



Internal Reform and Constitution building Capacities



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The draft constitution of the European Union: the end of the Community method?

I. Introduction

The draft constitution produced by the Constitutional Convention has provoked strong responses from supranationalists. The Commission and European Parliament have denounced the draft constitutional articles on institutional reform as representing a fundamental rebalancing of the institutions in favour of the member states in a way that meant the death of the Community method. Elmar Brok, MEP and leader of the conservative PPE parliamentary group, dismissed the new institutional blueprint as 'unacceptable', one that ruins the Monnet method and represents a 'victory for Metternich'.¹ For the Greens, Italian MEP Monica Frassoni said that the proposals reduced the Parliament's role to a mere annex of a powerful European Council.² Smaller member states, meanwhile, were apprehensive about the new constitutional articles fearful that the new institutional architecture will cement a powerful leading role for the larger member states. From their perspective, a neutral and influential Commission is an important guardian of the equal treatment of smaller member states.

The net effect of the institutional reform proposals in the draft constitution will almost certainly be to increase the relative political agenda-setting power and capacity for strategic direction of the member states in the Union (and particularly the large member states), due to the creation of the European Council president as a countervailing power to the Commission. Secondly, the draft constitution introduces an altered geometry for decision making in areas where the Community method is applied by emphasizing the role of national parliaments in monitoring subsidiarity and implementation.

¹ 'Institutional mayhem', *The Economist*, 26 April, 2003, p. 33. *Le Monde* reported Brok as saying the proposals 'ruiner la méthode Monnet' and 'donner la victoire à Metternich'. Thomas Ferenczi, 'Un président du Conseil européen: le projet Giscard marque un point', *Le Monde*, 25 April 2003, p. 7.

² *Le Monde* reported Frassoni as saying that the constitution 'verraient leur rôle réduit à de simple annexes d'un Conseil européen très puissant'. *Ibid.*

However, it is wrong to equate this shift in power with the end of the Community method. First, it is too soon to assess how significant the impact of this shift will be. The extent to which the European Council emerges as a countervailing power center to the Commission in the European Union, and particularly the extent to which it will shift power to the hands of large member states at the expense of small states will depend on how the details of the post are negotiated. These include the organization and resources of the supporting administration for the European president, and whether a role for small and medium sized states can be institutionalized.

Secondly, despite the fears voiced by the Parliament and Commission, the Community method emerges from the draft constitution alive and well. The legal and institutional basis for Community action remains intact, and indeed strengthened. The institutional reforms do not constrain the application of the Community method in the wide range of policy areas in which it is applied; indeed, it even extends its areas of application. In addition, as I will argue below, the constitution preserves the legal and institutional framework—the result of legal provisions such as the flexibility clause, a European Court of Justice socialized to drive market integration forward, and weak application of the subsidiarity principle—that creates a dynamic of expansion for the Community method.

This paper will discuss the British position in the constitutional debate. It is an interesting case to examine in detail, not only as it represents a large member state, but also one that is well known for its occasional intransigence over ceding state sovereignty in negotiations over further integration. This paper will assess the extent to which the proposals are in Britain's interest, as well as the extent to which the proposals preserve the intergovernmental method of integration.

II. Assessing the institutional and policy reforms of the draft constitution

The creation of a European Council presidency

'This proposal is about transforming the European Council into the executive for adults, and the Commission into the executive for kids.'

*Justice and Home Affairs Commissioner, Antonio Vitorino, February, 2003.*³

What is arguably the most significant institutional reform proposed in the draft constitution is the creation of a European Council presidency to replace the rotating six-month presidency. The aim of the reform's key proponents, the British, French and Spanish governments, was to provide more effective and coherent leadership to the European Council than a rotating presidency could provide. Under Article 16(1) of the draft proposals, the European Council 'shall provide the Union with the necessary impetus for its development, and shall define its general political directions and priorities'.⁴ The European Council president is to be elected by qualified majority by the European Council for a renewable two and a half year term. Article 16a(2) sets out the role of the European Council president:

The President of the European Council shall chair it and drive forward its work, ensuring proper preparation and continuity. He shall endeavour to facilitate cohesion and consensus within the European Council. He shall present a report to the European Parliament after each of its meetings.⁵

The European Council president is to be a former head of a member state government—the draft constitution stipulates that the Council president must have been a member of the European Council for at least two years. Secondly, the Council president is to be a full time post—the president must not be currently serving in another national or European post. This

³ Reported in *European Voice*, 'Time for Union to make executive decision', 13-19 February, 2003, p. 9.

