SMALL STATES AND CONSTITUTION MAKING: THE CAUSES OF DIFFERENT OUTCOMES IN PHILADELPHIA AND BRUXELLES

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The theme of this article is the analysis of the possible causes of different outcomes regarding the conflict between large and small states in two constitutional conventions: the American Federal Convention held in Philadelphia in 1787 and the Convention on the Future of Europe held in Brussels in 2002-2003. In both conventions this was the central issue. This conflict was relevant in Philadelphia regarding the resolution of issues on the representation and voting power of the states in Congress and on some other institutional issues (the Electoral College, the veto on the laws of the states, Senatorial powers, amendments) and in the European Convention on similar issues of voting power of states, and the composition or leadership in certain bodies (the Commission, the European Council). The small states in the Philadelphia Convention achieved success in defending the principle of equality of states primarily through equality in the Senate and obtained some other important victories. This success in the process of 'arguing and bargaining' was primarily the result of four interrelated factors: favorable rules of the game (voting by the states), the voting strength of the small states and their cohesion and firmness throughout the Convention, their unyielding bargaining position as to the principle of equality of states and credibility of their threats that they would not ratify the Constitution under the terms imposed by the large states. When analyzing the conflict between the large and small states in the European Convention it is obvious that the position of small states was institutionally weaker (the representatives of states were in the minority in the Convention's membership as they were only one of several institutional components; the majority of small states were accession states, which had no right to challenge a 'consensus' of the

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Convention) and were procedurally weaker (the rules of the game were against them, because they were imposed and manipulated by the Presidium, dominated by large states; voting, which could demonstrate their possible strength, was forbidden). Finally and very importantly, the small states were not coherent and united in pursuing their goals, they were not firm in the defense of the principles they had declared at the beginning of the Convention, and at the end they did not use credible threats, as was the case with the small states in Philadelphia. These are the fundamental causes for the failure of the small states in the European Convention to secure institutional solutions which they favored.

Key words: constitution making, Philadephia Convention, Convention on the Future of Europe, large & small states

INTRODUCTION

Jon Elster noticed 15 years ago that "the comparative study of constitution-making is virtually non-existent", and that "there is not a single book or even article discussing the process of constitution-making in a general comparative perspective".[1] This observation was not quite accurate at the time[2], and even less is it accurate today, due to some excellent comparative studies not only by him[3], but also by some other scholars[4]. However, there is still, in my opinion, a remarkable lack of comparative studies of the processes of federal and/or confederal constitution-making.[5] Federal and confederal constitution-making are not in the same category of constitution-making and cannot always be compared. By confederal constitution-making I mean of process of making a constitution for previously independent or confederated states. The classic example would be the Philadelphia Convention. By federal constitution making I mean process of constitution-making by states already associated in a federal

[1] See Elster, Constitution-making in Eastern Europe: Rebuilding the Boat in the Open Sea, (1993) 71 *Public Administration,* 169, 174.

[2] I'm thinking on the excellent study of Edward McWhinney, *Constitution-making: Principles, Process, Practice* (University of Toronto Press, Toronto, 1981).

[3] See Elster, Forces and Mechanisms in the Constitution-making Process, (1995) 45 *Duke Law Journal* 364-396; Arguing and Bargaining in Two Constituent Assemblies, (2000) 2 *Univ. of Penn. J. of Const. Law*, 345-421.

[4] See some excellent essays in Andrew Arato, *Civil Society, Constitution, and Legitimacy* (Rowman & Littlefield Publishers. Inc, Lanham, 2000).

[5] McWhinney's little book *Federal Constitution-Making for a Multi-National World* (A.W.Sijthoff, Leyden, 1966) is not about the constitution-making process.

state or a process of creating a federal state out of a previously unitary state, in which case the actors of constitution-making could not be federal entities, because they have still not been constitutionally created. Examples of federal constitution-making would be the creation of the Canadian Constitution Act of 1982[6] or the process of creating the German Basic Law of 1949. Therefore, I think one should be very careful when comparing constitution-making processes in a confederal or federal setting, as Elster does when he compares, for example, the American Federal Convention of 1787 and the German assembly that adopted the West German Basic Law of 1949.[7]

It is true that there are not many confederal and federal constitution-making episodes, especially not well-documented ones. That partly explains why there are so few comparative studies dealing with constitution-making in the (con) federal context. However, thanks to the recent process of European constitution-making, initiated by the Convention on the Future of Europe, we are witnessing at least a beginning of comparisons of this endeavor with similar earlier attempts. Most of these comparisons are related to the Philadelphia Convention.

Comparisons (both favorable and unfavorable) of the Convention on the Future of Europe with the Philadelphia Convention and the adoption of the US Constitution in 1787 are numerous.[8] Even before the beginning of the European

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6 On the other hand it would be very difficult to categorize the Constitution Act of 1867. It was a British statute. Up to 1867, the colonies of British North America had no political connections and each had its own governor appointed by Great Britain, almost the same situation as was present in 13 American colonies before the Revolution. In the Preamble of the British North America Act "the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion".

7 Elster points out that constituent assemblies for federally organized countries face the choice between 'one state, one vote' and proportional voting power, and that the American Founding fathers in 1787 chose the former method, whereas the German assembly in 1949 used the latter. See Elster, supra note 1, at 179.

8 Gráinne de Búrca, The drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness? (2004) 61 *Washington and Lee Law Review*, 555-583. See also Michael Rosenfeld, The European Convention and constitution making in Philadelphia, (2003) 1 *International Journal of Constitutional Law*, p. 373-378; Jack Rakove, Europe's floundering fathers (European Union proposed constitution), (2003) *Foreign Policy*, No. 138, p. 28-38; Florence Deloche-Gaudez, Bruxelles-Philadelphie: D'une Convention a l'autre, (*Critique internationale*, No 21, Octobre 2003), 135-150; Robert Podolnjak, Dvije ustavne konvencije: Sličnosti i razlike između Philadelphije i

Convention its chairman Valery Giscard d'Estaing said, in his speech in the European Parliament on 6th February 2002, that "the Convention on the future of the EU could be compared with the Philadelphia Convention, which prepared a constitution for the United States of America in 1787".[9] There were many reasons inducing analysts to compare these two events, despite the opinion of some scholars that "comparisons of the Brussels and Philadelphia conventions are facile and uninformed…like comparing apples to oranges".[10]

It is not my intention in this paper to compare the two conventions in all aspects of their work. Frankly speaking, there is still no elaborate and complete comparison of these two events. My ambition in this paper is more modest - to analyze only one aspect of their work, albeit a very important one. It is the conflict between the big and small states, which dominated the proceedings in Philadelphia, and was also very important in the Brussels Convention. Even if one may think that there have been insurmountable obstacles in comparing the two conventions, separated by more than two centuries, there is enough evidence pointing to the similarity of this cleavage in Philadelphia and Brussels.[11]

THE RELEVANCE OF THE SMALL STATES - BIG STATES CLEAVAGE IN TWO CONVENTIONS

The balance between smaller and larger entities is a critical issue in all federal or quasi-federal arrangements, as noted a few years ago by Max Kohnstamm.

Bruxellesa (Two Constitutional Conventions: Similarities and Differences between Philadelphia and Brussels), (2003) 53 *Zbornik Pravnog fakulteta u Zagrebu*, 1115-1188.

9 See Convention Bulletin, No. 1, 21.02.2002. (assessed at http://www.constitutional-convention.net/bulletin/archives/cat_edition_01_210202.html, on 15.04.2003).

10 James H. Hutson, Miracle at Philadelphia: The Drafting of the American Constitution of 1787, in Michael Gehler, Günter Bischof, Ludger Kühnhardt, and Rolf Steininger eds., *Towards a European Constitution: A Historical and Political Comparison with the United States* (Böhlau Verlag, Wien, 2005), 119. Philippe C. Schmitter also claims that "no process could be further removed from the Philadelphia Convention of 1789 (*sic*!) than the Convention meeting in Brussels". See his Constitutional Engineering by 'Process' not 'Product', in Kalypso Nicolaidis and Stephen Weatherill eds., *Whose Europe? National Models and the Constitution of the European Union* (European Studies at Oxford, OUP, 2003), 28.

11 "In Brussels as in Philadelphia in the confrontations the small states opposed the large states. In the course of the European Convention, their opposition has appeared in the institutional debates" (Deloche-Gaudez, Bruxelles-Philadelphie, supra note 8, 138).

Comparing the European Convention with the Philadelphia Convention he observed that

> "In the Union, the debate is compounded further by the fact that, unlike the US in 1787, Europe is made up of many nations and its ultimate aim is not to build a single nation. The common purpose should thus be to find a compromise that is acceptable to all Member States, keep the overall balance - thanks to a strengthened Community method - and allow a well-functioning enlarged Union."[12]

Of course, there were other cleavages and power struggles between the states in both conventions. In the European convention we have seen the conflict between more federalist and more intergovernmental states, between the countries of 'old' and 'new' Europe and between the enlarged Union's six big and 19 small member states.[13] In Philadelphia the most important conflicts, besides the one between big and small states, were between northern and southern states, slavery and non-slavery states, commercial versus agrarian states, and landed versus landless.[14] However, only the conflict between big and small states has had a potential to provoke a breakdown of both conventions[15] and therefore it is central in explaining some crucial institutional outcomes in Brussels and in Philadelphia.

It is interesting that the conflict between the big and small states repeated itself at another constitutional convention more than 200 years after the first one. This is even more interesting when one has in mind that the original conflict between large and small states as such was, for many analysts, in fact fictional or it has never materialized as such after the ratification of the Constitution.[16]

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[12] Kohnstamm, Max and Guillaume Durand, *Common Nonsense - Defusing the Escalating 'Big vs. Small' Row* (Brussels: European Policy Center, 2003).

[13] See Peter Norman, *The Accidental Constitution: The Story of the European Convention* (Eurocomment, Brussels, 2003).

[14] See Calvin C. Jillson, Constitution-Making: Alignment and Realignment in the Federal Convention of 1787, (1981) 75 *The American Political Science Review*, 599.

[15] Clinton Rossiter argues that the Great Compromise "was essential to the continued existence of the Convention". See Rossiter, *1787: The Grand Convention*, (W.W.Norton & Co., New York, 1987), 192.

[16] For contrary argument see David C. Hendrickson, *Peace Pact: The Lost World of the American Founding,* (University Press of Kansas, Lawrence, 2003), 224-225.

Robert Dahl once remarked that there “has, in fact, never been a significant conflict between the citizens of small states and the citizens of large states” and that “there has been no important controversy in the United States that has not cut squarely across the people in both small states and large”.[17]

The same argument was articulated by Giscard and his vice-presidents. In response_to the public presentation that the debates of the European Convention have reflected “a conflict of interest between the most populous and the least populous States of the European Union” they have concluded that “the alleged opposition between the most populous and the least populous countries in Europe is based on an inaccurate, and in any event superficial understanding of relations within the European Union”.[18] The large state - small state conflict was evaluated as most important and most relevant for explaining a series of crucial decisions in most analyses of the Philadelphia Convention[19] and the European Convention. In the Philadelphia Convention those issues are: the ratio of representation of the states in Congress, the congressional veto on the laws of the states, the powers of the Senate, the election of the President and amendments on the Constitution. In the European Convention the division between big and small states was evident foremost in the discussions on the voting system in the Council of Ministers, the presidency of the European Council and the size and composition of the Commission.

However, from the point of view of the smaller states, the outcomes of the two conventions couldn’t have been more different. In Philadelphia, the small states had achieved “a great victory” with the Great Compromise, which secured them equality of representation in the Senate. The small states achieved some other victories, e.g. in enlarging the powers of the Senate or in the Electoral College. And those victories have had great consequences for the functioning of the American political system even today in many ways.

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[17] See Dahl, *Democracy in the United States: Promise and Performance* (Houghton Mifflin College Div; 4th edition, Boston, 1981), 30.

[18] The European Union Convention papers: Relations between the most populous and the least populous states of the European Union (assessed at europa.eu.int/futurum/documents/other/oth131103_en.pdf).

[19] Shlomo Slonim concludes that “nearly all spheres of discussion at Philadelphia were permeated by large state-small state differences, and the final document reflected a much more ubiquitous compromise between large and small states and also between nationalists and that intent on preserving states’ interests than is commonly recognized”. See Slonim, Securing States’ Interests at the 1787 Constitutional Convention: A Reassessment, (2000) 14 *Studies in American political Development*, 2.

On the other hand, analysts of the Convention of the Future of Europe have concluded that "the small states had only obtained very marginal concessions in the last minute race to find a compromise" (equal rotation for Council formations, diminished powers of the president of the European Council), but that they had lost in key battles at the Convention (accepting the long-term president of the European Council, the reduced Commission and the double majority system including the 60% threshold for the population). On the issue of power in the EU "the result was clear: the small states had lost".[20] What are the causes of such different outcomes of the two conventions from the point of view of the small states?

