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The Convention on the Future of Europe: proposals for a European Constitution

A number of draft constitutional texts were submitted to the Convention during its deliberating phase from mid- to end 2002. In October 2002 the Praesidium unveiled a preliminary draft constitutional text, a 'skeleton' document, which is now the basis for further elaboration. The Praesidium presented its first 16 'fleshed out' articles in February 2003 and over 1,000 amendments have been proposed by Convention members.

This Paper looks at recent proposals for an EU constitution, the Praesidium text in particular, and reaction in the Member States.

Background information on the Convention and its early proposals are discussed in Library Research Paper 02/14, *The Laeken declaration and the Convention on the Future of Europe.*

Vaughne Miller

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Summary of main points

- In a section entitled *Towards a Constitution for Europe* the Laeken Declaration of December 2001 asked whether the "simplification and reorganisation [of the Treaties] might not lead in the long run to the adoption of a constitutional text in the Union" and if so, "What might the features of such a constitution be?" [1]

- The Convention on the Future of Europe was launched in February 2002 to discuss the constitutional, institutional and political future of Europe.

- Towards the end of the deliberating phase, in October 2002, the Convention Praesidium, headed by Valéry Giscard d'Estaing, presented a 'skeleton' preliminary draft EU Constitution.

- Several other constitutional texts were submitted during the second half of 2002, including one commissioned by the British Government and drawn up by a group of academics headed by Professor Alan Dashwood.

- The Praesidium's 'skeleton' draft formed the basis for more detailed discussion in early 2003 and the Praesidium is now elaborating draft constitutional treaty articles. The first 16 draft articles were presented to the Convention in February 2003.

- In March the Praesidium presented draft articles 24-33 and draft protocols on subsidiarity and proportionality and the role of national parliaments.

- By the end of February 2003 over 1,000 amendments to the first sixteen articles had been submitted to the Praesidium, giving rise to fears that Mr Giscard's aim of completing a draft constitutional text by June 2003 would not be met.

- The Convention process is due to end in December 2003, after which an Intergovernmental Conference (IGC) will be convened to discuss Treaty amendments in the light of the final constitutional text.

- The UK, Sweden, Finland and several candidate countries have asked for a longer period of reflection to allow time for parliamentary consideration of the outcome of the Convention.

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[1] 'Laeken Declaration', Presidency Conclusions 15 December 2001, at: http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm

CONTENTS

I Introduction

A. What is a constitution?

National constitutions contain a number of characteristics, some of which the EU already possesses (see below). In a study on the preparation of a European constitution, a Swedish academic, Andreas Føllesdal, defined a constitution as follows:

> A constitution typically performs four tasks. It creates (i.e. constitutes) new institutions or codifies existing institutions with specified competences in the form of bundles of legal powers. It curbs such powers, e.g. by a principle of legality, by securing human rights and other legal immunities and powers, and by dividing political authority among several institutions. A constitution may also channel the use of such powers further by indicating the goals to be pursued, typically as the ends of government stated in preambles. Fourthly, a constitution contains rules for constitutional change, so as to combine the requisite robustness with flexibility to adjust it to new circumstances. There are several benefits of an effective and normatively defensible constitution in this sense; in establishing new patterns of coordinated behaviour in the form of institutions, by reducing fear of abuse of powers, and by bolstering legitimate expectations (Cf. Elster 1988b, 13). A constitution thus safeguards citizens against risks and secures their interests, and, importantly, contributes to shaping citizens, by regulating the institutions that shape their life plans, interests and expectations.[2]

Another commentator looked at the social dimension of a constitution:

> A constitution is not a technical law that distributes competencies and regulates powers among institutions. A democratic constitution is, above all, the founding act that sets down the principles and values according to which men and women intend to associate, live together and constitute a society. It is the translation into legal terms of a social contract: as a written act, the constitution makes public the values that it embodies and the organisational rules that it determines, and offers citizens the instruments with which to compare the acts of public authorities with these values and rules and, when necessary, demand their respect. Hence, a constitution is the manifestation, set down in a legal text, of the democratic quality of a society, of every human society.[3]

In a study entitled "The perils of a European Constitution" Franklin Dehousse and Wouter Coussens looked at different kinds of constitutions:

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[2] *Drafting a European Constitution – Challenges and Opportunities* Constitutionalism Web-Papers, ConWEB No. 4/2002, http://les1.man.ac.uk/conweb/, Andreas Føllesdal, University of Oslo, at: http://www.les1.man.ac.uk/conweb/papers/conweb4-2002.pdf

[3] "An EU Constitution and Federalism after Nice: a New Chance or Requiem for a Myth?" *The International Spectator*, Vol XXXVI No. 1, January-March 2001, Pier Virgilio Dastoli,

> A Constitution may be the founding text of a State. Generally, the well-known exception of the UK notwithstanding, this text is written. Most of the Member States of the European Union have such a Constitution.
>
> It can, however, also be the founding text of an international organisation. Revealingly, the Universal Postal Union, one of the oldest international organisations, created in 1865, also has a Constitution. The international Labour Organisation is another example.
>
> In itself, giving a Constitution to the European Union consequently implies nothing about the nature of the European Union.[4]

How would a European constitution fit in with these models? A European Policy Centre working paper looked at what should and should not emerge from the Convention:

> […] the present debate will according to us have no real meaning unless it produces some changes. If the Convention is a repetition – or worse an amplification – of Nice, it will be a failure. To prevent this failure, two changes are necessary: one concerning the form of the text, the other one concerning its content.
>
> Concerning the form, we need a text which lays the foundations of the new European Union, and which is shorter, clearer, and more attractive. Concerning the content, we need a text that allows a European Union of 30 Member States to deal with the numerous challenges of the future (globalisation, immigration, terrorism, transnational crime, environment…). Few things would be worse now than conveying to the public the impression that a Constitution has been adopted whereas nothing has in fact changed. For us, such an operation would not only be futile, it would be quite frankly counterproductive. [5]

A European constitution would no doubt endow the EU with a stronger identity, although there is likely to be resistance to any transference to the EU of the characteristics of national identity, such as oaths of allegiance and national anthems, as well as to any suggestion that allegiance to the EU would override allegiance to the nation state. Comparing the acquisition of an American identity with moves towards a European identity, one commentator has noted:

> The constitutional journey in the United States, as we all know, began with the Articles of Confederation in 1781, defining a loose confederation without clearly defined purpose. In the fifth decade of its existence, the European integration process has accrued some sort of a preconstitution - from the Treaties of Rome and the Single European Act to the Treaties of Maastricht, Amsterdam and Nice.

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4 18 September 2002

5 European Policy Centre Working Papers, at: http://www.theepc.be/europe/strand_one_detail.asp?STR_ID=1&TWSEC=EPC%20Working%20Papers&TWDOSS=&REFID=902

> After all, it was only in the first half of the 19th century, that the notion of the United States as "one" gained overall recognition. The equivalent for Europe would be a breakthrough in identifying with a Union citizenship without losing one's national identity. More than the absence of a political will within EU institutions, the diversity of languages and the subsequent absence of a homogenous political sphere is said to be the biggest obstacle for the real approval of Union citizenship in the EU.[6]

B. The 'Constitutionalisation' of the European Union

The EC Treaties and amending treaties, the principles established by the case law of the European Court of Justice (such as the direct applicability and the supremacy of EC law) and the special rights conferred on EU citizens under the Treaties, have all contributed incrementally to the 'constitutionalisation' of the European Union. It has been argued that the EC Treaties already "comprise a surrogate constitution,"[7] and in 1986 the European Court of Justice (ECJ) described the EC Treaty as "a Constitutional Charter".[8]

However, the Treaties do not constitute a fully-fledged, explicit constitution with all the characteristics of a typical constitution and the various Treaty elements have not been consolidated or codified in one simplified constitutional text. The EC Treaties do not set out a list of competences attributed to the Community and/or the Member States in the way that a national constitution usually defines the powers of the state and sub-state authorities, although they make clear that in some areas of EU activity decision-making is the sole responsibility of the Community (areas of exclusive competence). On the other hand, while there is no explicit definition of competence, under the subsidiarity principle introduced into the Treaty in 1993, there is now in theory a presumption that matters will be dealt with at national level in those areas that are not within the exclusive competence of the Union, unless it can be demonstrated that action at EU level would be better or more efficient.

The present debate is not the first time that a proposal for a European constitution has been discussed in EU fora. In the early 1980s proposals were put forward for an EC constitution.[9] Mr Giscard d'Estaing proposed a catalogue of competences in 1990 during the debate on how to incorporate 'subsidiarity' into the European decision-making

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6 Implications of a Constitution for the European Identity Ludger Kühnhardt, at: http://www.ier.ro/ConferenceText.pdf

7 Frank Vibert, *Europe: a Constitution for the Millennium*, 1995

8 Case 294/3, *Les Verts*, 23 April 1986. ECR 1986-4, p. 1365.

9 There have been many constitutional proposals over the last 30 years or so. Notable examples were the *Draft Treaty on European Union*, the "Spinelli initiative", adopted by the European Parliament in 1984 (OJC 77/33). The EP's Institutional Affairs Committee put forward proposals for an EU constitution in 1994, in the *Herman* Report, EP Docs A3/31/94 and A3/64/94. These were debated in plenary in 1994 but there was no further EU action.

process. His proposal on "Making the principle of subsidiarity more explicit within the existing powers arising from the Treaties"[10] set out a division of competences and shared competences for the Community and the Member States. A number of constitutional proposals were also put forward during the preparatory stage of the 1996 Intergovernmental Conference.[11] However, this is the first time that a European constitution has been the focus of such a serious, wide-ranging debate involving the Member States, candidate states and civil society.

The constitutional reform process is running parallel with the enlargement process. The pending EU enlargement was accepted at the Nice Intergovernmental Conference (IGC) and the Laeken European Council as one of the main reasons for major institutional and constitutional reform. However, it is not clear whether constitutionalisation can address the problems and challenges enlargement will bring, whether it will have a positive or negative effect, or any effect at all.

The Laeken Declaration did not mandate the Convention on the Future of Europe to draw up a constitution and at the launch of the Convention in February 2002 there was no consensus on the need for a European constitution. Most Member States and the candidate countries favoured at the very least a strengthening of subsidiarity and a delimitation of competences between the EU and its component states.[12] However, support for a constitution has come from opposite ends of the political spectrum and from EU enthusiasts and sceptics alike. While the former have called for a formal written text, enshrining the fundamental values and principles of the Union and a clear division of powers and competences, the latter believe that a formal constitution will perhaps halt the drifting of power and competence away from the Member States to the Union.[13]

There has been a great deal of academic analysis of the constitutionalisation of the EU, in which authors have taken strong positions in the political debate for and against the adoption of a formal European constitution. The philosopher, Jürgen Habermas, for example, supports a written constitution. He has argued that the EU should protect the 'European lifestyle' and that in the long term EU political union will lead to a common European identity and public space.[14] Joseph Weiler, on the other hand, believes:

> […] the lack of a written constitution may help preserve the status quo of a treaty-based legal federation with confederal institutions. The absence of a European

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[10] Report to EP, A3/163/90/Part B.

[11] See also "Federalism and European Union: The Building of Europe, 1950-2000", M. Burgess, constitutional initiatives of the 1970s and 1980s, including the Tindemans Report of 1975-76 and the EP's Draft Treaty establishing the European Union of 1984.

[12] See Research Paper 02/14 for views on a constitution for the EU.

[13] A similar convergence of opinion came to the fore in the debate on subsidiarity in the 1990s.

[14] Jürgen Habermas : "Därför behöver Europa en författning", *Arena* No. 6, December 2001. pp 39-50.

