The Pitfalls of a Simplified Treaty

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Introduction

The purpose of this paper is to provide an analysis and assessment of the draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community (hereafter referred by its -rather inaccurate- kickname of "mini-Treaty)".[1] To be more precise, this paper is an assessment of the first draft of the draft, i.e., the "legal" or "technical" draft put together on the basis of the "principled" agreement reached in the European Council of June 2007. Such an assessment makes sense whether or not the Intergovernmental Conference reaches an agreement on a draft Treaty. If it does, it is likely that it will closely resemble the present draft, if only due to the extremely tight time schedule; consequently, most of the reflections here contained will be applicable to the final draft. If it does not, the present analysis may gave some hints at why it did not. Moreover, this assessment is also pertinent in my view because the present draft reflects quite accurately the emerging consensus among the European political class, i.e. among national political leaders and perhaps among a good deal of their advisors and "court" intellectuals. On all these basis, the very fact that we are here discussing the draft of a draft may not be a waste of time. At any rate, it seems to me that one is under a duty to put on the table the assumptions one makes, so that readers are fully "in the know" of what provisos underlie this train of reasoning.

This paper is organised in three parts. First, I put forward two claims on the Berlin process, i.e. the process which has led to the conveyance of the IGC with a view to draft a reform Treaty. Such claims are that the no vote in France and the Netherlands actually confirmed the constitutional nature of the Laeken process; and that the reason why European leaders were so slow to react to such powerful constitutional decision was that they tried to gain time to impose a different understanding of what constitution-making is about in the Union; not the people deciding, but national governments finding a good enough agreement among themselves. Second, I analyse the main characters and contents of the Berlin process and of the mini-Treaty. I basically claim that the process is characterised by constitutional avoidance, and that the mini-Treaty is so structured as to be short and simple; the latter is said to require dropping questions of a constitutional character, and limiting the Treaty to reform, not surpass, the primary law of the Union in force as of now. Third, I put forward eight critiques of the mini-Treaty; such critiques are not based on a previously defined ideological position, but are based either on the actual analysis of the plausibility and coherence of the claims that advocates of the Treaty make in its favour, or on the actual constitutional consequences of the mini-Treaty.

1. The Berlin process

§. The negative outcome of the French and Dutch referenda put an end to the Laeken process. Despite repeated protestations of European political leaders, the Constitutional Treaty was dead for good. Any other interpretation of the vote would have implied a

[1] The texts can be found at http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1297&lang=en&mode=g, which is the IGC's official webpage. As of the date of completion of the paper (September 12th), the texts were pending a second reading by the Working Party of Legal Experts.

retrospective recharacterisation of the Laeken process which was simply out of the cards precisely because of the depth and breadth of popular mobilisation in both countries, and very especially in France. Let me try to be clearer on this point. My claim is that the resounding no issued by French and Dutch citizens swept away any doubts concerning the chances of the Constitutional Treaty becoming the primary law in force of the European Union. Additionally, the resounding no had the (only apparently) paradoxical consequence of affirming the constitutional character of the Laeken process. The way in which the Constitutional Treaty had been debated and drafted, and its very contents, did not offer a final answer to the question whether this could be regarded as a constitution-making process, that is, whether the outcome could be said to be backed up by the democratic legitimacy characteristic which stems from a sufficiently democratic process of democratic constitution-making. True, the series of public speeches on the trails of Fischer's of May 2000, together with the Laeken Declaration of December 2001, could be properly interpreted as the signalling of a constitutional moment. But the process which then unfolded did so in ambivalent constitutional terms. In both process and substantive terms, one could say that the constitutional jury was still out. It was only once the citizens in France and the Netherlands constructed the question posed to them in their respective national referenda as a constitutional question, once they debated the pros and cons of the Constitutional Treaty *as if* they were being asked to decide on the constitution of the European Union that the Laeken process became clearly a constitutional process. This comes a long way to explain the importance and transcendence of the French and Dutch. The sheer force which stemmed from them, and which put an end to the Laeken process, had not its source on the fact that the vote was cast by citizens of founding Member States, not even from the fact that France was a large Member State with considerable economic and political clout. The actual reasons why the vote was decisive was the intensity and length of the debate which preceded the vote, the margin of the victory of the no, and the very fact that its partisans had managed to turn around public opinion despite the modesty of their institutional and economic means when compared to those who favoured a positive vote. Moreover, I will add that in the absence of a previous determination of how to ascertain the general European will on European constitutional questions, any claim on how to ascertain it is bound to be an open question (if at all amenable to a proper answer). Having said that, the French vote is the best proxy we have of the general will of European citizens on whether they endorsed or did not endorse the Constitutional Treaty as the repository of the fundamental legal norms of the European Union, simply because it was only in France there was a long and deep debate where private preferences were tested by contrary arguments. It is simply silly to counterargue that following the opinion of a majority of citizens of one Member States is undemocratic. To start with, the question of how to define the European *volonté générále* was skipped, not because French and Dutch voters favoured the fragmentation of the European will into national wills, but because the very framers of the Constitutional Treaty found inappropriate (dangerous?) to offer such a definition. That would have entailed transcending not so much the idea of unanimous consent by all Member States, but actually coming to terms with the need of defining a genuine European *volonté générále,* other cannot be a mere juxtaposition of national wills (which indeed would have required taking seriously the equality of European citizens as European citizens, not as citizens of different Member States; but more on this latter). [2]

[2]It may pertinent to remember that the drafters of the Constitutional Treaty were in this regard less bold than the European Parliament in 1984. While the Treaty on European Union was more cautious (one would should say subtle) in many substantive questions,

