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The need for Constitutional Compromise and the drafting of the EU Constitution

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The Good, the Bad and the Ugly: The Need for Constitutional Compromise and the Drafting of the EU Constitution*

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The Convention on the Future of Europe has provoked both cynicism and idealism. Cynics see it as a largely rhetorical exercise that consolidates but does not go beyond the achievements of recent intergovernmental conferences (IGCs) or greatly transform the nature of the EU (Moravcsik 2003). Idealists view it as offering the potential for a new departure that replaces intergovernmental bargaining with genuine deliberation to produce a genuine European consensus (Habermas 2001). According to this interpretation, a constitution should take the form of a contract that all rational individuals possessing a sense of justice would approve. Discussion within a constitutional convention should serve to weed out self-serving arguments, leading people to converge on a position that reflects common interests as defined by the exacting standards of public reason. From this perspective, the inevitable elements of real political negotiation and compromise that arise in any convention, however well designed (Elster 1996), represent unfortunate impurities that inevitably involve a sacrifice of principle to pragmatism in order to accommodate the partial concerns of powerful groups. What the cynic sees as a confirmation of the basically instrumental motivations of political actors, the idealist regards as a lost opportunity ((Eriksen/Fossum/Menendez, 2002, Ch 1, Magnette 2003). In this chapter we wish to dispute certain aspects of both these positions.

Underlying the idealist's account is the belief that a well-ordered society requires that people agree on certain just principles that offer the rules of the game for how they handle conflicts stemming from their different interests or beliefs (Rawls 1993, p. 53). However, though any political society will need to reach an agreement on how to settle their differences, the terms of that agreement may well involve making a decision over some of the very issues they disagree about – not least because their differences on many matters may be related to their holding different views of justice. These disagreements are often reasonable and so cannot always be ascribed to purely self-interested, myopic or other unworthy motives. Nevertheless, in such cases consensus in terms of a convergence on a single position as clearly the best proves impossible. Rather, some form of bargaining will be necessary to produce a mutually acceptable compromise of either a substantive or a procedural kind. Thus, the idealists are wrong to suppose a constitution based on compromise is a compromised constitution that has failed to achieve some putative ideal consensus on truth and justice. Yet, the cynics may be mistaken in believing it is just a self-interested bargain. It may represent the fairest and most appropriate agreement available given a plurality of equally reasonable, yet divergent and occasional conflicting, views.

There are deep and reasonable differences within the EU over the two basic purposes of any constitution. A constitution both establishes a polity, defining who the people subject to it are and within which functional and territorial spheres, and creates a form of regime, designating the procedures or styles of decision-making that need to be followed for arriving at and implementing common policies, authorising who can rule and limiting the scope of any governmental intervention through devices such as judicially protected rights. On both counts, members of the Convention on the Future of Europe were divided between those favouring keeping the largely intergovernmental and market-orientated character of the EU, and those looking to create a more federal and unitary structure with a broader remit. In addition, national and ideological differences cut across this divide. As a result, if the EU was to live up to its declared intention of preserving diversity in unity, a compromise of some kind was inevitable. The key issue is how satisfactory are the compromises that were achieved. As we shall argue, a pure bargain of the kind assumed as the norm by the cynics may often produce bad or ugly compromises. As the idealists hoped, the Convention setting offered an improvement in this respect. But a more deliberative politics rarely leads to consensus so much as good compromises, the result of a more complex kind of negotiation that is principled yet sensitive to clashes of interests and ideals.

Our investigation proceeds as follows. We start by outlining why compromise can be necessary and the types of compromise available, and offer an analysis of when they are good, bad or simply ugly. We then turn to the Convention, explore those features that promoted different sorts of compromise and provide examples and an assessment of the main forms that were agreed. We shall conclude that, within pluralist contexts, such as multi-national associations, the role of a constitution is not to produce a deliberative consensus within which bargaining can occur, but to facilitate an on-going process of compromise similar in kind to that achieved in the Convention itself.

Why Compromise?

Compromise is sometimes portrayed as a shoddy capitulation, whereby principle gets sacrificed to self-interest and short-term advantages. For example, in the case of a constitution it might be supposed that it should be based on principles that ought to be embraced by all who endorse liberal and democratic values rather than simply balancing the particular interests of those currently affected. Such calculations, critics of compromise standardly argue, can only lead to incoherence and injustice, such as the initial endorsement of slavery in the US constitution. Yet, compromise can also indicate a laudable willingness to see another's point of view, thereby showing a decent respect for difference. If there are divergent and competing views and interests, each of which are well-founded, then, if a collective agreement is necessary, it seems both prudent and justified to seek an accommodation between them.

There are various circumstances that might render such compromises necessary (Bellamy 1999, Ch. 1). These range from contingent or logical conflicts in satisfying particular human

goods, of not being able to fund, say, both libraries and swimming pools, differences between divergent conceptions of the good, such as the clash noted by Machiavelli between the Christian and the Pagan life, to the pull of different sorts of moral claim, such as the tension between consequential and deontological considerations. Not all goods and values can be accommodated in a given social space, and to the degree they are incommensurable as well as incompatible ranking them will prove a difficult task. Though certain philosophers believe that they can, at least in principle, resolve such dilemmas, no such proposed resolution commands universal assent. As John Rawls has pointed out, what he calls the 'burdens of judgement', defined as 'the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgement in the ordinary course of political life' (Rawls,1993, pp 53-56), place limits on what we can justify to others. Even the best argued case can meet with reasonable dissent due to such factors as the complex nature of much factual information and uncertainty over its bearing on any case, disagreement about the weighting of values, the vagueness of concepts, the diverse backgrounds and experiences of different people, and the variety of normative considerations involved in any issue and the difficulty of making an overall assessment of their relative weight (Rawls, 1993, pp. 56-57). As a result, 'many of our most important judgements are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will all arrive at the same conclusion' (Rawls, 1993, p. 58).