> constitution ensures that the Member States remain 'Masters of the treaties', and prevent their weakening as often happens in federations.[15]

The wider debate is beyond the remit of this paper but a select bibliography of recent work on this subject is included in Appendix II.

There is now a consensus at the Convention around the idea of an EU constitution, although not on how that constitution should apportion power and competence among the EU institutions or between the EU and its constituent states. The debate about whether the EU needs a constitution will no doubt continue, but the main issue for the Convention now is what the constitution should contain and how best to achieve this. Lord Maclennan, a UK parliamentary alternate at the Convention, summarised its task as follows:

> to formulate a constitutional treaty that may come to be regarded popularly as the constitution of the European Union. It is to assist people's comprehension of what the Union's purposes and powers are, to bring the Union closer to its citizens, and to codify a lot of law that is scattered throughout the jurisprudence of the European Court of Justice. It is also to remove the obstacles to effective action that would flow from the enlargement of the Union by an additional 10 members if there were not a constitutional change that recognised the need for alteration of the institutional structure, and which dealt as best it may with problems that have emerged in the operation of the existing law and institutional structure.[16]

However, the process was, he added:

> essentially a process of adjustment rather than the entire rewriting of the Union's law and policy. […] There is no consensus for regarding it as an opportunity to start from scratch and rewrite the relationships that have been built up over almost 50 years—certainly since 1957. That would be beyond the capabilities of any convention.[17]

II British Views on a European Constitution

The British Prime Minister, Tony Blair, argued in his speech in Warsaw in October 2000 that it was "perhaps easier for the British than for others to recognise that a constitutional debate must not necessarily end with a single, legally binding document called a

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15 Joseph Weiler "Europe: The Case Against Statehood" *European Law Journal*, 1998 http://www.les1.man.ac.uk/conweb/papers/conweb4-2002.pdf

16 Standing Committee on the Convention 12 February 2003 c 016 at: http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/cmconv.htm

17 Ibid

constitution".[18] However, by February 2002 the Foreign Secretary revealed that the Government would countenance an EU constitution.[19]

> We have to establish a better comprehension of what should be done at European level, and what should be left to the member states at national, regional or local level. The current lack of clarity here creates the impression that power is draining away from national governments to the centre, in Brussels. We have better to explain why collective decision-making is sometimes more efficient; but not take this assumption for granted.
>
> And we have to do more to explain to our citizens the practical benefits they derive from EU membership. But perhaps at the same time we have to provide a more coherent statement of what the EU is there for. The Treaties, lengthy and complex as they are, do not do so.
>
> This need not mean drawing up a long list of every activity of government, setting out in detail who should do what, and at which level. That would take years to negotiate, and anyway there are many areas where the EU and its member states will want to act together. But there is a case for a simpler statement of principles, which sets out in plain language what the EU is for and how it can add value, and establishes clear lines between what the EU does and where the member states' responsibilities should lie.
>
> Put like that, few people could object. But call it a constitution, and suddenly for some it doesn't look like such a good idea.
>
> My own view is that we shouldn't get hung up about the labels. Yes, most countries are founded on single-text, written constitutions. But just because an entity has a constitution doesn't make it a state. Many organisations, including the Labour Party, have constitutions. It's the substance that matters, not the name.[20]

In August 2002 Mr Straw set out his ideas for a European constitution:

> Political Parties and Golf Clubs have constitutions and are not states. A constitution for Europe does not mean a superstate.
>
> Many in the Convention favour greater powers for the EU's central authorities in Brussels. We support these claims in areas where it is manifestly in the national interest to do so, such as in the fight against crime and unlawful immigration.

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18 Speech at Polish Stock Exchange, October 2000, at:

19 "Reforming Europe: new era, new questions", Jack Straw, The Hague, 21 February 2002, at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391647&a=KArticle&aid=1014918160874

20 Ibid

> The Convention's main aim must be to design a written constitution for the people and communities of Europe, not the political elites. This need not mean a long list of each and every activity of government, setting out in detail who should do what and at which level. It should be a simple set of principles setting out what the EU is for and showing that national governments are the primary source of democratic legitimacy.
>
> But there is a case for a constitution which enshrines a simple set of principles, sets out in plain language what the EU is for and how it can add value, and reassures the public that national governments will remain the primary source of political legitimacy. This would not only improve the EU's capacity to act; it would help to reconnect European voters with the institutions which act in their name.[21]

In October 2002 in the *Economist* Mr Straw expanded on the Government's ideas for an EU constitution. His first criterion for a European constitution was that, like the UN charter and the US constitution, it should "fit easily into [his] jacket pocket".[22] The former was a "good read" and "sets out in logical form the purposes and principles of the organisation, its structure and its powers", while the latter was particularly praised for its Amendment X of 1791, the subsidiarity principle, that "powers not delegated to the United States by the [...] Constitution are reserved to the states ... or to the people." He admired the prose of their respective Preambles, while the EU Treaties "fail almost every test of clarity and brevity" (they now total some 255 pages). The minimal requirement, he suggested, would be for the *Treaty on European Union* (TEU) and the *Treaty Establishing the European Communities* (TEC) to be merged into one text and "put in a logical order - purpose, principles, then organs and institutions." But he also emphasised that the complexity of EU law was "indicative of serious shortcomings in the way the Union works" and needed urgent reform. Mr Straw envisaged the constitutional text as follows:

> Any new text should answer the basic questions about the Union which have characterised the debate in the UK for the past three decades. It should set out the EU's mission in simple language, clarify for befuddled voters the role and responsibilities of its institutions, and draw a clear distinction between supranational and national competencies. The constitution should start with just a few lines, setting out what the EU is - a union of sovereign states who have decided to pool some of that sovereignty, better to secure peace and prosperity in Europe and the wider world. It should confirm that the Union exercises only those powers which are explicitly and freely conferred on it by the member states,

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21 Jack Straw, "Strength in Europe begins at home", Edinburgh, 27 August 2002, at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391647&a=KArticle&aid=1030405878065

22 "A Constitution for Europe", *The Economist*, 11 October 2002, at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=KArticle&aid=1034270166922

> which remain the EU's primary source of democratic legitimacy. The treaty should celebrate the rights citizens enjoy and the core values they live by.
>
> The text should then set out the roles of the EU's institutions. And here, the reality is that in an EU of 25 member states or more, each of the three main institutions - the council, the commission and the parliament - needs to be strengthened.[23]

Mr Straw suggested that national parliaments should monitor the division of powers between the Union and Member States.

> National parliaments could quickly review each EU proposal, judging whether action is being taken at the right level and in the right way. This would not amount to a veto. But if a majority of national parliaments judged that a proposal infringed subsidiarity, the commission would be expected to re-examine its approach.

In a section of the article entitled "Stand and Deliver", he argued that a constitutional treaty which set out the role and missions of the institutions would be an important step towards giving EU citizens greater confidence in the Union's work. Foreign policy should "remain a matter for national governments, co-operating freely" but more effectively.

He thought the three-pillared Treaty structure could be merged into a single treaty, provided that the different arrangements for Common Foreign and Security Policy (CFSP) and some aspects of justice and home affairs policy were maintained. Finally Mr Straw countered some of the arguments raised against an EU constitution. One of these was the fear that this could lead to a European "superstate" submerging national identities. The debate should focus "less on the label of a constitution, and more on its substance". He concluded:

> Two years ago this newspaper concluded that Europe's citizens deserved a written constitution which provided an 'intelligible account...of the rules by which the future of the European Union will be shaped'. I agree. It is time to set out what the Union is, what it does and how it does it; to define the role and powers of the Union's institutions, and their relationships with the member states; and to improve the Union's ability to deliver practical benefits to Europe's citizens.[24]

Peter Hain told the European Scrutiny Committee (ESC) in November 2002 that a European constitution had some merits, but with the "important proviso" that it was "a constitution on the foundations of Member States, not some Brussels super state. I do not

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23 "A Constitution for Europe", *The Economist*, 11 October 2002

24 *Economist*, 11 October 2002, FCO website at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029392547&aid=1034270166922.

think there is any prospect of the Convention agreeing a federal super state model for the European Union".[25] He maintained that there would be little support in the EU or in the candidate countries for such a move. The Prime Minister confirmed this view in Cardiff in November 2002:

> First, we do need a proper Constitution for Europe, one which makes it clear that the driving ideology is indeed a union of nations not a superstate subsuming national sovereignty and national identity. This should be spelt out in simple language. A new Constitution for Europe can bring a new stability to the shape of Europe - not a finality which would prevent any future evolution, but a settlement to last a generation or more.[26]

III Praesidium Preliminary Draft Constitutional Treaty

The first indication of the possible content of a European constitution came with the Praesidium's three-part preliminary draft of a "Treaty Establishing a Constitution for Europe" on 28 October 2002.[27] Presenting his 'skeleton' draft text to the Convention plenary, Mr Giscard d'Estaing said that in the first few months of 2003, and depending on the results of plenary discussions on the Working Group recommendations, the Praesidium would present sections of a new draft constitutional treaty. Part I of the new Treaty would be drafted in a clear, limpid, even 'lyrical' manner, making it accessible to all citizens. Although far from complete, the draft already had 2,100 words and would be potentially a lengthy document.[28]

According to one commentary, the Praesidium text aimed "to reconcile federalist calls for stronger EU institutions with the intergovernmentalists' anxiety about preserving the power of member states".[29] It proposed a presidency of the European Council and kept the Commission outside decision-making in foreign affairs, justice and home affairs matters. The text indicated that the Praesidium was inclining towards a simplification of the EC/EU Treaties, rather than a radical overhaul of the relationship between the EU and its Member States. It merged two distinct views on Europe:

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25 Minutes of Evidence to ESC, 20 November 2002, 16 December 2002, HC 103-I, at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/103-i/2112002.htm

26 Tony Blair, "A clear course for Europe", 28 November 2002, FCO website at: http://www.pm.gov.uk/output/page6709.asp

27 CONV. Doc.369/02, 28 October 2002, at: http://european-convention.eu.int/docs/sessplen/00369.en2.pdf.

28 Compare with the Philadelphia Treaty on the US constitution in 1787, which contained about 4,500 words.

29 *European Voice*, 31 October – 6 November 2002.

> A Union of European states which, while retaining their national identities, closely coordinate their policies at the European level, and administer certain common competencies on a federal basis.[30]

The structure proposed a treaty in three parts, prefaced by a single preamble and with some Protocols. Of the 414 Articles in the current EC Treaty (TEC) and Treaty on European Union (TEU), 205 would remain unaltered, 136 would require 'technical' amendment and 73 would be substantially redrafted or regrouped. An unspecified number of additional Articles would be necessary to cover new areas, such as the proposed new Title VI ("The Democratic Life of the Union") and in all likelihood the content of the Charter of Fundamental Rights,[31] making the final document quite substantial and not the "pocket-sized" treaty that Jack Straw called for.[32]

The draft simplified the existing Treaty structure, abandoning the present three-pillared structure and bringing together in one constitutional text the core principles of the Union and the bases for their implementation. Part I of the draft, entitled "Constitutional Structure", comprised one legal entity (article 4) covering both the TEC and the TEU, and contained 46 articles divided into ten Titles:

- Definition and objectives of the Union
- Union citizenship and fundamental rights
- Union competences and actions
- Union institutions
- Implementation of Union action
- The democratic life of the Union
- Union finances
- Union action in the world
- The Union and its immediate environment
- Union membership

The draft incorporated the Charter of Fundamental Rights, although it was not clear whether the single constitutional preamble would include, or be merged with, the preamble to the Charter.[33]

Part II on "Union Policies and their Implementation" set out the legal bases for Union action in the internal market; economic and monetary policy; other specific areas of EU competence, such as agriculture and environment; internal security; areas such as

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30 CONV. Doc.369/02, 28 October 2002, see also *European Voice*, 31 October – 6 June 2002

31 The Charter might otherwise be included within the Union's legal framework in an Annex or Protocol

32 *Economist*, 11 October 2002 "A Constitution for Europe"

33 For comment on the draft, see Professor Jo Shaw's Notes on the Praesidium's Preliminary Draft Constitutional Treaty, at: www.fedtrust.co.uk/eu_constitutional

employment and culture, where the Union could take "supporting action"; external action, including the CFSP, and defence. Most of this text would be taken from the existing Treaties and the draft Articles were reminiscent of the existing general and institutional provisions.