Moreover, the claim of lack of democracy simply does not take seriously into account that of the eighteen Member States which have ratified the Treaty, in only two cases the people spoke directly.[3] So if we follow the argument seriously and consistently, what we have is on the one hand the "no" of the French and the Dutch, and on the other hand the "yes" of the Spaniards and the Luxembourgeois. The addition of these figures results in a narrow advantage for the "yes", exclusively due to the landslide victory of the "yes" in the Spanish referendum. But not only a close majority is insufficient for major constitutional reform, but this majority is extremely shaky, given that the Spanish referendum was merely a matter of aggregation of preferences, as nothing even closely resembling a debate actually took place (not to speak of the dismal level of participation). So the claim that the ratification process must go on to realise the European general is an argument which may be enticing in the abstract, but is fully ungrounded when considered in concrete. Be it as it may, my first claim is that a proper reconstruction of the Laeken process leads us to the conclusion that it was a failed constitution-making process. The ultimate reason it can be so defined is that (French and Dutch) citizens took seriously what may have been purely strategic claims on the side of European political elites (the labelling of the Constitutional Treaty as a Constitution, and the use of the positive connotations that the term constitution has for most Europeans in their campaign in favour of a yes vote) took a decision based on a constitutional reading of the Constitutional Treaty, and after a debate which took seriously the constitutional character of the draft. The fact that then they said no does not contradict my claim; it only reinforces it, because no-saying is the ultimate proof of the constituent authority of the people.

§. My second claim concerns the question of why there was such a long delay between the negative outcome of the French and Dutch referenda and the acknowledgment that the Constitutional Treaty was dead. If it was the people who turned Laeken into a genuine constitution-making process, how come their undisputed authority as *puovoir constituent* was not immediately acknowledged and acted upon? (by means of disposing of the Constitutional Treaty in the nearest dustbin). That is an interesting question which deserves some attention. First, the systematic reading of the speeches of the representatives of European and national institutions in the immediate aftermath of the referendum indicate that they were genuinely shocked. Indeed, they were shocked by the very effect that their decision to rise the constitutional card had had, i.e., what was regarded by many as a mere rethorical device with which to increase the chances of an easy ratification in some Member States (as just said, "constitution" was regarded as more "sexy" than "constitutional treaty", and as having a wider emotional appeal, to be cashed in at polling stations),[4] citizens took the claim seriously, and broke with the "permissive consensus" under which the underlying preferences in favour of supranational integration could be easily mobilised in favour of any project which claimed to advance such integration. Jean Claude Juncker put it very aptly when he

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they were bold enough as to claim that the Treaty should enter into force if a majority of Member States representing a qualified majority of the European population did endorse it. This implies not merely an arithmetic change, from unanimity to qualified majority, but the underlying shift from the mere juxtaposition of national wills to the positive definition of a general European will, which will be formed even if some national governments disagree.

[3]Only in another case (Germany), the ratification process could be said to have been equivalent to the process followed to amend the national constitution

[4]See Jack Straw 'On the European Constitution', *The Economist*, 8 July 2004.

claimed: “Europe does no longer make people dream”. Indeed, it did people *think* and act upon what they thought.[5] Second, a retrospective assessment of what happened in this period leaves scarce room to disagree with the conclusion that no serious reflection was actually undertaken (and was perhaps never seriously envisaged). The reflection period was declared in a hurry, in the absence of a clear blueprint of what to do (or do not). To open such a period was decided in the European Council of June 15 and 16th 2005. European leaders implicitly assumed that *any* reform Treaty should first and foremost reflect the best possible settlement at an intergovernmental level; because the Constitutional Treaty did reflect such a settlement, ratification should continue; however, they also gave clear indications that the way in which French and Dutch had voted rendered simply impossible to obtain unanimous ratification of the Constitutional Treaty (and thus ratification could not continue). It is interesting to notice that the way out of the constitutional crisis advocated by a good deal of the “no” campaigners (renegotiation taking into account the no vote), by full-blooded federalists (fully abandoning the intergovernmental aspects of the reform process, and thus designing the drafting process in a way that would ensure responsiveness to citizens' demands, and the ratification process in such a way that the general European will, and not fragmented national wills, would be decisive) or the Eurosceptics (simply scrapping the constitutional project) were never taken into account. Instead, European political leaders settled for “reflecting on what to do”.[6] But the lofty and imprecise objectives which were enumerated at the launch of the reflection period were never rendered concrete. A limited number of well-intentioned initiatives of some political and social groups, and the usual pinch of public relations exercises (which these days require a good deal of internet activities for sure) did take place, but there was never a concrete agenda, and no concrete proposals were ever subject to public scrutiny. Thus, the reflection period was merely a device to gain time to broke a new agreement at the intergovernmental level which would reflect the new circumstances. On the one hand, the myth of the Constitutional Treaty still being alive was regularly fed by the Commission and by some national governments to the public. This pattern reached some tragicomic levels with the “post-mortem” ratification of the Constitutional Treaty in some Member States. Finnish ratification was undertaken with the knowledge (and expectation) that the Constitutional Treaty will never enter into force, and was intended by the Finnish government as a means of marking in symbolic terms their “euro-philia”.This came in hand in hand with a reiteration that the Constitutional Treaty should not be renegotiated, and should stand in one piece. On the other hand, there were repeated statements that the right way forward was to avoid constitutional salience, and that should be applied

[5] See 'EU In Agony After Constitution Fiasco', available at http://www.dw-world.de/dw/article/0,1564,1603498,00.html

[6] See 'Jean-Claude Juncker states that there will be a period for reflection and discussion but the process to ratify the Constitutional Treaty will continue with no renegotiation', available at http://www.eu2005.lu/en/actualites/communiques/2005/06/16jclj-ratif/index.html. In concrete, the key words spoke by Junker were: “We think that the Constitutional Treaty is the right answer to many questions posed by people in Europe. We feel, therefore, that the ratification process must continue. This Treaty is the best one, which means that its renegotiation cannot even be envisaged. Secondly, we have taken note with regret – with a heavy heart as I said the other day – of the French and Dutch rejection of the draft Constitutional Treaty. The questions and issues raised during the debates in the Netherlands and France, and in other countries too, and the fears expressed, mean that we cannot continue as if nothing had happened. This leads us to think that a period for reflection, clarification and discussion is called for both in the countries which have ratified the Treaty and in those which have still to do so. During this period, changes should be seen in all these countries in the European Union’s institutions, the Commission, the European Parliament, the Council and the Member States, civil society, management and labour, national parliaments, political parties and other players”.