⁴ Convention Secretariat, Institutions: draft articles for Title IV of Part I of the Constitution, (CONV 691/03), 23 April 2003.

⁵ CONV 691/03.

is significant and represents a victory for France, Britain and Spain in the definition of the role of the Council president, because as a full time position, the president will be more powerful.

The Commission, the European Parliament and small states, all traditional supporters of the Community method, oppose the plan. For the small states, including Belgium, Luxembourg, the Netherlands, Greece, Austria, Finland and Portugal, the European presidency plan represents a threat to their influence in Europe.⁶ The possibility of large member states dominating the European Council presidency represents a direct threat. Secondly, the relative loss of Commission influence due to the emergence of a rival powerbase in the Union represents an indirect threat to them, because they view the Commission as an 'honest broker' capable of protecting their interests in an enlarged Europe. Indeed, the Commission has warned that the creation of a European Council President with a supporting bureau:

...could lead to unequal treatment of Member States and this would jeopardise the trust between them...In short, it would damage the Community method, firmly based on an equilibrium between Council, Parliament and Commission, which has been at the heart of the success of 50 years of European integration.⁷

Despite lobbying by the small states to support their proposal, Germany decided in January 2003 to support the idea of the European Council presidency in return for a Commission president elected by the European Parliament.

The importance of institutional development

It is difficult to assess the potential influence of the European Council Presidency and its impact on the institutional balance of power in the Union without further details on the organization and administrative resources that will be at the President's disposal. The relative power of institutions in a political system depends not only on the formal legal powers assigned to them, but crucially depends on the process of their institutionalization—how the legal framework of the institution is invested with 'life' through its administrative resources. This involves not only the allocation of financial resources to staff an office, but also the extent to which it acquires and has the capacity to exercise skills of strategic leadership and coordination. These are resources that the office may develop (or not) over time. The fact that the Presidency is to be made a full-time position is a clear signal that the proponents of the Presidency take the post seriously, indicating that it will be provided with sufficient administrative resources to support its work.

The institutionalization process also involves the socialization of the President and those in the supporting Council. Neo-functional theories have long identified the 'transfer of loyalties' of those in supranational institutions such as the Commission and the Court of Justice as one of the mechanisms that enabled further integration. This could also occur with the Presidency. Here, having a European Council President who is not a current serving leader of a member state may will facilitate his or her socialization as a 'European' rather than a national leader.

It is interesting to note that not all small states are opposed to the dual presidency. Denmark's prime minister, Anders Fogh Rasmussen, has come out in favour of the proposal on the condition that small, medium and large states hold the position in turn in order to prevent the presidency from becoming the preserve of large states.⁸ Denmark's optimism that

⁶ *European Voice*, 'Time for Union to make an executive decision', 13-19 February, 2003, p.9.

⁷ Commission Press Room, 'Reaction of the European Commission to the proposals for institutional reform (Convention)', (IP/03/563), 23 April, 2003.

⁸ *European Voice*, 'Paris and Berlin cook up shock deal over EU presidency,' 16-22 January, 2003, p. 2. The Danish government has proposed that 'each Member State should have one vote when electing the President and the election should be based on the principle of equality between Member States, possibly in the form of an equal rotation of Member States.' Convention Secretariat, *Suggestion for*

a European Council presidency can be constructed in such a way that preserves the balance between the influence of small, medium and large member states alerts us to the important point that the institutional details of how the Council presidency will be created may have as great an impact on the resulting impact on the inter-institutional (and inter-state) power balance as the presidency's broad legal framework.