The draft did not specify the number of articles to be contained in Part II but it would contain a detailed statement of the Union's policies, implementation methods and legal bases. Part III ("General and Final Provisions") contained 7 Articles.

The draft appeared to have drawn on the Working Groups' conclusions where they were available. It did not address the fundamental institutional issues, such as the distribution of power within the EU and between the EU and the Member States. Title IV envisaged only one or two articles on the composition and powers of each of the main EU institutions.[34] It was also vague on constitutional issues, such as the consequences of failure to ratify the constitution; and social issues, such as gender equality. It left open the question of whether the European Council should elect a long-term president. It did not make clear what powers the EU would have in foreign policy, putting EU competence for foreign and external security together with internal security.

The British Government welcomed the draft as a "useful framework for the next stage in the discussions"[35] and was pleased that the Giscard text included British suggestions for a greater role for national parliaments in the EU decision-making process. The Minister for Europe, Denis MacShane, sought to allay fears that the draft would, if it came into force, alter the relationship between the EU and the Member States, stating that it contained a provision for EU citizenship "in addition to" Member State nationality, as under the present Treaties, and "and makes clear (in Article 1) that the member states are the fundamental basis of the union. The Government would not agree to any constitution which changed this".[36]

The EU Ombudsman, Jacob Söderman, thought the draft promised "little of substance" for the benefit of ordinary people.[37] In his view the text had several serious omissions, including that of a commitment to openness, to informing people about their rights under EC law, and a "consistent set of good administrative practices in the EU administration".[38] The proposals for a president of the European Council and a Congress would, he thought, take EU decision-making even further away from the citizens of Europe. In an address to the *Instituto Superior de Ciencias Sociais e Politicas* and the Jacques Delors Foundation he said that there was nothing in the draft "to remedy the present chaotic situation in

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34 Compared with the TEC's 13 Articles on the EP, 9 on the Council, 9 on the Commission, 26 on the ECJ and 3 on the European Court of Auditors.

35 Denis MacShane, HC Deb 5 November 2002 c 139

36 HC Deb 21 January 2003 c224-5W

37 *European Voice*, 28 November – 4 December 2002.

38 Ibid.

which every institutions's administration has its own idea of how to treat citizens".[39] Professor Jo Shaw[40] commented on the overall structure of the draft text:

> From the point of view of legal coherence, […], the approach taken is quite sensible, since it would institute an overall framework for the Union which would ascribe an equal constitutional status not only to the rules which would make clear not just what the EU does (its tasks and goals), but also to those which determine how it undertakes its tasks and meets its goals.[41]

Some critics focused on options for a new name for the EU, which included in Title I (Definition and objectives of the Union) the term, "United States of Europe". This option was widely interpreted as meaning a centralised 'superstate'. One of the UK Parliamentary Representatives on the Convention, Gisela Stuart, condemned this "semantic squabble"[42] as distracting from the real issue of reconnecting the EU with its citizens. The British Government's Representative on the Convention, Peter Hain,[43] told the European Scrutiny Committee that the Government did not like "United States of Europe", "United Europe" or "Europe United" (which sounded like a football team) and appeared to be happy with the present name, the European Union.[44]

Dana Spinant, writing in *European Voice*, commented on the draft's reference in Part III (General and final provisions) to the repeal of the existing EC Treaties, noting that "the decision to abrogate previous treaties cannot be taken for granted".

> Some raise political and legal questions, saying it is a breach of national states' sovereignty if treaties which have been ratified by parliaments or approved by referenda in some countries are annulled.[45]

Part Three contained provisions for revision procedures for the separate Treaty parts, but did not distinguish between these procedures, as other constitutional proposals have done (e.g. unanimous agreement for amending articles of constitutional significance but majority voting for detailed policy decisions).

Jo Shaw concluded that the "draft in its current form sends out rather mixed messages".[46] She acknowledged that the text appeared "to be an attempt simultaneously to provide

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39 *European Voice*, 28 November – 4 December 2002.

40 Jean Monnet Chair of European Law, University of Manchester, Senior Research Fellow, Federal Trust (EU Constitution Project)

41 *Notes on the Praesidium's Preliminary Draft Constitutional Treaty (CONV 369/02, 28 October 2002)*, 6 December 2002, at: http://www.fedtrust.co.uk/aboutus.htm

42 *House Magazine*, 11 November 2002

43 Peter Hain remained as the Government's Representative after becoming Secretary of State for Wales

44 *House Magazine*, 11 November 2002

45 *European Voice*, 31 October – 6 November 2002

46 Professor Jo Shaw, *Notes on the Praesidium's Preliminary Draft Constitutional Treaty*, 6 December 2002, at: http://www.fedtrust.co.uk/aboutus.htm

support for all the different positions on the integration project"[47] but she also believed the jury would be out as to whether "the whole project does in fact reduce complexity".[48]

Martin Howe QC said of the draft: "What the Constitution lacks, and where it differs from the American historical precedent which the Convention is trying to mimic, is any serious democratic dimension".[49]

IV Praesidium Draft Articles 1-16

The Praesidium published the first 16 'fleshed out' draft articles of its proposed constitutional treaty on 6 February 2003.[50]

A. Reaction to the Draft Articles

1. Press comment

The UK press was generally negative about the draft articles and several European media reports described the UK's dissatisfaction. The *Financial Times* reported that the draft had been "rejected by Britain" while the *Independent* stated that Mr Hain had 'savaged' the draft articles. On 7 February 2003 the *Daily Telegraph* heralded the arrival of the 'Superstate', describing the draft with a collection of French idioms as a "coup d'état by a clique of a coterie of a cabal". The *Times* spoke of "an ambush by Valéry Giscard d'Estaing and his cabal of a dozen scribes". This report continued: "it massively expands the Union's supranational prerogatives in those very areas ... where people most insist that their own governments should be in control". It concluded that ground had been lost and not gained and that "Mr Blair needs heavy artillery now". In contrast, an editorial in the Swedish *Sydsvenska Dagbladet* suggested that the "misgivings that the EU should develop into a super state do not seem to be justified. It is not difficult to see the attempts to shape an EU constitution as an historical step in the right direction".[51]

The Danish press echoed some of the British misgivings, with *Politiken* and the *Berlingske Tidende* finding the draft had gone "way beyond the integration level of the United States".[52] *Politiken* and *Jyllands-Posten* quoted the Danish Convention member, Henning Christophersen, who thought the draft was good from a Danish point of view and would "not be problematic for the Danish Government".[53] The Irish press, mindful of

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47 Professor Jo Shaw, *Notes on the Praesidium's Preliminary Draft Constitutional Treaty*, 6 December 2002

48 Ibid

49 Martin Howe QC, speech to Congress for Democracy, 1 November 2002, at http://www.congressfordemocracy.org.uk/Howe%20speech.html

50 CONV 528/03, 6 February 2003, at: http://european-convention.eu.int/docs/Treaty/cv00528.en03.pdf

51 8 February 2003

52 7 February 2003

53 7 February 2003

the public's rejection of the Treaty of Nice in June 2001, underlined that "many of the issues under discussion remain controversial" and urged that these issues should be fully debated now, "not left dormant to surface suddenly in a referendum".[54] The *Irish Times* and the *Irish Independent* also reported a more favourable reaction to the draft, quoting Convention members John Bruton and Dick Roche, who thought "The document was not a charter for a federal Europe" and was "a good basis for further discussion". According to Finnish press reports, the draft was received with 'suspicion'[55] and reports in the UK, Denmark, Finland, Greece, Ireland, the Netherlands and Portugal were critical of the Praesidium's methods, drawing attention to the draft's failure to take account of many of the Working Group recommendations. The French, Italian, Luxembourg, Portuguese and Polish papers regretted the absence of any reference to God or religion and the Vatican found the text "totally unsatisfactory" for this reason.[56] The Swedish and Danish press, on the other hand, were in favour of keeping religion out of the constitution. Several papers reported the Enlargement Commissioner, Michel Barnier's, hopes of giving the regions greater weight in the constitution.[57] The Italian *Il Sole* seemed to think the text ignored the fact that the EU was still a common market: the draft was "A social vision that has forgotten the market".[58]

2. Reaction in Parliament

The Praesidium's draft articles were discussed in the Standing Committee on the Convention on 12 February 2003. Gisela Stuart told the Committee of her fears that delegates were not being robust enough in defending the interests of the nation states:

> The dynamics of the Convention have been such that those who say that there are areas where Europe's action has been quite sufficient, and that we should consider drawing back, are virtually non-existent. The dynamics of the debate stem from organised groups such as those in the European Parliament who, unlike us, have succeeded in overcoming party political divides in order to pursue one agenda, and one only.[59]

The other UK Parliamentary Representative, David Heathcoat-Amory, was alarmed by the text:

> The document before us […] is an alarming publication. Certainly, if enacted in anything like its present form, it will go well beyond what any British Government have said is acceptable. It will have profound implications for our

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54 *Irish Times*, 7 February 2003
55 *Uutispäivä Demari*, 7 February 2003
56 *Agence France Presse*, 6 February 2003
57 The French *La Nouvelle République* and the Austrian *Der Standard*, 7 February, and the *Süddeutsche Zeitung*, 8 February 2003, for example
58 7 February 2003
59 12 February 2003 c 004 at http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/cmconv.htm

> parliamentary democracy, and it will certainly represent the creation of a form of European state.[60]

Lord Maclennan was less worried, stating "I do not take the 'catastrophic' view of the 16 articles before the Committee; they are the first drafts that we have seen, and I do not imagine that they will remain unamended".[61]

Jimmy Hood, Chairman of the European Scrutiny Committee, expressed his concern at the speedy pace of the Convention in this elaboration phase and the Government's changing positions on its work:

> It is becoming difficult for anyone who is not directly involved to keep up with what is happening, and even harder to keep up with apparent major shifts in Government policy … .[62]

For Parliament, he added, the Standing Committee on the Convention was "one of the successes of the whole process".[63] He also took the opportunity to praise the work of Gisela Stuart in her attempts to improve the drafting of articles on the role of national parliaments.[64]

B. The 16 Draft Articles

The covering paragraph on the draft states that:

> The draft texts given here reflect the reports of the Working Groups on Legal Personality, the Charter [of Fundamental Rights], Economic Governance, Complementary Competencies, the Principle of Subsidiarity and External Action, as well as the guidelines that emerged on the basis of their recommendations during the plenary debate.[65]

In fact, the draft articles reflect some, but by no means all, of the Working Group and Plenary recommendations. There is no preamble as yet, although the content of the first few draft articles is of a general declaratory nature. The Convention has not published Part II draft articles, but as *The Economist* commented, there is "already lots of chewy stuff for the convention's delegates and for Europe's governments to get their teeth into".[66]

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60 12 February c005 at http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/cmconv.htm
61 Ibid c008
62 Standing Committee on the Convention 12 February 2003 c 025
63 Ibid
64 Mr Hood had been highly critical of the Working Group she had chaired for its failure to recommend radical reform. See RP 03/16 pp 39-40
65 CONV 528/03, 6 February 2003, at: http://european-convention.eu.int/docs/Treaty/cv00528.en03.pdf
66 *The Economist* 15 February 2003

Article 1 establishes the Union "Reflecting the will of the people and the States of Europe to build a common future, this Constitution establishes a Union ... within which the policies of the Member States shall be co-ordinated, and which shall administer certain common competences on a federal basis".

