

**The Rise and Fall of the EU's Constitutional Treaty - Book Review;**  
**Finn LAURSEN, The Rise and Fall of the EU's Constitutional Treaty, Leiden,**  
**Nijhoff, 2008**

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**I. Introduction: The financial crisis and the Constitutional Treaty**

The recent financial meltdown has served to create a common sense in Europe that, for one, it is a good thing to belong to the EU club if such a crisis occurs, and second, that it is even better to belong to the single currency club. The introduction of the EURO, which has been identified as one of the main reasons of the infamous Dutch 'no' in the referendum on the Constitutional Treaty,<sup>1</sup> appears to have saved Europe from a currency crisis on top of the credit crunch.<sup>2</sup> In Iceland, public opinion is putting pressure on the government to consider joining the EU and adopting the EURO.<sup>3</sup> Iceland's prime minister and even the eurosceptic fisheries minister have now conceded that such appears to be the only way forward out of the country's severe financial problems. Several countries that are member states but not part of the EURO zone, such as Poland, Denmark and Sweden, are now seriously considering adopting the common coin.

This means that, ironically, the credit crisis might very well prove to have come at a convenient time, bolstering public and political views on the desirability / necessity of European integration, in the midst of the ratification process of the Lisbon Reform Treaty. This attempt to salvage the remains of the sunken Constitutional Treaty by means of a stripped-down Reform Treaty, without any Constitutional symbolism, had not so long ago run afoul with the negative results of the Irish referendum.<sup>4</sup> The strenuous process of treaty reform that has been the cause of severe headaches for several clusters of politicians and policy-makers over the past years was therefore in need of a fresh impetus. Although a solution to the

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<sup>1</sup> See: S. WOLINETZ, "Trimming the Sails: The Dutch and the EU Constitution after the Referendum", in F. LAURSEN, *The Rise and Fall of the EU's Constitutional Treaty*, Leiden, Nijhoff, 2008, pp. 181-200.

<sup>2</sup> H. MARTENS and F. ZULEEG, "Where Would We Be Now without the Euro?", *EUobserver*, 15 Oct. 2008, available at <http://euobserver.com/19/26933>.

<sup>3</sup> The *EUobserver* reports that 69 percent of Icelanders want to join the EU and 72.5 percent want to swap the krona for the euro, based on a poll in the *Frettabladid* newspaper; P. RUNNER, "Financial Crisis Builds Polish Euro-Entry Momentum", *EUobserver*, 28 Oct. 2008, <http://euobserver.com/?aid=27004>.

<sup>4</sup> Here, I build on the useful nautical metaphor from: J. ROY, "Between Cherry-Picking and Salvaging the Titanic: Spain and the Rescuing of the Essence of the EU Constitution", in F. LAURSEN, *The Rise and Fall of the EU's Constitutional Treaty, o.c.*, pp. 123-144.

Irish ‘no’ and the ratification by several other member states is still needed, the recent economic events -however bad and detrimental- might pave the way to the successful adoption of the reforms that the EU so craves for.

It is from the moment of final adoption on that most of the work for the typical European lawyers really starts. Working with the new provisions, discussing and determining their correct interpretation, for jurists it is in the years after its birth that a Treaty text really becomes alive. Having never been born, let alone having become alive, the Constitutional Treaty tends to leave European jurists with mixed feelings as to whether and how to discuss it, for legally it is both a tremendously significant document as well as not being so in any way whatsoever. The really fundamental questions about the Constitutional Treaty, it seems, are about the causes of its rise and fall, which lie mostly within the domain of political science.

## **II. The rise and fall of the EU’s Constitutional Treaty**

The book under review happens to fit that picture exactly. *The Rise and Fall of the EU’s Constitutional Treaty*, edited by Finn Laursen, focuses on that period before the law becomes the law; the phase of political negotiations. Although somewhat interdisciplinary in character, the greater portion of the book adheres to a political science approach, and is concerned with the main actors, their aims and strategies on the European stage in the context of the Constitutional Treaty.<sup>5</sup> Encyclopaedic and wide-ranging, the various contributions offer a wealth of detailed information on exactly these key issues from different perspectives, and they succeed in pointing out patterns of increasing or decreasing influence and changing policy positions of politicians, their constituencies and countries.