from the very beginning by negotiating away from any form of public scrutiny. In their statements and in their acts, most European political leaders came to share the view that it had been a mistake to raise the constitutional card in the Laeken process. Their original calculus had been that the constitutional form would render easier to implement the reforms which a vast majority of them thought were necessary. But that had been proved wrong by the referendum fiasco. Without serious redrafting, it was unlikely that a repetition of the referenda would lead to a different result in France and the Netherlands. But because getting the IGC to agree on the rejected drafting had been so difficult, such an avenue was very much disfavoured. Which implied that no French or Dutch leader was likely to risk her political capital on the suicide manoeuvre of convincing her co-citizens to swallow the same text they had rejected by a large majority. Still, reforms were needed, even more once the enlargement to the twelve new Member States had taken place. So the astute way forward was to disentangle reform from constitutional reform. This is the very source of the idea of a "partial" rescue of the Constitutional Treaty through a "mini-Treaty". The idea was first articulated in a cogent manner by Nicolas Sarkozy, then still a Presidential candidate. It was then selected as the strategic option of the German Presidency of the Council. And was fleshed out in "technical" terms by the group of "wise men" funded by the Robert Bosch Foundation, and led by former vicePresident of the Laeken Convention Giuliano Amato.[7] The basic structure of the latter text was given a pinch of salt here and there principled in the European Council of June 2007, and has now been articulated into a first full draft of the mini-Treaty. To summarise, my second claim is that the delay in acknowledging the constitutional importance of the no vote in France and the Netherlands was a means of looking for a strategy to actually circumvent such a decision. Why these things happen is a wider question, which can perhaps only be answered if one considers the rise of a public relations approach in which spinning and focus groups are indeed the key tools in the art of politics, and in which the general will is increasingly substituted by manufactured consent. But that is clearly besides the mark here. Be it as it may, the advocates of the Mini-Treaty plea for modesty, and strongly advice avoiding any further topic, as radical disagreement is likely to result in blocking negotiations. To overcome the stalemate what is needed is a "common minimum denominator" proposal, which would then restart the process of European decision-making, and allow the Union to take the kind of decisions European citizens really want from it. This scenario appeals both to Eurosceptics and Europhiles. For the former, this is the modicum of reform that is really needed, and which will imply avoiding any temptation to expand the competences and power bases of the Union. For the latter, this step backwards would allow two steps forwards once the Union proves to its citizens that is capable of deciding in favour of the common good, that there is a real European added value.

3. The actual features of the mini-Treaty

§. The Berlin process is a procedural and substantive alternative to the Laeken process. Let us now consider what this entails in detail.

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[7]The fact that the text was ready by June can only be explained if their authors had a good sense of what was the likely calendar of the reform bandwagon in 2007. The approach was then agreed in the European Council of late June 2007. Despite the clever spinning of the German Presidency, which succeeded in portraying negotiations as a tragic clash between diverging national positions, the contrastation of the drafts which were circulated in advance and the final text makes one doubt that really this was a hard agreement to reach, notwithstanding the media strategy of the German Presidency.

§. The first element of the consensus around the mini-Treaty concerns the reform procedure. If the terms of the agreement were to be negotiated behind the scenes, the underlying understanding of what the reform process should look like was far from secret. As has just been advanced in the general remarks on the Berlin process, the favoured strategy was to disentangle the constitutional symbolism and form of the Constitutional Treaty from its substantive reform contents, and to repack the latter as a "reform Treaty". This entails slicing the Constitutional Treaty into small pieces, getting rid of enough pieces as to render minimally plausible the claim that its approval does no longer raise constitutional questions and thus credible the premise that this is no longer a European Constitution in any sense. This is why, as we will see in more detail in some lines, "constitutional symbols" have been deleted. This basically entails that there is no longer any reference to the flag or the anthem of the Union. And more importantly, the mini-Treaty contains no reference in its main text to the primacy of Union law over national law as the ultimate rule of conflict (thus, it abandons Article I-6); while the Charter of Fundamental Rights is given legal value by "reference". Its text is not part of the main Treaty, but is contained in annexed Declarations; in addition, its whole standing (and as we will see, the whole idea of what European constitutional law is) is challenged by Protocol number 7, which contains the British (and very likely, Polish) opt-out from fundamental rights protection; and by Declaration 41, which articulates Polish reservations on what concerns "public morality". To this it must be added the peculiar characterisation of "national security" as the only exclusive national competence which is boldly affirmed as such. More of that latter. What is now relevant is that the alleged "deconstitutionalisation" of the Treaty grounds the key two differences in terms of procedure between Laeken and Berlin. First, the European leg of the reform process is reduced to pure intergovernmental bargaining, with no attempt at engaging national publics on the discussion of the proposals; on the contrary, the very schedule of the reform agenda is indicative of the will to seal the drafting process from public influence.[8] Second, national ratification needs not proceeded in constitutional mode, and very importantly, the number of national referenda is intended to be small. Paradoxically, as we will see, the Berlin process breaks ground because it is the first time there is a (negative albeit purely unofficial) agreement on how national ratification process should look like. They should not involve the direct consultation of the people. That is key not only for the French President or the Dutch Prime Minister, but also for many political leaders who have openly expressed their distrust of their own citizens, at least on what regards European matters.

§. The second element concerns the substantive contents of the reform Treaty. It is to be characterised by two features: short and simple.

The mini-Treaty is to be "short", comprising a reduced number of articles which can easily be "communicated" to European citizens. The Constitutional Treaty was simply too long, and such length undermined the "communication" efforts of the advocates of the "yes"; sheer length made credible any potential claim of the partisans of the "no". Thus, Europe needs "a pocket constitution", a sort of "red European book" for the lefties or a "catechism" for the more pious followers of the Pope.[9] While the mini-Treaty as a whole is not that short, its advocates can still claim that it is shorter

[8]It is important to keep in mind that the mandate of the IGC was decided in late June, the IGC formally opened in July, and the mini-Treaty was expected to be signed in October. Less than four months in total, two of which correspond to the "summer holidays" of both general and strong European publics.