However, whether there will be an institutionalized role for small and medium sized member states in the European Council is not yet clear from the articles of the draft constitution. Article 16a(3) only provides that '[t]he European Council may decide by consensus to create a board consisting of three of its members chosen according to a system of equitable rotation'. The draft constitution does not stipulate what the role of the European Council board will be, however it represents a possible means by which small and medium sized member states may institutionalize their influence.⁹ A presidency supported by a board is similar to the idea of team presidencies of small and large countries, previously supported by France, Britain and Spain.¹⁰

The election of the president of the European Commission

The election of the European Commission president by the European Parliament, and the consequent strengthening of the Commission's legitimacy, was the *quid pro quo* that secured Germany's support for a European Council presidency. The United Kingdom, like France, was initially opposed to the idea of EP electing the Commission president, which they saw as an unwelcome and potentially harmful politicization of the post. However, by the end of December, the British position shifted, and the *Financial Times* reported a British diplomat as saying: 'we could live with an elected Commission president, provided we also get a strong chairman of the European Council'.¹¹ The draft constitution proposes a procedure in which the European Council selects a candidate for the Commission president by qualified majority. The candidate must then be approved by a majority of the European Parliament. With candidate selection firmly in the hands of the member states, and a rubber-stamping role for the European Parliament, the election of the Commission president does not appear substantially different from the current investiture procedure as set out in Article 214(2) TEC, which gives the Parliament the right to approve the Council's nomination for the Commission president. The British government supports the proposal because control over the selection of the Commission president and Commissioners is retained in the hands of the member states.

The draft constitution's procedure for electing the president of the European Commission falls short of recent proposals that would have increased the democratic legitimacy of the executive, by locating executive selection closer to the voters, whether in the hands of elected representatives of national parliaments or the European Parliament. For example, Simon Hix has proposed that the Commission president should be elected by national parliaments, in order to link executive selection at the EU level more closely to national political debate, and bringing executive selection closer to voters engaged in informed debate.¹² Danish government representatives to the Convention have proposed another innovative procedure: electing a Commission president from an electoral college composed of representatives of the European Parliament and National Parliaments. The electoral college would select the president from a list of candidates nominated by groups of

Amendment of Article 16a, Part I -- Title IV by Mr. Henning Christophersen, Poul Schlüter, Henrik Dam Kristensen and Niels Helveg Petersen.

⁹ However, the Council board is not a route to small state influence that Denmark envisages; the Danish government representatives are opposed to the idea of creating a Council board because it would involve 'creating new bureaucracies'. Convention Secretariat, *Suggestion for Amendment of Article 16a, Part I -- Title IV by Mr. Henning Christophersen, Poul Schlüter, Henrik Dam Kristensen and Niels Helveg Petersen.*

¹⁰ *The Financial Times*, 'Intake of new members threatens EU gridlock', 12 December, 2002.

¹¹ *The Financial Times*, 'UK softens line on European presidency', 30 December, 2002.

¹² Hix, Simon, *Linking National Politics to Europe*. Pamphlet produced for the project Next Generation Democracy: Legitimacy in Network Europe. London, The Foreign Policy Center, 2002.

member states.¹³ Finally, British Liberal Democrat MEP Andrew Duff has proposed that the newly elected European Parliament would select a candidate for Commission president. The European Council would then vote on whether to accept or reject the candidate. This would tie the selection to the political composition of the European Parliament.¹⁴

The proposals for 'electing' the Commission president represent a missed opportunity to strengthen the Commission, and the Union, through bolstering the democratic legitimacy of the Union's executive. Although the praesidium and member states such as the United Kingdom feared politicizing this position by tying executive selection too closely to party majorities in the European Parliament, doing so would have provided the Commission with a democratic mandate to underpin the exercise of its executive power. If we view the sources of power in terms of both formal legal powers granted by the Treaties *and* the extent to which the exercise of this power is viewed as legitimate by the governments and citizens of the European Union, then this reform proposal can potentially limit the power of the Commission President.