Although this inherently bears the threat of deterring legal scholars, putting the book away because it does not entirely fit the legal discipline would be a great waste. Rich in explanation and information, the book can be of great value for all wishing to understand more of the how and why of the Constitutional Treaty and its fall, and -to a certain extent- what lessons can be learned from it. It certainly helps that most of the contributions are accessible, interesting, and well-written. It allows jurists to explore and grasp the perhaps

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<sup>5</sup> Bindi puts it in her contribution that, “when we study the foreign policy of a country, the questions to deal with are: who does what? to which end? how? - hence, three different factors shall be looked at here: the actors, the aims, the strategies”; see: **F. BINDI**, “Italy and the Treaty Establishing a European Constitution: The Decline of a Middle-Size Power?”, in **F. LAURSEN**, *The Rise and Fall of the EU’s Constitutional Treaty*, o.c., p. 281.

somewhat bewildering world of negotiations and negotiators, their personal and professional interests, their party ideologies and the particular background of their countries, their statements and actions and inactions. This information is in a sense not only crucial in understanding the text of the Constitutional Treaty but also that of the Lisbon Reform Treaty. Furthermore, the saga of the European Constitution is rich in interesting events. For instance, to read about the infamous incident that caused considerable uproar all over Europe, when at the Brussels summit some Polish delegates argued that if it would not have been for World War II, Poland would have had 66 million inhabitants instead of 38, and that therefore -as a kind of reparation- more votes should be allocated to it, from a Polish perspective, is at no point tedious.

The book is divided into six parts or sections. Finn Laursen, the editor of the book, introduces the main topic in the first chapter. The introduction is not devoted to setting out and linking the various contributions into a comprehensive framework, which is to be regretted considering the vast amount of contributions and the diversity of the topics. The only reference to the structure of the book can be found in the preface, in five short and descriptive sentences. It would have greatly benefited the reader to have been provided with a more insightful, thorough and clear outline. Nevertheless, the introductory chapter is of high quality, certainly a contribution in its own right, and Laursen does succeed in effectively setting the scene.

#### **A. Section 1: Policy and pillar aspects of the Constitutional Treaty**

The first section, following the introductory chapter, deals with the content of the Constitutional Treaty in relation to the specific areas of international trade [R. Leal-Arcas], justice and home affairs [J. Monar], the EU foreign minister [P. Norheim-Martinsen] and contains an analysis of the Treaty from an economic perspective [F. Brunet]. This first section is perhaps one of the most interdisciplinary parts of the book, and subject-wise the most compatible with the traditional interests of European lawyers. The four contributions each touch upon interesting topics, although it results more in a vague smattering of issues, represented in the broad title “policy and pillar aspects”, than in a comprehensive discussion of the entire content of the Constitutional Treaty and the changes it was supposed to bring.

The contribution by Leal-Arcas intends to shed some light on the changes proposed by the Constitutional Treaty affecting the common commercial policy of the EU. It argues for a strong, central role for the European Commission, reduction of unanimity and exclusive EC competence, while at the same time warning of the dangers of technocratic rule. The subsequent contribution by Brunet is mainly concerned with the economic dimension of the Treaty, arguing it to be “the best representation of the European economic and social model”.<sup>6</sup> Brunet poses an overwhelming amount of interesting questions -such as, *inter alia*, “why do we need constitutions?”;<sup>7</sup> “in the EU, do the Nordic, the Mediterranean, the Eastern, the Western member states have different systems of logic?”;<sup>8</sup> and “does [the] European gap in performance show the limitations of the European model and announce its substitution by the American model?”-<sup>9</sup> but regrettably does not offer an equal serving of interesting answers.

