

# Five minutes with Lord Kerr of Kinlochard: “The Constitutional Treaty was clearly ahead of its time”

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*It is now ten years since the Member States of the European Union signed the Treaty establishing a Constitution for Europe. The Treaty, which was subsequently rejected in referendums in France and the Netherlands, ultimately inspired the Treaty of Lisbon, which entered into force in December 2009. In a discussion with EUOPP's editor Stuart Brown, [Lord Kerr of Kinlochard](#), the Secretary General of the European Convention which produced the Draft Constitutional Treaty, discusses the failures of the process, the impact on the Commission, and the attempts to reform the UK's relationship with the European Union currently being pursued by David Cameron.*



## **Ultimately the Constitutional Treaty failed to be ratified, but what would you view as the key failures of the process in terms of the specific elements which eventually emerged in the Lisbon Treaty?**

The Constitutional Treaty was clearly ahead of its time. We misjudged the extent to which people were turning against Brussels. We failed to get across the extent to which the Treaty itself would have defined the limits of the powers of the EU's institutions and made it impossible for them to be extended by stealth. We failed to sell that adequately, though in the end these elements were picked up in the Lisbon Treaty.

The Treaty failed in France because people were resistant to virtually any proposition President Chirac put to them. Those on the left had in the second round of the 2002 French presidential election been forced to vote for Chirac to keep out the Front National's Jean-Marie Le Pen, so whatever Chirac asked them next the answer was always likely to be 'no'. It also failed because the beginnings of the present concern over free movement rights within the EU were already apparent. It failed in the Netherlands for somewhat more obscure reasons, but by then it was already dead in any case.

Its principal failure as a text, however, was that while we strengthened the European Council by providing it with a permanent President, and while we increased the powers of the European Parliament, we didn't do anything for the European Commission. That was a failure of nerve on our part because the provisions that came out of the Convention with respect to the Commission were not radical at all and they should have been.

## **Why did the Commission end up as a relative 'loser' from the Convention?**

I suppose originally the mistake came from people like me. The Commission led by Jacques Delors was my model of a Commission that worked fairly well. It had shared decision-making, but it also had a very powerful President – so it was quite a centralised institution, but also a collegiate one. That's where I think it should be and I think if you believe in the single market you need a strong Commission to penalise the backsliders and drive the project forward.

However the British and the Germans, in particular, who had two Commissioners each at the time (as did the French, the Spanish and the Italians), thought the Commission was getting too large. We therefore agreed to give up one of our Commissioners in the Treaty of Nice in 2001. This was, in retrospect, a serious blunder. We should have kept that concession in hand for a debate with the smaller states, who simply pocketed the concession and then didn't at all like the text we eventually put to the Convention, which was essentially a watered down version of a text I had written.

My text said that the President-designate of the Commission should nominate up to 12 individuals, chosen for their particular expertise, irrespective of nationality, but taking due account of political and geographical balance. I wanted

to get away entirely from the idea of one Commissioner per Member State because that turns into the notion that states have their own Commissioner looking after national interests – when the role of the Commission should be to act in the general interest.

My text failed miserably in the Convention and we ended up with a system in which there would be fewer Commissioners than the number of Member States, but this would be determined on the basis of an equal rotation. Of course, that was pretty absurd given it implied countries like Germany would be represented just as often as Malta. That is the text that was eventually rejected by the Member States following the referendum on the Lisbon Treaty in Ireland and as a result we now have a Commission which maintains the 'one Commissioner per state' rule and is therefore much too big.

So I think the original mistake stemmed from the larger states giving up their second Commissioner much too soon. If it had been more of a bargaining process in which we could have traded our extra Commissioner for a concession on reducing the Commission's overall size it might have been more successful.

**Jean-Claude Juncker has put in place a new working structure within the Commission which is based on a 'cluster' system. Does this have the potential to solve some of the issues around the Commission being too large?**

The structure Juncker has adopted is very, very clever. Juncker and the first Vice-President Frans Timmermans are not in charge of any particular area – except in Timmermans' case internal coherence, transparency and related issues – but they are responsible for overall co-ordination within the Commission. Federica Mogherini is in charge of the external dimension, while the other five Vice-Presidents are in charge of particular clusters of Commissioners.

All these Vice-Presidents, apart from Mogherini, come from small Member States. Meanwhile the large Member States' Commissioners, such as the UK's Jonathan Hill, are essentially working under one of these Vice-Presidents in a group of other Commissioners. I think that's really a very clever system indeed. I'm not sure if it will allow the Commission to work as a true 'college' – there may be an inner college among the Vice-Presidents – but it essentially means the Commissioners from the big Member States have been given some of the most important portfolios while still having to work under one of the Vice-Presidents.