The communitarisation of Justice and Home Affairs and Common Foreign and Security Policy

The de-pillarisation of the Union is the most significant policy reform introduced by the draft treaty, extending the Community method to many areas in the policy fields related to the 'area of freedom, security and justice'—the former third pillar of the Union. The normal legislative method, co-decision, will be applied to policies on border checks, asylum and immigration, and external borders. Judicial cooperation in civil matters will also be subject to the Community method, although voting in the Council may occur under unanimity rules.¹⁵

The British government supports greater European cooperation on asylum (and has explicitly called for qualified majority voting to speed decision-making in that area), and greater cooperation between European police forces and judicial systems.¹⁶ However, there are limits to British acceptance of greater cooperation in justice and home affairs. First, the government has called for reinforcement of national sovereignty in measures regarding internal security, emphasising that 'internal security of the European Union as a whole is a matter for collective action; safeguarding its own national security is a matter for each individual Member State'.¹⁷ Secondly, the British government has been concerned with incompatibilities with national legal system and national legal traditions. For example, the British government has attempted to limit provisions in order to prevent the Treaty text from being used as a basis for the harmonization of legal systems. Third, the UK government has called for the use of soft law and flexible instruments in the areas of Justice and Home Affairs—its amendment to Article 15 on judicial cooperation in criminal matters has called for the use of framework laws rather than laws to pursue Union objectives.¹⁸ Finally, throughout the areas of justice and home affairs, the British strongly support a strengthened role for national parliaments in monitoring subsidiarity.

In the areas of policing and judicial cooperation in criminal matters, however, the proposals in the draft constitution do not represent integration in the classic Community method, and so apply the 'brakes' on supranationalism, in a manner compatible with UK interests. In policing and judicial cooperation in criminal matters, we see a new geometry

¹³ Convention Secretariat, Amendment Form. Suggestion for amendment of Part I, Title IV, Article 18a, submitted by Henning Christophersen, Poul Schlüter, Henrik Dam Kristensen and Niels Helveg Petersen.

¹⁴ Convention Secretariat, Amendment Form. Suggestion for amendment of Part I, Title IV, Article 18a, submitted by Andrew Duff, Lamberto Dini, Lord MacLennan, Adrian Severin

¹⁵ Convention Secretariat, CONV 614/03 ANNEX, Brussels, 14 March 2003, Articles 10-14.

¹⁶ Jack Straw, 'A Constitution for Europe', *The Economist*, October 12, 2002, p. 38.

¹⁷ Convention Secretariat, Amendment Form. Suggestion for amendment of Article : Title: Area of freedom, security and justice, 6 [sic], by Mr. Hain with the support of Lord Tomlinson.

¹⁸ Convention Secretariat, Amendment Form. Suggestion for amendment of Article 19, Title : Area of freedom security and justice, 19, by Mr. Hain with the support of Lord Tomlinson.

emerging: an extension of Commission and European Parliamentary influence coupled with enhanced member state influence. Draft article 31 in Part 1 of the constitution provides member states, along with the Commission, with a right of initiative in police and judicial cooperation in criminal matters. Also, for the first time, we see a new role for national parliaments. The praesidium suggests a role for national parliaments in the monitoring of policy implementation for policing and judicial cooperation in criminal matters (Part 2, Article 1), due to the fact that the policy area 'affects fundamental freedoms and is at the heart of the very principle of subsidiarity'.¹⁹ Finally, in areas of policing and judicial cooperation in criminal matters, the praesidium has clearly indicated that the application of the principle of subsidiarity is vital. It provisionally includes, as Article 2, a subsidiarity procedure (due to be moved to the text of the subsidiarity protocol). Further, the subsidiarity procedure it provides in Article 2 is a 'strong version', suggesting a lower barrier to trigger Commission review of proposed legislation, one quarter of national parliaments, than that proposed in the text of the subsidiarity protocol, which requires only one third of national parliaments.