Elsewhere we have argued that even the most basic of constitutional principles, namely fundamental rights, can be subject to disagreements resulting from these sources (Bellamy and Schönlau, 2004). For example, think of the debates over breaches of privacy. It is often difficult to identify these not just because the empirical details may be unclear but also (and most importantly) because people differ over the boundaries of the concept, hold different accounts of the public interest and where it overrides the right to privacy, view personal responsibility differently and so on. As a result, they have different views of when a right exists to be breached in the first place. Indeed, the laws in many states differ on this point. For example, France and Germany protect the privacy of public figures more than Britain or the United States. Thus, although all EU member states share a commitment to human rights, when it came to drawing up the Charter of Fundamental Rights they frequently divided over the *substance* of rights, or which rights we have and why, the *subjects* of rights, or who may possess them, the *sphere* of rights, or where they apply, the *scope* of rights, or how they relate to other rights and values, and the *securing* and *specification* of rights, or the type of political or judicial intervention and the precise set of entitlements that are needed to protect them, both in general and in particular cases. Members of that Convention disputed whether rights covered social and economic matters as well as civil and political issues, if they applied simply to EU institutions or the domestic arrangements of the Member States as well, their impact on certain collective national interests, how far, if at all, they covered all persons residing within the EU territories as opposed to Member State nationals alone, the ways they were to be framed - abstractly or very specifically, as policy goals or clear entitlements, and the extent to which the Charter was simply a declaratory statement or legally binding. These disagreements were largely overcome through various kinds of compromise. Our claim here is that much the same can be said for its successor convention when it came to debating other parts of the constitution.

How to Compromise

In circumstances of reasonable disagreement, deliberation will not necessarily act as a funnel that leads the disputants to converge on a single position. There is no better argument none can reasonably reject, and no compelling reason for anyone to transform their position to adopt another's. We submit that people overcome this impasse by dropping the search for a strong consensus (in the sense of all being converted to a particular view) and looking instead for mutually acceptable agreements. In this case, all the parties remain convinced that their own position would be the best, at least given their own concerns, but come to appreciate that reasonable alternative perspectives exist that ought to be acknowledged in some way as well. In other words, compromise need not be simply a matter of prudence but also of principle, reflecting a willingness to 'hear the other sides'. Here deliberation works more like a filter, weeding out purely self-interested moves in order to reveal those positions that ought to be accommodated and those that should not (Bohman 1998, Ch 2). This process achieved, then different sorts of compromise may well be available, depending on the issue in dispute.

Roughly speaking there are three broad categories of compromise, each of which has a number of variations (Bellamy, 1999, Ch 4). The first kind seeks a direct compromise between the different viewpoints. One of the commonest methods consists of bargaining and arises in what Albert Hirschman has called 'more-or-less' conflicts (Hirschmann, 1994). In these cases, the disputants are either arguing over a single good whose meaning they share, or are able to conceive their various demands as being translatable into some common measure, such as money. Thus, when employees haggle over wages or house buyers over the price of their prospective home, they may have issues other than money in mind – such as the need to work late or the proximity of a railway line in these two examples - but they can nevertheless put a price on their concern that enables the parties to agree a mutually satisfactory deal. According to this model, democratic bargaining should yield partisan mutual adjustment in order to arrive at a mutually beneficial compromise on matters of collective concern. However, there are a number of problems with this approach. There is a danger that bargainers look out for themselves and seek to get as much of what they desire as they can. They only take account of the interests of others to the extent they are obliged to. Given the strong and rich generally need concede less to the weak and poor than to other rich and strong groups, pure bargaining seems unlikely to produce equitable or stable compromises. Add to this weakness the problems of free-riding and selective defection in decisions over most public goods, and the likelihood of bad compromises resulting from the bargaining model increases. Finally, there are questions of integrity and the incommensurability and incompatibility of what different groups want. Certain values are integral to a given group's identity and could not be bargained away without a sense of deep loss. Particular goods are often simply different, and to seek to compare them would

be as absurd as asking whether we should regard Mozart as better or worse an artist than Shakespeare.

These difficulties are what give compromise a bad name. However, fortunately more complex and deliberative forms of arranging compromises exist on those occasions when we need to make a decision and pure bargaining would be inappropriate. Thus, a more sophisticated style of negotiation goes beyond simply 'splitting the difference' and involves trading to mutual advantage, whereby each gets some if not all of what they want. For example, most political parties have to engage in a degree of log-rolling to get elected. This procedure brings into a single party various groups who may disagree over many issues but prioritise them differently. If three groups are split over the possession of nuclear weapons, development aid and a graduate tax, but each values a different one of these more than the others, it may be possible for them to agree to a package giving each the policy they value most while putting up with another they disagree with in an area that matters less to them. Of course, sometimes the result can be a programme that is too inconsistent to be tenable or attractive. Here, it might be better for the groups to shift to an agreed second best. A notion adapted from economics, the basic idea is that modifications to one's preferred option may be less desirable than obtaining one's next best or even lower ranked choice. A cheap sports car that pretends to be an expensive one may be less appealing than a solid family estate. Individuals and groups with conflicting first preferences may even have a shared second preference. Sometimes it may appear that people's concerns are simply incommensurable, irreconcilable or talk past each other. Appeals by religious groups for special treatment have sometimes been portrayed in such terms. Yet it may be possible to employ analogies to appeal to a shared norm or precedent and argue casuistically towards a common position. Within a largely secular political culture, say, it may be possible for a religious group to point to some humanist analogue to religious belief, such as state support for the arts, to justify protection of their religion on grounds of equity.