The inclusion of the word 'federal' has alarmed sceptics, who see it as the first step towards a "United States of Europe" or a European 'superstate'. Proposals have already been tabled for its removal (see below). The *Financial Times* commented: "The strong tide of opinion in a more federalist direction is a marked contrast with earlier assurances that the debate in the 105-member convention was moving in Britain's direction".[67]

During the EP delegation meeting on the drafts on 27 February the anti-EU French MEP William Abitbol pointed out that 15% of the Convention had tabled amendments against using the word 'federal', which was an early indication of the difficulties of reaching a consensus.[68] At the plenary debate on 27 February several contributors thought that, although the word 'federal' only referred to the exercise of certain competences and did not imply that the EU was a federation, the draft treaty could perhaps make it more explicit that EU competences originated from Member States. During the debate the British Government alternate, Baroness Scotland, thought that 'federal' was "politically charged". She too argued that the tone of the opening treaty articles should tell citizens about the genesis of the Union, specifically that its powers came from Member States which had decided to pool sovereignty.

On the other hand, this article does not mention "ever closer union", an aim which Working Group V on complementary competencies had considered inappropriate. At the plenary the French Government delegate, Foreign Minister Dominique de Villepin, preferred the term "federation of nation states" and wanted to see "ever closer union" reinstated, in order to guarantee the furtherance of European integration.

The UK alternate, Lord Maclennan, has described the phrase "ever closer union" as "historically resonant" and "neither precise nor lacking in anxiety-creation".[69] He told the Standing Committee on the Convention:

> That is important, because as I read the situation the intention is that this document, when finalised, should be a firm, clear and largely unchanging settlement, whose acceptability can then be considered by citizens and member Governments. That should remove the anxiety—at present legitimate—that every constitutional change will ineluctably be followed by another, as a process of integrative development takes place. That the desirable objective of having a

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67 *Financial Times*, 20 February 2003

68 Plenary debate 27 February 2003. The verbatim report of the plenary debate can be accessed at: http://www.europarl.eu.int/europe2004/textes/verbatim_030227.htm

69 Plenary debate, 27 February 2003

> settlement should be part of that process seems to me to be entirely in the interests of this country and of the rest of the Union.[70]

The UK Conservative MEP, Timothy Kirkhope, wanted the supremacy of national parliaments to be guaranteed by an addition to Article 1(2) which would make reference to the "sovereignty of member states". Mr Kirkhope wanted Article 1(4) amended to include a provision for referendums to take place on the final text of the constitutional treaty in those countries where they were permitted, before ratification in the Member States. If there was unanimous support for the final text, the people of Europe would "have no reason to feel that their national identities have been threatened".[71]

Article 2 sets out the Union's core values: "The Union is founded on the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights ... Its aim is a society at peace, through the practice of tolerance, justice and solidarity". An article in the French newspaper, *Le Monde*, regretted the draft's failure to adhere to the conclusions of the Working Group on Social Europe on this article by omitting social justice and equality as core values.[72]

In spite of pressure from Christian Democratic parties, churches, religious organisations and the Vatican, there is no reference to God or to Europe's "Christian heritage" in this article (see also below).

Article 3 sets out the Union's objectives, which include the promotion of peace and well-being, sustainable development, balanced economic growth and social justice, full employment, high levels of competitiveness and living standards, economic and social cohesion, equality between men and women, environmental and social protection, scientific and technological advancement, including space discovery, an area of freedom, security and justice, respect for cultural diversity, eradication of poverty, protection of children's rights, respect for international law and "peace between States".

There had been considerable criticism of the Praesidium's preliminary draft for its failure to mention, let alone aspire to, equality between men and women and children's rights. The Praesidium appears to have taken such criticism on board in its elaboration of this article. While the majority of these aspirations are uncontroversial, it is arguable whether 'space discovery' should be an objective of the Union. This addition gave rise to some perplexity at the plenary debate on the drafts.

The Working Group had recommended specific competence extensions in the area of public health, which is included here, along with a possible re-drafting of Article 16 TEC

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70 12 February 2003 c 008 at: http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/cmconv.htm

71 Plenary debate, 27 February 2003

72 *Le Monde* 18 February 2003

to enable EU legislation in the field of "services of general interest", but this is not included in the draft.

Baroness Scotland reminded the plenary on 27 February 2003 that articles 2 and 3 on values and objectives would be used by the courts to interpret the new treaty and therefore had to reflect the competences of the Union, with higher level 'aspirations' in a political preamble. Moreover, 'values' and 'objectives' had to be distinguished. Values should be those on which the Union was founded, "human dignity, liberty, democracy and the rule of law and respect for human rights",[73] whereas objectives should be grouped in a way reflecting the current pillars, and subject to re-examination in the light of specific policy provisions in Part II of the Treaty. The objectives should also note the Union's respect for the diversity of the Member States, and the richness this brought to the Union. "They should reflect competences rather than aspirations".[74]

In this context, Gisela Stuart reminded the Standing Committee on the Convention that the precise meaning of some of the Part 1 draft treaty articles and their implications would depend on what Part 2 of the constitution specified.

> For example, the listing has public health as a shared competence. It is clear which aspects of public health are shared competences, but the majority are not, and part 2 will clarify that. We as representatives will welcome clear markers from Members of Parliament if they feel that we need to take great care when part 2 is drafted so that it reflects their wishes.[75]

Article 4 grants the Union legal personality. This means that the EU could sign international treaties and sit on international bodies, such as the United Nations. The Working Group on legal personality had agreed that the Union would benefit from this status in the future.

Article 5 integrates the Charter of Fundamental Rights into the Constitution. The Charter currently has no formal legal force but incorporation would make it legally enforceable in the EU Courts and in national courts throughout the EU. Incorporation would make the further transfer of legal sovereignty to the EU inevitable, and would therefore have legal implications in the Member States, but the EU constitution and the Charter would not replace the constitutions of the nation states.

This article also allows EU accession to the European Convention on Human Rights, which previously had given rise to arguments over duplication, confusion of jurisdictions and competences. Accession reflected the majority view in the Working Group.

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73 27 February 2003 at: http://www.europarl.eu.int/europe2004/textes/verbatim_030227.htm
74 Ibid
75 12 February 2003 cc003-4 at:

Most of the proposed amendments to this article concerned the position of the Charter in the structure of the constitution, either at the beginning or annexed as a protocol, with the plenary favouring the former. Baroness Scotland welcomed the Charter as a "political text", but insisted it should not be incorporated into the text of the constitution. She said the British Government had not "been afraid of looking at ideas on how to give the Charter legal status. The challenge is to find ways to give our citizens legal security and certainty in relation to the Charter's ambiguous and conflicting text".[76] Jacob Söderman approved of making the Charter binding and enabling the Union to accede to the European Convention on Human Rights, but added: "as the article is currently drafted, it does not include the possibility to accede to other international human rights conventions, as the Member States can do".[77]

Peter Hain had conditionally accepted the WG recommendation for incorporation as long as the horizontal articles,[78] as well as the charter language itself, were incorporated, in order to make sure that it could not change the law of the Member States. Lord Maclennan pointed out: "That is one reason why it is not yet possible to make a firm pronouncement on whether the language will suffice. We do not have the so-called horizontals to enable us to see the limitations on incorporation, which may be intended".[79] Gisela Stuart had reservations about the reference to the Charter as an "integral part" of the constitution. She wanted "absolute reassurance that any reference to it would include all the commentary on those articles, which is fundamental […] in the UK context, it offers protection in respect of creating any new rights".[80]

Article 6 prohibits any form of discrimination on grounds of nationality, within the field of application of the Constitution. This amplifies Article 6 TEU, the human rights article, and Article 13 TEC, the anti-discrimination article.

Article 7 endows "Citizenship of the Union" on all Member State nationals. This would be additional to national citizenship and not replace it, although this article has also been interpreted as meaning a kind of dual nationality. The article sets out the benefits of citizenship, which are already guaranteed by the Treaty in Articles 17-21 TEC.[81]

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76 Plenary debate 27 February 2003, at: http://www.europarl.eu.int/europe2004/textes/verbatim_030227.htm

77 Ibid

78 Horizontal articles deal with the limitation of the scope and application of the Charter, Articles 51 and 52, for example. Vertical articles focus on particular rights

79 Standing Committee on the Convention, 12 February 2003 c 012. For the Government's views on incorporation of the Charter, see Research paper 03/16 pp 26-28.

80 Standing Committee on the Convention, 12 February 2003 c 012

81 For an interesting discussion of the notion of EU citizenship, see Josephine Shaw, *Citizenship of the Union: towards post-national membership?* at: http://www.google.co.uk/search?q=cache:ovqow8GbD1UC:www.jeanmonnetprogram.org/papers/97/97-06-.rtf+%22eu+constitution%22+%2B+implications+%2B+habermas&hl=en&ie=UTF-8

Article 8 sets out the Union's fundamental principles governing the allocation of competences. The guiding principles are conferral, subsidiarity, proportionality and "loyal cooperation". The presumption is that "Competences not conferred upon the Union by the Constitution remain with the Member States". Articles 8 and 9 correspond roughly with the WG conclusion that a constitutional treaty should contain a title covering all issues of competence, and in particular a basic delimitation of competence in each policy area, a definition of the categories of Union competence and conditions for the exercise of Union competence.

The second and third sub-paragraphs of the draft article are similar to the current Article 5 TEC, the subsidiarity Article, and are equally opaque (what does "necessary to achieve the objectives of the Constitution" actually mean?).

In reply to a parliamentary question, the Europe Minister, Denis MacShane, said of "loyal cooperation" that the principle already existed in Article 10 TEC and Article 11(2) TEU, and that "The Government supports this principle".[82] Within the existing constitutional order of the EU, Article 10 TEC places on Member States the duty to "take all appropriate measures … to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community… They shall refrain from any measure which could jeopardise the attainment of the objectives of this Treaty". These requirements entail a principle of loyal cooperation, which has been upheld by the ECJ, for example in Case C-476/93, *Nutral v. Commission* [1995] E.C.R. I-4125, para. 14.[83]

At the newly established 'spillover' plenary on 5 March 2003 Peter Hain thought that the subsidiarity formulation set out in Article 8 was "pretty good" and drew on the provisions of the current Treaty. He thought there had been strong support for his earlier plenary intervention that the principle of subsidiarity ought to be applicable to the regions and he drew delegates' attention to the amendment which he had tabled on that subject (see below). Mr Hain, though "broadly happy" with Article 8, thought 8(1) and (2) needed to be explicit about stating that the powers vested in the Union were done so by the Member States.