Analyzing the European Convention and the conflict between the large and small states some scholars have found several causes for the small states' failure. The first is that the Convention was dominated by intra-state bargains and in this type of negotiation a member state's size is the major resource. Therefore Germany and France imposed their 'hegemonic compromise' on other, primarily small states, because of their 'material leadership resources'. The size of their population (over 30% of the EU population) was a crucial resource in the Convention's institutional debate, because Giscard d'Estaing, as the president of the Convention, defined consensus in terms of the majority of the EU population, not the majority of states. The second major resource of the two largest states in the Union was its past reputation as leaders in all treaty negotiations, and the third resource was "their privileged access to the Convention Presidium" and to the president, who was a 'crucial ally' of the bigger states, not only because he had become the Convention's chair at the insistence of their leaders. Thus "material leadership resources and influence in the Presidium, which the smalls lacked, proved most important and the final compromise trumped the interests of the smalls".[21]

[20] Paul Magnette and Kalypso Nicolaidis, Coping with the Lilliput Syndrome: Large vs. Small Member States in the European Convention, (2004) *Politique Europeenne*, No. 14, 22-23.

[21] See Simone Bunse, Paul Magnette and Kalypso Nicolaidis, Big versus Small: Shared Leadership and Power Politics in the Convention, in C. Mazzucelli and D. Beach, (eds.), *Leadership in the Big Bangs of European Integration*, (Palgrave, Macmillan, 2006), 134-157; Simone Bunse, Paul Magnette and Kalypso Nicolaidis, Shared Leadership in the EU: Theory and Reality', in D. Curtin, A.E. Kellermann, and S. Blockmans (eds), *The EU Constitution: The Best Way Forward?* (The Hague: T.M.C. Asser Press, 2005), 275-296.

I could partially agree with the above-mentioned causes of the failure of the small states, especially as regards the relationship between the bigger states and the Presidium of the Convention, but I think that the factor of 'material leadership resources' must not be perceived as crucial for the Convention's outcome. After all, and herein lies the value of comparisons, the small states in the American federal convention won regardless of their lack of 'material resources' or their 'reputation'. Before the Philadelphia Convention the two largest American states - Virginia and Pennsylvania - had over 30% of the total population of the original 13 states, and with the third largest (Massachusetts) they had over 40%.[22] This corresponds very closely to the population strength of Germany, France and UK in proportion to the total EU population. The size of the population was not a dominant factor accounting for the results of the large states - small states conflict in Philadelphia.

In this paper I would like to point to some other more important causes of different outcomes in Philadelphia and Brussels. The analysis of the small states' strategy in Philadelphia will show that they made maximal use of their voting strength, which was not available to the small EU states in Brussels, because of the Presidium's imposed rule of non-voting on any issue. They were also highly determined in their demands, uncompromising (especially as to the respect for the principle of the equality of states), and, most important, they were very convincing in their threats that they would not ratify the Constitution under the terms imposed by the large states. Another important reason for the success of the small states was their demonstrated strong cohesion and firmness throughout the Convention. Several important causes contributing to the small states' success in Philadelphia lie in the organization and the 'rules of the game of the Convention, and particularly in the timing of resolving the issues which were dividing large and small states. We shall see that most of these factors contributing to the small states' advantage in Philadelphia were not present in Brussels, or were not used effectively or not at all by the small EU states. Let's turn first to the Philadelphia Convention.

[22] The American constitution-makers didn't have exact data on the size of the population in several states, but their estimates were largely confirmed after the first census in 1790. See their estimates in C.C. Pinkney's speech in South Carolina House of Representatives in January 1788, in Max Farrand ed., *The Records of the Federal Convention*, (Yale University Press, New Haven, 1966), 3; 253 and the actual size of the population of the 13 states in 1790 in David Brian Robertson, *The Constitution and America's Destiny*, (Cambridge University Press, Cambridge, 2005), 94.

THE SUCCESS OF SMALL STATES IN PHILADELPHIA

The story of the Federal constitutional convention in Philadelphia is so well-known and elaborated in numerous excellent studies that it is not necessary to repeat the most important scholarly findings.[23] There is an almost universally accepted conclusion that the conflict between the large and small states had dominated the proceedings in the first seven weeks, and that in the period from 20th June to 16th July the Convention almost exclusively concentrated on the issue of the ratio of representation (proportional or equal), because numerous delegates thought that this question had to be solved before other issues (the powers and organization of federal government).

The first and the most fundamental issue of the Convention was the design of the legislative branch, i.e. the choice between a unicameral or a bicameral body, elections by the people or by state governments and the issue of state representation (equal or proportional). The constitution makers recognized the fundamental importance of the issue of state representation. Madison's pre-convention strategy in preparing a constitution plan to be presented at the Convention clearly assumed that "the first step to be taken is…a change in the principle of representation".[24] In other words, the rejection of an unjust principle of equality of state votes prescribed in the Articles of Confederation, in favor of the principle of proportional representation that reflects differences in the significance and influence of states. Contrary to the expectations of Madison, Hamilton, Wilson and other advocates of the national government that it is possible with relatively little difficulty to ensure a coherent majority at the Convention prepared to accept a national government resulting from direct or indirect elections by the people, without any intermediary role by the states, advocates of a compromise gradually prevailed. Instead of adopt-

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[23] I would recommend the following studies of_constitution-making in Philadelphia: Clinton Rossiter, *1787: The Grand Convention*, (W.W.Norton & Co., New York, 1987); Thorton Anderson, *Creating the Constitution: The Convention of 1787 and the First Congress*, (Penn State Press, University Park 1993); Calvin Jillson, *Constitution-Making: Conflict and Consensus in the Federal Convention of 1787*, (Agathon Press, New York 1988); Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, (Vintage Books, New York 1997). See also my *Federalizam i republikanizam: Stvaranje američkog ustava* (*Federalism and Republicanism: Creation of the American Constitution*), (Barbat, Zagreb, 2004).

[24] James Madison to Edmund Randolph, 8 April 1787, in Philip B. Kurland and Ralph Lerner eds., *The Founders' Constitution*, (Liberty Fund, 2000), Vol. 1; 190.

ing a purely national structure or keeping the existing federal structure of the legislative body, most delegates, i.e. state delegations, accepted in the end a midway position between the "two ideas…that in one branch the people ought to be represented, in the other, the States" (William Johnson). That implied that "the proportional representation in the first branch was conformable to the national principle and would secure the large States against the small", and "an equality of voices (in the Senate) was conformable to the federal principle and was necessary to secure the Small States against the large" (Oliver Ellsworth).[25] Why did the small states succeed in achieving the famous 'Great Compromise' that gives them equality of votes in one house of the Congress, which is certainly their greatest achievement at the Convention?

We must start from the simple fact that everything in the Convention was decided by voting. Early in the Convention it was decided that each state delegation would have one vote, regardless of the population, in accordance with the rules that were in force in the Congress of the Confederation (one state, one vote). Madison thought that he had behind him a solid coalition of six states consisting of the three largest states (Virginia, Massachusetts and Pennsylvania) and the three southernmost states (North and South Carolina, Georgia). The population of the latter three southern states was not the criterion of their 'largeness'. But all states in Madison's coalition were 'large' states because they had access to vast tracts of Western lands, on grounds of their colonial charters or other legal basis, so they thought that in the near future they would have a much larger population. That is the foremost reason for their voting for proportional representation in Philadelphia. On the other hand, the remaining seven states had no such lands in the Western territory. So, the division on the Convention was between states large in population or territory ('landed states') and the states with a small population and/or bounded territory.[26]

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[25] Farrand, *Records*, 1; 461-462, 468.

[26] See Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic 1776-1790*, (Liberty Press, Indianapolis, 1979), 274-5; David Brian Robertson, Madison's Opponents and Constitutional Design, (2005) 99 *American Political Science Review*, 228-9. It could be said also that it was a conflict between the states with high growth of population expectations and the states with low growth of population expectations. See Frances E. Lee and Bruce I. Oppenheimer, Frances E. Lee and Bruce I. Oppenheimer, *Sizing up the Senate: the Unequal Consequences of Equal Representation* (The University of Chicago Press, 1999), 37.

The coalition of large states had from the very beginning an unexpected advantage, because two of the smallest states weren't represented at the Convention - Rhode Island didn't send its delegation at all, and the delegates of New Hampshire arrived finally after the 'Great Compromise'. So, up to the end of June, Madison's coalition of large states had a small but decisive advantage of 6 states to 5, and speaking strictly mathematically it should have won the fight over representation. Numerically speaking, the small states were at a disadvantage and therefore they tried to break the coalition of large states using three weapons - arguments, threats, and appeals for a compromise.

As to their arguments, they focused on the following propositions: that the interests of the small states would be ignored, and that the influence of the large states would be overwhelming and dangerous to the federal system should proportional representation be installed in both houses, that states as states have interests deserving protection, and finally that state governments have to be equally represented in the legislative body of the confederation and have some means of self-defense against the federal government. Arguments from the large states centered on the republican (we would say today democratic) principle that the majority of people should elect the majority of representatives, and seven of the smallest states had only a quarter of the population. The principle of equal representation of states would therefore establish the rule "that the minority will rule the majority".[27] Madison also pointed out that there is no possibility of large states' coalition against the small ones, because there is no common interest of large states and their size as such was never a reason for their alliance.[28]

Rational arguments and deliberation are of little help in situations of diametrically opposed groups, as witnessed by numerous examples of constitution-making episodes.[29] Some scholars think that arguments of the small states were weaker.[30] If that is so, than the threats of some small state's delegates could have been more important in persuading some of the delegates in the other camp to accept equal representation at least in one house of the Congress. Let

[27] James Wilson in Farrand, *Records*, 1;484.

[28] Farrand, *Records*, 1; 447.

[29] See Jon Elster, Arguing and Bargaining in Two Constituent Assemblies', (2000) 2 *University of Pennsylvania Journal of Constitutional Law*, 345-421.

[30] For example Jack Rakove, The Great Compromise: Ideas, Interests and the Politics of Constitution Making, (1987) 44 *William and Mary Quarterly*, 444.

us cite once more Gunning Bedford and his most horrible threat heard at the Convention:

> "The Large States dare not dissolve the Confederation. If they do the small ones will find some foreign ally of more honour and good faith, who will take them by the hand and do them justice. He did not mean by this to intimidate or alarm. It was a natural consequence; which ought to be avoided by enlarging the federal powers not annihilating the federal system."[31]

Of course there were almost equally strong replays from some of the large states' delegates, arguing quite the opposite - that the small states would lose much more by the dissolution of the Confederation. Bedford went further than any other delegate from a small state threatening not only the rupture of the Confederation in case of adoption of proportional representation, but also calling for some foreign power as a protector. This was probably said in the heat of the debate so other delegates from small states used a different argument, saying that proportional representation would be unacceptable and would be an insurmountable obstacle in ratifying the Constitution in their states.

Proposing that each state shall have one vote in the Senate on 11 June Roger Sherman said that "everything…depended on this", because "the smaller states would never agree to the plan on any other principle". Luther Martin said that he "had rather see partial Confederacies take place than the plan on the table". After the decision on 29 June that the representation in the first house (House of Representatives) shall be proportional, Oliver Ellsworth from Connecticut said that equal representation of states in the Senate could be "this middle ground" for a compromise between large and small states and that if this should not be accepted, all northern states, except one (Massachusetts), would not acceed to new government.[32] Madison was right writing to Jefferson after the Convention that the small states "made an equality in the Senate a sine qua non".[33] Long after the Convention Gouverneur Morris, one of the most influential delegates in Philadelphia declared that "if the whole power

[31] Farrand, *Records*, 1; 492. Numerous scholars cite Bedford's speech trying to demonstrate the deep split between the large and small states at the Convention.

[32] Farrand, Records, 1;201, 1;445, 1;468-469.

[33] Madison to Jefferson, Oct. 24 1787, in B. Bailyn ed., *The Debate on the Constitution*, Part I (The Library of America, New York, 1993), 1;202.

of the Union had been expressly vested in the House of Representatives, the smaller States would never have adopted the Constitution. But in the Senate they retained an equal representation, and to the Senate was given a considerable share of those powers exercised by the old Congress”.[34]

It is impossible to measure analytically the real impact of different causes on the positive outcome for the small states, and it is not the purpose of this article to determine the exact influence of different reasons which brought equal representation in the Senate but to identify them by analyzing the voting, the arguments and *post-festum* explanations of the participants at the Convention. There are strong arguments in favor of numerical advantage of the small states because of the voting rules at the Convention[35], but it could be equally argued that the small states were decisive, uncompromising (as to the equality in the Senate) and, most importantly, very convincing in their threats that they would not ratify the Constitution under the terms imposed by the large states.[36] Last, but not least, the small states demonstrated strong cohesion and firmness throughout the Convention. Reading the debates of the Federal Convention, it

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[34] Farrand, *Records*, 3;405.

[35] I agree with Elster that “a crucial feature was that voting was by majority rule, each state having one vote”, but that this feature could not in itself ensure that the outcome would be equality in the Senate, because the small states were in minority at the Convention. However, the voting procedure adopted at the Convention increased the voting and bargaining power of the small states. See Jon Elster, Equal or Proportional?, Arguing and Bargaining over the Senate at the Federal Convention, in Jack Knight and Itai Sened eds., *Explaining Social Institutions* (University of Michigan Press, 1998), 148-149.

