

Analysis of the Constitution by Esko Seppänen 13.6.2003

The EU Convention on the Constitution approved a draft EU Constitution on 13.6.2003.

It was Friday the thirteenth.

The Constitution will alter the nature of the EU, which will become more of a federation. The old pillars will be toppled and the EU will become militarised by erecting a new NATO pillar within its structure.

I was one of the 207 people in the Convention who drafted the Constitution over a period of 16 months. As a result of our work, half a billion Europeans will become EU subjects by dint of this Constitution, which will have primacy over national legislation.

The atmosphere at the last meeting of the Convention was like a party meeting of the North Korean communists. The Constitution's Uncle Joe, Valéry Giscard d'Estaing, was lauded like the Great Leader, Kim Jong Il, or his father before him, Kim Il Sung. All the members of the Convention knew where and when to clap.

There was no voting in the Convention, although we had tabled 5,000 amendments to the Constitution. The Praesidium, that is to say the Politburo, which did not have representation from all countries, decided what the will of the Convention was, and called it consensus. As federalists were over-represented in the Convention, consensus meant consensus among them, but not unanimity.

At the final meeting there were some pre-arranged speeches. In the main only representatives of the big countries spoke.

For example, Teija Tiilikainen, representative of the Finnish Prime Minister, did not get to speak at all. Consequently, the Chamber did not hear that she had received instructions from her government to express Finland's reservations (i.e. non-acceptance) with regard to parts of the Constitution dealing with institutions and defence.

To end the meeting the so-called Hymn to Europe was played (which they want to make the national anthem of the federal state). On hearing it, the loud and raucous federalists, in ecstasy over the Constitution, stood up just as if it were indeed a national anthem that was being played.

I sat. I was not the only one but there were only a few of us. The EU does not have a national anthem.

The new Union

The draft Constitution consists of a *preamble* (which has no legal force) and four parts: 1. the Constitution, 2. the so-called Charter of Fundamental Rights, 3. a section on policy, and 4. rules for entry into force.

In addition the Constitution had annexed to it a thick bundle of *protocols* and *declarations* for approval by an intergovernmental conference.

There was a desire to write the spirit of the draft into Article I-1, which reads:

"Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise in the Community the confidences they confer on it."

The Constitution establishes a *new European Union*. The existing Union is to be discontinued by repealing the previous Treaties. (Article IV-1).

Whether all the Member States have to agree with the establishment of the new Union in order for it to have legal validity, is not written into the text. This is a totally political question:

“If one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council. ” (Article IV-6.4)

A federation or not?

The word ‘federation’, present in the first drafts, was deleted from the Constitution. Instead, the new Union shall exercise “*in the Community way*” the competences conferred on it by the Member states. (Article I-1).

The word ‘Community’ refers to the federalist-style ‘*Community method*’, which in practice means the same as ‘federal method’. We also compromised with the federalists by writing the following section into the Constitution’s preamble: “*(we are) convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient division, and, united ever more closely, to forge a common destiny.*”

The phrase “*united ever more closely*” served to placate the federalists with respect to omitting the word ‘federation’ from the document. They were consoled by the fact that, although the word had been left out, its essential spirit remained.

Charter of Fundamental Rights

The EU will have its own *legal personality*.

Residents of the Member States will have *dual nationality*: we will be both citizens of our own country and of the EU. The Constitution sets out the rights and obligations of EU citizens.

The *Charter of Fundamental Rights* is written into the Constitution verbatim, as was drafted in 2000, with recourse to the same *Convention method* as the present Constitution (except that the representatives of the applicant countries were not

involved at that time).

Great Britain encountered national difficulties in accepting the Charter of Fundamental Rights. In that country they do not have their own written constitution, and, for the politicians there, any mention of the rights and obligations of citizens means restrictions on freedom. The Charter was approved once Britain managed to attach to it instructions for interpretation drawn up by civil servants, on the basis of which the fundamental rights and obligations of citizens of the EU are not absolute.

These instructions for interpretation were written into the preamble to Part II of the EU Constitution with the result that *"in this context the Charter will be interpreted by the courts of the Union and the Member States with due regard for the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter."*

This has no legal weight. It does help Blair's government, however, to market the Constitution to its citizens. All the stakeholders accepted the big con, aware of Blair's political needs.

The rule on qualified majority decision

New EU laws will start being decided generally by *qualified majorities*.

The *right of veto* will be taken away from the Member States.

It will nevertheless be retained by the three big Member States acting in concert. The 22 smaller countries will not be able to vote them down if the three have different intentions and wishes, even if all the others agree.

Some horse-trading was done. For example, Article 54.4, in Part I of the Constitution, says this: *"The Council of Ministers shall act unanimously when adopting the first multiannual financial framework following the entry into force of the Constitution."*

This paragraph won Spain over with regard to accepting the Constitution. It made it able to put the screws on other countries financially when long-term decisions were to be made on agricultural and cohesion aid after 2010 for the benefit of certain old Member States (Spain, Greece, Portugal and Ireland).