Article 9 on the application of fundamental principles states in 1.1 that the constitution and the laws adopted under it "shall have primacy over the law of the Member States". This confirms the status of the EU as a separate political order and the principle

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82 HC Deb 13 January 2003, c382-3W. The draft constitution submitted by the British Government and drawn up by Professor Alan Dashwood had also suggested four main principles: the principle of conferred power, the principle of subsidiarity, the principle of proportionality and the principle of loyal cooperation. See Draft Constitutional Treaty of the EU and related Documents (Cambridge Draft/FCO), October 2002, CONV 345/1/02, rev1, at: http://register.consilium.eu.int/pdf/en/02/cv00/00345-r1en2.pdf

83 See also Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, 1999, para. 8-010 and 11-042

established by the European Court of Justice of the supremacy of Community law over that of the Member States. This would be the first time that the supremacy of EC law would have an explicit legal and constitutional basis, although the principle was established in the early case-law of the ECJ, notably in *Costa v ENEL*.[84] The ECJ ruled:

> […] in contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal system of the member States and which their courts are bound to apply. […] The transfer by the States from their domestic legal systems to the Community legal systems of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.
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> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[85]

The Working Group had recommended that conditions for the exercise of competence (in a general title on competence) should include clauses covering the principles of subsidiarity, proportionality, the primacy of Community law, national implementation and execution, the common interest and solidarity, and a statement of reasons for the adoption of an act. The Praesidium articles reflect the general recommendations of the Group. In the Union's "non-exclusive competences", subsidiarity shall apply "as laid down in the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Constitution."[86] This aims to guarantee that the EU does not try to take over functions which should be left to national governments.

At the plenary debate on 28 February there was support from several contributors for allowing subsidiarity to be applied in areas of exclusive competence, which is ruled out in the present Treaties. Baroness Scotland found Article 9(1) over-simplified and conflictive with Article 8(1). The Scottish SNP MEP, Professor Neil MacCormick, spoke of the "need to be sure that we leave to the local what the local can do best". He continued:

> We must also make sure that the symbolism in this constitution is right and that the little countries of Europe, the Länder of Germany and Austria, regions like

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84 The principle has also been enshrined in some Member States' constitutions.

85 Costa v ENEL [1964] ECR 585, and confirmed in Simmenthal, 1978, Factortame, 1990, and Francovich, 1991.

86 This was not presented until 27 February 2003 and set out an "early warning system" to alert national parliaments if they thought their powers were being usurped.

> Catalonia and countries like Scotland, are there in the text, not relegated to Article 9(6).[87]

At the 'spillover' plenary Mr Hain expressed the view that reference had to be made to proportionality as well as subsidiarity, as breach of the former had often caused more offence than the latter. He also thought Article 9(6) did not need to be so detailed, as there was the risk of the article becoming a catalogue of Member State competences.

Article 10 on categories of competence describes exclusive Union competence and shared Union/Member States competence. The Union would have competence in the coordination of economic policy, the implementation of the CFSP, the "progressive framing of a common defence policy", coordinating or supplementing actions in certain areas and the implementation of policies to be defined in Part Two of the Constitution.

Gisela Stuart had concerns about draft 10.4 on the CFSP and defence:

> We must be clear, when we consider any common border defence arrangements, that this does not become a back-door way of giving the Commission or the Court justiciability in those matters. It is absolutely clear that they should remain intergovernmental, and I regard it as one of my tasks to ensure that those safeguards are provided. However, we have to wait for the rest of the articles, and we must see what part 2 does.[88]

Baroness Scotland argued that the constitutional treaty should allow Member States to protect their national interests and that the distinct national aspects of CFSP and Justice and Home Affairs (JHA) policies had to be respected. CFSP could not be considered as a category of competence in the same way as the others in Article 10. Article 10(4) should be used to signal that this was a different kind of cooperation. David Heathcoat-Amory was concerned that, taken in conjunction with article 14 (requiring loyalty and mutual solidarity):

> it is clear that the Union having defined the policy, member states are obliged to support it. The situation will be that the Union, without the pillared structure, which will have gone, defines the policy, and member states must then support it unreservedly in a spirit of loyalty and mutual solidarity. I believe that that spells the end of British independence.[89]

Article 11 defines the Union's areas of "exclusive competences" which will:

> ensure free movement of persons, goods, services and capital and establish competition rules, within the internal market, and in the following areas:

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87 Plenary debate 28 February 2003 at: http://www.europarl.eu.int/europe2004/textes/verbatim_030228.htm

88 Standing Committee on the Convention 12 February 2003 c 018

89 Ibid

- customs union,
- common commercial policy, monetary policy for the Member States who have adopted the euro,
- the conservation of marine biological resources under the common fisheries policy.

The Working Group had been divided over defining "exclusive competence". Should the present Treaty Articles 3 and 4, setting out the areas of Community activity, be redefined? Some believed the criteria for classification under "Union competence" should primarily be political, while others thought that classification under exclusive competence should be based on purely legal considerations. Only matters where it was essential that the Member States did not act alone, even if no Union solution could be found, should be classified as exclusive competence. The Group had concluded that the two views might be reconcilable.

Draft article 11(2) would give the Union exclusive competence to conclude international agreements when this was provided for in EU law, was necessary for the Union to act internally, or affected an internal EU act. In the *ERTA* case in 1971 the ECJ took the view that the Community had an exclusive power after it had adopted a common rule[90] and subsequent cases extended the powers of the Community in the conclusion of international agreements.[91] Baroness Scotland thought Article 11(2) sought to codify ECJ case law, which would probably be insufficient to capture the complexities of Court judgments. Citing the recent "Open Skies" ruling of the ECJ, she thought it would be

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90 Judgment 31 March 1971, *Commission v Council (European Road Transport Agreement- ERTA)*, case 22/70, [ECR] 1971

91 The ECJ ruled in *ERTA* (Case 22/70, [1971] ECR 263) that the prior use of internal competence adopting 'common rules' was a necessary condition for the origin of the respective external power. In the *Kramer* judgement (Joined Cases 3, 4 & 6/76, *Cornelis Kramer and others*, [1976] ECR 1279) it was implied that even if no common rule had been adopted at Community level, the EC may have a treaty-making power flowing implicitly from other provisions of the EC Treaty. Opinion 1/76 (, [1977] ECR 741) confirmed that the implied treaty-making power may flow from the provisions creating internal powers. The ECJ ruled in the Opinion that: "Whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion. This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. It is, however, not limited to that eventuality. Although the internal Community measures are only adopted when the international agreement is concluded and made enforceable,[...].[t]he power to bind the Community vis-à-vis third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is necessary for the attainment of one of the objectives of the Community".

wiser to leave the Court to its jurisprudence.[92] This was not a simple matter: it would be impossible to transpose all caveats into two lines and anything longer would be unclear.[93] In response, the UK Liberal Democrat MEP, Andrew Duff, stated: "codifying is an essential function of the process of drafting the constitution. If we are not codifying we are not drafting a constitution. If we are not drafting a constitution, what on earth are we doing?"[94]

Article 12 defines "shared competences" as the internal market, the area of freedom, security and justice, agriculture and fisheries, transport, trans-European networks, energy, social policy, economic and social cohesion, environment, public health and consumer protection.

Baroness Scotland thought an indicative list of shared competences would not be acceptable, as a catalogue of competences had been rejected in the Working Group. Shared competences ought to be "a residual category".[95] Those areas of policy with aspects of shared competences and supporting measures (such as development aid, research and development and economic policy) should be enumerated in a separate article "for the sake of clarity and to ensure that we respect competence".[96]

David Heathcoat-Amory was concerned about a creeping extension of Union powers, telling the Standing Committee on the Convention that draft article 12 was:

> By any standard […] a colossal extension of the powers of the Union, and it shows that the constitution will not make a clear and final division between the powers of the Union and those of member states. Instead, there will be no realistic or clear check. A new constitutional doctrine will accelerate the transfer of decision making from member states to the Union.[97]

At the plenary debate on 28 February 2003 Mr Heathcoat-Amory argued that the draft articles did not offer a clear division of powers between the Union and Member States.

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92 Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98 against the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany. The Court firmly established the application of the so-called 'AETR' principle in aviation by which the Community acquires an external competence by reason of the exercise of its internal competence, "where the international commitments fall within the scope of the common rules", or "in any event within an area that is already covered by such rules". The Court specified in these cases that "whenever the Community had included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries, it acquires an exclusive external competence in the spheres covered by those acts". The Court identified three specific areas of Community exclusive competence: airport slots, computer reservation systems and intra-Community fares and rates (COM(2002) 649 final, 19 November 2002).

93 Plenary 28 February 2003 at:http://www.europarl.eu.int/europe2004/textes/verbatim_030228.htm

94 Plenary 28 February 2003

95 Ibid

96 Ibid

97 12 February 2003 c006 at: http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/cmconv.htm

The inclusion of areas such as transport, energy, social policy and public health under article 12 would not create clarity, while other areas of shared competence could be 'buried' in Part II of the treaty. The text did not act as a check or limit on the Union created by the constitution, nor accurately reflect the existing position. In his view radical new powers had been given to the Union to co-ordinate Member States' economic policies and to represent them in international agreements on such matters as intellectual property rights and criminal justice.[98] For Andrew Duff the classification of competences was "too rigid".

According to the *Financial Times*, "convention officials concede that the draft text underestimated the sensitivity in countries such as the UK on issues such as the EU's powers and national sovereignty".[99]

Article 13 states that the Union shall co-ordinate the economic policies of the Member States, in particular by establishing broad guidelines, and the Member States shall conduct their economic policies, "taking account of the common interest, so as to contribute to the achievement of the objectives of the Union". Specific provisions will apply to Eurozone States, suggesting that these Members could make their own rules for the "Club of Twelve".

Fears have been expressed that under Article 13 the constitution, not the Member States, confers powers on the Union. Mr Heathcoat-Amory pointed to the difference between the existing TEC Article 99 and draft article 16 in the area of economic policy. Article 99 states that the "Member States shall regard their economic policies as matters of common concern", while draft article 13 states that "The Union shall coordinate the economic policies of the Member States". This, he thought, would "profoundly alter the nature of the European Union and the role of member states". It was "a significant change because, up to now, it has always been assumed and claimed that the powers of the Community and the Union are delegated to them by Member States. That will no longer be the case. The draft makes it clear that the constitution gives the Union, which is separate from member states, certain powers".[100]

An article in the French newspaper, *Le Monde*, regretted the draft's failure to adhere to the conclusions of the Working Group on Social Europe, drawing attention to "the absence of any reference to a social market economy that the group proposed to replace the idea of an open market economy, an expression currently used in the Treaties to define the European model".[101]

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98 Plenary debate 28 February 2003, at: http://www.europarl.eu.int/europe2004/textes/verbatim_030228.htm

99 *Financial Times*, 20 February 2003

100 Standing Committee on the Convention 12 February 2003 c005 at: http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/cmconv.htm

101 *Le Monde*, 18 February 2003 (unofficial translation)

Article 14 requires Member States to "actively and unreservedly support the Union's foreign and security policy in a spirit of loyalty and mutual solidarity." Although Working Group VIII on defence had been generally opposed to a mutual defence commitment, there was "broad support" for a "solidarity clause" requiring "recourse to all of the Union's instruments for the protection of the civilian population and democratic institutions".[102] This would be enshrined in the constitutional treaty and would:

> … enable all the instruments available to the Union to be mobilised (including the military resources and the structures originally set up for the Petersberg tasks, as well as police and judicial cooperation, civil protection, etc.) in actions undertaken within the territory of the Union aimed, in particular, at averting the terrorist threat, protecting the civilian population and democratic institutions and assisting a Member State within its territory in dealing with the implications of a possible terrorist attack. It would therefore be a question of taking advantage of the interdisciplinary character of the Union's approach, in order both to respond effectively to new challenges and to indicate clearly what distinguishes the European Union from a military alliance.[103]

Mr Heathcoat-Amory wanted to delete Article 14 altogether, stating:

> I regard this article as dangerous, but I am not sure whether its aspect is comic or tragic, given that it is being asserted at the very moment when the absence of a common foreign policy on Iraq is clear for all to see.[104]

Gisela Stuart thought there would be no point in deleting words that were enshrined in Treaty commitments into which the UK had already entered and which were dealt with in draft article 11.2. She preferred a merged CFSP and defence article in the constitution:

> I will argue that the two should be merged, because I do not want a Commission competence for external policies to be created through the back door. I shall also watch extremely closely to ensure that the European Court of Justice has no jurisdiction over those matters, and that when simplification is considered, they clearly remain intergovernmental matters.[105]

Article 15 sets out areas where the Union may take "coordinating, complementary or supporting action": employment, industry, education, vocational training and youth, culture, sport, protection against disasters. The EU's powers are limited here and new laws "cannot entail harmonisation of Member States' laws and regulations". This conforms with the WG conclusions.