Monar’s chapter on the influence of the Constitutional Treaty on the justice and home affairs domain successfully argues that the recasting of the overall legal framework would not completely abolish the third pillar, which would survive in a hidden way, due to a range of procedural and institutional provisions separating police and judicial cooperation in criminal matters. This is an important matter, both legally and politically, and Monar manages to discuss it in a thorough and interesting way. Another laudable aspect of the contribution is the discussion of the Commission’s *passerelle* initiative, which does stand separate from the Constitutional Treaty but is all the more relevant to discuss. Equally topical is Norheim-Martinsen’s chapter on the Constitutional Treaty invention of the EU foreign minister, which would “replace the role of the presidency as the official driver for and voice on matters falling under the CFSP” and would “bring together the functions of High Representative for the CFSP and Commissioner for External Relations”.<sup>10</sup>

## **B. Section 2: Case studies of national preferences**

The second section is where the book truly comes into its own, offering in-depth “case studies of national preferences”. Laursen offers a contribution on the “two-level game” of

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<sup>6</sup> **F. BRUNET**, “The European Economic Constitution: An Analysis of the Constitutional Treaty”, in **F. LAURSEN**, *The Rise and Fall of the EU’s Constitutional Treaty*, o.c., p. 51.

<sup>7</sup> *Ibid.*, p. 65.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> **M. NORHEIM-MARTINSEN**, “Who Speaks for Europe?”, in **F. LAURSEN**, *The Rise and Fall of the EU’s Constitutional Treaty*, o.c., p. 106.

Denmark, the ever-sceptic UK is analysed by A. Blair and J. Roy describes the role of Spain. To enable the reader to consider the role of the German presidency [A. Möller], the Dutch ‘no’ [S. Wolinetz], the French ‘no’ [C. Mazzucelli], the infamous Polish ‘nice or die’ attitude and other landmark events in the history of the Constitutional Treaty in their national contexts, is really the strength of the book. However, in dealing with the same issue from many different national perspectives, its strength is also its weakness. Although the excellent various case studies serve well to give an insider’s national take on the events, eleven different viewpoints on a certain event will necessarily overlap as they mostly still deal with that same event. In that sense, it is more a book of reference than one that reads like a novel.

In Roy’s writings, Spain is presented as one of the leading countries in the saga of the Constitutional Treaty, having been an active participant in the drafting of the text, as well as the first country to submit the Treaty to a referendum; 76.73% of the voters, representing 42.3% of the actual electorate, saying yes. And after the less successful referenda in two other countries, it was -according to Roy- again Spain to take the lead in trying to “salvage” the wreckage.<sup>11</sup> Since the disappointment and resulting political difficulties over the failure of the Constitutional Treaty in the countries that were in fact very much in favour of it, such as Spain, has been a somewhat neglected topic, this chapter serves well to bring these aspects under attention. As for leading countries that have been responsible for saving the day after the rejections of the Dutch and French electorates, Germany in fact deserves still more credit than Spain. Möller devotes his remarkably strong contribution to this imperative role played by Germany, most notably the German presidency succeeding in “organising a breakthrough on the constitutional project”,<sup>12</sup> while along the way effectively relating the history of Germany and the EU, mapping the national political scene. According to Möller, it was the “weeks of travelling and listening to the individual member states’ ‘red lines’, patience, the will to compromise, the reputation of Chancellor Merkel [...] and a tough stance on the Polish government during the final hours of the meeting” that were responsible for Germany’s success.<sup>13</sup>

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<sup>11</sup> **J. ROY**, “Between Cherry-Picking and Salvaging the Titanic”, *o.c.*, p. 137.

<sup>12</sup> **A. MÖLLER**, “From Idealism to Pragmatism: Germany and the Constitutional Treaty”, in **F. LAURSEN**, *The Rise and Fall of the EU’s Constitutional Treaty*, *o.c.*, p. 145.

<sup>13</sup> *Ibid*, p. 154. In Chapter 11, Wilga reports that Merkel had indeed taken a tough stance on the Polish crisis, by at some point threatening: “Wenn es mit den Polen nicht geht, dann wird es eben ohne die Polen gehen”; see: **M. WILGA**, “Poland and the Constitutional Treaty: A Short Story About a ‘Square Root’?”, in **F. LAURSEN**, *The Rise and Fall of the EU’s Constitutional Treaty*, *o.c.*, p. 240.

