner Constitution? None of the books really tackles this question, though Norman does say that Sir John Kerr was initially in favour of a leaner constitution (p. 63). By reformulating all the existing treaties, the new constitutional treaty has also led to complex referenda. As a referendum requires either a straight 'yes' or 'no', Dehaene sees it as a totally unsuitable tool for closing the democratic gap between the government and the citizens. It looks as if not just the citizens but also the governments responsible for this Constitutional Treaty can gird their loins.