While the Community method is strengthened by the fact that it is now applied to areas of immigration, asylum and external borders (with some British hesitancy)²⁰, the new geometry of decision making in police and judicial cooperation in criminal matters is seen by some to damage the Community method. The EPP parliamentary group is opposed to these special procedures that limit supranational action, arguing that the Community method 'must be applied to all fields of Union action. Therefore there is not need for keeping separate procedures for the current third pillar in Part One of the Constitution'.²¹

While the British cautiously support further supranational policy management in limited areas of justice and home affairs, they do not welcome extension of the Community method in the areas of common foreign, security and defence policy. In addition to the area of national taxation, in which the British are insistent on maintaining a national veto, the British government has been emphatic about preserving member state sovereignty in foreign, security and defense policy.²² Last year, Jack Straw declared that while Europe is stronger in foreign policy when it acts together, foreign policy 'must remain a matter for national governments, co-operating freely'.²³ Since then, the crisis in Iraq has demonstrated the extent of foreign policy divisions in Europe, particularly between the United Kingdom and other European states, and the British position has remained firm. The British government has said they will not accept extending the jurisdiction of the European Court of Justice to Common Foreign and Security Policy (Peter Hain has referred to the suggestion as 'heresy')²⁴, and have sought to insulate CFSP policy making from the jurisdiction of the ombudsman.

The provocative wording in the Praesidium text of Article 14 defining the Union's competences in foreign and security policy made British opposition inevitable:

Member states shall actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity. They shall refrain from action contrary to the Union's interests or likely to undermine its effectiveness.²⁵

¹⁹ Convention Secretariat, CONV 614/03 ANNEX, Brussels, 14 March, 2003, comments p. 6.

²⁰ In its submissions to the Convention, the British government has clearly indicated that it 'intends to retain its special position on frontiers' [secured in the Treaty of Amsterdam], with the implication that 'the JHA articles in the new Treaty will in due course need to be qualified by a reference to the UK's special position and the arrangements which govern it. Convention Secretariat, Amendment Form. Suggestion for amendment of Article 31 by Mr. Hain with the support of Lord Tomlinson.

²¹ Convention Secretariat, Amendment Form. Suggestion for amendment of Article 31 by Brok, Santer, Stylianidis et al.

²² *The Financial Times*, 'Britain's eurosceptics wake up to EU Treaty: UK ministers downplay significance of plans for a constitution and reject demands for a referendum', May 13, 2003.

²³ Jack Straw, 'A Constitution for Europe'. *The Economist*, 12 October, 2002, p. 38.

²⁴ *European Voice*, 'Convention split over powers for Court', 13-19 February, 2003, p.3.

²⁵ CONV 528/03.

The article was one of the few which British governmental, parliamentary and EP delegates to the Convention alike were opposed to, provoking even the most pro-integrationist of British delegates to comment that the 'commitment to 'active and unreserved' support of common foreign and security policy is no doubt well-intentioned but is hardly attuned to reality'.²⁶ The British government tabled an amendment to Article 14. The language of the amendments shift ownership of common foreign and security policy squarely back to member state hands, emphasizing that 'the Union shall implement common action *on behalf of* the Member States' (emphasis added). In addition, the amendment to Article 14 tabled by Peter Hain then defines a set of foreign security and defence policy objectives that explicitly recognize the 'specific character of the security and defence policy of certain Member States'.²⁷ The British not only seek to guard member state sovereignty in foreign, security and defence policy, but seek a policy in which NATO retains a key position in a European defence strategy, where 'the EU will act on the basis of consultation and coordination with NATO to determine the most appropriate form of response to a crisis'.²⁸ However, the British government sees 'no prospect of the Council taking a decision to agree common defence in the near future'.²⁹

III. The resilience of the Community method

The previous section has attempted to assess the effect of the institutional and policy reforms in the draft constitution on the Community method. It finds that overall, the Community method remains intact. Co-decision is to be the normal legislative method. De-pillarization of the Union has extended the Community method to more policy areas, most strongly in non-criminal areas of judicial and policing cooperation. In criminal areas of judicial and policing cooperation, the Community method is modified by greater member state control and an emphasis on flexible methods of governance, while in foreign, security and defence policy, member states remain opposed to supranational policy management.