These more developed forms of compromise share a common desire not so much to compare different positions as to give each one its due and to seek reciprocal solutions. They adopt a problem solving approach to conflicts, rather than viewing them as a battle to be won or lost. The aim is an integrative rather than a distributive compromise, with the interests and values of others being matters to be met rather than constraints to be overcome through minimal, tactical concessions. Such compromises try to include the moral reasons of each side. Conflicts can often appear intractable at the level of abstract principle because radically under-described. Deliberation overcomes this problem by allowing the concerns of the parties involved to be fully articulated, so that the specific force of the various reasons involved can be appreciated. Thick description may help clarify the distinctive weight of different demands. Each party may agree that reasons of different weight or involving different sorts of consideration are involved. When described in detail, it may prove possible to address the main preoccupations of each party in a coherent way. The forms of compromise suggested above, such as log-rolling, second best and reasoning by analogy, represent attempts to put together a coherent package that finds a place for the views of all concerned.

Sometimes time constraints or the character of the differences dividing them prevent parties from agreeing a compromise on substance. A second kind of compromise often comes in here, which employs a procedural device to overcome deadlock. In these cases, the parties agree to defer to whatever outcome issues from the procedure, regardless of whether they agree to the decision or not. The acceptability of the procedure does not turn on its coming up with the 'right' answer, for that is what is in dispute. Nevertheless, there must be something about the procedure that inspires confidence that its decisions would not be so irrational or arbitrary that it would be preferable to live with the conflict. In general, the procedural virtue appealed to is that of fairness in the weighing of the different views – that all are shown equal consideration and have a chance to influence the outcome. Taking turns offers a simple form of procedural compromise, but risks becoming a nonsense if it means that decisions change with the decision-maker. A presidency that rotates between different groups is one thing, a rotating policy quite another. Ronald Dworkin calls compromises of the latter type 'checker board' solutions (Dworkin, 1986, p. 179). He gives as an example of such a compromise a proposal that abortions be permitted amongst women born in odd but not in even years – after all, anti-abortionists would regard this as better than no ban and pro-abortionists as superior to a complete ban. Yet, compared to the integrative compromises discussed above it appears incoherent – a compromised form of justice rather than a just compromise. For example, it is in stark contrast to Dworkin's own attempt to address this issue by giving weight both to 'the intrinsic value of life' and the 'procreative autonomy' of women, which can be seen as an attempt at an integrative moral compromise (Bohman 1998, p. 92), even if he does not portray it in these terms himself.

To avoid such checkerboard solutions, procedural compromises usually involve an agreement that a given decision process is fair for choosing a single collective outcome. Choosing by lot or tossing a coin offer pure procedures of this nature. However, these mechanisms also seem better adapted (and are more common) for choosing decision-makers than making decisions. Giving all views an identical chance to define the outcome can be at variance with showing everyone equal concern and respect. Collective political decisions usually affect very large numbers of people. To give the opinion of a single individual the same weight as a view supported by many thousands of people is to treat the latter unequally. Unanimous decision making, which gives a veto to even very small minorities, suffers from a parallel failing. By contrast, as May famously showed (May, 1952), majority voting alone satisfies certain basic criteria of fairness and rationality. In particular, it weighs each person's view equally, rendering all preferences equally (if minimally) decisive. Of course, this result assumes ideal conditions. In real politics, there are problems of consistent minorities and tyrannous majorities. Because of these problems, strict majoritarianism is rare.[1] Most legislatures are elected via systems that produce multiple parties and a degree of representativeness that makes coalition building necessary. The attempted compromise here is to give disadvantaged minorities a role in collective decision-making that ensures their views are not discounted entirely, but without undermining equality and effectiveness. In particular circumstances, animosity may run so high that people prefer to defer the decision to another. Third party arbitration, where trust is placed in the arbitrator to do the

balancing in an impartial manner according to a fixed set of rules, likewise represents a procedure aimed at giving equal weight to all views.