[36] Elster is trying to explain the outcome of the conflict between the large and small states at the Convention by using the bargaining theory. He thinks that threats of civil war, disruption of the Union and foreign powers’ intervention used by some delegates had been part of a bargaining process. I don’t see threats always as a sort of bargain. According to Elster, “bargaining concerns the division of benefits from cooperation, compared to a permanent breakdown of cooperation” (Elster, Equal or Proportional?, 154). So, e.g. if you say that you won’t ratify the Constitution unless you get equal representation in the Senate it is clearly a threat, and the other side has to evaluate if it is a credible threat. You don’t even have to argue that the other side would lose some benefits, because the non-ratification of the proposed Constitution could simply mean that the result would be a *status quo*. In this specific situation the *status quo* would be the retention of the Articles of Confederation. However, in such a case both sides would lose some benefits because of failure “to form a more perfect union”. In the context of the “arguing and bargaining”over equal representation in the Senate there is a story of a possible ‘true’ bargain, but it cannot be verified.

is striking that the delegates of the small states were so unanimous in defending their position from the very beginning of the proceedings. It is worthy to recall that on 31 May Sherman said that he "favored an election of one member by each of the State Legislatures" in the Senate.[37] And he defended that position no matter what. Confronted with such an attitude of *all* the delegates from Connecticut, New Jersey, New York (except Hamilton) and Delaware, *some* of the large states' delegates backed the position after one and a half months of arguing, bargaining and threatening.

The firmness and steadiness of the small states in defending their interests was also evident after the 'Great Compromise' in the debates over the congressional veto, over the presidential election and the senatorial powers. It was again Madison who proposed a veto of the national legislature on all legislative acts of the states, considering this power as an essential instrument in the hands of national government for control of the state governments.[38] Some small state delegates considered that this power is not only too dangerous in the hands of federal government, with many practical difficulties in exercising it, but that this also enhances the power of the largest states. It is indicative that the veto was rejected the day after the 'Great Compromise', with only three large states voting for it.[39]

The small states were also very successful in securing large powers for the Senate in which they had obtained the greatest share of influence. It is true that originally the Senate was supposed to be the most important body of the new federal government according to Madison's plans, but after the 'Great Compromise' he and some other delegates from larger states wanted to diminish the senatorial powers, considering this body not to have been properly constituted, and to transfer some crucial powers to the president, because they hoped that their states would have a much greater influence in its election.

In the final compromise reached only a few days before the end of the Convention, the small states, as put by Charles C. Thach Jr., "had demanded and obtained their pound of flesh".[40] The powers over treaties and appointments were divided between the president (the power of treaty proposal and nomi-

[37] Farrand, *Records*, 1;52.

[38] See Slonim, Securing States' Interests at the 1787 Constitutional Convention, 8.

[39] Farrand, *Records*, 2;28.

[40] Charles C. Thach Jr., *The Creation of the Presidency 1775-1789* (Da Capo Press, New York, 1969), 133.

nation of public officials) and the Senate ('advice and consent'), which was the concession of the small states, and in return the large states accepted that the small states would have a bigger influence on the election of the president (partly because of the composition of the electoral college and partly because of the contingency arrangement that the president shall be elected by vote of the state delegations in the House of Representatives, each state having one vote, in case that no candidate has obtained the majority of electoral votes).

Assessing retrospectively the results of the Federal Convention from the small states' point of view, we may conclude that they had been very successful in the process of 'arguing and bargaining'. The small states obtained equality in the Senate, then they secured that this legislative house had extra-powers of treaty-making and appointments, after which they acquired a more significant influence on the election of the president, and finally at the end of the Convention they won the crucial concession - "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate". Let us now see how did the small states fare at the European Convention and the IGC.

THE FAILURE OF SMALL STATES IN BRUSSELS

First, we need to define large and small states in the European context. There is no unified definition. We could use different categories for definition, e.g. size of population and territory, economic size (GDP) or 'political size' (meaning military and administrative capabilities), or a combination of some categories. However, the simplest category and the one most used is the size of population. I shall accept the following definition of small states in the European Union: "Small EU states are defined as those with significantly less than 40 million inhabitants".[41] In the EU-27 only six states are large: Germany, France, Great Britain, Italy, Spain and Poland. Romania and possibly the Netherlands could be considered as 'medium-size' countries, but other countries are clearly 'small' or 'very small'.

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[41] Simone Bunse, Paul Magnette and Kalypso Nicolaidis, *Is the Commission the Small Member States' Best Friend?,* (Sieps, 2005), 8.

Organization and the rules of the game of the European Convention from the point of the large states - small states conflict

Let us first examine the organization and proceedings of the Brussels Convention. Comparing it with the Philadelphia Convention we shall see important differences in the organization of the two conventions, in their decision-making procedures and positioning of the small states.

When analyzing the Philadelphia and the European Convention many scholars have been referring to them as 'constitutional conventions'. This is not quite true, especially as regards the Philadelphia Convention. The Federal convention in Philadelphia was, as was correctly noticed by Roger S. Hoar in his classic work on constitutional conventions, "really a diplomatic treaty-making body, rather than a constitutional convention in the purest sense of the term". However, all the other conventions which ratified the American Constitution were, in his opinion, "all regularly-called constitutional conventions".[42] The state legislatures had appointed the delegates of the Philadelphia Convention, paid their expenses, and gave them instructions which they had to obey. The whole organization of the Convention was based on the representation of states: every state had one vote (regardless of the number of its delegates), seven states made a quorum, the majority of present state delegations were competent to decide all questions. The State was therefore the organizing category of the Convention. Speaking in contemporary language, the Philadelphia Convention was actually an intergovernmental conference.

The Convention on the Future of Europe did not follow the logic of Philadelphia. Quite the contrary - the Convention came as a result of discontentment with the treaty-making process at the Nice summit. Although the organization of the European Convention, as in Philadelphia, reflected "the fundamental idea of establishment of a body legitimized and capable to do the initial, 'expert' part of the job on elaborating the constitutional document"[43] it was in almost all the details of its membership, organization and the way it did its business completely different from the American Federal Convention. As to its membership, it did not consist only of the representatives of Member States governments, but also of representatives of national parliaments, members of the European Parliament

[42] Roger Sherman Hoar, *Constitutional Conventions: Their Nature, Powers, and Limitations* (Little, Brown & Co., Boston, 1917), 8.

[43] Branko Smerdel, Convention on the Future of Europe and the Process of Constitutional Choices, (2003) 1 *Revus - Revija za evropsko ustavnost*, 10.

and the European Commission. The representatives of applicant countries also attended the Convention, but it was stated in the Laeken Declaration that they "will be able to take part in the proceedings without, however, being able to prevent any consensus which may emerge among the Member States".[44]

Another very important difference between the two conventions was the fact that the European Convention had another steering body envisioned by the Declaration. It was the Presidium of the Convention composed of the Convention Chairman and Vice-Chairmen and nine members drawn from the Convention (the representatives of all the governments holding the Council Presidency during the Convention, two national parliament representatives, two European Parliament representatives and two Commission representatives). The European Council itself appointed the former French president Valery Giscard d'Estaing as chairman, and Giuliano Amato (former Italian prime minister) and Jean-Luc Dehaene (former prime minister of Belgium) as vice-chairmen. This important decision of the European Council has signified that the chiefs of states and governments of the EU countries did not want to let an 'uncontrollable meeting' happen, in the sense of its possible goals and decisions. In the Declaration it was stated just that the "Chairman will pave the way for the opening of the Convention's proceedings by drawing conclusions from the public debate", but his role throughout the Convention was far more significant and could in no way be compared with the symbolic role of George Washington's chairmanship of the Philadelphia Convention. It would be more appropriate to compare him with James Madison, as he was, like Madison, the most important author of the constitutional draft.[45] Madison was, as far we know, the most important among Virginia's delegates in drafting the Virginia plan, and Giscard was the principal author of the 'preliminary draft Constitutional Treaty' of October 2002 and, what is even more important, of the Draft Institutional Proposals of 22 April, 2003.[46]

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[44] Laeken Declaration on the Future of the European Union (assessed at http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm, last visited 10 March 2003).

[45] George Tsebelis claims that Giscard "may be the most influential author of a constitutional document in the history of the EU". However, that was said before the referendums in France and the Netherlands and the subsequent downfall of the Constitutional treaty. See Tsebelis, Agenda Setting in the EU Constitution, (Paper presented at the DOSEI conference, Brussels 2005), 4.

[46] See Editorial comments: Giscard's constitutional outline, (2002) 39 *Common Market Law Review*, 1211-1215; Peter Norman, *The Accidental Constitution: The Story of the European Convention* (EuroComment, Brussels, 2003), Documentary Annex, Section A, 343-349.

Giscard's role as a constitution drafter was accompanied by his strong leadership of the Convention. As noticed by scholars, he was as Chairman the 'agenda-setter' at the Convention - making proposals to the Convention, deciding which amendments would be accepted and which would not, prohibiting voting, summarizing the daily proceedings and defining the terms of existing or missing consensus among the delegates on certain issues.[47]

I attach great importance to the fact that the Convention did not vote on proposals, amendments, and drafts of articles or, at the end, on the draft constitutional treaty. As to the decision-making, the European Convention was completely the opposite of Philadelphia. Early at the Convention, at the first informal meeting of the Presidium on 22 February 2002, it was concluded regarding the working method of the Convention that "given the non-homogenous character of the composition of the Convention it was not appropriate to resort to a vote. The Convention should aim at achieving consensus or, at least, a substantial majority".[48] Without the possibility of voting on anything it was up to the President (and the Presidium) to declare when consensus existed on certain issues and what it implied. One scholar has argued that, because all the states had the same number of representatives at the Convention (one representative of the government and two representatives from the parliament), it would be very difficult, if not impossible, to vote at such an assembly without some system of weighted votes, because the majority could represent a very small minority of the EU population, and therefore the Convention was condemned to try to find consensus.[49] Such thinking presupposes illegitimacy

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[47] See especially Tsebelis, Agenda Setting in the EU Constitution (supra note 45) and George Tsebelis and Sven-Oliver Proksh, The Art of Political Manipulation in the European Convention, (2007) 45 *Journal of Common Market Studies*, 157-186.

[48] European Convention, Summary of Conclusions, 1st informal meeting of the Presidium 22 February 2002. At the plenary session of the Convention on May 16, 2003, Giscard shall elaborate the Presidium conclusions as to voting: "The Convention does not vote and for a simple reason: its composition does not allow it. There are two representatives from the Commission. The Commission will not have 2 out of 105 votes. That would not make sense. There is the group of national parliamentarians, which is three times greater than the group of members from the European Parliament. We will not have the one oppose the other. Therefore, we will not vote and have to find a consensus. This will naturally become more delicate during the final phase, but that is our rule". European Convention, plenary session, 16 May 2003, at 5-134.

[49] See Paul Magnette, The Convention and the Problem of Democratic Legitimacy in the EU, International Conference 'The European Convention, a Midterm Review', (Center for European Studies, Harvard University, 2003), 10.

of decision-making by state voting, although the decision-making in most of the federal systems starts, at least partially, from the principle of equality of member states. This proposition is even more valid when we speak of confederal unions of states. The American constitution makers voted by states in Philadelphia principally because it was the method of voting of the Congress of the Confederation. Elster sees a possible causal connection in this, in the sense that the Philadelphia Convention "adopted the principle (one state, one vote) for its own proceedings because it was used by the institution that had called it into being. And it proposed the principle for the future because the smaller states at the Convention benefited from the disproportionate strength which they derived from its use at that stage".[50] On the other hand, the European Council, as the creator of the Brussels Convention, did not specify in the Laeken Declaration anything as to the decision-making process, and the Presidium did not even think, as far we know, of adopting the system of qualified majority voting in the Council as a possible solution for the voting at the European Convention. However, we know that the Presidium itself had voted on some occasions, and so it did use the decision-making procedure which it did not want to use at the level of the Convention.[51]

Because of the absence of voting, it was, as we shall later see, impossible for the delegates of small EU countries to prove that their position was the majority position at the Convention on some crucial institutional questions, or at least that there was no consensus on some institutional proposals which would change the institutional solutions accepted at the Nice IGC. Since there was no voting, it was up to the Presidium and especially up to the President to expose if there was a consensus or a large majority at the convention in favor of some proposal or amendment. And that gave the Presidium and Giscard great power of manipulation and the power to be 'the arbiter of consensus'. As an insider critic of the way the Draft Constitutional Treaty was made, Gisela Stuart argued that "consensus was achieved among those who were deemed to matter and those deemed to matter made it plain that the rest would not be allowed to wreck the fragile agreement struck…The 'consensus' reached was only among those who shared a particular view of what the Constitution was supposed to achieve."[52] This is relevant for our theme because we know that

[50] Elster, Constitution-making in Eastern Europe, supra note 1, 180.

[51] See Gisela Stuart,*The Making of Europe's Constitution*, (Fabian Society, London, 2003), 24.

[52] Stuart, The Making of Europe's Constitution, supra note 51, 24, 25.

Giscard was particularly inclined to favor the position of large states[53], as we shall see when we turn to certain crucial institutional questions. And in this, he was fully supported by the Presidium.