Secondly, in the area of institutional reform, critics see the creation of a European Council presidency as a move that fundamentally undermines the Community method because it creates a competing power center that challenges the Commission's leading role as a supranational, 'neutral broker' propelling integration. They fear that a strong European Council presidency will create a countervailing, intergovernmental propelling force, that will potentially serve as a conduit for interests of the large and powerful member states, and promote an intergovernmental style of governance.

However, this analysis has so far left out a crucial element: the way in which the current legal framework, and the draft constitution allows for a drift in power or competence between treaty revisions. The legal framework of the Union creates, and the draft constitution preserves, a dynamic of continual competence drift from the member states to the Union. If we fail to consider this dynamic, we may underestimate the resilience of the Community method.

Modes of Community power drift: the flexibility clause

One of the chief ways in which the current legal framework of the Union creates a dynamic of centralization is through the 'flexibility' or 'elastic clause', Article 308 TEC, which acts as a mechanism for 'competence drift', though in one direction only. The article provides for the Community to take action in areas where there is no explicit treaty basis for it to do so,

²⁶ Convention Secretariat, Amendment Form. Suggestion for amendment of Article 14 by Andrew Duff, Dimitrij Rupel, István Szent-Iványi and Lamberto Dini.

²⁷ Convention Secretariat, Amendment Form. Suggestion for amendment of Article 14 by Mr. Hain.

²⁸ Speech by Mike O'Brien to the City Forum Seminar on the Future of NATO, 24 January, 2003, Salters Hall, London.

²⁹ Convention Secretariat, Amendment Form. Suggestion for amendment of Part I, Title V, Article 30 by Mr. Hain.

provided it is acting in pursuit of the objectives of the Union as set out in the Treaty. Article 308 TEC (formerly article 235) states:

If action by the Community should provide necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures

The use of the flexibility clause has not been restricted in the draft constitution. The recommendations from Working Group V on complementary competences, under the chairmanship of Henning Christophersen, were rejected by the plenary session of the convention in November, 2002.³⁰ Working Group V was concerned that the new constitution not create a dynamic of increasing centralization. It is telling that Working Group V had also recommended that 'the reference to "an ever closer Union" in TEU Article 1 should be rephrased or clarified in order to avoid the impression that future transfer of competence to the Union remains in itself an aim and objective of the Union.'³¹

Working Group V recommended a number of proposals that would have limited the application of the flexibility clause. These include limiting the application of Article 308 TEC to measures relating to 'the common market, the Economic and Monetary Union, or the implementation of common policies or activities referred to in TEC Article 3 and 4'.³² Secondly, they called for the possibility of *ex ante* judicial control of the use of the flexibility clause. Finally, they recommended that it be possible for acts adopted under the clause to be repealed by qualified majority vote. The elastic clause, or the flexibility clause, revised as Article 16(1) under Title III of the draft constitution, reads:

If action by the Union should prove necessary *within the framework of the policies defined in Part Two* to attain one of the objectives set by this Constitution, and the Constitution has not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and *after obtaining the assent of the European Parliament*, shall take the appropriate measures. (Emphasis added).

The italicised phrases indicate the revisions Article 16(1) has made to the provisions for flexibility in its previous version, Article 308 TEC. First, the former flexibility clause restrictively linked the justification for expansion to pursuit of the objectives of the Community 'in the course of the operation of the common market'. The flexibility clause in Article 16(1), by contrast, is broader in its application because justification for Union action is linked to pursuit of its objectives while acting 'within the framework of the policies defined in Part Two', which includes justice and home affairs and common foreign, security and defence policy. Secondly, the draft Article 16(1) strengthens the powers of the European Parliament, by requiring its assent for Union action under the flexibility clause, where previously, only consultation of the EP was required.