The Vice-Presidents, in addition to being from smaller Member States, are also cleverly chosen. They all have considerable personal status as individuals – Jonathan Hill, for instance, will be reporting to Jyrki Katainen, who was Prime Minister of Finland up until June of this year. The Vice-Presidents also have no Directorates-General working to them – in previous Commissions a proliferation of Directorates-General occurred because every Commissioner had to have his own set of officials. It has been alleged, although some people dispute it, that this caused a proliferation of legislation on the grounds that Commissioners felt if they weren't proposing new laws they weren't earning their keep.

So I do think it's a highly positive development that the Vice-Presidents aren't responsible for a single Directorate-General. That means you effectively have a double-check on proposals. The staff will propose a piece of legislation, the relevant Commissioner will approve it, but it won't then automatically go out to the Council and the Parliament, as it tended to do during the Barroso Commission. When you have to sell your proposal to a Vice-President and then, perhaps, to an inner-college of Vice-Presidents, that should produce greater coherence in the legislative proposals coming out of the Commission. It's too early to know whether this will work in practice, but it's certainly the best solution I've seen to the problem.

**David Cameron has set a goal of renegotiating the UK's relationship with the European Union by 2017. Given your experience of negotiations at the European level, how realistic do you think this target is?**

Well a treaty amendment is impossible on that timescale. President Hollande is not going to sign any treaty which requires ratification by a referendum. One of the worst experiences of his political life was the divisiveness caused

within the Socialist Party by the referendum over the Constitutional Treaty. The official party line was to support the Treaty and Hollande's job, as the party's co-ordinator, was to ensure the party did, but it split down the middle, with a 'no' faction led by Laurent Fabius emerging in opposition. He's probably also in a similar position to Chirac, where his personal unpopularity would ensure whatever he put to the electorate would be rejected. So it's simply not going to happen.

Now David Cameron has stopped defining the requirement in terms of a treaty amendment. On the other hand, some of the things which seem to be in his mind with respect to a renegotiation would undoubtedly require treaty change. This is particularly true of the issue of free movement, as well as the rather odd idea of removing the words 'ever closer union' from the EU's treaty framework – which, since the Lisbon Treaty, are now much less prominent than they once were in any case.

I actually no longer understand what the Prime Minister's position is and I think most continental politicians don't understand it either. I think most of them think it's time he spelled out what it is he actually wants, although I perfectly understand why he hasn't done this as UKIP will simply say whatever his aims are don't go far enough. If his agenda is still the same as it was when he made his Bloomberg speech in January 2013, which was mainly concerned with making Europe more competitive, then most of the northern European countries would agree with him. But nothing that he called for in that part of the speech required treaty amendment and yet he ended the speech by calling for precisely that.

I think it's possible to envisage a negotiation focused on competitiveness in which quite a lot is achieved. The moment you say it has to be formally established through a treaty amendment, however, you'll start shedding supporters, and treaty amendment can only be done through unanimity among the Member States. If reforms were sought without a treaty amendment, using a qualified majority in the Council, then while there might be a fight between northern European and southern European countries, some reforms would be achievable.

I don't rule out the possibility that like Harold Wilson in 1975, the Prime Minister could pick up a few concessions, present them as a major change and win a referendum on that basis. But many people on the Continent are not convinced that the Prime Minister has any clear strategy, other than to be seen to rock the boat. I think a number of factors have led to that conclusion: the attempt to veto the Fiscal Compact, the hopeless resistance to the appointment of Juncker (who is a very good Commission President from a British point of view), the recent sham victory over the UK's budget contributions, and the talk of leaving the European Convention on Human Rights.

As a result of these developments, the rest of Europe are beginning to think that Cameron is moving onto UKIP's territory – as if he seems to think that to defeat UKIP in the 2015 general election, the political battle has to be fought on the topics of Europe and immigration. This is something they don't understand and they're beginning to wonder whether any deal at all would be sufficient for him as the rhetoric has become increasingly anti-European. As such I think we're getting into a somewhat dangerous situation as far as the UK's EU membership is concerned.

*This interview was conducted in association with the 'EU in Practice' series of seminars run by the LSE's European Institute. For more information on the series, see [here](#).*

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**About the interviewee**

**John Kerr, Lord Kerr of Kinlochard**

John Kerr, Lord Kerr of Kinlochard is an independent member of the House of Lords. He served as the British Representative to the European Union from 1990 until 1995, the British Ambassador to the United States from 1995 until 1997, the Permanent Secretary of the Foreign and Commonwealth Office between 1997 and 2002, and was the Secretary General of the European Convention.



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