This shouldn't surprise us when we know that the composition of that body was not representative from the point of view of the small EU states. The Presidium originally numbered 12 members (and later they co-opted Lojze Peterle, as the representative of the candidate countries, but with no right of voting). Of these 12 members, seven came from large EU countries and only five members of the Presidium came from the small states. It could be said that the Presidium was meant to be representative of different institutional components of the Convention's membership, and not the representative of Member States, but nevertheless I do not think that it is only by accident that all the five big EU countries had their representative in the Presidium (France and Spain with two each), and some key small states (as e.g. Austria, Finland and Holland) had no representatives in that body. The majority of the small states of the EU were therefore a minority in the Presidium. The power of agenda-setting and of submitting the draft proposals was firmly in the hands of the larger EU states. What a difference compared with the Philadelphia Convention - in cases when the American Convention was deeply split on certain issues the members resorted to grand committees consisting of one representative from each state to find a compromise solution which could be accepted by the Convention as a whole.

There is another reason, in my opinion, for favoring the larger states in the European Convention. It has to do with their serious attitude to the Convention, which may have played a role when draft documents were to be presented to the IGC. This is visible in the high-profile of representatives of the larger states at the Convention, especially in the second-half of its proceedings. So, starting from October 2002, before the debate on the institutions opened, Germany was represented by Joschka Fischer, its minister of foreign affairs. Afterwards, France similarly sent foreign minister Dominique de Villepin to the Convention. Britain was represented from the start by with Peter Hain, its Minister for Europe, and Italy by Gianfranco Fini, the deputy prime minister. However, the trend-setter was actually Spain, which decided in July 2002 to appoint its MEP and member of the Convention Ana Palacio as foreign minister,

[53] Peter Norman reports that Giscard "was generally perceived as a 'big country' man - an impression he did nothing to dispel while chairing the plenary". See Norman, *The Accidental Constitution*, supra note 13, 152.

and send her as a representative of the Spanish government in the Presidium. This 'invasion of foreign ministers' largely transformed the convention into a disguised IGC', because the "foreign ministers, and ministers of cabinet rank, such as Hain or Fini, could negotiate and cut deals in the expectation that they would be supported by their governments and parliaments. This was less certain for those countries represented by non-politicians, be they officials or academics".[54] P. Norman argues that Finland, which was not represented at the Convention by a politician, was among the more disappointed member states at the end.[55]

It might be that at a certain point in the Convention's proceedings, when it was evident that it would try to make a single proposal to the IGC that the larger countries decided to settle the crucial institutional issues at the Convention, and not afterwards at the IGC. And it must have been an attractive option to them having in mind that the rules of the game were set to favor them. Therefore it should not come as a surprise that the 'deal' between the large countries made at the Convention (except for Spain's discontentment with the QMV) withstood later IGC and was incorporated in the Lisbon Treaty with almost no significant changes. All attempts of the small EU states to 'improve' the Draft Constitutional treaty and insure their goals after the Convention were mostly in vain.

The timing of the debate on institutional issues

As I said earlier, the American constitution makers wanted to settle the crucial issue of the 'distribution of power' in the legislative branch of the new Congress before the rest of constitutional design. The Virginia plan, made by Madison and his colleagues in the delegation and presented at the beginning of

[54] Norman, *The Accidental Constitution*, supra note 13, 158-9.

[55] This observation is confirmed by Kimmo Kiljunen, one of Finland's members at the Convention: "That Finland failed to gain a seat in the Presidium was partly due to a failure on the part of the Government. In Laeken, as the Convention was being set up, Finland concentrated on one thing alone: the Food Agency. The nature of the Convention was also drastically misjudged - it was viewed as an academic exercise. But whenever politicians convene, they want to decide. That is why the Convention morphed into a constitutional congress. That is why it produced a single Draft Constitution". See Kiljunen, *The EU Constitution - A Finn at the Convention* (Publications of the Parliamentary Office 1/2004), 160.

the proceedings, was at most a constitutional outline, specifying only some basic principles of the new government. Although the Convention debated all the points elaborated in the plan, it was obvious from the beginning that no question of the organization of the government or its powers could be settled before the final decision would be made on the distribution of power (proportional or equal) between the states. Only after the 'Great compromise' had been achieved, the first draft of the constitution was made by the members of the Committee of detail in late July. What I want to stress is that the solution of the issue of representation in Philadelphia had precedence over all the other issues. So, in the heat of the debates over representation the American constitution makers had nothing to lose by insisting on its conflicting demands, because they had no agreement as to the rest of the constitutional content. And here I find another important difference in the proceedings of the European Convention.

The debate on the institutional questions began only in January 2003, in the second half of the Convention and the articles dealing with institutions were presented to the conventioneers in late April 2003, just two months before the planned ending of the proceedings. After the 'listening' phase, and then the'analysis' phase, with a dozen working groups preparing their reports on various important constitutional issues, the most important 'writing phase' began only in October 2002, when the Preliminary draft Constitutional Treaty emerged, but it was only a skeleton, looking more like a table of contents of a future constitutional treaty. Far more important was the draft of the first 16 Articles presented to the Convention in February 2003.[56] At that time, it was certain that the Convention was going to produce a document called a constitutional treaty, not some recommendations for the IGC. After a year's work the conventioneers had invested much of their time and talent in the project called 'Constitutional Treaty' or 'European Constitution'. After much of the eventual Constitutional Treaty's content had been agreed, it was impossible for a great majority of conventioneers to bring the whole project into question because of their differences on institutional issues. When you have almost 90% of the Constitution accepted by consensus it is very difficult to give it up because of the 10% of contested content. The pressure to reach some kind of agreement as to the rest of the text must be strong at that point of constitution making.[57]

[56] See Editorial Comments, The sixteen articles: On the way to a European Constitution, (2003) 40 *Common Market Law Review,* 267-277.

[57] Two possible explanations could be found in the scholarly literature accounting for the strategy of debating institutional issues near the end of the Convention. One is that the

The proposals on the Union's institutional architecture

We have seen that at the American Convention the crucial constitutional draft, or rather, an outline of the constitution was presented at the beginning of the proceedings. The Virginia plan was the logical starting point of the debate because it was the work of the delegates from the largest and most important state in the Union. So it is not surprising to find similar logic at work at the European Convention. Many draft constitutions had been submitted to the Convention in its early phase by individual delegates[58], but none of them was taken seriously.[59]

There was only one plan submitted to the Convention, and dealing with institutional issues, this could, at least superficially, be compared with the Virginia plan. This was the Franco - German contribution to the institutional

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Convention could not open institutional themes before the ratification of the Treaty of Nice. As long as the Irish voters didn't approve the Treaty at the second referendum held on October 20, 2002, it would be hazardous to debate the institutional issues, because it could suggest to the voters that the deal achieved in Nice is not relevant any more. See Desmond Dinan, Reconstituting Europe, in Maria Green Cowles and Desmond Dinan eds., *Developments in the European Union*, 2nd ed. (Macmillan, London, 2004), 25-46. The second explanation much more in line with mine is that the leaders of the Convention feared the "nightmare scenario looming over the Convention at which its work would become locked into the polarization on different institutional visions". To prevent such a scenario Giscard resorted to a 'buying time' strategy in which the drafting phase came near the end of the Convention. The advantages supposed to follow from this strategy were first, to create the 'Convention spirit' based on deliberation and compromise in solving "more technical, less politicized issues", and second, "all conventioneers were put under pressure either to engage in compromise or to take responsibility for having the whole project fail". See Ben Crum, Genesis and Assessment of the Grand Institutional Settlement of the European Convention, (2004) *Politique Europenne*, No. 13, 96.

58 The most respectable were Andrew Duff's 'A Model Constitution for a Federal Union of Europe' (CONV 234/02), Elmar Brok's 'Constitution of the European Union' (CONV 325/02), Robert Badinter's 'A European Constitution' (CONV 317/02) and Peter Hain's 'Draft Constitutional Treaty of the European Union' (CONV 345/1/02). The best comparative overview of many drafts for a European Constitution elaborated during the Convention's life could be found in Peter Häberle, Die Herausforderungen des europäischen Juristen vor Aufgaben unserer Verfassungs-Zukunft: 16 Entwürfe auf dem Prüfstand, (*DÖV*, 2003), 429 - 443.

59 Norman calls them 'freelance constitutions', most of which were "noted and forgotten". Norman, *The Accidental Constitution*, supra note 13, 65-67.

architecture of the EU, a compromise proposal of the two largest states, sent to the Convention in January 2003.[60] For some analysts this joint proposal became the key turning point in the Convention's proceedings.[61] The Franco - German contribution was a compromise between German federalist desires and French intergovernmental inclinations. In short, "France agreed to the Commission President being elected by the European Parliament, and Germany agreed to the European Council being headed by a president elected by qualified majority by the Council for a once-renewable two-and-a-half year term or a single one of five years."[62] The German preference was for the continuation of the process of parliamentarisation of the relationship between the Commission and the EP and the strengthening of the community method. Therefore, according to the joint proposal, the Commission President would be elected by the EP and afterwards approved by the European Council. He forms a college of commissioners, taking account of the geographical and demographic balance and may distinguish between commissioners with a sectorial portfolio and those with specific functions, with a strict system of rotation, which did imply a Commission with a smaller number than the number of the Member States. On the other hand, an elected president of the European Council was perhaps the most important institutional innovation of the Franco-German proposal, although it was earlier informally proposed by some European statesmen.[63] The idea was to have a stable Presidency to give the leadership of the European Council continuity, stability and a higher profile. The elected President would prepare, chair and organize the proceedings of the European Council and he/she would represent the Union on the international arena. The highest

[60] See 'Deutsch-französischer Beitrag zum Europäischen Konvent über die institutionelle Architectur der Union', submitted by Joschka Fischer and Dominique de Villepin, CONV 489/03, 16 January 2003. On this proposal see Renaud Dehouse, Andreas Maurer, Jean Nestor, Jean-Louis Quermone and Joachim Schild, The Institutional Architecture of the European Union: A Third Franco-German Way?, Notre Europe, Reasearch and European Issues, No. 23, April 2003.

[61] Norman, *The Accidental Constitution*, supra note 13, 174; Crum, Genesis and Assessment of the Grand Institutional Settlement, 98.

[62] Statements made by M. Jacques Chirac during his joint press briefing with Mr Gerhard Schröder, Paris 14.01.2003 (available at http://www.ambafrance-uk.org/France-Germany-Statements-made-by.html, last time visited on 20 May 2008).

[63] The idea of an elected president of the European Council was presented separately by Spanish premier Aznar, British Prime Minister Blair and French president Chirac and therefore was informally known as ABC proposal.

intergovernmental organ of the EU would, therefore, have a leader, competing with the Commission President for pre-eminence.

At the end of February 2003, partially as a response to the Franco - German proposal, the UK and Spain submitted their joint proposal entitled *'The Union Institutions'*.[64] Among other proposals, the two governments endorsed the idea of a full-time 'chair' of the European Council appointed for four years. However, as to the election of the Commission President, the UK and Spain proposal differed from the Franco - German one, since they suggested that he/she should be appointed by the European Council and afterwards approved by the European Parliament.

The small states submitted two important contributions in the early phase of the institutional polemic within the Convention. The first contribution was submitted even before the Franco - German proposals. It was the contribution of the Benelux countries of 11 December 2002. In the Memorandum of the three small founding Member States it was proposed that the Commission, as the institution that guaranties the common interest of the Union, needs to be strengthened in the following way:

- A Commission President elected by the European Parliament according to a procedure to be determined and by a three-fifth-majority vote of its members. Then the Council, in its composition of heads of state and government, will decide with a qualified majority.
- A strong Commission which, in accordance with the Nice decisions, would eventually become reduced in number. A Commission guaranteeing the equality of all member states in both its operation as its composition, based on the principle of equal rotation.
- A Commission responsible before the two institutions involved in its appointment and subject to dismissal through censure by one of those institutions.
- A Commission mandated with the exclusive right of initiative in legislative matters.

In answer to what at the time were still informal proposals for an elected president of the European Council, the Benelux countries stated:

> "The Benelux is of the opinion that the system of the Council Presidency must be reformed in order to guarantee the effectiveness and the continu-

[64] Pater Hain and Ana Palacio, *The Union Institutions*, CONV 591/03.

ity of the Council's activities in an enlarged Union. The status quo is no longer a viable option. At the same time, we must safeguard the principle of equal treatment of all member states, as well as the balance between the institutions of the Union. The Benelux is of the opinion that the proposal of the President of the European Council, appointed outside the circle of its members and for a long period, does not come up to these conditions… the Benelux favors maintaining rotation on the level of the European Council and specialized councils. The Benelux will in any case never accept a President elected from outside the Council (emphasized by R.P.)."[65]

The fourth significant contribution also came from the small EU states. Sixteen Member and Accession states, practically all small countries except the Benelux countries and Greece, submitted to the Convention their joint document, in which they responded to proposals of the large countries on the institutional architecture of the Union. The document starts from the proposition that the Constitutional Treaty must reflect the Union's "unique nature as a union of states and peoples". The equality of states is, according to the small states, "a core principle which must be respected in the reform of the Union's institutions". Therefore, the small states cannot accept "any arrangements which sought to establish a hierarchy of Member States or to differentiate between them in terms of their entitlement to involvement in the operation of the institutions". The small states shall insist on maintaining the rotation, especially in the Council, and that no new institutions should be established, especially not ones that could upset the institutional balance. All of them, except two countries (Denmark and Sweden) shall emphasize their support for the "retention of the rotating system in particular in the European Council, the General Affairs Council and Coreper". Smaller states supported all the measures aiming at enhancing the democratic legitimacy of the Commission, emphasizing that "guaranteed equality as between member states in the composition and operation of the Commission must be retained" and also the principle of one Commissioner per Member State".[66]

Reflecting on the stated positions of the Member and Accession States on some key issues of the Union's institutional architecture dividing the large

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[65] 'Memorandum of the Benelux: a balanced institutional framework for an enlarged, more effective and more transparent Union', CONV 457/02.