As we have seen, the praesidium draft broadens the scope for application of the flexibility clause. The provisions to allow for judicial control of the use of Article 16 and the repeal of acts by QMV, as recommended by Working Group V, do not appear in the praesidium text.³³ The French and German governments in particular have opposed limiting the application of the clause because they feel it would limit the ability of the Union to respond to unforeseen policy challenges. The British government has not objected, yet has emphasized that the exercise of the clause has not only to be linked to the application of a strengthened subsidiarity procedure (see below), but should also be linked to the principle of

³⁰ *European Voice*, 'Forum's first big failure unnoticed amid the furore', 14-20 November, 2002, p. 4.

³¹ Convention Secretariat, *Final report of Working Group V* (CONV 375/02), 31 October, 2002, p. 2.

³² CONV 375/02, p. 17.

³³ CONV 528/03.

proportionality.³⁴ This does not represent a consensus in British politics—the Conservative representative, David Heathcoat-Amory, has proposed a much more restrictive version of Article 16. First, he proposes temporally limiting the application of the flexibility clause through the introduction of a sunset clause under which authorisation for the Union to act under the provisions of Article 16 would automatically lapse after one year. Secondly, he proposes requiring an absolute majority of the European Parliament. Finally, he proposes giving any national parliament that objects to the action the power to annul the legislation.³⁵

The principle of subsidiarity is a counterbalance to the centralizing dynamic created by Union action through the flexibility clause. Subsidiarity, introduced in the Treaty on European Union, and elaborated in the Treaty of Amsterdam, provides that decisions should be taken as closely to the level of citizens as possible. This means that for areas of action in which the Union does not have exclusive competence, as is the case in all areas of action under Article 308 TEU, a subsidiarity test must be applied. Article 5 of the EC Treaty states that the Community shall act 'only if an in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'

In practice, however, the principle of subsidiarity has proved to be a weak counterbalance to the centralizing dynamic created through the use of the flexibility clause. The Court of Justice has historically been reluctant to enforce subsidiarity, viewing such an action as overtly political.³⁶ Estella argues that for the Court of Justice, taking an active role in enforcing subsidiarity conflicts with its interests of furthering integration. On his analysis of the first 10 years of subsidiarity case law, Estella concludes:

Concerning the material side of the principle, the Court stance seems to be clear. This stance is that, save in cases where the Community legislature has committed a manifest error, the Court will not review a Community legislature norm on grounds of subsidiarity.³⁷

Bermann argues that the Court of Justice broadly interprets implied powers (the powers granted to the Community under article 308 TEC) because it historically, it has valued 'maximizing the effectiveness of Community law' more than it valued the limited transfer of sovereignty.³⁸

Will the new subsidiarity procedure deliver the 'clear, open, effective, democratically controlled Community approach' that the member state governments called for in the Laeken declaration? The subsidiarity procedure has been strengthened due to the fact that the draft constitution explicitly defines a role for national parliaments in reviewing proposed legislation on subsidiarity grounds. Under the draft protocol, all national parliaments are to receive legislative proposals, and have a six week window in which to assess whether or not the proposal complies with the principle of subsidiarity.³⁹ If a third of national parliaments determine that the Commission's proposal does not comply with the principle of subsidiarity, the Commission is compelled to review its proposal.

³⁴ European Convention, Amendment form. Suggestion for amendment to Article 16 submitted by Peter Hain.

³⁵ European Convention, Amendment form. Suggestion for amendment to Article 16 submitted by David Heathcoat-Amory.

³⁶ See Antonio Estella, *The EU Principle of Subsidiarity and its Critique*, (Oxford: Oxford University Press, 2002), pp. 147-163; George Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', *Columbia Law Review*, 94, (1994), p. 362.

³⁷ Estella, *The EU Principle of Subsidiarity and its Critique*, p. 152.

³⁸ Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', p. 361. In his analysis, Bermann concludes: 'the Court frequently finesses the question of whether the textual conditions for implied powers under Article 235 are met, and instead, gives the express powers of the institutions under the Treaty a sufficiently broad and liberal meaning to meet the Community's needs' (Bermann, 1994:362).