[9] For example, the Amato Committee boasted that it cut the total number words by 80%.

than the present primary law and than the Constitutional Treaty because the revamped Treaty on European Union is indeed a short one, and it has a formal standing higher than the Treaty on the functioning of the European Union. Thus, it can be claimed that it plays the role of a synthetic text which can be "easily communicated", to which citizens can be referred in order to get a grasp of what the European Union is and what it is supposed to do.

The mini-Treaty should also be "simple", and by that two things are basically meant. First, that it is not a full-fledged alternative to existing law, a full consolidation of the primary law of the Union, but an incremental reform which will builds on the existing Treaties. This is why their present structure is essentially kept, even if their substantive content is thoroughly changed (filled with a mixture of the contents the Treaties in force, the Constitutional Treaty and the handful but key changes agreed in the European Council of June). As already hinted at, the amended Treaty on European Union -together with the Charter of Fundamental Rights, to which it refers- would play a role formally akin to Part I of the Constitutional Treaty, and can thus be said to contain the "fundamental" legal norms of the Union (the core of its material constitution). In its turn, the Treaty on the establishment of the European Community now becomes the Treaty on the functioning of the European Union, which contains the operational norms formally regarded as placed in an intermediate position between the Treaty on European Union and standard European secondary law (i.e. regulations and directives). Not only the structure remains in place, but indeed no specific provision is contained in the Treaty on its relationship with the primary law in force now. As we will see, that may reduce the size and apparent complexity of the Treaty, but it comes at a price. Second, the mini-Treaty is to presented as limited to specific questions concerning the institutional set-up and the decision-making process which it is claimed are the source of the risk of paralysis of the Union after enlargement. When it is said that a Europe of 27 cannot operate with the decision-making rules and institutional structure of the little Europe of 1957, what is basically meant is that the the power to make European laws and to take policy decisions must be defined in ways different than the present ones. The underlying theme is the streamlining of the decision-making process and the elimination of veto powers which could paralyse the Union. This requires in some cases the creation of new institutional structures, in others the reform of existing ones, and finally, the change of the actual rules determining which majorities are needed with each institution to reach a decision. On what concerns the latter, the key change concerns the voting rules within the Council. This is done by means of scrapping the system of "weighed voting", under which Member States are assigned a different number of votes depending on population (at present, Article X TEC requires a majority of Member States, representing 62% of the total population of the Union, and representing a certain number of weighed votes). Instead, it is now required (ex Article 9c) that the measure is supported by 55% of the Members of the Council (formally, it is also said that it must be supported by 15 Member States, but given that the Member States are 27, in most cases, bar some exceptional situations, that would not imply an additional requirement) which represent 65% of the population. However, the decision will also be approved if only three Member States oppose it, even if they represent more than 35% of the population of the Union. This is basically in line with Article I-25 of the Constitutional Treaty. However, the big difference is that the transitional period during which the rules will not be applied does not extend to 2009 (as was the case in the Constitutional Treaty) but to 2014, and eventually to 2017, as the Protocol on transitory provisions establishes. On what regards institutional reform, the mini-Treaty follows the path of the Constitutional Treaty and increases the institutional thickness of

the European Council, by means of assigning it explicit functions; at the same time, it modifies the structure of the Presidency of the European Council and the Council of Ministers (a very necessary step if the money which has already been invested in the premises of such Presidency in Brussels is not to prove fully wasted) ; it streamlines the Commission; and it creates a hybrid Minister of Foreign Affairs; while it drops the name (preferring to redefine the present position of High Representative), it keeps the (thin) substance of the Constitutional Treaty in this regard. In doing this, all potential formal or symbolic references of a constitutional character have been dropped.

4. Eight Critiques

First critique: The mini-Treaty is not small at all

The second critique contests that one can seriously regard the reform Treaty as a mini-Treaty. Firstly, it is important to keep in mind that it would be simply unfair to compare the Constitutional Treaty as a whole with the revamped Treaty on European Union as included in the IGC draft. Not only the text should be completed with the provisions which are not amended, but preserved from the existing Treaties, but more to the point, fairness would require us to add the completed Treaty on the functioning of the European Union, the annexed Protocols and Declarations, and all pre-existing Protocols and Declarations which have not been explicitly repealed. If we paste all that in one volume, it will not be short. Secondly, the claim that the revamped Treaty on European Union contains the core of the fundamental norms of the Union is less tenable than the claim that the First and Second Part of the Constitutional Treaty did contain such fundamental provisions. In the latter case, the Convention and the IGC missed a golden opportunity when they rejected the claims of some participants to establish a clear hierarchical ranking between Parts I and II (and IV, containing general and transitional provisions) and Part III of the Treaty. But that could have been done because in fact Parts I and II (and IV) were drafted as if they were the actual constitutional law of the Union. This cannot be said of the revamped Treaty on European Union. Not only it merely refers to the Charter of Fundamental Rights (which is only explicited in Declaration 11?), but some key provisions of European Union law are to be found in the "functional part", such as the key provisions on European citizenship. Can really one claim that the Treaty on European Union is exhaustive of the fundamental legal norms of the Union if it excludes provisions on citizenship (and such provisions are regarded as mere functional?). Moreover, something to which we will come back, we are confronted with the paradox that some of the provisions excluded as part of the strategy of deconstitutionalising the reform Treaty are actually made part of the reform Treaty, only in a less obvious form. Especially revealing is the decision to drop Article I-6 of the Constitutional Treaty on primacy, while adding Declaration 29 which reproduces the Opinion of the Council Legal Service, which is worth quoting at length:

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL,15 July 1964, Case 6/641) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice

Finally, the mini-Treaty fails to establish a clear cut ranking between the Treaty on European Union and the Treaty on the functioning of the European Union. In both cases, amendment is only possible if national governments agree unanimously within the European Council and if such decision is unanimously ratified by each and every Member States according to its own national constitutional provisions. The fact that reform of provisions of the Treaty on European Union require the calling of a Convention, presumably of the kind of the Laeken Convention, is not enough as to draw a hierarchical ranking among the two of them, given that such a Convention would only act as a preparatory body, and given that nothing prevents Member States from calling such a Convention also when reforming the Treaty on the functioning of the European Union.