[66] *'Reforming the Institutions: Principles and Premises'*, CONV 646/03.

and small states at the Convention and afterwards at the IGC, it could be concluded that the large states were unanimous in favoring the establishment of an elected 'chair' or 'president' of the European Council, and practically all small states were against that idea. As to the idea of a smaller Commission and of abandoning the principle of one Commissioner per Member State, this was only hinted in the Franco - German proposal, and not even mentioned in the UK - Spanish contribution. On the other hand, all small countries insisted on the retention of the principle of one Commissioner per Member State, as one of the key principles emphasizing the equality of the Member States in the EU. It is interesting to note that in none of the four documents is there any mention of a request for a change in the definition of qualified majority voting in the Council, except that in the contribution of 16 small states it was stated that "while we accept that demographic factors are relevant both to representation in the European Parliament and to the voting weights in the Council of Ministers, we would not support any further reliance on them".

The Presidium of the Convention made its long awaited proposal of the Draft articles on the Union's Institutions on 23 April 2003.[67] We know that the proposal was based primarily on Giscard's Draft Institutional Proposals leaked to the press the day before.[68] In this paper we are interested only in examining the three institutional issues - QMV in the Council, the composition of the Commission and the chairing of the European Council. In all of these questions Giscard's draft and the Presidium's proposal favored the position of the larger states. In Article 17a it was proposed that "when the European Council or the Council takes decisions by qualified majority, such a majority shall consist of the majority of Member States, representing at least three- fifths of the population of the Union".[69] In Article 16a the Presidium proposed the election of the European Council Chair, for a term of two and a half years, renewable once, and in Article 18 it proposed, against explicit statements of the great majority of states that the principle of one Commissioner per Member State must be retained, that "the Commission shall consist of a President and

[67] The Presidium proposal on the Institutions - draft articles for Title IV of Part I of the Constitution, CONV 691/03.

[68] See Norman, *The Accidental Constitution*, supra note 13, 223-235. Giscard's Draft is published in the Documentary Annex, 343-349

[69] In Giscard's draft an even higher threshold for the population was proposed (two-thirds of the Union's population).

up to fourteen other members", and that "it may call on the help of Associate Commissioners".

Let us now turn to the three crucial institutional issues which have divided the large and small states at the European Convention and see how in each of them the large states prevailed in the end.

Qualified majority voting in the Council

The revision of the voting system in the Council was indeed the "most provocative article"[70] in Giscard's draft, because it eliminated the essential part of the Nice triple majority system - the weighted votes based on the degressive proportional system. The weighted votes had been the backbone of the Council's voting from the beginning of the European Communities. They were based on a complex balance between demographic aspects of Member States and their equality, favoring the smaller countries in the Union. This was evident from the start when we have in mind that the three large founding Member States (France, Germany and Italy) had according to the Treaty of Rome four votes each in the Council of Ministers, and three Benelux countries had together five votes, although their overall population was twofold smaller. With successive enlargements this system of weighted votes was constantly adapted and its evolution was unproblematic till the latest enlargement. However, it seemed that the complex solution accepted in Nice could be a solution for the Council voting for a longer period. This proved to be the wrong assumption.

In January 2002, a month before the European Convention started, and before the Treaty of Nice was even ratified, the German Foreign minister Joschka Fischer said that "the real challenge of Nice was to balance the interests of the bigger and the smaller Member States…because this is very important for an enlarged European Union". However, the problem was very difficult to solve, according to Fischer, because there was no agreement "on the principle that the majority principle in the federation would be the double majority". According to Fischer:

> "If this principle had been accepted in Nice, then…things would have been very easy. By not accepting the principle and not making a clear-cut decision

[70] Norman, *The Accidental Constitution,* supra note 13, 225.

about the principle, it was very, very complicated to bring all the different interests together in some sort of free-style compromise…So, you see, it is very complicated to find a compromise without the principle, without a compromise about the principle. So, the question for the Convention will be whether there will be the strength, the wisdom and also the vision for a Maastricht-like compromise."[71]

Perhaps we could find in these Fischer's thoughts the reason for proposing the principle of the double majority at the Convention so early after Nice. The proposition came from Giscard, but there is a suggestion from an insider that the proposal had originated from Klaus Hänsch, a member of the Presidium from Germany.[72] The motives for the proposal of the double majority at the Convention, excepting Fisher's striving for a principled solution for the Council's voting, are missing.[73] They are not evident even when one reads the debates of the European Convention, because only a few speakers talked about it. The proposal for a simple double majority (majority of states representing at least 50% of the EU population) was brought forward on 20 January 2003 by

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[71] See Fischer's remarks at the European University Institute in Florence on 17 January 2002 (available at http://www.iue.it/About/News/PdfFiles/Fischerspeech.pdf.).

[72] See Alain Lamassoure, *Histoire secrete de la Convention europeenne* (Albin Michel, Paris, 2004), 379. Norman's view is that the 'double-majority' was Giscard's idea and that it was "completely unexpected". See Norman, *The Accidental Constitution,* supra note 13, 321.

[73] There were some rumors that the proposal for a 'double majority' system was proposed having in mind its long - range utility in keeping out of the Union some large European (or non-European) countries. In an interview with the *International Herald Tribune* in September 2004, Giscard suggested that double-majority voting could undermine Turkey's wish to join the EU because its population in 10 to 15 years, might exceed that of every other member state, and so it could have possibly the largest weight in EU decision making, and that could discourage member states from allowing Turkey into their club. Giscard even admitted that "With accession, Turkey would become the most populous country in the EU with the greatest voting power in the council". While Giscard didn't say that the new voting rule had been designed to make it harder for Turkey to join the EU, another member of the Convention's Presidium, Ana Palacio from Spain, suggested that the proposal could have been related to Turkey's membership: "I would say that the proposal was not tabled in innocence, and having been a member of the convention, I know what I'm saying…I strongly believe that it is in the EU interest to have Turkey as a member, but under the double-majority arrangement, Turkey has no chance of ever joining." See 'Giscard says 'a rule we can't change' hurts Ankara's chances: Will Turkey join the EU club?' (*IHT*, September 13, 2004).

Louis Michel, Belgian Foreign Minister, and then supported by Erwin Teufel, a member of the German Parliament and Maria Berger (Austria), an alternate Member from the EP.[74]

In the Convention's proceedings on 15 and 16 May 2003 some speakers commented the Presidium's proposal on the QMV in the Council, but it was far from a true debate that could be expected having in mind such a radical change. What a difference in relation to Philadelphia! Although Andrew Duff and Giscard d'Estaing pointed out that the Convention was here because the Nice Treaty had failed and that it was the job of the Convention to find the remedy, the majority of speakers stood up against changing the rules that had been adopted at the Nice IGC, arguing that Nice "introduced a well-balanced compromise" (Hübner from Poland). Hololei from Estonia said that

> "Important compromises that maintained the institutional balance and guaranteed equality of Member States were made in Nice and it makes no sense to restart the discussion from square one. What was the logic behind the sweat and tears during the discussions in Nice if we do not allow the outcome to function in practice? We must give Nice a fair chance. The size and principles of the composition of the Commission, the weighting of votes in the Council and the size of the European Parliament should be left untouched by the Convention."

Another related argument was that the Nice voting compromise was at the same time a promise to accession countries, which subsequently were able to hold referendums according to the terms of the Nice treaty. Interestingly enough, only one member - Jens-Peter Bonde, a eurosceptic from Denmark, tried to point to the advantages that the larger states would have according to the Presidium's proposal. According to Bonde "the demand that 60% of the population must be attained in QMV means that the three biggest countries can block a decision sought by 22 Member States"in EU-25. Bonde was right in emphasizing that raising the threshold for the population favors the larger states, but no one from the smaller states carried on with this line of argumentation.[75] If anything could be concluded from such a thin debate it is firstly

[74] See the transcript of the session on http://www.europarl.europa.eu/Europe2004/textes/verbatim_030120.htm.

[75] See the transcripts of the session on http://www.europarl.europa.eu/Europe2004/textes/verbatim_030515.htm.

that there was no consensus evident in the Convention for changing the rules of voting in the Council, and secondly that the deliberations (or negotiations) on this were held outside the Convention's plenary.

The 'president' or 'chair' of the European Council

At the heart of the institutional debate on the Brussels Convention was the question of location, exercise and control of the executive power.[76] The conflict was initiated, as we know, with the British, French and Spanish proposal to appoint a 'president' or 'chair' of the European Council for a longer term, instead of the six-months rotation of the presidents of states and government at the top of the EU.[77]

The proposal had been formally submitted to the Convention by France and Germany in January 2003, just in time to provoke a very strong reaction on the Convention's floor at the session on 20-21 January. The cleavage in this and also in the session in May, dealing with institutional articles, was not only between the members of large and small states, but also between the federalists and intergovernmentalists, and the two cleavages were crosscutting.

The Franco - German proposal produced the sharpest reactions among the delegates and the states at the Convention. For the delegates it was disputable because of the impression that the two largest states "were trying to present a *fait accompli*, a compromise agreed outside the Convention that the Convention should accept".[78] It was noticed also that some countries, which supported the

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[76] Kristy Hughes, The Battle for Power in Europe: Will the Convention Get it Right?, (EPIN Working Paper, No. 4, February 2003), 7.

[77] The British support for the originally French idea was elaborated by the then Foreign Minister Jack Straw in October 2002: "The European Council should set the strategic agenda for the Union. But one of the problems with delivery has been that—unlike the commission which is appointed for five years—there are musical chairs every six months in the European Council and the Councils of Ministers. The presidency switches from one country to the next. This stop-go comes at the expense of consistency and efficiency. I therefore support Jacques Chirac's proposal for a full-time president of the European Council, chosen by and accountable to the heads of government. He or she would serve for several years, overseeing delivery of the Union's strategic agenda and communicating a sense of purpose to Europe's citizens". Jack Straw, A Constitution for Europe (*The Economist*, October 10, 2002).

[78] Hughes, The Battle for Power in Europe, 8.

introduction of a permanent chair of the European Council, had been lobbying strongly among other states to win them over to their side. That meant that the intergovernmental negotiations went parallel and outside of the Convention.[79]

The small states shall oppose such reforms, especially of the presidency of the European Council, perceiving in them the strengthening of the role of the largest countries. This was clearly stated by Finish Prime Minister Paavo Lipponen even before the Convention: "There are obvious intentions to change the system into a kind of directorate, where the European commission and smaller countries will be pushed aside."[80] The president of the European Council, according to the fears of the smaller countries, would be someone coming from a larger country or at least someone preferable to them, and that would render impossible for the politicians from smaller EU states to represent the Union, at least symbolically for the period of six months.[81] This was nicely summarized by an analyst:

> "The insistence on keeping the rotating presidency of the Council shows the importance of symbolism in the ongoing integration process. Like medieval kings that rather than residing in a capital, traveled through their lands from place to place to personalize political power and strengthen their legitimacy, the European Union is still in need of celebrating European rituals in the different parts of states and making integration visible to local citizens and civil servants. For the next few years, until the EU is accepted as a natural part of the political landscape, the Union should keep the itinerant circus of European council presidencies, though practical matters might be transferred step by step to supranational organizations."[82]

[79] As noticed by Kristy Hughes: " Having established the Convention to debate these issues and find solutions, some governments are now trying to obtain an intergovernmental agreement outside the Convention - which government representatives would then bring within the Convention. Not so much the IGC happening within the Convention but the IGC happening in parallel on the outside". See Hughes, *The Institutional Debate: Who is Pre-empting the Convention?*, (available at www.epin.org/pdf/comment_hughes_preempting.pdf).

[80] Blair and Schröder plan to open up EU, (*The Guardian*, February 26, 2002).

[81] The possibility of some kind of directorate of the largest EU states is accentuated by the recent revelation of a secret deal between the UK, France and Germany "not to back a candidate one of the others doesn't want" for the post of the president of the European Council. See 'Brown deal bars Blair from top EU job' (*Independent*, 20 April 2008).

[82] Bernd Halling, Rebellion of the small, (*EUobserver*, 10.04.2003).