At times even an acceptable procedural solution may seem unavailable. This situation can arise either when an issue is so divisive no common position would ever prove acceptable or when one or more of the parties involved do not recognise the right and/or the need for decisions on a given matter to be taken collectively (or at least by a given collectivity). In these circumstances, compromise can take the form of either trimming or segregation. Trimming arises when certain issues simply get taken off the agenda, most commonly through the employment of constitutional 'gag-rules' (Holmes 1998). The classic case is the strict separation of Church and state. The difficulty is that the 'method of avoidance', to use the Rawlsean term for this strategy, suggests a lowest common denominator that may favour the status quo and involve keeping quiet about a deep injustice. In this respect, trimmers resemble G. K Chesterton's man of universal good will, ridiculed for saying 'Whatever the merits of torturing innocent children to death, and no doubt there is much to be said on both sides, I am sure we all agree that it should be done with sterilised instruments.' Moreover, trimming may be as controversial as a more positive policy, taking off the agenda the issues that most animate people and delegitimising the political system in the process. For example, removing religion from politics will not be perceived as a neutral solution by those people whose deepest political convictions stem from religious beliefs. After all, this is the case not only for Christian fundamentalists, whose demands typically drive liberals towards the trimmer's position, but also for Abraham Lincoln and Martin Luther King. Allowing views, even extreme ones, to be publicly debated enables reasonable views to be distinguished from the irrational and bigoted. Segregation similarly seeks to skirt around conflict by preserving the integrity of each value, culture or interest within its own domain. The private gets separated from the public, people placed into groups of the like minded and given autonomy to decide language, religious or other policies for themselves. Some segregation is vital for individual and group autonomy. However, the borders are rarely clear cut and can be as politically controversial as the issues they are meant to resolve. No matter how well drawn, they almost always include dissenting minorities in their turn, many of whom would belong to a majority given other arrangements and often were members of the majority prior to the new boundaries being drawn.

All three kinds of compromising, along with their variants, are standard political techniques and frequently combined. Each has its respective merits and demerits, according to the issue and the perspectives of the people concerned. Take, for example, religious education in a multicultural society. Trading might yield ecumenical solutions or concessions, such as special rights, in other areas which certain religious groups regard as more important, as in Britain's exemption of Sikhs from wearing crash helmets on motorcycles. Or it might be better to trim or establish as a shared second best that schools are strictly secular. Societies that are deeply segmented along religious lines have often adopted various forms of segregation, such as consociationalism (Lijphard, 1968). Sometimes a minority group engages in negotiation to get accepted. For example, British Muslims have pointed to analogies with established liberal or Christian practices to get certain of their claims recognised as legitimate and to promote understanding of them (Modood, 1993).

While consensus aspires to a fixed point above normal political divisions, compromises necessarily reflect them. They differ according to context and evolve as people's circumstances and views change. Nevertheless, the above discussion of compromise offers us certain guidelines for distinguishing the good from the bad and the ugly. Pure bargaining works well for issues working along a single dimension in which matters of principle and identity are not involved, but even then has potential problems of non-compliance, free riding and inequity that are only likely to emerge from a more deliberative and negotiated strategy (Neyer 2003). As such, critics of compromise in the constitutional realm are right to object to pure bargaining on most occasions. However, a more deliberative approach can give rise to integrative compromises. The qualities evidenced by such compromises are a willingness to 'hear the other sides' and to reach mutually acceptable agreements. Similar virtues of equality of concern and respect and reciprocity characterise good procedural compromises. Indeed, a good procedure is likely to be one that is sufficiently inclusive as to lead to integrative compromises. By contrast, pure procedures have no filtering mechanisms, and let irrational and intolerant positions stand unchallenged. Equal weighting is different to identical weighting. The latter also often produces substantively incoherent or compromised decisions, such as checker-board solutions. When neither an integrative compromise of a substantive kind nor a fair procedural compromise proves possible, then segregation can offer the answer. After all, a checker-board involving different jurisdictions is both common and arguably fosters individual and group autonomy. However, sub-dividing existing units can often be ugly if not exactly bad, while trimming is invariably so.

SeeTable 1 in appendix.

With these issues in mind, lets now turn to the Convention on the Future of Europe and address the issues of why compromise was necessary, whether it offered a context liable to promote good compromises, and the degree to which the agreements reached were indeed good.

A Compromised Constitution?

The Convention on the Future of Europe was expected to overcome the 'pure bargaining' of the intergovernmental conferences traditionally entrusted with reforming the EU's primary laws. The use of the convention method to draft the EU Charter of Fundamental Rights had produced a surprising degree of agreement on an array of controversial issues (Eriksen/ Fossum/Menéndez, 2003, Ch 1). A convention was now seen as the appropriate tool to propose solutions for the 'left-overs' of Nice (i.e. those institutional questions at the eve of EU enlargement which had been solved only partially with the Treaty of Nice) as well as for such long standing problems of the Union as the division of competencies between the EU and the member states (European Council- Laeken Declaration, 2001). Though most governments were initially reluctant, they seem to have reasoned that this was potentially their last chance for major institutional reform, which many fear will become harder post-Enlargement , and so became willing to adopt alternative methods to break through the apparent deadlock of the IGCs. The role of governments as guardians of national interests, on

the one hand, and the general taboo on questioning established arrangements lest all the extant bargains and agreements unravelled, on the other, were seen as inhibiting discussion of the radical changes needed to shape the integration process and either extend or constrain it. They hoped a convention would be freer to consider a wider range of options. A convention was also viewed as a mechanism for securing a degree of popular and especially parliamentary support for any decision (Magnette forthcoming).

Although the Convention set up at the Laeken summit had a wide remit, it was not given the task of drafting a European Constitution but of studying the questions and presenting options for Treaty reform which would then be discussed and decided on by a subsequent Intergovernmental Conference (IGC). Prompted by the Convention President, Valéry Giscard d' Estaing, it took on this constitutional role itself, believing the merging of the various treaties into a single, more coherent document offered the best solution to the various issues it had been asked to consider. There were a number of features of the Convention that favoured its being more deliberative than an IGC, although as we shall see the result was not consensus in the strict sense so much as a better form of compromise.[2] First, it had more time. Originally the Convention was given a year for its colossal task of examining the more than 800 articles of the current EU set-up, starting from February 28, 2002. In the event, the Convention took more than 50 official meetings and a little more than 17 months to produce its draft, which was presented to the heads of state and government in July 2003. Thus, its deliberations took place over months rather than days. The need for quick decision-making almost always precipitates a tendency to bargain. Opponents get bought off, or powerful groups simply cut a deal that ignores minority views. As we shall see, time pressures often had this effect in the Convention too.