Second critique: The mini-Treaty is extremely complex

Given some of the arguments already referred to in my first criticism, it will not be any surprise to the reader that I also claim that the Treaty is far from being simple. Indeed, it may be the case that the simultaneous will to keep as much as possible of the Constitutional Treaty, while rendering plausible the claim that the reform Treaty disentangles reform from constitutional questions has resulted in an extremely complex structure.

Firstly, the fact that the mini-Treaty is a limited reform exercise, and that no systematic attempt is made to derogate the whole set of primary norms of the European Union could give rise to extremely complicated questions concerning the persistent validity and interpretation of some Protocols and Declarations. The depth and extent of this problem would require a more systematic analysis than the one I have had the time of undertaking in the few weeks since the text has been available. Being honest, I can only offer such general statement, and indicate that concrete implications would require a more paused study. Secondly, and perhaps even more importantly, the strategy of constitutional avoidance, coupled with back-door reinsertion of constitutional clauses could lead to major uncertainties on the actual implications of the mini-Treaty. In my view, this is especially pertinent on what concerns the problem of primacy and of the status of the Charter of Fundamental Rights. On what concerns the first, the solution of dropping Article I-6 and then having a Declaration in which the IGC takes notice of what the legal advisors of the Council think leaves a major degree of uncertainty on what is the actual standing of the principle of primacy. What kind of legal value does the acknowledgment of the opinion of a set of legal advisors have? How is it to be interpreted by the European Court of Justice, national constitutional or high courts, even lower courts? That is an extremely open question which is bound to increase, not decrease, the complexity of the primary law of the Union. On what regards the Charter, one is tempted to conclude that the removal of its main text from the main body of the Treaties is unlikely to have major legal effects. But it has major symbolic implications, only reinforced by two provisions which is hard to deny will have systemic legal effects, namely Protocol number 7 (which establishes an opt-out mechanism from protection of fundamental rights) and Declaration 41 on “public morality” legislation in Poland. Protocol number 7 is the direct consequence of the persistent distrust which British governments have shown towards the Charter of Fundamental Rights of the Union, distrust which has been justified on fears of an subreptitious increase of the powers of the Union pace the Charter, and an undue intromision in the policy choices of the government of Her Majesty. It is important to keep in mind that such objections

were overrun in the Charter Convention by the insertion of a set of horizontal clauses which limited the legal effects of the Charter; such fears were that notwithstanding ones again invoked by the representative of the British Government to the Convention to obtain a further reinforcement of such horizontal clauses, and by the assignment of official authoritative value to the explanations which had been prepared by the Praesidium of the Charter Convention. During the runon to the European Council of June 2007, the British delegation once again invoked its fears on the entry into force of the Charter, and it obtained Protocol number 7. It is key to realise that although it has been presented as a way of dealing with the "Charter problem", its present drafting goes much further. Indeed, it is worth quoting at length Article 1:

> *1. The Charter does not extend the ability of the Court of Justice, or any court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*
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> *2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to the United Kingdom except in so far as the United Kingdom has provided for such rights in its national law.*

What is interesting here is that while there is explicit reference to the word "extend" (which may be taken as indicative that both the ECJ and national courts could still do what this Article prevents them from doing if based on primary law other than the Charter), the article actually takes out from the parameter of European constitutionality the whole set of "fundamental rights, freedoms and principles" that the Charter "reaffirms", that is, also of the fundamental rights, freedoms and principles that were part and parcel of the primary law of the Union before the Charter was solemnly proclaimed in 2000. The literal tenor of this provision entails that only those rights, freedoms and principles not explicitly enshrined in the Charter (the unennumerated rights) could be actually referred to by the ECJ and national court to review the constitutionality of British laws and regulations (and in general, administrative acts and private acts falling under the remit of Union law). Furthermore, this effect is further magnified by Article 2, which reads:

> *To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of the United Kingdom.*

This provision refers to the "general limiting clauses" which were introduced in the original text of the Charter in order to ensure a reduced bite of the Charter. However, such "general limiting clauses" were likely to be regarded as compatible with the conclusion that fundamental rights contained in the Charter did still impose a "core" protection independent of what national laws established. Such a conclusion is now ruled out through Protocol 7, thus rendering impossible a fully systemic interpretation of Union law, and thus endangering the very principle of equality before the law of European citizens.

These provisions are short; but the price of apparent shortness is the hidding of major complexities. That is indeed the theme of my third critique.

Third Critique: Could it be small and simple?

There is an unavoidable tension in the rationales of the mini-Treaty. On the one hand, it is claimed that the new text should be "small", to avoid the same deficiencies of complexity and sheer length which allegedly contributed to the failure of the Constitutional Treaty. On the other hand, it is said that it should be "simple", a pocket-size text which Europeans could read in one or two hours, and through which they could understand the basic purposes and functions of the Union. These two rationales are very cogent and clear in abstract, but experience shows that it is virtually impossible to realise them at the same time. The very experience of drafting the Constitutional Treaty shows that simplicity may favour smallness, but that a small and simple Treaty raises extremely complex and controversial questions. Simplification requires first and foremost drafting a text which will replace the jungle of Treaties, annexes, declarations and protocols. But doing so is full of consequences, which legal advisors to national negotiators will no doubt elucidate, and which will consequently result in hard bargaining, through which the openly constitutional nature of the decisions being adopted will come to the fore. [10] If we go that way, it is clear that the idea of a mini-Treaty as is put forward would be simply ludicrous. This is likely to increase the easiness and speediness of its ratification in some Member States, but it could easily backfire in some others. It is not unlikely that some electorates, especially those who will have to be anyhow called to express their view in a referendum, because such plebiscite is constitutionally required, or because it would be politically unavoidable, would find this solution extremely infelicitous. Because it is clear that a text which will add on previous Treaties could only in a very formal sense be called simple. In reality, it will be a further source of headaches for officials at all levels of government, and indeed will ensure high fees for European lawyers for decades. It could still be said that we could have all the pros and none of the cons by means of having a mini-Treaty which will derogate previous "contrary" provisions, leaving unspecified which such provisions are, and how the derogation is to be understood. Well, this may be swallowed by both national representatives and parliamentarians, but would clearly not add to the simplicity of primary European law. Indeed, such a formula could be the quickest way to enrich most practitioners on European law.