The Convention's Praesidium also bought and sold other Articles based on the needs of the big countries.

More competences for a new Union

The new Union's and the European Parliament's power of decision will increase when the Member States hand over to the Union new exclusive competences and more *shared competences*

The number of these will double, and in the future the supranational European Parliament will be able to block the common will of the Member States on more and more issues.

When qualified majority decisions are also extended to implementing the *area of freedom, security and justice* (Article 1-41), this will involve the transferral of new legal competences to the Union. They even want to harmonise criminal law. That way nations will lose their historical and traditional forms of administering justice and the general acceptability of their laws. National laws represent a nation's shared memory about what is right and what is wrong.

The supreme powers of interpretation in matters relating to competence will go to the *EU Court of Justice*

This will be the EU institution that will be able to interpret the Constitution in the spirit of a "Constitution and law" which, "adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States." (Article 1-10.1).

Coup on the part of the big counties

The *European Council*, which is a meeting of heads of state, will be an EU institution. It will

have no legislative powers, but it will have a permanent chairman, who is to be called *President*

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The Council of Ministers will continue to have a rotating presidency and the presidential term is to be lengthened to at least a year. "*Except where the Constitution provides otherwise, decisions of the Council of Ministers shall be taken by qualified majority.*" (Article 1-22).

The EU will not have any special council responsible for regulating or adjusting laws similar to an Upper Chamber (Council of the States and Regions), but its embryo has been created: there is to be a Legislative and General Affairs Council, which, in its role of legislator, will be open to public scrutiny.

The EU will have its own *Minister for Foreign Affairs*, who is to conduct the common foreign and security policy and act as President of the Council of Foreign Affairs Ministers. He will also be a Vice-President of the Commission. Such a solution is pretty tasteless in parliamentary terms. It would seem that a civil servant is heading a council of ministers: someone lower down the scale is managing those above.

There will be a ceiling of 732 Members of the *European Parliament*. The number of Finnish Members will decline at first to 14 and later increase when the new Member States join. The fewer Members there are, the more limited democracy is. Democracy is also diversity, difference and variety, but in the European Parliament the differences crumble under the supranational power of the big countries.

The *Commission* will have two levels of Commissioner: voting *European Commissioners* and Commissioners. The Commission is to retain its right of initiative with regard to legislation, but, as it will only have 15 voting European Commissioners, not all countries will be able to influence the content of initiatives as a result. There is a danger that the Commissioners will not rotate evenly: "

each successive College shall be composed as to reflect satisfactorily the demographic and geographical range of all the Member States of the Union."

(Article I-25.3)

The European Commissioners are to be elected from a group of three candidates put forward by every Member State *“for their European commitment”* (Article I-26.2). That means that all the Commissioners will be like-minded and comparable to the Communist Party Politburo in the old Soviet Union.

The Member States are likely to tear up the Convention package particularly regarding the Institutions and the new division of power.

The militarisation of the EU

The EU armed forces will become NATO-compatible under the Constitution. The EU is not to have a defence facility independent of NATO.

And how could it, when in the Iraq war, of the big countries, Great Britain, Italy, Spain and Poland agreed to America's illegal invasion, and after the war Germany too is falling once more in line with the USA?

EU to have its own President

Against all this it has to be understood that the EU will be getting a President, who will *“at his or her level ensure the external representation of the Union on issues concerning its common foreign and security policy.”*

If there were not to be a President, who in practice will only be an EU Summit Chairman, foreign policy would also be made the competence of the Commission. That would have increased the federalist nature of the EU even further.

The establishment of the office of President will mean the Union will have a number of hubs, as not all power will be concentrated in the Commission. It is a good thing for a community of half a billion people to have centres of power other than the supranational Commission (where not all

Member States have their own voting Commissioner). That would become a politburo very quickly indeed.

Foreign affairs to remain the competence of the Member States

The Constitution distinguishes between foreign and security policy (Article I-39, and security and *defence policy* (Article I-40).

Defence policy is different from defence. Most EU countries operate their regional defence through NATO. It has been written into the Constitution that EU defence policy should not be in conflict with NATO.

The Constitution defines common defence policy as “...(that which) will lead to a common defence” (Article I-15.2), and common security and defence policy as “(that which) will lead to a common defence, when the European Council, acting unanimously, so decides.”

The Treaty of Amsterdam has been amended in this regard such that the Constitution uses the word ‘when’ in place of the word ‘if’.

Common foreign and security policy (CFSP)

Article 15 of Part I of the Constitution states that:

“1. The Union’s competence in matters of a common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy, which might lead to a common defence.

2. Member States shall actively and unreservedly support the Union’s common foreign and

security policy in a spirit of loyalty and mutual solidarity and shall comply with the acts adopted by the Union in this area. They shall refrain from action contrary to the Union's interests or likely to impair its effectiveness."