Second, it had a broad membership, bringing together representatives from the Commission and European Parliament, as well as the national parliaments and governments of both the 15 current member states and ten candidate and three applicant countries.[3] With two members of each national Parliament and from the Commission, one from each national government and 16 from the European Parliament, the Convention had 102 full members (shadowed by an equal number of substitutes), plus a president and two vice-presidents. The Convention also included observers from other EU institutions like the Committee of the Regions, the Economic and Social Committee, social partners and the European Ombudsman, and aimed at consulting widely (though it was also criticised for not succeeding). Bargaining typically takes place among a small group of like-minded actors, who do not need to consult either experts or stakeholders, and for whom making a decision proves more important than getting it right. A larger group, involving a number of stakeholders and experts, is more likely to raise problems and divergent perspectives, all of which need to be explicitly addressed. However, the Convention was not so big that discussion between all the members of the Convention could not take place, or individuals got tempted into playing to the gallery rather than making arguments. Nevertheless, smaller working groups frequently proved crucial for brokering agreements in sensitive areas.

Third, its deliberations were largely public without being in the glare of publicity. Bargaining is notoriously characteristic of 'smoke-filled rooms'. A degree of publicity forces people to make their case by appealing to public interest arguments and generally acceptable reasons rather than naked self-interest or purely partial concerns. Such public reasoning may often be employed hypocritically, but it nevertheless constrains what people can demand of others. However, too much publicity leads to grand-standing and populist attempts to palliate or appeal to influential interest groups outside the Convention. To a degree, European IGCs suffer from both problems – their deliberations are private but so widely publicised that politicians will always want to claim that they have struck a 'tough bargain' for their constituents regardless of the justifiability of their demands.

Fourth, the Convention was task-orientated, focused on producing workable, long-term arrangements. From his inaugural speech onwards, the Convention's President was at pains to uphold the 'convention spirit'. He invited members to 'embark on our task without preconceived ideas, and form our vision of the new Europe by listening constantly and closely to all our partners.' (cited in Magnette forthcoming). As a result, he urged that 'the members of the four components of our Convention must not regard themselves simply as spokespersons for those who appointed them'. He made members sit in alphabetical order rather than in political or national groupings. Though not entirely successful, since these groupings met outside the plenary sessions, overt references to ideology or national interest were seen as breaches of Convention etiquette.

Fifth, Giscard d'Estaing also decided (and was not seriously challenged on this by the Convention) that the decision-making method would be 'by consensus' rather than by unanimity or majority vote (Magnette forthcoming). Unanimity could have allowed the tyranny of the minority, whereby a very small group – even one representative – could hold out against any agreement until their demands were met. However, given the diversity of interests involved, a bare majority risks a minority being unduly and consistently passed over. The decision to seek a 'consensus' could at one level be seen as itself a compromise between two of the positions the constitution sought to reconcile: namely unitary, 'pan-European' interests, where a simply majority of the European population could be sufficient to carry a policy, and the various distinct interests of the different member states, which are only likely to be satisfied by seeking an agreement acceptable to all. Nevertheless, the President's interpretation of this rule was at times both obscure and controversial.

Finally, the Convention contained sufficient power holders or their trusted representatives to be realistic in its objectives and not be tempted into utopian schemes. A mere talking shop divorced from the realities of politics has no incentive to make its proposals either practical or popularly legitimate. Yet, the degree of government interest, which grew towards the end, was also a weakness. In general, rules should not be made by those likely to be subject to them. Once again, this will encourage a form of bargaining, where short term considerations of immediate advantage will compete with a more deliberative desire to devise general rules that can be equally applied to all for the common benefit.

As table two shows, the results of the Convention's deliberations supply examples of many types of compromise, and more examples could easily have been added.

See Table 2 in appendix.

While pure bargaining played a lesser role, because in the complex context of constitutional negotiations there are not many one-dimensional issues that lend themselves to more-or-less agreements, it was not entirely absent. Certain national governments attempted to force through concessions by using the threat of a veto – especially in the very last phase of the Convention when time pressures meant that such tactics could be used without having to be justified before the Convention as a whole. For example, Germany and France were each able to overturn a previously agreed extension of qualified majority voting to an area of particular sensitivity to them: namely, immigration and access to the labour market, and trade in cultural goods, respectively.

However, the commonest kind of compromise was based on negotiation. Examples of 'good' negotiated compromise include the involvement of national parliaments in monitoring subsidiarity. The debate about how to uphold the principle of subsidiarity without overly curtailing the EU's capacity to act or jeopardising the efficiency of its law-making power, was initially polarised between those seeking the creation of a third chamber representing national parliaments and others advocating very little, if any, change to the current (weak) system of enforcement. The compromise solution integrated both points of view. Though national parliaments were not formerly involved in EU decision-making, their role is strengthened. They must now be kept informed of EU developments and have the possibility of issuing 'early warnings' when they believed the principle of subsidiarity to be under threat, supplemented with the ultimate sanction of bringing cases before the European Court of Justice via the national governments.