³⁹ CONV 579/03

While there is no reason to believe that the Court of Justice will veer from its current reluctance to invalidate legislation on subsidiarity grounds, thus providing an *ex post* protection against competence drift, under the new provisions, subsidiarity may develop into an effective *ex ante* procedural check on competence drift to the Union. It is important to note, however, that in the praesidium text, when one third of national parliaments determine that a proposed piece of legislation falls foul of the subsidiarity principle, the Commission is compelled to review the legislation, but is not compelled to revise it.

The British government's amendment to the Convention draft proposals on the application of the principles of subsidiarity and proportionality sought to strengthen the language calling for consultation of regional and sub-national bodies when legislation is reviewed.⁴⁰ Strengthening subsidiarity is important for the UK government, not only because of its traditional concern with safeguarding national sovereignty, but because subsidiarity is a central concern for its devolved governments. The First Minister for Scotland, Jack McConnell, has taken an even stronger and innovative position on subsidiarity than the British government, calling for a 'Subsidiarity Council', composed of a small number of serving members of national and regional parliaments, to serve as a subsidiarity watchdog.⁴¹

IV. Conclusions: a Community method redefined? The emergence of new geometries of governance

How do we assess the survival of the Community method? First, from a policy perspective, we can consider the extent to which the application of the Community method has been extended to new policy areas. Secondly, from an institutional point of view, we can first consider whether the post-reform institutional architecture supports efficient supranational policy management. Measured along these dimensions, claims that the Community method is dead or mortally damaged by the draft constitution are exaggerated. By establishing co-decision as the 'normal' legislative method and by extending the range of policy areas to which the Community method is applied, particularly in the areas of freedom, security and justice, the draft constitution has ensured the robust survival of the Community method. Coupled with this, we can argue that where the Community method is used, it is strengthened by reforms aimed at creating a more effective Commission, for example, by reducing the number of Commissioners to 15 to maintain a workable organisational structure post-enlargement. However, there have also been missed opportunities. Electing the Commission president according to a procedure that would have linked the selection of the executive to political competition and debate among European electorates could have strengthened the Commission by enhancing its democratic legitimacy.

We can also assess the robustness of the Community method from a relative point of view, comparing it with other modes of policy making to determine what emerges as the dominant mode of policy making. While the draft constitution represents a strengthening and an extension of the Community method, it also represents integration by other means, and for critics of the constitution, this represents a challenge to the Community method. In policy areas such as common foreign and security policy or national taxation, the Community method has met a roadblock and future cooperation will occur through intergovernmental means, with the leadership of the European Council President likely playing a key role. The shift in the institutional balance of power is significant because it strengthens the capacity for intergovernmental leadership in policy areas such as these. In other areas, integration is proceeding by flexible means, with an emphasis on soft law, framework law and flexible instruments. For some, such as the UK government, such flexibility is both desirable and pragmatic and represents an efficient way to drive policy-making forward in a Union where

⁴⁰ Convention Secretariat, Amendment form. Suggestion for amendment submitted by Mr. Hain on the subsidiarity protocol.

⁴¹ Speech by Jack McConnell, 'The Future of Europe Debate—A Scottish Perspective', 6 June 2002.

there is still disagreement on the *finalité politique* of the Union. Finally, integration is proceeding through the use of the new geometry in the Union that increasingly includes national parliaments.

The Community method is not dead. It remains the dominant mode of policy making in the Union, and operates in a legal framework which continues to provide an effective avenue for expansion of Community competence, through the flexibility clause, although this is limited to some degree by strengthened subsidiarity provisions. However, there is a tendency by strong supporters of the supranationalism to define integration and measure the survival of the Community method in terms continued, linear expansion of the Community method in the pursuit of an 'ever closer union'. The draft constitution, by contrast, creates a polity in which national parliaments are increasingly influential, and in which the most pioneering modes of policy making are likely to involve intergovernmental coordination or the use of flexible instruments.