Fourth critique: institutional decision-making cannot be reformed ina constitutional vacuum

The idea that the mini-Treaty should focus exclusively on institutional questions, and that such questions refer to the "mechanics" of decision-making, and consequently, are easy to agree on, and do not have a constitutional profile which would mobilise the public, allowing for a nice and quiet ratification through national parliaments, is at the

[10] Such dynamics explain why the goal of writing a single Treaty which will replace previous texts could only be fulfilled by abandoning a clear-cut distinction between the "constitutional" and "non-constitutional" parts of the said Constitutional Treaty, and thus compromising the very "constitutional" nature of the text (indeed, if one had to choose the factor which weighted heaviest on the rejection of the Constitutional Treaty in France and the Netherlands, that would be it). Simplification into one single Treaty with a clear-cut division of the constitutional and non-constitutional parts would have required the kind of thinking and deciding through which a Convention "linked" to an Intergovernmental Conference, and lacking a popular mandate, was simply incapable of tackling without putting in peril the very objective of being capable to come to a successful end. But even if its forces were short to its ambitions, the Convention had enough muscle to impose the key principle that the Constitutional Treaty would derogate most of the pre-existing primary law of the Union.

very least a rather eccentric idea. First, it is quite clear that it was precisely these institutional issues which led to the blockage of intergovernmental negotiations in December 2003. So experience tells us that there is no reason to assume that the mechanics of decision-making are easier to agree on than, say, the very purposes of common decision-making. The reason should be obvious to all: institutional and decision-making procedural reform do not take place in a vacuum, but build on the cumulated experience of common decision-making. Consequently, Member States guess which substantive outcomes are more or less likely in the event of institutional and decision-making procedural reform. Indeed, there was more of a veil of ignorance in 2004 than there is now, as all 25 Member States as of May 2004 have cumulated three years of experience in the enlarged context of the Union (Romanians and Bulgarians had less time to learn, but were exposed to an environment which quickened the learning process). The fact that a given institutional shape or decision-making procedure blocks decision-making does not necessarily entail that all should agree on reform, provided that some Member States think that they (or the interest which have captured such government) profit from such blockage of decision-making. Secondly, it must be kept in mind that what is meant by institutional set up and decision-making process is in reality a key constitutional question, namely, the actual definition of the European general will. One can pretend otherwise, but the simultaneous reduction of the areas where a single Member state can block decision-making through veto and the definition of qualified majority voting by reference to (essentially) population implies a step (even if inadequate, even if the formula are wrong) to a definition of a general European will which is not a mere juxtaposition of national wills. Can we seriously deny this is a constitutional question? Can we pretend it is just a matter of "mechanics" and thus compatible with the strategy of constitutional avoidance? I can only find one valid answer to such a question, and that is no.

Fifth critique: Is it really a Treaty?

This brings us to a further theme, namely, whether dropping the constitutional rhetoric is enough to transform the nature of the mini-Treaty.

Firstly, whether a text is or is not a constitution critically depends on the social practice within which it will be interpreted and applied. In that regard, it is very important to recall that the European Union exerts powers which are akin to those of many federations and/or nation-states, and that such powers are structured and disciplined by a set of material constitutional norms. In this context, it is difficult to avoid the conclusion that prima facie, a reform Treaty which introduces major reforms to such norms must be regarded as a text of constitutional import, and not merely as an international treaty which assumes that the core constitutional structure of the nation-state is unaffected.
Secondly, it is important to keep in mind that the fact that the national leg of the reform process is not subject to explicit European standards implies that the question whether or not the mini-Treaty has constitutional salience remains a question to be answered from the national constitutional standpoint, and as such, is a question which cannot be definitely answered on the basis of the protestations of European leaders exclusively. It may provide a expedient way out to some national leaders (particularly in France and the Netherlands) but it does not change a iota of the national constitutional law of any Member State. In substantive terms, it is hard to assume that the correct answer to the question whether the ratification of the mini-Treaty does require either a national

constitutional reform or the direct consultation of national citizens is "no" in all twenty seven Member States, given that the mini-Treaty will formally turn the Charter of Fundamental Rights binding (although it already had legal effect given its consolidating role, this will likely expand its role as canon of exceptions to fundamental economic freedoms, for example), it will increase the areas subject to qualified majority voring, it will redefine the ordinary European general will in ways which trasncend the mere aggregation of national wills, it will basically affect the relationship between national governments and national parliaments because of the new role assigned to national parliaments in European law-making, and it will enlarge the powers of national executives over key areas of civil liberties protection, especially in the area of police and judicial cooperation on criminal matters.[11] In pragmatic terms, it is important to keep in mind that it will be sufficient for one Member State to hold a referendum and that plebiscite result in a no vote for the ratification process to implode. Nobody knows the future, and consequently nobody can predict what the result would be in each and every of those Member States which finally hold a referendum, but it is far from obvious why the electorates should be better disposed to a mini-Treaty intentionally aimed at circumventing public scrutiny in other Member States than to, say, the Maastricht Treaty. Is it being seriously claimed that dropping "constitutional" from the text will dramatically change the perspectives of getting a "yes" in a referendum in these countries? That some of the very same people supporting this position were not so long ago claiming that a positive result depended on a bandwagon of national referenda in which citizens said yes to the Constitutional Treaty does not help dispelling my doubts.