Another successful integrative compromise resulted from the negotiations about the division of competencies between the European Union and its member states. A core question of the Laeken mandate, this issue provoked heated debate during the early stages. Some, notably the German Länder, wanted a fixed catalogue of competencies, others were wary of prematurely fixing EU structures in their current state. As with the agreement on national parliaments, a compromise was forged within a working group. The proposed solution was to introduce three basic categories of competencies (exclusive and shared competencies and a category of 'supporting, coordinating or complementary action', Arts. 12, 13 and 16), as well as special provisions for specific policy areas (economic and employment policy, foreign and security policy, Arts. 14-15) and a flexibility clause which allows the Union to adopt measures for which it does not have specific competencies, but which are necessary to obtain the objectives of the Union. The safeguard against excessive use of this latter provision is the unanimity requirement and the necessary consent of the European Parliament (Article 17.1), the specific reference to the subsidiarity monitoring mechanism (Art 17.2) and the exclusion of harmonisation (Art. 17.3). This complex compromise seems to have satisfied most if not all Convention members that the right balance had been struck.

However, while the Convention method was successful in filtering out clearly unreasonable or irrational views during the deliberation process, and thus avoided really bad negotiated compromises, it did produce a couple of ugly negotiation results. Perhaps the ugliest of all (certainly from an aesthetic point of view) was the rather convoluted preamble, with its vague appeals to somewhat questionable European values. Another, more serious, example is the vagueness of the article on the role of the Chair of the European Council, which had been a very contentious issue from the beginning. Due to extensive negotiation and various rounds of compromise, the article in its current form tries to accommodate opposing views (those who thought an elected president of the European Council would be the key solution to the EU's effectiveness and legitimacy problems, versus those who saw it as the end of European integration because of its strengthening of the intergovernmental aspect of the EU). The result is a weak compromise, which is at best a lesser evil for both sides.

Procedural compromises were naturally crucial to the Union's institutional arrangements. The principle of equality of member states was frequently invoked in the debates about them, with equal rotation promoted as its clearest expression. This was introduced at Treaty level in its basic form in the article on the rotation of the Presidency of the Council of Ministers (Art 23), even though various proposals had been made for elected Chairs of these bodies. Nevertheless, the specifics of the 'equal rotation' are left for the European Council to decide, '…taking into account European political and geographical balance and the diversity of Member States' (Art 23.4). Similarly, the equal rotation of Commissioners proposed in Article 25 mentions special 'principles' which need to be followed when establishing the details – a reflection of the difficulties attending the adoption of this particular procedural compromise.

On the whole, however, the need to develop coherent policy-making structures meant that more complex procedural solutions were adopted. The system for the election of the President of the European Commission as introduced by Article 26 represents a good compromise in this respect. It combines the two logics (the intergovernmental and the supranational) of European integration: the European Council proposes a candidate by a qualified majority, for the European Parliament to elect by a majority. The somewhat vague formula that in choosing the candidate the European Council should take 'into account the elections to the European Parliament' is a compromise solution which allows room for some flexibility until a more stable European party system has emerged.

By contrast, the system for the definition of the qualified majority (Art. 24) represents a bad procedural compromise. The system agreed at Nice had been a classic case of the dangers of hurried bargaining. It had exacerbated existing disproportionalities in the number of votes per country, made the voting system far too complex and raised the threshold of a qualified majority (Maurer 2003). The originally proposed solution of a double majority based on a majority of member states representing a majority of the EU population would have been a clear, simple and fair solution. Yet in the negotiations, bargaining once again came to the fore and the threshold of the population requirement was raised to 60% per cent, thereby increasing the relative weight of large member states. While some rebalancing seemed necessary of the hitherto disproportionately represented small member states, the compromise here seems to go too far in the other direction. Paradoxically, it is this point on which the IGC following the

Convention now seems to hinge because of the intransigence of two member states (Spain and Poland) who want to maintain the favourable position offered by the Nice system.

A merely ugly compromise is the procedure for the choice of the members of the Commission (independent of the question of how many members the Commission will ultimately have): for article 26.2 stipulates that 'each Member State determined by the system of rotation shall establish a list of three persons in which both genders shall be represented, whom it considers qualified to be a European Commissioner.' It seems difficult to imagine that this will lead to a genuine competition between equally qualified persons as opposed to political game playing with a list of one real candidate and two bogeyman/woman candidates. This compromise can only be explained as an attempt to placate fears that the appointment of the Commission members would otherwise be taken over by the elected Commission President and thus completely out of the hands of national governments.

As far as trimming is concerned, it is difficult to establish in many cases which issues could have been debated by the Convention, but were not included as a matter of choice or reasoned decision. On the whole, the Convention sought to avoid the vagueness and deliberate ambiguities that were often employed to reach agreements at IGC's. From this point of view, trimming was seen as a failure. However, one issue which was consciously (and largely successfully) removed from debate was the contents of the EU Charter of Fundamental Rights. While the Laeken mandate had clearly indicated that a solution had to be found on the questions of if and how the Charter should become part of the constitutional treaty, it did not mention the contents of the Charter. Yet there were voices in the second Convention's early debates that criticised certain aspects of the Charter and seemed to imply the need to re-open the issues decided by the first Convention. Nevertheless, the working group on the Charter very clearly stated that '...the content of the Charter represented a consensus reached by the previous convention... The whole Charter – including its statements of rights and principles, its preamble, and, as a crucial element, its "general provisions" – should be respected by this Convention and not be re-opened by it.' (CONV 354/02:4). Given that it is unclear that the decisions of the second Convention could have been any different to the first in this regard, trimming on this issue was probably the best solution. Nevertheless, a certain 'ugliness' resulted from this compromise. Two far from elegant preambles is arguably at least one too many within any constitution. Moreover, the inclusion of the explanatory notes of the first Convention's Praesidium, requested by Britain since they believed these clearly restricted the scope of the Charter to EU institutions, arguably creates more rather than fewer ambiguities. The status of the notes was in any case unclear, given that they were not discussed by the Charter Convention.