The strongest reason for the opposition of most of the delegates to the institution of a permanent president was their deep conviction that it essentially increases the possibility of conflict of roles and missions of the president of the European Council with the president of the Commission. In the plenary, on 21 January 2003, Antonio Vitorino said, in the name of the Commission, that "two competitive, two parallel executives would have neither transparency nor accountability".[83] The representative of the Italian Senate Lamberto Dini and British MEP Andrew Duff in their joint contribution to the Convention admitted that the EU needs stronger leadership, however this could be done not by installing another president at the top of the EU, but by electing 'a president of the Union' with the dual legitimation of Council and Parliament.[84] Guy de Vries, Holland's government representative, emphasized that the creation of new institutions in the Union must not impair the principle of the member states' equality and that the rotating presidency is one of the most important elements in the balance among the Member States. Far from making the Union more effective and more democratic in his opinion, a full-time president of the Union risks having the opposite effect - he will "inevitably encroach on the powers of the President of the Commission" and "the result would be confusion, acrimony and stalemate. Thus weakened, he asked, would the European Commission still be able to attract senior politicians and who would want to head a Commission with its wings clipped?

The strongest opposition to the institution of a full-time president of the European Council came, expectedly, from the delegates of the accession countries, because these countries would never have the opportunity to lead the Union if the rotation system were abandoned. Danuta Hübner, representative of Poland's government, stated that "the rotation system is the best possible expression of equality among Members of the Union. It is also a good way to make the public identify with European integration". Her colleague Rytis Martikonis, representative of Lithuania's government, similarly pointed out

[83] In its special reaction to the Presidium draft of the institutional articles the Commission stated that "The Union needs a clearly defined and fully accountable executive, acting in the general interest", but that "the proposals fall short of clarifying who would play this role and, instead, contribute to institutional fragmentation". See Reaction of the European Commission to the proposals for institutional reform (Convention), IP/03/563, 23 April 2003.

[84] See their joint contribution 'A proposal for a Unified Presidency', CONV 524/03, 31 January 2003.

that "undeniable political - or shall we say popular - advantage of a rotating presidency is in ensuring that Member States are directly involved in the governance process, thus playing a crucial role in connecting or legitimizing the Union with its citizens". Other delegates repeated these arguments in the sense that the system of rotation is the only one guaranteeing true equality of Member States, that it ensures that every Member State has the right to chair the European Union and gives every Member State international visibility.

On the other hand, the majority of delegates from the larger Member States, regardless of which component of the Convention they may represent, supported the idea of a president of the European Council, stating, like Peter Hain, that in a EU-25, the European Council with a constantly changing president cannot be an effective partner for the Commission or Parliament and so it "needs the continuity and strategic drive of a long-term president if it is to play its full role in the dynamic of a new, enlarged European Union".

Reading the speeches of the delegates of the two day discussion it is obvious that the large majority of speakers were critical to the proposal of electing a full-time president of the European Council. According to Hanja Maij-Weggen, at the end of two-day debate in January, of 91 speakers on the subject of the European Council presidency only 12 were for the long-term president, 15 had serious reservations, and 64 were against this institutional innovation.[85] At the plenary session on 15 May 2003, Austrian delegate Voggenhuber said to Giscard: "Up to now, 101 members have put their signature against this proposal of the long-term European Council presidency, 15 governments. Is this enough, or must we still torture ourselves for weeks with this plan that has no majority and will never have a consensus behind it?... I think, the president of this Convention can gladly discuss this at all Italian markets, but he - and the Presidium with him, needs to take knowledge that in this Convention an enormous majority is consensually against this notion of a long-term Council presidency."[86]

Having in mind the interventions of Hanja Maij-Weggen and Woggenhuber, it is difficult to see how Giscard and the Presidium could have proposed the

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[85] See the transcript of the session at http://www.europarl.europa.eu/Europe2004/textes/verbatim_030120.htm. Giovanni Grevi from the European Policy Centre counted 55 speakers against, 18 in favor, and 15 somewhat against. See Grevi, Glowes off: the going gets tough in the Convention (EPC, 22 January 2003).

[86] See the transcript at http://www.europarl.europa.eu/Europe2004/textes/verbatim_030515.htm.

'European Council chair' in their draft articles on the Union's Institutions and in the final draft of the Constitutional treaty. I have never read a satisfactory explanation how it is possible that after such an undisputable negative reaction of the great majority of the delegates, the Convention could at the end consensually accept the institution of the president of the European Council.

The size of the Commission

As we said before, it was well known to Giscard that practically all smaller countries are in favor of the retention of the principle 'one commissioner per member state'. The smaller states have been skeptical to the proposals for the reduction of the number of Commissioners because they thought that in such a case the Commission, as argued a few years ago by the Portuguese State Secretary for European Affairs, would *de facto* run at the level of the senior officials where the large Member States are better 'represented' than the smaller states.[87]

Contrary to the attitudes of at least 16 smaller states that stated in April, before the IGC in Athens, that they insist on 'one commissioner *per* member state', Giscard and the Presidium proposed the reduced composition of the Commission with two classes of Commissioners - those with full voting rights and the so-called 'associate commissioners'. This proposal was made in complete agreement and with the full support of larger states, which Giscard had consulted during the conference in Athens on 16 April 2003. At the conference Giscard argued that the time had come to redress a democratic balance that had been upset as power flowed to the smaller states with EU expansion. He specifically declared that if the system of 'one commissioner per member state' were left unchanged, then the seven smallest countries of the EU, with just 2.4 per cent of the population, would have more seats and votes on the Commission than the six biggest states, which represent 75 per cent of the population. And therefore it is, in his opinion, not enough to take only the number of states into account, but "we also have to take into account their populations, because we operate in a democratic way here."[88]

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[87] Cited according to Youri Devuyst, *EU Decision-making after the Treaty establishing a Constitution for Europe*, (University of Pittsburgh, Center for West European Studies, Policy Paper 9, July 2004), 12.

[88] 'Small states join forces against EU power shift' (*Times*, 24 April 2003). Allegedly, after the Convention's end Giscard said that the accession of the countries of former Yugo-

The crucial debate on the size of the Commission at the plenary on 15-16 May 2003 showed deep dividing lines between the delegates from large and small states and a large majority of speakers called for one commissioner per country, explicitly rejecting the possibility of having some kind of associate commissioners, because this solution would go against the principle of equality of states. Some of them indicated that they would be willing to consider the second-best option - a smaller Commission based on the principle of equality of states. Serracino-Inglott from Malta, speaking on behalf of the small countries, said: "we still hope that the Convention will overcome what the media at the time of Nice called 'the Lilliput complex', that is, the strange fear that seems to have struck or afflicted the large states, the fear that they might be overwhelmed by the influx, nine-strong, of small countries". On the other hand, the members from larger states insisted on a smaller Commission, repeating the arguments of efficiency and thinking that the number of commissioners must be dissociated from the number of Member countries and that the President of the Commission should be given the right to determine the number of Commissioners.[89]

Giscard didn't change his position even after a clear negative response from the majority at the Convention. First, he argued that Member States should have 'equivalent rights', but this did not imply that they should all have equal status, because in his opinion the EU system should be based first of all on the equality of citizens. After the session he said at the press conference: "You can speak of equality of citizens, that people are equal. But small states do not have the same economy; they do not pay the same contributions".[90] It is obvious that with this kind of logic the demographic factor must determine the composition of the Union's institutions and the rules of voting and this must

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slavia would, under existing provisions, mean that they would have five Commissioners (Giscard did not anticipate the breaking of the Federal Republic of Yugoslavia into Serbia and Montenegro), while the founding Member States would have one each. See Rainhard Rack and Daniela Fraiss, A Constitution for Europe, in Michael Gehler et al., *Towards a European Constitution: A Historical and Political Comparison with the United States*, (Böhlau Verlag, Wien, 2005), 66, ft. 95.

[89] See the transcripts of the session on 15 May at http://www.europarl.europa.eu/Europe2004/textes/verbatim_030515.htm and of the session of 16 May at http://www.europarl.europa.eu/Europe2004/textes/verbatim_030516.htm.

[90] Dana Spinant, 'Citizens are equal - but some states are more equal than others', (*European Voice*, Vol. 9, No. 19, May 2003).

be favorable to the larger states. The composition of the Commission is not exempted from this logic - it was still acceptable when in the EU-15 five of the largest states, with two commissioners each, had parity with the small states in the Commission of 20 members. But after the Nice agreement these five states (Germany, France, UK, Italy and Spain) had only five out of 25 Commissioners. One Convention official explained frankly why the size of the Commission must be reduced: "The trouble with a large Commission (one commissioner per country) is that, as it decides by simple majority, commissioners representing less than 10% of the Union's population could carry decisions…The only way to avoid this is to break the one country - one commissioner link and to have a smaller (Commission) team". Another one, close to Giscard, said that the 'all states are equal' taboo must be broken if the Union is to be built on 'sound political foundations'. That means that the principle of equality of states must be modified because the principle of equality of citizens must be taken into account also: "Malta is not as big as the UK or Germany, and does not pay the same amount of money to the EU budget either. How can you say they are equal? They are obviously not. But they should have equivalent rights…But EU citizens are equals and that should be reflected in the composition of EU institutions. We will spell out in the constitution that the EU is a union of states and peoples. We should be serious about the people and not only prepare a Union of states".[91]

This statement reminds me of James Wilson's remarks at the Philadelphia Convention. Defending the interests of the larger states and the majority principle based on the population he asked: "For whom do we make a constitution? Is it for men, or is it for imaginary beings called states, a mere metaphysical distinction?"[92] Wilson was trying to build a national state, and not a confederation, based on the principle of equality of states so it is understandable his insistence only on the equality of citizens.[93] However, it is not at all obvious why the same argumentation should be accepted in the EU, a union of states with no ambition at this point to create a national state.

When the Presidium published its draft of Part One of the Constitutional treaty on 26 May 2003 (CONV 724/03) it was obvious that the draft was

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[91] Spinant, supra note 90.

[92] Farrand, Records, 1;494.

[93] See more Randolph C. Adams, The Legal Theories of James Wilson, (1920) 68 *University of Pennsylvania Law Review and American Law Register*, 345.

highly favorable to the larger states - in all three institutional issues we have been analyzing the draft went against the majority of small states and majority of Convention's members: it proposed the European Council president, the reduced Commission of 15 members with associate Commissioners, and the Council's decision-making by qualified majority consisting of the majority of Member States, representing at least three-fifths of the population of the Union.[94]

The Convention's Compromise

What were the options for the small states after the Presidium published its draft of the first 'constitutional' part of the Constitutional treaty? The first option was to stick by its principled positions formulated several times in the past few months, threatening to undermine Giscard's single proposition of a Constitutional treaty, and instead to forward several 'options' to the IGC. The second was to try to find a balanced compromise with the larger states.

At first sight, the first option looked as if it could be successful. After Giscard's meeting with the government representatives on 4 June (which Giscard had left before it ended) George Katiforis, the Greek government alternate, faxed him the summary of positions of representatives of Member State governments on crucial dividing institutional issues. According to Katiforis, among other things:

- 18 government representatives backed the six-months rotating president of the European Council against five supporting a full-time elected chair;
- 18 were against reopening of the Nice agreements on the weighting of votes in the Council of Ministers, the number of European Parliament seats and the structure of the Commission. If the Commission had to be downsized, equal rotation among member states should apply.[95]

It seemed that the group of small states was cohesive and firm, and more united than ever, but it was soon evident that they had some fundamental weaknesses. First, we must have in mind that the majority of the small state coalition was made up of accession countries. As we know, according to the

[94] See articles I-21, I-24 and I-25 of the Draft Constitution, Volume I - Revised text of Part One, CONV 724/03.

[95] Reported according to Norman, *The Accidental Constitution*, supra note 13, 277.

Laeken Declaration, they were able to take part in the proceedings, but with no right "to prevent any consensus which may emerge among the Member States".[96] And we know also that Giscard didn't count the vote of Alojz Peterle, the representative of the accession countries, when the Presidium voted.[97] So, the bloc of small countries was effectively much smaller - it consisted of seven Member States (Belgium, the Netherlands, Luxembourg, Portugal, Finland, Austria and Ireland). These so called 'seven dwarves' coordinated their activities from March 2003, but they never made a united front versus the five larger states. The reason for this is the semi-detached position of the Benelux countries from the beginning of the Convention. Instead of being a leader of the small states group (something akin to the position of Connecticut at the Philadelphia Convention) the Benelux countries had from the beginning of the European Convention insisted on their special position as founding members. We mentioned before that the Benelux countries had made their first contribution on the institutional issues in December 2002, even before the Convention started, and that they did not sign the joint contribution of 16 small states in March 2003 ('Reforming the Institutions: Principles and Premises').

In the split between the Benelux countries and the other small Member States, especially Austria, Finland and Ireland, as regards the institutional architecture of the Union and the content of the possible compromise with the larger states, I see one of the crucial reasons for the small states' failure at the European Convention.

Let us repeat the starting position of Benelux - even in December 2002 it was partially different from the subsequent position of the 16 small countries. The Benelux countries stated at the time that they would never accept a full-time President of the European Council (the same as other small countries), and they favored the size of the Commission in accordance with the Nice decisions, with the possibility of reducing it in number, and applying the principle of equal rotation. Nothing was said about the QMV in the Council. On the other hand, 16 small countries insisted on respecting the Nice compromise on the QMV and the size of the Commission, giving no alternative to the principle of 'one commissioner per member state'. And they strongly rejected the long-term president of the European Council. The Benelux countries strongly rejected the abandoning of the rotating presidency also in their reaction to the

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[96] *Laeken Declaration*, see the footnote 44.