The two culprits of the fall of the Treaty and the ensuing crisis, France and the Netherlands to be sure, are discussed back to back in chapters 8 and 9. Explaining the French rejection of the Constitutional Treaty, Mazzucelli's chapter points at then-president Chirac's "strategy to use the referendum as an instrument of executive politics to gain the domestic advantage" as a flawed one.<sup>14</sup> She convincingly explains that "the French social and economic situation and the idea that a treaty renegotiation was likely led a majority of the populace to reject the European Constitutional Treaty in favour of an alternative Europe".<sup>15</sup> Wolinetz in turn argues that the Dutch no vote was "one of a series of shocks which had shaken Dutch politics since 2002 and that the cabinet, the major parties and more broadly, the political class, responded in Dutch fashion, by adapting, absorbing dissenting points of view and making them their own", and rightly explains it as connected to a lack of information and discontent with the EURO rather than with the Constitution itself.<sup>16</sup> Supported by numbers and statistics, the chapter provides a valuable insight in why the Dutch came to vote 'no', and what it has brought them in the end.

The topic of euro-scepticism featured in the two preceding chapters is continued in Blair's story of the UK and the Constitutional Treaty. Focusing on the government's negotiating strategy in the IGC negotiations, it sets out what were the UK's 'red lines', to wit increased qualified majority voting, the foreign minister being a member of the Commission and the creation of a mutual defence pact within the EU, and how it was able to achieve most of what it wanted in the Constitutional Treaty. It discusses the role of key actors such as Peter Hain and Tony Blair, but does not devote any attention to the failure of the Treaty and the subsequent phase in the Constitutional chronicle. The UK can be qualified as difficult in European affairs, but Poland has been working hard to take over the dubious post of toughest negotiator in the EU. Most of the contributions discuss at some point the problems that arose out of Poland's 'nice or die' attitude, which makes Wilga's case study on Poland an anticipated one. It sets out how Poland infamously seized on the Constitutional Treaty's failure to challenge, most importantly, the voting system. It rightly observes that "as much as the rise of the Constitutional Treaty was impressive without much contribution of Poland, its fall happened quick and certainly due to Poland's significant role in this process".<sup>17</sup>

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<sup>14</sup> C. MAZZUCELLI, "The French Rejection of the European Constitutional Treaty: Two-Level Games Perspective", in F. LAURSEN, *The Rise and Fall of the EU's Constitutional Treaty*, o.c., p. 177.

<sup>15</sup> *Ibid.*

<sup>16</sup> S. WOLINETZ, "Trimming the Sails", o.c., p. 181.

<sup>17</sup> M. WILGA, "Poland and the Constitutional Treaty", o.c., p. 246.

Section 2 ends with Laursen's chapter, discussing Denmark and the Constitutional Treaty. The two-level game theory that appeared in Mazzucelli's chapter is also at the centre of this paper. In contrast with some years before, when in 1992 the Danish populace shot down the Maastricht Treaty in a referendum, the role of Denmark in the Constitutional crisis was limited. Seeing that it never came to a Danish referendum after the French and Dutch rejections, that Denmark did not have a role as presidency, and that Denmark did not have many 'red lines' apart from keeping its previously acquired opt-outs in place, it is commendable that the chapter, dense and informative, is still engaging.

### **C. Section 3: Roles of presidencies and Community actors**

The third part follows a similar approach to the second. It contains two more case studies, of the two countries that happened to serve as presidencies during the Constitutional process, to with Italy [F. Bindi] and Ireland [A. Dür and G. Matteo]. The third section of the book also sheds light on the role of the two main Community actors; namely, the increasing influence of the European Parliament [D. Beach] and the 'missed opportunities' of the European Commission [E. Moxon-Browne]. Although the decision to make a separate section of these four chapters can be criticised, as the first two could just as well have been included in Section 2, as they are case studies all the same, the quality of the papers remains high.