Other areas of trimming were rather less felicitous. The Convention's failure to reach agreement on the issue of economic governance (working group final report: CONV 357/02) meant that the draft constitution is largely silent on some crucial matters in this area. In the fields of taxation and monetary policy, for example, the working group could only agree to recommend that the EU's existing limited competencies should be maintained. And while it recommended that other issues (for example social dialogue) should be discussed in the Convention as a whole, because these issues went beyond its mandate, the failure to reach a compromise in the working group also led to a curtailment of debate on these apparently divisive issues in the Convention. How far these *lacunae* will lead to injustices remains to be seen, though problems in this area are bound to resurface sooner rather than later.

Segregation was also a tool employed by the Convention in the search for agreement. Clearly, to reserve certain decisions within the EU context for member states or even sub-national actors is a form of segregation. To some degree, a clearer demarcation of state competences in certain areas was employed to allow greater integration in others. In this regard, the new arrangements for protecting subsidiarity represented a compromise between the groups in the Convention who clearly pushed for further centralisation of competencies, and those who wanted to roll back integration and give powers to the national level. This sort of compromise was not possible in all issue areas, however, with foreign affairs and common defence and security policy proving particularly tricky. Various forms of flexible integration have been offered as one way of getting round this problem. The idea of enhanced cooperation, for example, allows those countries wishing to embark on further integration in certain areas to do so without waiting for the agreement of those member states that are unwilling or unable to participate. The challenge is to balance such a clause against the danger of an overall dissolution of the European Union or the creation of a two-tier system if the mechanism is used too often. The procedure for enhanced cooperation in Article 43 of the draft constitution therefore introduces a large number of safeguards (such as non-exclusivity of the groups forging ahead, the rule that enhanced cooperation be used as a 'last resort', only upon authorisation by the Council and with a minimum of one third of member states as participants etc.) to ensure it does not lead to the development of permanent parallel groups of member states. Once again, it represents a fair balancing between the demand for unity and consistency, on the one hand, and for diversity and autonomy, on the other.

Similar reasoning lies behind the institutionalisation of the Euro-group, where different speeds of integration are already established. By adopting specific provisions for those countries which have adopted the Euro (Art I-14.3 and Articles III 88-90), decisions about monetary issues are to a certain extent segregated. While it seems obvious that EU members belonging to the Euro naturally have to take certain decisions together without those who do not belong to the single currency, the inclusion of such specific provisions at the constitutional level raises the question of whether a permanent closure might be established of the Euro-group vis-à-vis a minority of non-Euro Member States. This impression is exacerbated by the fact that the Constitution also contains a section on 'transitional provisions' (Arts III 91-96) on member states that do not (yet) fulfil the criteria for Euro-membership, but it does not seem to provide for Member States to decide not to join the single currency at all. How these provisions will interact with political reality is a matter for future analysis, but there is at least the danger of segregation being imposed by the majority on the minority.

Another instance of segregation, which reflects the provisions on subsidiarity mentioned above, is the referral of the decision

on how each national parliament can exercise its rights under the new subsidiarity surveillance system to national legislation. For legal reasons this solution is probably the only one possible, but it risks internalising the potential conflicts between national parliaments and the European level (which is the necessary arena to find an agreement on subsidiarity issues) to one between national parliaments and their national governments, especially in cases where a second chamber has a different political majority to the national government. Moreover, this arrangement weakens the overall effectiveness of the subsidiarity check because it might lead to an uneven application of the sanctioning mechanism envisaged by the compromise. Therefore, this provision is an ugly part of an otherwise good compromise.

Conclusion

The convention represented a successful departure from the intergovernmental bargaining of the IGC's, that managed to produce integrative rather than merely distributive compromises. However, these compromises should not be regarded in their turn as falling short of some ideal consensus, the result of continuing elements of pure, self-interested bargaining. A reasonable difference of opinion exists as to how far the EU serves the interests of citizens within the member states better than their national governments. These debates involve both normative as well as empirical considerations. Moreover, citizens within each member state are divided on this issue to a greater or lesser degree. A very broad spectrum of opinion exists between Eurosceptics and Eurofederalists, with people being more pro-Europe on some issues than others and differing over which ones. Compromise is inevitable therefore. From this perspective, the key successes of the Convention do not lie in having fixed those issues that are EU matters and those that are not. Views on this subject are likely to change over time and vary according to the issue. Rather, its main achievement lies in devising workable structures of governance that reflect the spirit of compromise and that will allow further compromises to be negotiated in the future.

Endnotes

1 Lijphart's (1984, pp. 156-60) analysis of 21 stable democracies revealed only 6 as conforming to this pattern.

2 For the features conducive to deliberation, see Elster 1998.

3 Though as Shaw 2003 notes, significant groups remained underrepresented.

References

Bellamy, R. (1999). *Liberalism and Pluralism: Towards a Politics of Compromise*, Routledge, London.