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[102] CONV 461/02 para 56-7
[103] Ibid para 57
[104] Standing Committee on the Convention 12 February 2003 c 013
[105] Ibid c 013-4

Article 16 is the replacement for the catch-all TEC Article 308 that gave rise to considerable debate in Working Group V on complementary competences. As recommended by the Group, the draft limits the application of the article to the framework of policies to be defined in Part Two of the draft constitution, and requires unanimity in the Council and EP assent, rather than merely its view. It also provides a monitoring system (presumably the early warning system contained in the draft protocol) to alert national parliaments to proposals based on it.

Most of the WG had agreed that a certain measure of flexibility in the Treaty system of competence should be preserved, to allow the Union to deal with unexpected developments and challenges. There was general agreement in the Group that Article 308 should state that it cannot serve "as the basis for widening the scope of [Union] powers beyond the general [Treaty] framework" or "be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty", or as the basis for harmonisation measures in policy areas where the Union rules out harmonisation. The Praesidium draft article only guarantees the third of these limitations.

At the Standing Committee on the Convention Lord Stoddart pointed out that the flexibility clause meant that the Council and EP would be able to "alter the Constitution without ratification by national Parliaments".[106] Gisela Stuart admitted that her

> initial instincts were that if we draw up a constitution that defines competences, a flexibility clause ought to be unnecessary, or we define the powers, but have a clause that, in essence, covers anything that we have not thought of at that stage".[107]

She argued that:

> if the article remains as it stands, it will provide a back-door means of effecting treaty changes. Logically, if article 16 is intended only to be used in emergencies, it should contain a sunset clause, because other mechanisms should be available for permanent use".[108]

In her account to the Standing Committee, she also expressed reservations about the meaning the Convention was attributing to Treaty 'status quo' during its discussions. She cited the amendment to Article 308 as an example:

> There has also been a tendency to describe arrangements as the status quo when that is debatable. What is described as the status quo in the draft articles is the status quo in treaty articles, plus the abuse of those powers over a number of years. I shall give an example. When we discussed a replacement for article 308,

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[106] 12 February 2003
[107] Ibid c 014
[108] Ibid

> which clearly allows the treaty to act beyond its capacity in pursuing the implementation of the single market, I questioned the existing drafting. It was argued back to me that as the majority of cases in which that article has been used in the past few years relate to Bosnia, Macedonia and the Balkans, and were therefore external action, it is wholly unreasonable to say that the powers in article 308 should not be extended beyond implementing the single market, because they entail external relations.[109]

By the end of February 1,187 amendments to these draft articles had been submitted by Convention members and alternates, giving rise to fears that the Convention timetable would slip. The amendments are to be debated in blocks and the Praesidium will then redraft the articles to take account of the consensus. The plenary debated the amendments on 27 and 28 February 2003, the anniversary of the launch of the Convention, and the Praesidium now has to reconcile its drafts with the numerous amendments.

David Heathcoat-Amory questioned the Government about its position on the draft constitution, in view of the fact that the first articles appeared to contradict earlier Government views on its content:

> As the Minister knows, the convention has published a draft constitution, which is organised on a federal basis, as it puts it, with massive new powers, especially over economic policy, and with full legal incorporation of the EU charter of rights. Since all that is contrary to the Government's previously expressed policy positions, will he either explain why they are making all those concessions in the convention or instruct the Government representative, who is not in his Department, to start saying no, clearly and unambiguously, to the new constitution? It will be impossible to retrieve all the new concessions at the intergovernmental conference that the Minister mentioned.[110]

Mr MacShane was unruffled by this call for urgent action and confident that the amendment process would remedy anything which did not meet with the Government's approval.[111] The Government Representative, Peter Hain, has proposed amendments, with explanations, to almost all the 16 articles, which can be found in Appendix II:[112]

For the UK Parliamentary Representative and Praesidium member, Gisela Stuart, the 16 articles were only a "first offering" to which members could table amendments. This

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[109] Standing Committee on the Convention, 12 February c 004 at: http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/st030212/30212s01.htm

[110] HC Deb 25 February 2003 c113

[111] Ibid

[112] The Convention Secretariat has published a summary of all proposed draft amendments to the 16 articles in CONV 574/03, 21 February 2003, which can be accessed at: http://register.consilium.eu.int/pdf/en/03/cv00/cv00574en03.pdf.

would indicate how divergent positions were and enable the Convention to decide how to try to reconcile positions. She pointed out that Part I of the constitution was dependent to some extent on legal bases for policies to be set out in Part II, and the technical group drafting Part II had been instructed to return to the Convention (presumably the Praesidium initially) for guidance in "grey areas". For example, there had been lengthy discussions in the Praesidium on whether "public health" should be described as a "shared competence" or an "area for supporting action." In the Praesidium's draft it is the former, while the existing Article 152 TEC defines it as principally a "complementary competence", with some exceptions.[113]

Mr Heathcoat-Amory warned that national parliamentarians would be left with too little time in which to respond to the draft constitutional text. He thought the Convention was treating enlargement as no more than an arithmetical exercise, instead of reckoning with the cultural change and greater diversity that enlargement would bring. Both Lords Maclennan and Tomlinson were concerned about the Convention procedures and the short deadlines for tabling amendments to the draft articles. Lord Maclennan was disturbed that the idea of a 'Congress' kept reappearing, despite overwhelming opposition within the Convention.

The amended articles presented by Mr Heathcoat-Amory are set out, with explanations, in Appendix II.[114]

V Praesidium Draft Articles 24-33

On 28 February 2003 the Convention was presented with the Praesidium's draft Title V of the treaty, namely Articles 24 to 33, on the exercise of Union competence.[115] The draft is based on the conclusions of Working Group IX on Simplification in the light of the plenary discussion of the final report. Articles 29 (Common Foreign and Security Policy), 30 (Common defence policy) and 31 (Police and criminal justice policy) are not included at this point.[116]

The draft distinguishes between legislative acts, which it calls "European laws", and "European framework laws", which would be adopted under the co-decision procedure, renamed the "legislative procedure", with some exceptions under draft article 25(2). The Commission would continue to initiate legislative proposals and there would be parity between the Council and the EP in the adoption of legislation, except in the area of police

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[113] National parliamentarians' caucus meeting on 6 February 2003. David Heathcoat-Amory later pointed out that the working groups on complementary competences and Social Europe had come to different conclusions on the status of public health as a competence.

[114] The amendments proposed by alternates are not given here, but they can be accessed at: http://european-convention.eu.int/amendemTrait.asp?lang=EN

[115] The intervening articles in Title IV on institutional arrangements are still under discussion.

[116] See CONV Doc. 571/03.

and judicial cooperation in criminal matters, which would be subject to special rules. Transparency was a major concern for the drafters. Non–legislative acts, European regulations and decisions, would be adopted by the Council or Commission exercising executive powers. In line with the conclusions of WG IX on the CFSP, decisions would be the only means of adopting CFSP instruments under draft article 29. Draft article 27 specified and defines the conditions and rules for delegating legislation to the Commission. Draft article 28 clarifies the present Article 202 TEC on implementing powers at Community level. Implementing powers would be conferred on the Commission, or, in the case of CFSP, on the Council. This draft also sets out the legal basis for the current "committee procedure" decision, when implementing powers are exercised by the Commission.

Mr Hain proposed amendments with explanations to this batch of draft articles, which are contained in Appendix II.

VI Draft Protocols on "Subsidiarity and Proportionality" and "The role of national parliaments"

Convention Working Group I had considered the principles of subsidiarity and proportionality, while Working Group IV had looked at the role of national parliaments. The two are closely linked, as subsidiarity assumes a greater role for national parliaments in EU activities.[117] WG IV had recommended an "early warning system" intended to reinforce the monitoring of compliance with the principle of subsidiarity by national parliaments. An *ex ante* monitoring mechanism would for the first time involve national parliaments in the European legislative process, enabling them to ensure correct application of the subsidiarity principle through a direct relationship with the law-making institutions. The Group thought the Treaty should stipulate that the Commission should address its legislative proposals directly to each chamber of each national parliament at the same time as to the Community institutions (at present national governments forward proposals to their parliaments).

Draft Protocols on the application of the principles of subsidiarity and proportionality and the role of national parliaments were published on 27 February 2003 and presented to the plenary on 28 February.[118]

[117] Article 5 TEC is the current subsidiarity article, and contains an assumption that the Member States will take action in areas where the Community does not have exclusive competence, unless 'by reason of the scale or effects of the proposed action', it could be better achieved by the Community.

[118] These Protocols are contained in CONV Doc 579/03, 27 February 2003.

A. Subsidiarity and Proportionality

The draft texts do not appear to reflect the conclusions of Working Groups I and IV and the subsequent plenary debate on the WG final reports. Many members thought the compromise text on the early warning system, in particular, lacked teeth. The Praesidium text confers the power to activate the early warning system on each national parliament, and not on each chamber, as recommended by WG I (and endorsed by WG IV). It leaves to national parliaments the internal arrangements for the consultation of each chamber (in bicameral parliaments) and/or regional parliaments with legislative powers. The Praesidium text recommends that the threshold for activating the mechanism should be set at one third of national parliaments, as recommended by WG I.

Once the early warning system has been activated, the text provides a weak basis for the Commission to take into account the arguments put forward by national parliaments, stating: "The Commission shall take account of the reasoned opinions of the national parliaments". Following this, the Commission may decide to "maintain, amend or withdraw its proposal". Even if a majority of national parliaments activates the early-warning system, the Commission is not obliged to withdraw its proposal. The draft has not adopted the idea submitted to the Praesidium by Gisela Stuart[119] to introduce a 'red-card' procedure requiring the Commission to withdraw its proposal if reasoned opinions are received by two-thirds of national parliaments.

While both WGs had recommended that *ex post* ECJ judicial review of compliance with the subsidiarity principle could be strengthened, and that a national parliament (or one chamber thereof) should be allowed to refer the matter to the ECJ for violation of the principle of subsidiarity, Article 8 of the Praesidium draft states:

> Under Article [current Article 230] of the Constitution, the Court of Justice shall have jurisdiction to hear actions brought by Member States on grounds of infringement of the principle of subsidiarity, where appropriate at the request of their national parliaments, in accordance with their respective constitutional rules. Under the same Article of the Constitution, the Committee of the Regions may also bring such actions as regards legislative acts on which it was consulted.[120]

This effectively removes the right of national parliaments to independent recourse to the ECJ, as parliaments would have to request their governments to act as their conduit. On the other hand, paradoxically, the draft allows the Committee of the Regions to bring cases directly before the ECJ.

The principle of proportionality is barely mentioned in the draft. The WG on national parliaments had recommended that "the link between subsidiarity and proportionality

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[119] CONV 540/03

should be further emphasised".[121] This idea was raised again in the plenary debates on draft constitution Article 8, at which the UK Government representative had pressed for greater linkage between the two.