[97] Stuart, *The Making of Europe's Constitution*, 24.

Franco-German proposal in January[98], and again in May in their final contribution to the institutional issues.[99] And then, in June, just before the European Council meeting in Thessaloniki in the statements made by Prime Minister Guy Verhofstadt and Deputy Prime Minister Louis Michel (who was Belgium's representative at the Convention) it was said, among other things, that it is "regrettable that the European Council is to become a separate institution (albeit without legislative authority)" and that "the text also sets out the new function of the President of the European Council, but also contains a number of elements that limit that role".[100] The question is why Belgium accepted the President of the European Council; although it had at least three times before solemnly declared that this institution was unacceptable. In December 2002 it even declared, together with the Netherlands and Luxembourg that "the Benelux will in any case never accept a President elected from outside the Council".[101]

We know today from the proceedings of the Philadelphia Convention that when the small countries declared that they would never accept proportional representation in both houses of the Congress they really meant what they said. The warning, or the threat, if you wish, was serious, and at the crucial moment the large states were aware that the small states would not surrender to their demands. In Brussels, we had the same stated position of the smaller states that they would never accept the institution favored by the large states, and at

[98] See 'Prise de position des Premiers Ministres et des Ministres des Affaires étrangères du Benelux suite a la Contribution franco-allemande a la Convention européenne sur l'architecture institutionnelle de l'Union', 20.01.2003, available at http://www.futurum.gov.pl/futurum.nsf/0/E0A940EB38B3574DC1256DA2003D1308 (last visited 18 February 2008).

[99] See Contribution by Benelux countries 'The Union's Institutions', 8 May 2003, CONV 732/03.

[100] Statement available at http://www.futurum.gov.pl/futurum.nsf/0/D212B63564E71CDBC1256DA2003D1360/$File/oth190603_en%20be%201.pdf (last visited 10 June 2008).

[101] Philippe de Schoutheete, a former Permanent Representative of Belgium, said in March 2008 that the Benelux countries had accepted the long-term president of the European Council " in exchange for other concessions and the implicit assurance that this new President would not necessarily be provided by one of the big EU countries". See ' Belgian diplomat: Benelux accepted Blair's EU President proposal on condition that it would not be filled by the big countries' (*Open Europe*, press summary, 18 March 2008).

the very end of the Convention they yielded to them. Could we speak of some sort of a compromise regarding the President of the European Council? It could be said that the smaller states succeeded in limiting his role, making him more of a 'chair-person' at the meetings of the European Council, than a president who could be a rival to the president of the Commission, but this could hardly be called a compromise. It is true that, as was often emphasized, the European Council president was granted little formal powers, but, as remarked by an analyst, "at this point in time we see only glimmers of the new office, weakly shining from the yawning risks of failure. We tend to forget that it was thus with the American Presidency at the time of its creation".[102]

The Benelux position against the president of the European Council practically disappeared near the end of the Convention, as witnessed by P. Norman, "because Belgium did not share Luxembourg's deep distaste for the long-term European Council president".[103] And when Benelux did not oppose the installation of the European Council president it meant at the same time that there existed a sort of consensus of the founding Member states on this point and that the coalition of the 'seven dwarves' was gone.

The smaller states also yielded to the larger in the matter of QMV in the Council. Although practically all of them were losers in the new system of 'double majority' the only thing in which they succeeded was to prolong the introduction of this voting system till 1 November 2009, which could hardly be called a compromise. The question of the new voting system received inadequate attention at the Convention and in public, which is very strange compared with the situation at the American Federal Convention. Someone from the United States might say that the Convention's solution is almost the same as that adopted in Philadelphia, and so, from the normative point of view, it is the best possible solution. Only at first sight it might seem that the European 'double majority' system has any resemblance to the American 'double majority' system. But this is completely wrong. In the United States the double majority includes both branches of the Congress and means that each law is enacted by the majority of people represented in the House of Representatives, and the majority of states represented in the Senate. And in most federal systems population weight is the dominant factor in one, but not in both houses of the legislature. In the European Union, in which the

[102] John W. Sap, The European President, (2005) 1 *European Constitutional Law Review*, 51.

[103] Norman, *The Accidental Constitution*, supra note 13, 322.

co-decision procedure is envisaged as a normal procedure of law-making, the European Parliament and the Council resemble the classic federal legislature, albeit with a different logic than the rest of the federal systems: both the European Parliament and the Council are based on the demographic factor - with the digressively proportional system of allocation of representatives in the EP and with the full population impact in the second leg of the 'double majority' system in the Council.

Even in the German federal system, which deviates from the principle of the equality of the state's representation in the federal house of legislature, and adopts instead the system of weighted votes there is a much smaller span of votes between the smaller and larger federal units. The *Bundesrat* has a total of 69 votes and each of the 16 federal units has between three and six votes. So, the greatest *Land*, North Rhine-Westphalia with a population of 18 million has 6 votes in the *Bundesrat*, the same as Lower Saxony with 8 million people. The smallest, Bremen, with less than a million, has 3 votes. The effect of the distribution of votes is that the largest four states (North Rhine-Westphalia, Baden-Würtemberg, Bavaria and Lower Saxony) with almost 50 million people (more than 60% of the total population of FR Germany) have only 24 votes, which is just over a third of the total votes in the *Bundesrat*. The largest states cannot dominate in the *Bundesrat*. On the other hand, the smallest 11 countries with 25 million people have 40 votes, which is the majority of all votes. The question is how is it possible that the German federal system, which is characterized often as a 'unitary federal state', is much more just to the smaller federal states than the EU federal system, which is only a union of states. Thus it is evident that Germany has imposed in the EU's federal legislature a system of voting which is far more favorable to the larger states than is her own. And the second paradox is that the conflict over the 'double majority system' was fought principally between the large states themselves - with Germany and France on the one side, and Spain and Poland on the other.

In my opinion, only the solution regarding the size of the Commission could really be called a compromise, although I think that it would have been better for the small states if they had succeeded in their defense of the principle of 'one commissioner per member state'. We know that the 16 smaller states (practically all except Benelux) insisted in their contribution *'Reforming the Institutions: Principles and Premises',* submitted in March 2003, on "guaranteed equality between member states in the composition of the Commission"and on retaining the principle of 'one commissioner per member state'.

The problem from the beginning was the ambivalent position of Benelux on this issue. In their contribution in December 2002 they proposed "eventually reduced… Commission guaranteeing the equality of all member states in…its composition, based on the principle of equal rotation".[104]The Benelux proposal was different from the other small states' position in accepting the smaller size of the Commission, and different from the large states in insisting on the equal rotation of all member states in the collegium of commissioners. As a middle position it could be called a compromise position. Why did the Benelux countries differ from the rest of the small countries in their acceptance of a reduced Commission? There is no definite explanation, only some possible hints. One is that the Belgian preferences during the Convention changed because of the impact of Jean Luc Dehaene, the former Belgian Prime Minister and the Vice-President of the Convention.[105] Another is that that the smaller and more effective Commission looked more promising from the federalist perspective, favored by Belgium and at least some other smaller countries. And the third possible explanation is that the reduced Commission, formed according to the principle of equal rotation of all member states, "promised the smalls a fair shot at the top Commission jobs, whereas they would have no such guarantee in a large Commission in which the Commission president would choose how to divide responsibilities".[106] At the end, the final compromise proposal of the Presidium (equal rotation between all the member states and the arrangement that the replacement of the system of 'one commissioner per member state' will be delayed and 'will take effect on 1 November 2009') was acceptable for

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[104] Memorandum of the Benelux: a balanced institutional framework for an enlarged, more effective and more transparent Union', CONV 457/02.

[105] Peter Bursens argues that, although Dehaene had no direct impact on the Belgian government, his impact on the Belgian position was substantial. On the number of Commissioners (and Bursens thinks that this was the only substantial issue that has witnessed a change of preference of the Belgian government during the course of the Convention), Dehaene's impact was very important. According to Bursens: "At the outset, the Belgian government had made clear that every Member State should remain entitled to appoint one commissioner, underlying the high symbolic value for the citizens of each Member State. It was only during the latter stages that Belgium changed its position, after consultations with Jean-Luc Dehaene, and declared in favor of a rotation mechanism, arguing that a smaller Commission would guarantee greater effectiveness". See Bursens, Enduring Federal Consensus: An Institutionalist Account of Belgian Preferences regarding the Future of Europe, (2004) 2 *Comparative European Politics*, 352.

[106] Norman, *The Accidental Constitution*, supra note 13, 268, 320.

the majority of the smaller countries, so that, in the end, only five of them still adhere to the principle of a large Commission, consisting of nationals of all member states.

As we can see, on the three major issues dividing large and small states in the European Convention, the small states lost outright on two (QMV in the Council and the long-term presidency of the European Council) and reached a sort of compromise on one (a reduced Commission with equal rotation of member states), which, from my point of view, is not favorable to the small states in the long term.

Some scholars, looking for explanations for the failure of the small states in the European constitutional convention, have seen them in their negative coalition, i.e. in their opposition to the proposals of larger states, without offering alternative proposals.[107] When you defend the *status quo*, as was the case with the small states regarding the retention of the Nice compromise on the size of the Commission and the system of QMV in the Council, and the rotation of the European Council presidency, you do not need to present an alternative proposal. In a certain way, this could be compared with the position of the small states in Philadelphia. They had defended the *status quo* regarding the equality of states in the Senate, because it was the principle of voting of the Confederation Congress. However, the argument regarding the 'negative coalition' of the small states is related to another one, which is more relevant for me: the weak cohesion and solidarity of the small states group. I would like to cite a longer account of a member of the Convention who gives, in my opinion, a very good explanation for the failure of the small states:

> "The representatives of small Member States desperately tried to agree on a consensus but failed. They did manage to write a joint letter to Valery Giscard d'Estaing, but this only contained points that were self-evident anyway…
>
> The only real issues addressed were that the equality of the Member States should be preserved in the composition of the Commission and that the

[107] For example Anna Verges Bausili argues that "generally speaking, the group (of small states) was more united as an opposing front to specific institutional proposals led by large countries, and in denouncing a perceived bias in the Chairman (seen as favoring large member states) than in presenting a single commonly agreed alternative". See Anna Verges Bausili, The Constitutional Convention and Ireland (*The Federal Trust Online paper* 21/03), 6.

Presidency of the Council should rotate. That was all. The small Member States could not even agree on whether they should defend the practice of each Member State having a Commissioner of its own.

The small Member States thus broke ranks. Only Austria and Portugal, and a number of candidate states, eventually remained with Finland. That was not much of a position in which to make an impact. Perhaps there was not a great deal of desire to do so either, because it was understood that the whole matter would be reopened at the IGC. There the Member States have equal representation and there every government must agree before a final solution. There was no such veto available at the Convention, and there was therefore no point in aiming for compromises. Standing firm at the Convention equals leverage at the IGC, or so the Finnish Government believed. Unfortunately, this assessment proved inaccurate, to say the least."[108]

In this testimony of a participant in the European Convention we could identify the dissension, lack of preparation and bad tactic on the part of the small states in the process of European constitution-making, which had to result in their failure in defining a new 'institutional architecture' of the EU.

I still think that, regardless of Giscard's rules of identifying consensus in the Convention, the small states could have used their veto in the Convention, assuming that there was a majority of them willing to use this 'nuclear weapon'. However, in the final days of the Convention, in the hectic situation when Giscard appealed to the members and the institutional components (government representatives, representatives of national parliaments, MEPs) to think of the consequences of failure to reach a consensus, it was difficult to organize the large group of small states and insist on some 'red lines'. This role could have been played by the Benelux countries, but they were the first to break ranks with the small state coalition.

It was, as predicted by Kiljunen, absolutely wrong for the small states to think that the IGC could change the core of the 'institutional compromise' of the Convention. Immediately after the Convention Joschka Fischer said that it would be wrong and very risky to open 'the Pandora box' on the IGC, i.e. to re-open some sensitive questions on which the Convention had barely succeeded

[108] Kimo Kiljunen, *The EU Constitution - A Finn at the Convention* (Publications of the Parliamentary Office 1/2004), 143-144.

to achieve a 'compromise'.[109] So the gains that the small states achieved after the IGC negotiations are, in the main, some further delays in the application of rules regarding the composition of the Commission[110] and the new double majority system in the Council.[111]

The hardest blow made by a small state to the new 'institutional architecture' of the EU came unexpectedly with the Irish 'no' at the (first) referendum on the Lisbon treaty. Among the many different reasons for voting against the treaty was opposition to the institutional solutions, favoring large states. This played a prominent role in the 'NO' campaign. Among the eight reasons "to vote NO to Lisbon", published on the website of *'Libertas org.'*, a coordinating centre of the Irish campaign against the Lisbon treaty, the first three are the ones we have been emphasizing as the worst outcomes for the small states: creation of "an unelected President and a Foreign Minister of Europe", reduction of "Ireland's voting weight", and reduction of the number of Commissioners to two- thirds of the number of member states.[112] In the first reactions to the Irish 'NO' it was stated that there were specific fears of a small country that the Lisbon treaty was a 'bad deal' which would greatly diminish its influence in the Union.[113]

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[109] Fischer said earlier on the Convention's plenary on 8 November 2002 that "what the Convention could not achieve, it would be very difficult to achieve elsewhere", See the transcript of the session on http://europarl.eu.int/europa2004/textes/verbatim-021108.htm.