Thirdly, it is completely unpredictable how national populations would react to the news that the mini-Treaty will not be as a rule subject to referenda. The advocates of this formula have no doubt being fully convinced by the worst Brecht, who preferred to change the composition of the people to the substance of a decision. But are citizens to be of the same mind? It is open to be doubted that the mini-Treaty is now regarded as a way of swallowing a bitter pill, and that the very success of non-governmental actors in mobilising the French and Dutch electorates will not motivate such organisations everywhere in Europe to attack the mini-Treaty, and to raise hell in the name of a referendum. It should be noted that the cause of a referendum will mobilise not only the "no" people in the previous round, but indeed many of the "yes" people, provided that they think that democratic rights are more important than outcomes (but more on new cleaveages latter).

Sixth Critique: Urgency and the consequences of enlargement

The very reasons why the mini-Treaty is needed, and is needed so urgently, are at best vague; at worst, they are completely muddled or even not fully true. The outmost champion of the mini-Treaty (President Sarkozy) claims that Europe is in stalemate, as a consequence of enlargement of its membership without proper institutional and decision-making reform. Furthermore, the rejection of the Constitutional Treaty has left the European Union incapable of acting decisively, and that is a big problem which

[11]That principles such as "nulla poena sine lege" and the non-retroactivity of penal sanctions could be weighed and balanced against other principles by requirement of European law is indeed already happening through the influence of the European Court of Justice. To give Treaty sanction to that would imply (as was the case with primacy) raising an issue of constitutional dimensions, one which would advise following a "constitutional" process of ratification, not an "intergovernmental" one.

needs to be sorted out. This line of reasoning captures one of the most repeated claims made during the "phantom" reflection period, and to which I have already referred, namely that enlargement required structural reform of European decision-making, which did not take place either in Nice nor through the Constitutional Treaty due to its rejection, because the way in which the Union at 9, 10, 12 or 15 decided cannot simply be resorted to with 25 Member States. The present ways of forming a common European will are simply too cumbersome, and not only occasionally render impossible to decide, but routinely render decision-making costly in time and money. However, the fact is that the measures put forward would indeed ensure paralysis for the coming ten years if they were ever adopted; the mini-Treaty not only entrenches the requirement of unanimity voting in key fields, such as the finances of the Union, the approximation of national tax systems (including the amendment of the already existing acquis communitaire) or the design of social policy; but in addition, it renders sure that qualified majority voting will kept on being defined as presently until 2014, and almost certain that the date in which such rules will be changed will be 2017; if that is the proposed solution, one can seriously doubt that reform is really urgent, or that this reform will really be of any use. At least, they are the best recipe to make the present state of affairs (the alleged paralysis) last at least ten years; perhaps longer than the European Union as we know it.

But more to the point, the diagnosis is simply wrong. Europe is not increasingly paralysed, but is increasingly biased in favour of certain substantive outcomes. On the one hand, legislative output seems not to have decreased, but increased in the last years despite enlargement.[12] That is not surprising, given that a) it is well-known that the model of "executive federalism" already push the Council towards unanimous decision-making, even when qualified majority voting could be resorted to; b) most decisions are not taken at the Council, or even Coreper level, but at the level of working groups or committees, where the decision-making logic tends to be "technocratic", and thus amenable to deliberative action, to discussions where the force of the better argument prevails, and socialisation on Europeanness leads participants to review their positions accordingly.[13] Indeed, enlargement has had a big impact, but not in terms of decision-making capacities. It is the other hand of the argument that should be paid attention to. Namely, what enlargement has affected is *decision-making biases*, already in place before enlargement, but now reinforced to the power of nine. The structural division of labour between decision-making processes in the EU implies that market-making decisions, which essentially increase negative economic freedoms, require a qualified majority in the Council, and thus, can be taken even if several Member States oppose. On the contrary, market-correcting measures, with a regulatory [understood in terms of intervening market operations, and not only establishing the rules of the game) and redistributive profile, are subject to unanimity requirements, which are (almost) impossible to reach in an enlarged European Union. An empirical analysis not only of the measures approved since 2004, but also of the initiatives tabled by the Commission, will probably show that the structural biases in favour of market-making has become even clearer. But to tackle such bias, we should reconsider the very source of it, namely, the division of labour between decision-making procedures. The fact that we define qualified majorities in less demanding ways, or that we add a couple or four of instances in which decision-making can take place by qualified majority voting, does not really change much, and indeed could make things worse (indeed, the structural democratic

[12]Report Sciences Po.

[13](nota bene, this does not mean that decisions are democratic in a normative sense, but that the force of the best –technical-argument tends to prevail).

deficit resulting from the division of labour between decision-making procedures is a direct consequence of a decision taken in the very name of democratic legitimacy, namely, the introduction of qualified majority voting and the assignment of co-legislative powers to the European Parliament).

Seventh critique: Power is not akin to legitimacy; the risks of success in the absence of legitimacy

The Berlin process assumes that what was wrong was the strategic decision to couple reform with the rising of the constitutional card. Their promoters believe that a path of least resistance can be devised by means of avoiding constitutional problems, or at least, pretending to avoid them. This could well result in a ratification success which will not only not increase the legitimacy of Union law, but actually fully unravel its legitimacy basis, and consequently, its capacity to integrate the Union. That this is so has much to do with one lesson of the Laeken process that has been fully neglected, namely, that the design of a constitution-making process which is not intended from the start to forge a coherent common will, but merely a coherent common will among political elites, can only be successful if such elites are widely and rather blindly trusted by citizens. But such levels of trust are unrealistic (and indeed, they should be regarded as problematic from a normative standpoint) in democratic polities as Member States aspire to be. Because they are unrealistic, draft constitutional proposals produced under such arrangements are bound to be extremely fragile. Either they fail because the people appropriates whatever avenues are open to exert their constituent power (as was the case in France and the Netherlands, through a negative referendum vote; they could also do so in general elections, or through massive popular protests, not unheard of in France, for example) or they fail because the lack of democratic legitimacy erodes compliance. The mini-Treaty could lead both to ratification failure because some the people of one or more Member States appropiates its constituent power, or to a ratification success followed by major social contestation. In both cases, it is important to realise that stakes are high, and that what is at risk is the very viability of the process of European integration literally understood. Even if national executives could get out with it, and force national parliaments to ratify without consulting citizens, that may exhaust the legitimacy credit of the European Union.