Bindi's article deals with the Italian actors, aims and strategies in the Constitutional chronicle. She reports that "the Italian members of the Convention are reported to have been quite active and present, in contrast to Italy's tradition of absenteeism in the European Parliament - and elsewhere". She identifies Professor Amato as the most important positive Italian influence on the Constitutional Treaty, having "worked on a consolidated version of the EU at the European University Institute" in Florence<sup>18</sup> and points out Berlusconi's inability to close the deal "by confusing personal friendship with political collaboration" as one of the most negative influences.<sup>19</sup> Most importantly, she sets out to explain the first-ever failure of the IGC in 2003, presided by Italy. The fact that the Italian presidency "lacked the support of both France and Germany, whose support had been fundamental in the Italian Presidencies in 1984 and 1990 when Italy had to square the circle" is put forward as the main

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<sup>18</sup> F. BINDI, "Italy and the Treaty Establishing a European Constitution", *o.c.*, p. 287.

<sup>19</sup> *Ibid*, p. 299.

factor in that failure.<sup>20</sup> This tale of Italian failure stands in contrast with Irish fame for its highly effective 2004 presidency. Dür and Matteo devote a chapter to this success story. They analyse the conditions allowing Ireland to become such an effective mediator, developing a theoretical framework showing that both neutrality and the possession of mediation skills are necessary ingredients.

Beach then brings a new actor to the scene: the European Parliament. Refreshingly focusing on a different actor than the member states, it drives home the point that thanks to “the change in the negotiating structure from the traditional IGC method to the Convention method” the influence of the European Parliament was increased.<sup>21</sup> The Chapter is modelled around proving this increase in the Parliament’s power, containing a comparative case study of the role and impact of the European Parliament in the 2000 IGC and Constitutional Treaty negotiations in 2002-2004. The paper is based on sound methodology and proves an interesting point. A very short chapter on the role of the European Commission completes this section’s quartet of contributions. Moxon-Browne provides a stimulating treatise on how the Commission failed to have a significant impact on the deliberations and outcomes of the Conventions. As explanations, the author offers the defensive position of the Commission in the Convention, the lost opportunity of its 2001 White Paper on Governance, and the fact that the two representatives were overshadowed by Giscard d’Estaing’s strong leadership.

#### **D. Section 4: The negotiation process**

The first one of the two chapters making up the fourth section is a study of the role of Europe’s regions [J. Laible] and could also have been included in the previous part, but is given a place in this section entitled “the negotiation process” next to Laursen’s third chapter focusing on the Intergovernmental Conference of 2003-2004. Laible researches “the rhetoric of legitimacy and regional participation” in the light of the Constitutional Treaty.<sup>22</sup> Indeed, legitimacy has been the key word both in the run up to the Constitutional Convention, as well as after the Dutch and French referenda, in the so-called ‘reflective’ phase. In what is perhaps the strongest paper of the book, Laible provides a thorough analysis of the importance of

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<sup>20</sup> *Ibid*, p. 298.

<sup>21</sup> **D. BEACH**, “A New Pragmatism: The Role and Impact of the European Parliament in the Constitutional Treaty Negotiations”, in **F. LAURSEN**, *The Rise and Fall of the EU’s Constitutional Treaty*, o.c., p. 323.

<sup>22</sup> **J. LAIBLE**, “Producing ‘Ever Closer Union’? The Rhetoric of Legitimacy and Regional Participation in the EU Constitutional Convention”, in **F. LAURSEN**, *The Rise and Fall of the EU’s Constitutional Treaty*, o.c., p. 361.

Europe's regions, how their role has been institutionalised and -paradoxically- how it has increased in terms of participation but decreased in terms of influence in the Constitutional process. This study is conducted both from the point of view of the regions and the European institutions.

The subsequent chapter is yet another penned by the book's editor, Laursen. It describes the intergovernmental conference that finalised the negotiation of the Draft Constitutional Treaty, starting during the Italian presidency in 2003 and ending during the Irish presidency in 2004. Laursen examines the question why treaty reform was considered necessary and how the issues were negotiated. Although the value of the chapter lies in the perhaps by definition somewhat more 'objective' account of the developments, when compared to the country case studies, most of the events described in the paper have already been exhaustively dealt with in the preceding chapters. That makes this contribution somewhat superfluous, something that is especially remarkable as it is a contribution by the editor himself; who therefore could have decided to leave it out.