[110] The Commission shall have one national from each Member state till 31 October 2014 (five years more than proposed in the Constitutional treaty) and as from 1 November 2014 the Commission shall consist of a number of members corresponding to 2/3 of Member States. That means that in the EU-27 the Commission shall have 18 members, which is three more than proposed in the Constitutional treaty.

[111] Mostly because of Poland's opposition to the new voting rules the application of the double majority system was postponed till 1 November 2014, with the transitional period till 31 March 2017, during which the Member States shall be entitled to request that instead of the new voting rules, the Nice QMV rules continue to be used when the proposed act is of a particular political sensitivity to that Member State. Furthermore, the thresholds in the double majority system for the states and the population were raised to 55%, and 65% respectively. And this higher threshold for population favors the larger states, as said before, and it was insisted on by Poland. The other threshold (55% of the Member States) is useless after the entry of the 28th country in the EU.

[112] '8 Reasons to Vote No for Lisbon' (assessed at http://www.libertas.org/content/view/293/139/ on 20 June 2008)

[113] 'Why Europe Should Listen to Ireland', *Der Spiegel*, (available at http://www.spiegel.de/international/europe/0,1518,559639,00.html).

In the negotiations that followed between the Irish government and European officials on the matter of what guarantees would be necessary for Ireland to achieve a successful result of the expected second referendum, it was agreed, among other things, that in the future the number of commissioners should not be reduced. At the Brussels European Council held on 11 and 12 December 2008, it was concluded:

> "On the composition of the Commission, the European Council recalls that the Treaties currently in force require that the number of Commissioners be reduced in 2009. The European Council agrees that, provided the Treaty of Lisbon enters into force, a decision will be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State."[114]

The second Irish referendum on the Lisbon Treaty was, as we know, successful. It could therefore be concluded, somewhat paradoxically, that the Irish people succeeded in what all the negotiators on behalf of the small states had not been able to achieve in the Brussels Convention and in the IGC.

Lessons for the future

The story of small states' failure at the European Convention is relevant for future conventions and intergovernmental conferences. It is envisaged in the ordinary Treaty revision procedure that if the European Council adopts a decision in favor of examining amendments to the treaties, proposed by authorized bodies, "the President of the European Council shall convene a Convention composed of representatives of the national parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission" and the Convention "shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States" (Article 48 of the Treaty on the European Union). Therefore, the Convention is going to be a permanent body authorized to submit proposals (except in the case of the

[114] Brussels European Council, 11 - 12 December, 2008, Presidency Conclusions: The Treaty of Lisbon, para. 2.

European Parliament's opinion that the Convention is not needed, which is hardly to be expected).

In a future Convention the small states must not repeat the same mistakes concerning their preparedness and defense of some principled positions, before its beginning. Some Finnish delegates of the past Convention have certain excellent ideas about the procedural changes that would be necessary, if the small states wish to avoid repeating the failure from the Convention on the Future of Europe. I have summarized the most important of their suggestions:

- all Member States must have an equal right to participate in the preparation of any future Convention and to be taken into account,
- the Member States must define the rules of the game, working methods and the mandate of the Convention in advance and those decisions must be precise, equitable and should also be adhered to, unless all the Member States unanimously decide otherwise,
- the work of the Convention must be transparent, not only regarding the plenary sessions, but also especially regarding the Presidium,
- the Convention must elect its own Presidium, including the Chairman, as was the case in the Convention working on the Charter of fundamental rights,
- the Presidium and Secretariat of the Convention must without question have a representative from each of the Member States, because the EU is fundamentally a union of states, and
- the Convention should be able to vote, as was the case in the Presidium, because the alternative, as was experienced at the Convention on the Future of Europe, was 'consensus', the definition and very existence of which was at the discretion of the Presidium, and was often artificial and even dishonest.[115]

CONCLUSIONS

The theme of this paper was a comparison of just one, albeit central aspect of two constitutional conventions - the American Federal Convention, held

[115] The suggestions are from Kimo Kiljunen, Matti Vanhanen, Jari Vilen and Esko Helle. See Kiljunen, *The EU Constitution*, 155-203 passim.

in Philadelphia in 1787 and the Convention on the Future of Europe, held in Brussels in 2002 - 2003. It was the conflict between the large and small states, which was central to both conventions.

This conflict was relevant in Philadelphia in the resolution of issues concerning the representation and voting power of states in the Congress and some other institutional issues (Electoral College, veto on the laws of the states, Senatorial powers, amendments) and in the European Convention on similar issues of voting power of states, and the composition or leadership in certain bodies (the Commission, the European Council).

It is beyond doubt that the small states in the Philadelphia Convention have achieved success in defending the principle of equality of states primarily through equality in the Senate (confirmed through the constitutional provision "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate") and obtained some other important victories (extra-powers of treaty-making and appointments in the body in which they are dominant, significant influence in the election of the executive, etc). This success of the small states in the process of 'arguing and bargaining' was, in my opinion, the result primarily of four interrelated factors: favorable rules of the game (voting by the states), voting strength of the small states and their cohesion and firmness throughout the Convention, their unyielding bargaining position as to the principle of equality of states, and credibility of their threats that they would not ratify the Constitution under the terms imposed by the large states.

Analyzing the conflict between the large and small states in the European Convention it is obvious that the position of the small states was institutionally weaker (the representatives of states were in the minority in the Convention's membership as they were only one of several institutional components; the majority of small states were accession states, which had no right to challenge a 'consensus' of the Convention) and procedurally weaker (the rules of the game were against them, because they were imposed and manipulated by the Presidium, dominated by larger states; the voting, which could demonstrate their possible strength, was forbidden). Finally, and this is very important, the small states were not coherent and united in pursuing their goals, they were not firm in the defense of the principles they had declared at the beginning of the Convention, and at the end they didn't use credible threats, as was the case with the small states in Philadelphia. This I consider to be fundamental causes for the failure of the small states in the European Convention to secure institutional solutions which they favored.

Sažetak

Robert Podolnjak [*]

MALE DRŽAVE I USTAVOTVORSTVO: UZROCI RAZLIČITIH ISHODA U PHILADELPHIJI I BRUXELLESU

Tema rada je analiza mogućih uzroka različitih rezultata dviju ustavnih konvencija - američke federalne konvencije održane u Philadelphiji 1787. i Konvencije o budućnosti Europe održane u Bruxellesu 2002-2003. - što se tiče sukoba između velikih i malih država, koji je prema mišljenju autora bio središnji međudržavni sukob u obje konvencije. Taj je sukob bio relevantan u Philadelphiji u rješavanju pitanja koja su se odnosila na predstavništvo i glasačku snagu država u Kongresu te nekim drugim institucionalnim pitanjima (elektorski kolegij, veto na zakone država, ovlasti Senata, ovlast amandmana na Ustav), a u Europskoj konvenciji sukob se odvijao po sličnim pitanjima glasačke snage država i sastavu ili vođenju određenih tijela (Komisija, Europsko vijeće). Male su države u Philadelphijskoj konvenciji postigle uspjeh u obrani načela jednakosti država naročito putem jednakosti u Senatu, a postigle su i neke druge važne pobjede. Taj njihov uspjeh u procesu "uvjeravanja i pogađanja" bio je rezultat prvenstveno četiriju međusobno povezanih čimbenika: povoljnih poslovničkih uvjeta odlučivanja (glasovanje putem država), glasačke snage malih država i njihove povezanosti i čvrstoće tijekom čitave Konvencije, njihove nepopustljive pregovaračke pozicije glede načela jednakosti država i vjerodostojnosti njihovih prijetnji da neće ratificirati Ustav pod uvjetima koje su željele nametnuti velike države. Analizirajući sukob između velikih i malih država u Europskoj konvenciji očito je prema mišljenju autora da je pozicija malih država bila institucionalno slabija (predstavnici država bili su u manjini u sastavu Konvencije jer su činili samo jednu od nekoliko njenih instituciuonalnih sastavnica; većinu malih država činile su pristupne države koje nisu imale pravo dovoditi u pitanje 'konsenzus' Konvencije) i proceduralno slabija (poslovničke odredbe o radu konvencije bile su im nesklone, jer su bile nametnute od Predsjedništva konvencije u kojem su dominirale velike države; glasovanje koje bi moglo demonstrirati njihovu potencijalnu snagu bilo je zabranjeno). Konačno, što je vrlo značajno, male države nisu bile dovoljno složne i ujedinjene u ostvarivanju svojih ciljeva, nisu bile čvrste u obrani načela koja su deklarirale na početku Konvencije i na kraju nisu koristile uvjerljive prijetnje, kao što su to činile male države u Philadelphiji.

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To su fundamentalni uzroci neuspjeha malih država u Europskoj konvenciji da osiguraju institucionalna rješenja za koja su se zalagale.

Ključne riječi: ustavotvorstvo, Philadelphijska konvencija, Konvencija o budućnosti Europe, velike i male države.

Zusammenfassung

Robert Podolnjak [**]

KLEINE STAATEN UND VERFASSUNGSGEBUNG: DIE URSACHEN DER UNTERSCHIEDLICHEN RESULTATE IN PHILADELPHIA UND BRÜSSEL

Das Thema dieser Arbeit ist die Analyse der möglichen Ursachen für die unterschiedlichen Ergebnisse zweier Verfassungskonvente, der amerikanischen föderalen Konvention 1787 in Philadelphia und des Konvents über die Zukunft Europas 2002-2003 in Brüssel, hinsichtlich des Konfliktes zwischen den großen und den kleinen Staaten, der nach Meinung des Autors der zentrale zwischenstaatliche Konflikt in beiden Konventen war. In Philadelphia war dieser Konflikt bei der Lösung der Frage nach der Vertretung und Stimmkraft der Bundesstaaten im Kongress sowie einigen anderen institutionellen Fragen relevant (Electoral college, Vetorecht gegen bundesstaatliche Gesetze, Ermächtigungen des Senats, Ermächtigung zur Bestimmung von Verfassungszusätzen), im Europäischen Konvent bezog sich die Auseinandersetzung auf ähnliche Fragen der Stimmkraft der Staaten und auf die Zusammensetzung oder Führung bestimmter Organe (Kommission, Europäischer Rat). In der Verfassung von Philadelphia konnten die kleinen Staaten einen Erfolg verbuchen, indem sie das Prinzip der Gleichberechtigung der Staaten insbesondere durch die Gleichberechtigung im Senat durchzusetzen vermochten. Es sind ihnen auch andere wichtige Siege gelungen. Dieser Erfolg im Prozess zwischen "Überzeugungsarbeit und Feilschen" ist in erster Linie auf vier untereinander verbundene Faktoren zurückzuführen: die günstige Entscheidungsregelung in der Geschäftsordnung (Abstimmung durch Staaten), die Stimmkraft der kleinen Bundesstaaten in Verbindung mit ihrem Zusammenhalten und ihrer Standfestigkeit während des gesamten Konvents, ihre unbeirrbare Verhandlungsposition bezüglich des Gleichheitsgrundsatzes der Staaten und die

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Glaubwürdigkeit ihrer Drohungen, die Verfassung unter den Bedingungen, die die großen Staaten aufzuzwingen versuchten, nicht zu ratifizieren. Nach Analyse des Konflikts zwischen den großen und den kleinen Staaten im Europäischen Konvent ist der Autor der Ansicht, dass die Position der kleinen Staaten institutionell schwächer (die Vertreter der Staaten waren in der Zusammensetzung des aus mehreren institutionellen Bestandteilen gebildeten Konvents in der Minderheit; die meisten kleinen Staaten waren Beitrittsländer, die nicht berechtigt waren, den "Konsens" im Konvent in Frage zu stellen) wie auch prozedural untergeordnet war (die Bestimmungen der Geschäftsordnung zur Arbeit des Konvents waren ihnen nicht geneigt, da sie vom durch die großen Staaten dominierten Präsidium des Konvents diktiert worden waren; eine Abstimmung, die ihre potenzielle Kraft hätte demonstrieren können, war verboten). Und schließlich brachten die kleinen Staaten in der Verfolgung ihrer Ziele nicht genügend Einigkeit und Eintracht auf, was von großer Bedeutung war; sie verteidigten ihre zu Beginn des Konvents proklamierten Prinzipien nicht unerbittlich und setzten letztendlich keine überzeugenden Drohungen ein, wie es die kleinen Staaten in Philadelphia getan hatten. Diese fundamentalen Ursachen erklären, warum die kleinen Staaten im Europäischen Konvent bei der Durchsetzung der institutionellen Lösungen, für die sie sich eingesetzt hatten, gescheitert sind.

Schlüsselwörter: Verfassungsgebung, Philadelphia-Konvent, Konvent über die Zukunft Europas, große und kleine Staaten