Eight critique: The big break with constitutional reform: why Berlin is not a proper way of rescuing the Constitutional Treaty

A last question which seems to me proper to raise is whether it is appropriate to describe the mini-Treaty as a reduced (lite?) version of the Constitutional Treaty to the extent that the source of most of the amendments being introduced to the primary law in force is no other than the Constitutional Treaty.
Prima facie, the answer can only be positive. It suffices to give a quick glance to the text to see that the first draft is a cut and paste exercise, where the pieces are essentially borrowed from the present Treaties and the Constitutional Treaty, with some new pieces stemming from the Presidency Conclusions of June 2007.
However, an overall assessment leads to the opposite conclusion. First, and quite obviously, the key question remains what has been cut and what has been pasted. Indeed, if the very advocates of the mini-Treaty protest that so much has been cut as to render implausible the claim that the mini-Treaty introduces changes of constitutional

importance, they are granting *a contrario* that the Constitutional Treaty did indeed have such a constitutional importance. So there is a clear break with the Constitutional Treaty if the mini-Treaty does not have such a relevance. Moreover, the advocates of the mini-Treaty claim that this is an international treaty, for the very same reasons, i.e., denying any constitutional salience. But if this is an international treaty and an international treaty only, then the adequate procedure of ratification is to be determined in each national legal order in a fully autonomous manner, as it was already claimed. That is, the question whether the mini-Treaty has or has not constitutional salience has twenty seven different answers. If this is so, the mutual pledge which members of the European Council seem to have made to each other concerning the inconvenience of calling a national referendum contradicts the very characterisation of the mini-Treaty as an international Treaty. They feel that there must be at the very least negative limits to how the national constitutional process should proceed. This implies indeed a paradoxical break with the Constitutional Treaty; now there is an imposition of negative European standards on the national ratification process. Such a negative break renders only bigger the distance between the Constitutional Treaty and the mini-Treaty. Secondly, the fact that most of the new text comes from the Constitutional Treaty, and that a good deal of the new drafting there introduced is now reproduced in the mini-Treaty does not mean that the mini-Treaty has "rescued" the Constitutional Treaty. Such a conclusion could only be based on an aggregative conception of what the constitution is. However, it is simply wrong to characterise fundamental laws as congeries of norms, as was already argued.

Thirdly, the rationales for the reform process started in 2000 and "rectified" in 2007, and the procedure through which this reform is now attempted are extremely different. The Laeken process was based on the assumption that there was a need to introduce some changes in the institutional and decision-making structure of the European Union, and that the implicit material constitution of the European Union should be rendered explicit. The signallers of the constitutional moment, from Joschka Fischer to Lionel Jospin, agreed on the double-headed nature of the legitimacy shortcomings of the Union. The functional capacities of the Union were dependent not only on adequate institutional engineering with a view to an enlargement which will almost double the number of Member States and result in massive new economic and social challenges given the very different economic structures of new and old Members; but also on citizens regaining political control over the whole process by becoming the explicit authors of their own fundamental laws. This belief in the coupling of political stability and a constitution proper did not come out of the blue, but out of the constitutional experiences of most Member States (indeed, one could say all Member States, with the partial exception of the United Kingdom, whose government is however increasingly based on explicit constitutional documents supported by large political majorities; that is the case of the Human Rights Act and indeed of the Acts which establish the Scottish and Welsh Assemblies, and their respective powers). Consequently, it is very correct to say that the Laeken process aimed to reduce the tension between the conception of the constitution inscribed in the common constitutional traditions which formed the core of the material constitution of the European Union and the actual features of such a synthetic constitution fifty years after the process of integration had been launched. While the common European constitutional law could not but be grounded on the authority of We the People, the fact that such authority was merely collectively juxtaposed atenuated the strength of their legitimatory radiation force. This is indeed what explains that even a watered down document such as the Laeken Declaration did contain not only a set of concrete possible substantive reforms, but also pointed to a

reform process with explicit constitutional implications. And also why once the process was launched, its procedure acquired even stronger constitutional features, despite the persistent will of some key national governments (if not all) to rein in such developments. Indeed, the signalling of the process as a constitutional one was an invitation to citizens to appropriate the process, and their actual political mobilisation rendered impossible comfortable backroom agreements. In a constitutional perspective which is not obfuscated by short-term considerations, it is clear that the fact that the process came to an end not because national governments could not agree among themselves, but because citizens rejected the texts after thorough deliberations at the very least in France is in itself evidence enough to take seriously the hypothesis that this ratification failure indeed entails a constitutional success, in the precise sense that the identification of European constitutional law with the norms featuring the highest democratic legitimacy has been taken seriously, and acted upon, by European citizens. Quite differently, the Berlin process is said to be a pragmatic and astute way of rescuing the Constitutional Treaty given the circumstances which prevail after the two negative referenda in France and the Netherlands. The argument goes that it is always wise to follow the path of least resistance. The Laeken process proved not to be the path of least resistance to achieve the substantive objectives contained in the Constitutional Treaty, therefore we should look for a path of lesser resistance, which is said to be the Berlin process. Thus, the difference between the two processes is said to be not one of substance (give or take one or two questions) but merely of strategy. And the strategy consists precisely in attaching fast to the substantive changes of the Constitutional Treaty, while getting rid of its "symbolic" constitutional features. However, behind this astute rethorics lurks a full break with the Laeken process, which has deep and problematic consequences. Leaving aside the question of whether all "constitutional" innovations of the Constitutional Treaty have been dropped or not (and consequently, whether this can be said to be an international treaty *simpliciter* which does not require to be ratified in a constitutional mood), one should reflect on the implications of claiming that the "substance" is preserved while the "symbols" are dropped.