Decisions are to be made unanimously, except if it is decided unanimously that a decision should be made by qualified majority (Article I-39). There are also other exceptions to unanimity (Article III-196.2). They lead one to suggest that foreign policy will not be implemented in the EU on the principle of unanimity but frequently by qualified majority.

Structured cooperation

Article 40 in Part I on implementing the common security and defence policy is one of the Constitution's most important sections from Finland's point of view. It demonstrates that the *EU is becoming militarised*

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So-called structured cooperation (Article 40.6) is cited as a new form of cooperation.

"6. Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish structured cooperation within the Union framework. Such cooperation shall be governed by the provisions of Article III-208."

The Article referred to goes on to say this:

"1. Those Member States whose military capabilities fulfil higher criteria and wish to enter in more binding commitments in this matter with a view to the most demanding tasks, hereby establish structured cooperation between themselves within the meaning of [Article I-40(6)]. The military capability criteria and commitments which those Member States have defined are set out in that Protocol."

2. If a Member State wishes to participate in such cooperation at a later stage, and thus subscribe to the obligations it imposes, it shall inform the European Council of its intention. The Council shall deliberate at the request of the Member State in question but only the representatives of the Member States taking part in structured cooperation shall participate in the vote."

This is a matter of what has been hitherto termed *flexibility*.

Flexibility has commonly meant that not all Member States need to participate in everything. Examples are EMU and Schengen. A certain number of Member States cooperate on the basis of these agreements in the name of the EU as a whole. In the Constitution flexibility is also being extended to military action, which until now has been outside the scope of the EU Treaties.

The same thing is termed *closer cooperation* in the Constitution. Different and looser criteria are being determined for closer military cooperation than for closer cooperation in other areas.

The wording of the Constitution means that some Member States (e.g. Germany, France, Belgium and Luxembourg) can establish mutually viable military structures outside the EU Institutions. The same Article in the Constitution (Part III: 208.4) states they may be allowed to act in the name of the Union as a whole:

"4. The Council may ask the Member States participating in such cooperation to carry out at Union level a task referred to in [Article III-205]..."

The group of countries engaged in closer military cooperation may establish its own decision-making bodies and storm troops in order to carry out tasks written into the EU Constitution that may be implemented in the name of the Union as a whole. These are (Article III-205.1): *"joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peacemaking and post-conflict stabilisation."*

The Finnish translation says 'peacemaking', which could also be interpreted as 'war'. EU common defence could also mean invasion, which would be carried out by troops based on structured cooperation operating in close cooperation.

Declaration annexed to the Constitution

Structured cooperation still does not make the EU a military alliance. It is more a matter of the implementation of crisis management tasks. That is different from regional (NATO) defence.

There is another Article (Article I-40.7 which would make the EU a military alliance:

"7. Until such time as the European Council has acted in accordance with paragraph 2 of this Article, closer cooperation shall be established, in the Union framework, as regards mutual defence. Under this cooperation, if one of the Member States participating in such cooperation is the victim of armed aggression on its territory, the other participating States shall give it aid and assistance by all the means in their power, military or other, in accordance with Article 51 of the United Nations Charter. In the execution of closer cooperation on mutual defence, the participating Member States shall work in close cooperation with the North Atlantic Treaty Organisation. The detailed arrangements for participation in this cooperation and its operation, and the relevant decision-making procedures, are set out in Article III-209."

Article 209 referred to reads:

"1. The closer cooperation on mutual defence provided for in [Article I-40(7)] shall be open to all Member States of the Union. A list of participating Member States shall be set out in a Declaration annexed to the Constitution. If a Member State wishes to take part in such cooperation at a later stage, and thus subscribe to the obligations it imposes, it shall inform the European Council of its intention and subscribe to the Declaration annexed to the Constitution."

When the Constitution was being drafted this was expressed referring to such "closer cooperation enabling those wishing to do so to 'repeat' the commitment already entered into under Article V of the Brussels Treaty in the Union framework".

Article V is the clause referring to the collective defence of the WEU, in which security guarantees also become automatically redeemable on the part of the USA. For that reason the USA will probably demand that all these countries join NATO.

Article III 209.4 refers to NATO-compatibility:

“4. These provisions shall not affect the rights and obligations resulting, for those concerned, from the North Atlantic Treaty.”

The non-aligned nations' path to NATO

Whether or not it signs the declaration referred to in Article III-209 is entirely a matter for Finland, or any other militarily non-aligned nation, to decide.

If that country signs, it will become a militarily aligned state.

If it does not sign, it will remain non-aligned.

This applies to the EU's six non-aligned and neutral countries (Sweden, Austria, Finland, Ireland, Cyprus and Malta).

The alternative whereby non-aligned countries could align themselves just with the EU on the basis of the common defence option does not exist. The EU's common defence, which also means attack, is not NATO-independent – it is NATO-compatible.