Bellamy, R. and Schönlau, J. (2004). The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights, *Constellations*, 11.1.

Bohman, J. (1998). *Public Deliberation: Pluralism, Complexity and Deliberation*, MIT Press, Cambridge MA.

Convention on the Future of Europe - documents available at http://european-convention.eu.int/bienvenue.asp?lang=EN

Dworkin, R. (1986). *Law's Empire*, Fontana, London.

Elster, J. (1996). *Argomentare e negoziare*, Anabasi, Milan.

Elster, J. (1998). Deliberation and Constitution Making. In J. Elster (ed.), *Deliberative Democracy*, Cambridge University Press, Cambridge.

Eriksen, E.O., Fossum, J.E., Menéndez, A.J. (2002). *Constitution Making and Democratic Legitimacy*, ARENA Report No 5, Oslo

Eriksen, E.O., Fossum, J.E., Menéndez, A.J. (2003). *The Chartering of Europe*. Nomos, Baden-Baden

European Council, *Declaration on the Future of the European Union*, Annex I to the Conclusions of the Presidency of the European Summit at Laeken, 14/15, December 2001

Hirschman, A. (1994). Social Conflict as Pillars of Democratic Market Society, *Political Theory*. 22, 203-218.

Holmes, S. (1998). Gag Rules or the Politics of Omission. In J. Elster and R. Slagstad (eds), *Constitutionalism and* Democracy. Cambridge University Press, Cambridge.

Lijphard, A. (1968). *The Politics of Accomodation: Pluralism and Democracy in the Netherlands*. University of California Press, Berkley.

Lijphard, A. (1984). *Democracies*. Yale University Press, New Haven.

May, K. (1952). A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision. *Econometrica.* 10, 680-684.

Magnette, P. (2003). Will the EU be More Legitimate after the Convention?, in J Shaw *et. al.*, *The European Convention: Working Towards a European Constitution*, The Federal Trust, London

Magnette, P. (forthcoming). Deliberation vs. Bargaining: Coping with Constitutional Conflicts in the Convention on the Future of Europe. In E O Eriksen and J. Fossum (eds.) *Developing a European Constitution*. Routledge, London

Maurer, A. (2003). Schließt sich der Kreis? Der Konvent, nationale Vorbehalte und Regierungskonferenz. *Stiftung Wissenschaft und Politik Arbeitspapier*, Berlin.

Moodod, T. (1993). Kymlicka on British Muslims, *Analyse und Kritik*. 15, 87-91.

Moravcsik, A. (2003) 'The EU ain't Broke', *Prospect*, March, 38-45

Neyer, J. (2003). Discourse and Order in the EU, *Journal of Common Market Studies*, 41, 687-706.

Rawls, J. (1993). *Political Liberalism*, Chicago University Press, Chicago

Shaw, J. (2003) Process, Responsibility and Inclusion in EU Constitutionalism, *European Law Journal*, 9, 53-67.

Table 1: Type of compromise

Quality of the Compromise	*Type of Compromise*					
	Bargaining	**Negotiating (trading, log-rolling, second best etc..)**	**Procedural** **Pure** **(e.g. lottery or rotation)**	**Procedural** **Imperfect (e.g. majority - or qualified majority - decision making**	**Trimming**	**Segregation**
Good	In single dimensional, more/or less disagreements	When integrative	When for decision-makers	When likely to give rise to integrative compromises	When mutually acceptable as the most integrative solution	To promote individual and group autonomy
Bad	In matters of principle	When involves irrational or intolerant views that do not accommodate positions of others	When for decisions	When lead to the tyranny of the majority	When produce injustice	When exchange the oppression of one minority by another
Ugly	Results in mere *modus vivendi*, so unstable, because dependent on the bargaining power of those involved	When distributive	When for decisions	When the agreement brokered by others	When drive dissent underground and give irrational and intolerant views a spurious legitimacy	When the conflict

Table 2: Type of Compromise

Quality of the Compromise	*Type of Compromise*					
	Bargaining	**Negotiating (trading, log-rolling, second best etc..)**	**Procedural Pure (e.g. lottery or rotation)**	**Procedural Imperfect (e.g. majority - or qualified majority - decision making**	**Trimming**	**Segregation**
Good		early warning system on subsidiarity for national parliaments – protocol division of competencies: no rigid catalogue, but categories (Arts. 11-17)	general principle of equal rotation for presidency of sectoral council formations (Art. 23.4)	election of Commission president by majority of European Parliament on proposal by qualified majority of the Council (Art. 26.1)	No re-discussion of the Charter compromises	Strengthening of subsidiarity control via national parliaments; principle of enhanced cooperation of member states which want to go further (Art. 43)
Bad	last minute exceptions to qualified majority voting introduced by individual powerful players - cultural trade (France), immigration (Germany)			qualified majority threshold raised to majority of member states and 60% of population – risk of blockade by minority (Art 24)	Economic governance – since no agreement could be reached in the working group, Constitution is weak on the subject	possibly the institutionali-sation of the Euro- group (Art I-14, Arts III 88-96)
Ugly		unclear job-description of president of European Council (Art. 21)		proposal of three candidates for Commissioner per country (Art. 26)	ignoring an initiative of 200 convention members for a stronger transparency-clause (Bonde)	decision about ECJ appeal about subsidiarity passed on to national debates