Peter Hain submitted a detailed amendment to the protocol, which adds substantially to paragraph 1 on institutional respect for subsidiarity, in order to clarify some of the hitherto vague provisions understood to be guaranteed by that principle:

> **1 bis**. For Union action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Union. The following guidelines should be used in examining whether the above mentioned condition is fulfilled:
> - the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
> - actions by Member States alone or lack of Union action would conflict with the requirements of the Constitution or would otherwise significantly damage Member States' interests;
> - action at Union level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.
> **1 ter**. The form of Union action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Union shall legislate only to the extent necessary. Other things being equal, framework laws should be preferred to laws.
> **1 qua**. Regarding the nature and the extent of Union action, Union measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Constitution. While respecting Union law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Union measures should provide Member States with alternative ways to achieve the objectives of the measures.[122]

Mr Hain inserts 'proportionality' in all paragraphs where the Praesidium text had omitted any reference to it and stresses the regional dimension. In paragraph 2 he proposes that Commission consultation shall always include taking account of "any regional and local dimension of the action envisaged" (deleting "where appropriate") and includes in paragraph 3 the Committee of the Regions as a recipient of all Commission legislative and amended proposals and all Council and EP legislative resolutions and common positions. The COR would also be able to send a reasoned opinion on subsidiarity/proportionality to the EU institutions. Mr Hain deletes paragraph 7 on the submission of a reasoned opinion prior to a Conciliation Committee, meeting on the grounds that this would over-complicate the mechanism.

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[120] CONV 579/03 27 February 2003
[121] CONV Doc.353/02
[122] http://european-convention.eu.int/Docs/Treaty/pdf/2000/SubHain.pdf

Both UK Parliamentary Representatives co-sponsored amendments to the Subsidiarity and Proportionality Protocol.[123] These include reference to proportionality where it had been omitted from the Praesidium draft and in paragraph 5 reinstate the WG proposal that any chamber of a national parliament can send a reasoned opinion on the non-compliance of a proposal with subsidiarity and proportionality. In article 6 they propose that where at least one third of the chambers of national parliaments issues a reasoned opinion,[124] the Commission should review its proposal, "taking the utmost account of the reasons given by national parliaments".[125] The amendment places a much greater onus on the Commission to justify its subsequent action. It further strengthens paragraph 6, stating that a proposal should not be proceeded with if two-thirds of national parliament chambers issue reasoned opinions for non-compliance. If the Commission subsequently introduces a new proposal on the same subject, it would have to justify this decision, taking into account the previous reasoned opinions.[126] The proposal provides for a reconsideration of a common position or amendments and subsequent justification for action by the Council or the EP. It also removes the need for Member State governments to be commissioned by parliaments to bring an action to the ECJ. Finally, it emphasises the role of national parliaments by adding them to the recipients of the Commission report on the application of draft article 8(3) and (4) of the constitution.

B. Role of National Parliaments

The draft Protocol on the role of national parliaments also failed to take up several WG recommendations that were broadly endorsed in the Plenary. These include provisions to ensure that the Council fully respected the 6-week period following publication of a Commission legislative proposal and a possible role for the Member States' Committees on European Affairs, or COSAC, in promoting interparliamentary co-operation.[127]

The Stuart/Heathcoat-Amory co-sponsored draft takes up many Working Group recommendations omitted from the Praesidium draft, which sought greater involvement by national parliaments in the activities of the Union. In an expanded preamble it notes the COSAC agreement in January 2003 on relations between EU governments and parliaments and spells out the need for more national parliamentary involvement in the interests of democracy and accountability. It emphasises the importance of national parliaments being able to express their views before decisions are made, expressly rules out "preliminary agreements" becoming the basis for the adoption of legislation in Council and insists on adequate time specifications at the various legislative stages to

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123 http://european-convention.eu.int/Docs/Treaty/pdf/2000/SubStuart.pdf

124 For this and related purposes, a unicameral parliament would count as two chambers.

125 http://european-convention.eu.int/Docs/Treaty/pdf/2000/SubStuart.pdf

126 Draft article 6 bis, http://european-convention.eu.int/Docs/Treaty/pdf/2000/SubStuart.pdf

127 The acronym is from the French "Conférence des organes spécialisés dans les affaires communautaires".

allow for national scrutiny of proposals. It gives the Council the duty to justify action in the face of a national scrutiny reserve and adds to Praesidium draft paragraph 5 (on the submission of information on Council meetings) the transmission of a record of the debate at open Council meetings. Following on from the Commission's White Paper on European Governance,[128] which advocated a "reinforced culture of consultation and dialogue" between national parliaments and EU committees, the proposal gives the Commission a duty to respond promptly to requests and questions from national parliaments and to transmit all information to national parliaments at the same time as to governments. Finally, in paragraphs 11-14, the amendment spells out the role and remit of COSAC in scrutinising legislative proposals for compliance with subsidiarity and proportionality, and requires the Union institutions to respond to any COSAC contribution. COSAC would be consulted by the EP in promoting inter-parliamentary cooperation and could promote the exchange of information and best practice between parliaments.[129]

VII A Christian Constitution?

One emotive and unresolved issue is whether the constitution should include a reference to Christianity or God. Attempts two years ago to include a reference to God in the preamble to the European Charter of Fundamental Rights failed, although the Charter, and the Treaties themselves, require Christian values, such as respect for human rights and dignity, to be upheld. Some commentators believe that notions of an essentially Christian Europe should be included in the new constitutional text. Germany, whose constitution begins with a reference to God[130], favours such a reference. The Spanish constitution mentions cooperation of the State with the Catholic Church. The Danish constitution mentions the support of the State for the Lutheran Evangelical Church. The EPP's proposed constitution for Europe (see below) also referred to Christianity in its Preamble, mentioning Europe's "spiritual and moral heritage". Pope John Paul II told Giscard d'Estaing on 31 October 2002 that he hoped a new text would include a clear reference to Europe's Christian values and to God. Monsignor Noel Treanor, the Secretary-General of the Commission of the Bishops' Conferences of the European Community (COMECE), which submitted a contribution to the Convention, maintained that an inclusive reference could be found which would take account of both those who believed in God and those who did not.

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[128] *European Governance: A White Paper*, COM(2001) 428 final, 25 July 2001

[129] http://european-convention.eu.int/Docs/Treaty/pdf/3000/ParStuart.pdf

[130] The Preamble to the *Grundgesetz*, or Basic Law of 23 May 1949 begins: "Conscious of their responsibility before God and man, …".

> Such a reference would not accord privileges to any religious group, but it would recognise that human dignity, and the freedom and rights that flow from it, are truly fundamental, transcending any particular decisions of policy and law."[131]

He recalled that the greatest systematic human rights abuses in Europe in the twentieth century had been perpetrated by secular, totalitarian regimes, and concluded: "Faith influences the way we see the world and behave towards others, so to regard it as simply a private matter is absurd".[132] The Vatican's line is supported by Italy, Poland, Slovakia and Germany. The Polish Government would like a reference to God in its own constitution repeated in the future EU treaty or constitution and is seeking such a reference in the accession treaty due to be signed on 16 April 2003.

However, a direct reference to God or Christianity is unlikely to be acceptable for many Member States whose constitutions do not contain such references (the French constitution, for example, emphasises the secular nature of the State. The European Socialists and the Greens on the Convention are opposed to such a reference, which they consider discriminatory, and anti-racist groups have found the Pope's comments on the matter "extremely worrying".[133] Such a reference could also be incompatible with membership for Turkey, a Muslim state.

The Commission President, Romano Prodi, was not in favour of a reference to the Christian religion in the future constitution.[134]

> In the "Pénélope" document, this article, like all the other provisions of the Charter, becomes an integral part of the draft constitution and consequently takes on genuine constitutional value. Freedom of religion and conscience is indeed an essential and fundamental right, and hence a constitutional right, given the diversity of faiths and opinions in Europe.
> […]
> Apart from these constitutional differences, account should also be taken of the many religions and philosophies or schools of thought that currently exist in Europe. For all these reasons, we preferred to state, clearly but "neutrally", the contribution of religions to European integration, stressing from the first article of the draft constitution the importance of the "spiritual and moral values" on which the Union is based.
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> A reference to individual religions could be seen by some people as a factor of division between citizens (the followers of such religions and all other people),

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131 *European Voice*, 28 November – 4 December 2002.
132 Ibid.
133 Mouloud Aounit, Mouvement Contre le Racisme et Pour L'Amitié entre Les Peuples, *European Voice*, 7-13 November 2002.
134 "What reference to religion in the European Constitution?" http://europa.eu.int/futurum/documents/offtext/prodireligion_en.htm

> whereas the reference to the values expressed by these religions should be a factor of unity and collective identification.
>
> […] If the new Europe is built on the basic values that have shaped it over its history, this will benefit all people, regardless of their spiritual or philosophical tradition. It would not be right, in the light of history, at a time when the foundations of the new, greater Europe are being established, to marginalise the religions and movements which have contributed to the culture and humanism of which Europe is rightly proud, and which are continuing to do so. However, this does not at all mean disregarding or downgrading the requirement for the secularism of states, and hence of Europe. It means taking account of Europe's roots, which are to be found in humanism, the Enlightenment and the Greco-Roman heritage, but also in the religious and spiritual heritage.
>
> Recognising this heritage does not mean sending a message of rejection and exclusion. On the contrary, it is the ability to mix and combine very diverse influences and cultures that constitutes the real strength of Europe.[135]

This issue revealed deep divisions between conservatives and socialists at the Convention plenary debate on the first draft articles on 27 February 2003. Several amendments have been submitted calling for a reference to God and Christianity as rooted in European history and more than 80 amendments proposed an article on European values in which religion would be included. The Italian Deputy Premier, Gianfranco Fini, whose National Alliance party has strong views on religion, called for the constitution to state that the EU was a "community that shares a Judeo-Christian heritage as its fundamental values".[136] Several other conservative delegates proposed an even stronger and more direct mention of God "as the source of truth, justice, good and beauty".[137] This group from Germany, the Netherlands, Luxembourg, Italy and Poland stated that "Without these values Europe would not be what it is today".[138] On the other hand, socialist contributors called for amendments which guaranteed the separation of church and state. How religion is handled could have serious legal implications for the constitutional text and could influence the outcome of future court rulings on a range of ethical issues, such as euthanasia, abortion and human cloning. Andrew Duff commented wryly:

> Concerning religion and Almighty God, he is responsible for bringing Christendom, Judaism and Islam graces, faith and duties, but he is not responsible for the flowering of liberal democracy and fundamental rights and therefore he should not appear in our constitution.[139]

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135 "What reference to religion in the European Constitution?" at: http://europa.eu.int/futurum/documents/offtext/prodireligion_en.htm

136 Plenary debate 27 February 2003 at http://www.europarl.eu.int/europe2004/textes/verbatim_030227.htm

137 Ibid

138 Ibid

139 Ibid

The constitutional text is unlikely to contain a direct reference to God, but it might well confirm that the EU respects the national identity of Member States, including the legal status of churches and religious societies. This would preserve the various concordats the Catholic Church has agreed in countries such as Germany and would safeguard existing arrangements whereby a proportion of income tax collected by the government is passed on to the clergy (as, for example, in Germany and Italy).