#### **E. Section 5: Ratification issues**

The fifth section contains papers researching "constitution making and the search for a European public sphere" [C. Lu], "elite behaviour" in the referenda [R. Nielsen] and a contribution dealing with the French 'no', by F. Vassallo. Since the sixth section also contains such a paper, authored by Paris-Dobozy, in addition to the French case study in section three, and considering that the contributions do overlap, it seems that a stricter selection should have been made. This is not to say that the chapters have no unique value at all; Vassallo offers a historical perspective of the use of referenda in France while primarily aims to focus on the aftermath of the 2005 'no'. Lu convincingly argues that "the discrepancy between the transparent and inclusive Constitution-making process and the rejection of the Treaty" by the Dutch and French voters can be explained by the fact that a European public sphere was lacking.<sup>23</sup> Because of this absence, the channels that were open for citizen participation were hardly utilised. There was no meaningful debate among citizens or between citizens and elites, nor was there an effective information flow. The elites are also front and centre in Nielsen's empirical paper, which asks the pertinent question why elites convene referenda if they are so

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<sup>23</sup> C. LU, "Constitution-Making and the Search for a European Public Sphere", in F. LAURSEN, *The Rise and Fall of the EU's Constitutional Treaty*, o.c., p. 431.

inconvenient to them. The paper addresses the question in relation to the 10 scheduled referenda in Ireland, Spain, Luxembourg, Denmark, the Netherlands, Poland, the Czech Republic, Portugal, Great Britain and France. Although to a certain extent an “elite response to the oft-decried democratic deficit”, the reason appears to root more in “national dynamics”, where politicians convene referenda for strategic reasons, as Nielsen’s research shows.<sup>24</sup>

### **F. Section 6: Perspectives and assessments**

The first paper of the sixth and last section tackles the question of ‘flexible integration’ in the context of the European Constitution [L. Olsen]. Stripping the concept of its catchphrase superficiality, Olsen succeeds in a thorough analysis of the changes in the flexibility provisions introduced in the Constitutional Treaty, in a remarkably short contribution. Subsequently, we find the aforementioned article on the ‘no vote in France, by Paris-Dobozy. Reflecting on the crisis following the rejection, she rightly point out the paradox of France as a “driving force in EU construction”, while being “responsible for halting twice a crucial step toward further political integration”.<sup>25</sup> The last chapter, apart from Laursen’s concluding remarks, by König, tells us again the story of the Constitutional proposal, its rejection and the subsequent aftermath. It focuses on negotiations and the German presidency, and although the chapter is well written, most of it has already been said in the 23 preceding ones.

### **III. Conclusions**

The book is concluded the same way it is introduced, by its editor Laursen. His final thoughts are inspiring, and his conclusion thematically ties the book together, although more references to the various contributions and their place in the greater scheme would perhaps have served to create a greater unity in the book. On a final note it needs to be addressed that the book generally does not deal with the Lisbon Reform Treaty. Laursen says about this point that “that Treaty is another story, which cannot be told fully before the end of the ratification process, nor can it be told or explained fully without understanding the rise and fall of the Constitutional Treaty”.<sup>26</sup> That certainly seems to be a fair point, for such an approach would

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<sup>24</sup> R. NIELSEN, “Everything Shall Now be Popular: Explaining Elite Behaviour in the Constitutional Treaty Referenda”, in F. LAURSEN, *The Rise and Fall of the EU’s Constitutional Treaty*, o.c., p. 472.

<sup>25</sup> M. PARIS-DOBOZY, “The Implications of the ‘No’ Vote in France: Making the Most of a Wasted Opportunity”, in F. LAURSEN, *The Rise and Fall of the EU’s Constitutional Treaty*, o.c., p. 518.

<sup>26</sup> Preface, p. x.

otherwise simply make the book too voluminous. The importance of researching and analysing the various issues that are connected to the rise and fall of the Constitutional Treaty is certainly timeless, especially from a politico-historical perspective. And although for many, including most European lawyers, the interest in the Constitutional Treaty will fade as the Lisbon Treaty is born, this book is certainly still valuable to have on one's shelf, to once in a while remind one of the turmoil of the past and to help understand its underlying dynamics, in order to draw lessons from it for the future.