Dr MacShane put forward the Government's view in a parliamentary reply in February 2003:

> The EU is a multicultural group of States with a large non-Christian population. Britain is itself a multi-cultural and multi-faith society. Any reference in the EU's constitutional Treaty would need to reflect this diversity, which is one of the greatest strengths of both Britain and the EU. That said, it is difficult to see what such a Treaty reference would add. Article 10 of the EU Charter of Fundamental Rights already states that everyone has the right to freedom of thought, conscience and religion.[140]

VIII An "Exit Clause"

Several of the constitutional texts submitted so far, including the Praesidium 'skeleton' draft and the text submitted to the Convention by the British Government, the so-called 'Cambridge text',[141] contain articles providing for a Member State to withdraw from the Union, a facility that has been rejected by the Member States on previous occasions. While the Praesidium has not yet elaborated on its skeleton article, the Cambridge text suggests the following formulation for Article 27:

> *Any Member State may withdraw from the European Union. It shall address to the Council its notice of intention to withdraw.*
> *The Council, meeting in the composition of the Heads of State or Government and acting by unanimity, shall determine, after consulting the Commission and the European Parliament, the institutional adjustments to this Treaty that such withdrawal entails.*
> *3. For the purpose of this Article, the Council, meeting in the composition of Heads of State or Government, and the Commission shall act without taking into account the vote of the nationals of the withdrawing Member State. The European Parliament shall act without taking into account the position of the Members of parliament elected in that State.*

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[140] HC Deb 25 February 2003 c433-4W

[141] The work was commissioned by the FCO and carried out by a group of constitutional experts from Cambridge University headed by Professor Alan Dashwood. It was published in October 2002.

As the commentary explains, this makes it explicit that a Member State would not need 'permission' to withdraw from the Union. Institutional rearrangements would be granted by agreement of heads of state, without the need for ratification by the remaining Member States, and the EP could, for example, give its assent to the withdrawal, as under the accession procedure.

A formal withdrawal provision has been welcomed by some, but the Irish Taoiseach, John Bruton, believes that such a provision:

> […] could become a bargaining weapon that could be abused by bigger states who were not getting their way. While a withdrawal threat from a small state might be ignored, even the possibility of such a threat from Germany or France would give those countries an inordinate increase in their bargaining power.[142]

The position in the UK has been that there was no need for a withdrawal clause from the present EC Treaties. The then Foreign Office Minister, Baroness Scotland, asked why there was no provision in the EC Treaties for the free and unilateral withdrawal of Member States, as there is for the treaties governing NATO and the WTO, replied:

> We see no need for the Treaties governing membership of the Union to include a specific provision on unilateral withdrawal. It remains open to Parliament to repeal the European Communities Act 1972, the logical consequences of which would be to withdraw from the EU. The terms of such a withdrawal would be for the Government to negotiate with the other member states.[143]

The UK Government Representative on the Convention, Peter Hain, told the European Scrutiny Committee in November 2002:

> We saw it for the first time as we did other ideas in the skeleton draft constitution which he put forward and we are having a look at it. It may be a good idea that Members States which are so fed up with the European Union are able to remove themselves from it. We need to look at the detail, we need to know exactly what it means.[144]

National constitutions naturally do not contain such a clause, although they almost always provide a mechanism for amendment. The inclusion of one in a future EU constitution would reflect the unique, hybrid nature of the EU. It would contain elements typical of a national constitution, on the one hand, and others belonging to the statutes governing membership of international organisations, on the other. Treaties often make it explicit in their withdrawal clauses that this does not mean release from treaty obligations prior to withdrawal. For example:

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[142] *European Voice*, 5-11 December 2002.
[143] HL Deb, 11 January 2000, WA 96-7.
[144] Minutes of Evidence to ESC, 20 November 2002, 16 December 2002, HC 103-I, at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/103-i/2112002.htm

a. WTO Agreement

The Agreement Establishing the World Trade Organisation (as amended, 1994) contains a withdrawal provision in Article XV:

> 1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.
> 2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.[145]

b. Council of Europe

The Statute of the Council of Europe has a provision for withdrawal from the organisation in Article 7:

> Any member of the Council of Europe may withdraw by formally notifying the Secretary General of its intention to do so. Such withdrawal shall take effect at the end of the financial year in which it is notified, if the notification is given during the first nine months of that financial year. If the notification is given in the last three months of the financial year, it shall take effect at the end of the next financial year.

The Council of Europe's *European Convention on Human Rights* provides for denunciation of the Convention in Article 58:

> 1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
>
> 2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.[146]

c. Statute of the International Criminal Court (ICC)

Article 127 provides:

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[145] http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.
[146] Signed 4 November 1950

> 1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
>
> 2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.[147]

IX Ratifying a European Constitution

A. A Treaty or a Constitution?

There has been some debate over the nature of the text that will be the outcome of the Convention and how it would be ratified and adopted by the Member States. Will it annul the existing EC Treaties or simply amend them? Should its adoption be subject to a Europe-wide referendum?

Mr Giscard d'Estaing has said that the constitutional text would not be like any other treaty, implying that it might require a different ratification procedure from that of previous Treaty amendments. Gisela Stuart disagrees:

> To me this is a treaty that will come into force when it is ratified by all the member states. Whether or not it calls itself a constitution, its mechanism of ratification is that of a treaty—end of story.[148]

Lord Stoddart has questioned the legality of imposing a written EU constitution on the UK:

> Can what is proposed possibly be lawful? How on earth can a written constitution be imposed on a country that has survived on a flexible constitution? Our constitution is plain: no Parliament can bind its successor. That has never been undermined and it cannot be undermined. It is impossible for a written constitution to be imposed on the people of this country, unless we make it clear

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147 ICC Statute, signed 17 July 1998.

148 Standing Committee on the Convention 12 February 2003 c 022

> to them that if that happens, it will not really matter what they do at general elections.[149]

B. Parliamentary Scrutiny

The Standing Committee on the Convention met on 12 February 2003 to approve the Fifth Report (21st November 2002), Sixth Report (29th January 2003) and Seventh Report (11th February 2003) from the United Kingdom Representatives to the Convention on the Future of Europe. The Eighth Progress Report was published on 17 March 2003 and the Standing Committee meets for the fourth time on 19 March to discuss it.

In the Lords, Peers have questioned Ministers over Parliament's role in monitoring progress at the Convention and in responding to a final text emanating from it. Lord Maclennan asked the Government whether it intended:

> to publish a White Paper at some stage in the process; or, better still, to initiate a sequence of parliamentary debates geared to the key topics under consideration in the convention to enable Parliament to give full and timely consideration to those issues before the recommendations of the convention are set in a single frame?[150]

The Foreign Office Minister, Baroness Symons, replied that thought was being given as to "how the report back to Parliament should take place from the Government's point of view".[151] She was willing to discuss this with their Lordships and said that "The Government's mind is reasonably open on this point".[152] Lord Elton asked the Minister to

> go a little further and tell us what exactly will be the status of the document when we get it? What will be the effect of any debate which Parliament has upon it? Is it amendable? Is it guidelines? How do we influence the future and not merely express our opinions upon it?[153]

Baroness Symons replied that she really could not "give any cast-iron undertakings",[154] and agreed with Lord Tomlinson (the other alternate) that such concerns were premature.

In November 2002 Lord Pearson of Rannoch, a 'Eurosceptic', questioned the Government about how the outcome of the Convention would be handled in Parliament:

> My Lords, given the enormous importance of the constitutional issues which are being considered by the convention, will the United Kingdom Parliament be free

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149 Standing Committee on the Convention 12 February 2003 c 033
150 HL Deb 7 May 2002 c986.
151 Ibid.
152 Ibid, c987.
153 Ibid
154 Ibid.

> to accept or reject whatever the convention comes up with, or will it all be subject, as before in the progress of the European Union, to the treaty-making powers of the Royal Prerogative, which make this Parliament into a rubber stamp?

Baroness Symons replied that in her experience Parliament was not "in any way a rubber stamp", and assured Lord Rannoch that after the Convention had reported in June 2003 , there would be "an opportunity for debate by national parliaments before any treaty is drawn up".[155]

The Prime Minister has also assured Parliament that the outcome of the Convention will be scrutinised by Parliament before a new treaty is ratified:

> A new constitutional treaty would need to be ratified according to the individual constitutional arrangements in each of the member states. As with all previous EU treaties, any new treaty would be subject to rigorous scrutiny by Parliament before the UK could ratify it.[156]

C. A Referendum?

On the question of a referendum in the UK, there is no constitutional requirement to hold a referendum for any purpose in the UK, but Parliament is free to legislate for a referendum on any question at any time. In 1997 the then Leader of the Opposition, William Hague, called for a referendum on the Amsterdam Treaty, which the Prime Minister rejected, saying: "The idea that this country should have a referendum on the Amsterdam Treaty is one of the most absurd propositions that has been advanced in recent times".[157] Mr Blair also rejected suggestions for a referendum on the Treaty of Nice. The constitutional implications of previous Treaty amendments have not been considered significant enough to warrant a referendum. Indeed, both Conservative and Labour Governments have long resisted referendums to endorse EC Treaty amendments.

In the debate on the Convention on 2 December 2002 Graham Allen asked "how the Government see Parliament's role in endorsing a European convention, and also how he sees the electorate's role in defining a constitution that may govern them for many decades?"[158] Peter Hain replied that "if any treaty emerges from the convention's discussions following an intergovernmental conference it will be a new treaty, which, in the normal way, will require legislation here. The House will determine its position on

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[155] HL Deb 26 November 2002, cc638- .
[156] HC Deb 14 January 2003 c516W
[157] HC Deb 9 July 1997 c933
[158] HC Deb 2 December 2002 c 674

that treaty".[159] He confirmed this in February 2003, saying "The outcome will be put to Parliament before ratification".[160]

In response to a question from Andrew Turner as to whether the Government planned to hold a referendum on the outcome of the Convention on the Future of Europe, the Minister for Europe, Denis McShane, replied "No".[161] Mr MacShane was somewhat more expansive in reply to a question from Boris Johnson:

> This country does not have a tradition of plebiscites that allow populists to range over plebiscitary politics, using their weekly magazines to pump out endless anti-European propaganda. Every previous treaty from the treaty of accession in 1973 to Maastricht, Nice and Amsterdam has been debated properly in the House, and I think that ratification by Parliament is the right way forward.[162]

Two days later he confirmed that under the British Parliamentary tradition for the ratification of EU treaties: "The Government has no plans to hold a referendum on any new EU treaty".[163]

David Heathcoat-Amory pointed out that the opening words of the draft constitution were "'Reflecting the will of the peoples and the States of Europe", concluding that "The states of Europe aspect might be represented by Parliament, but to find the will of the people we must ask the people—and that means that there should be a referendum, both in this country and in others".[164] Lord Maclennan was circumspect, stating that "For political reasons, [a referendum] may be thought a desirable and sensible thing to do, further down the track".[165]

A group called the "European Referendum Campaign" has called for a Europe-wide referendum on the constitution, which would be held in all Member States on the same day as the European Parliament Elections in June 2004.[166] It is not clear how much support there would be for such a referendum. The Danish Prime Minister, Anders Fogh Rasmussen, has said that once the content of the new treaty or constitution has been decided, he will put it to a referendum. It is possible that there will also be a referendum in Ireland and in some of the new Member States.

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159 HC Deb 2 December 2002 c 674
160 HC Deb 7 February 2003 c c479W
161 HC Deb 18 December 2002 396 c804W
162 HC Deb 25 Feb 2003 c114
163 HC Deb 27 February 2003 c688W
164 Standing Committee on the Convention 12 February 2003 c 023
165 Ibid
166 See "The people must adopt an EU Constitution" Lisbeth Kirk *EUObserver.com* 17 March 2003

D. Opinion Polls

The European polling organisation Eurobarometer has reported the following results of surveys on a European constitution:

1. Member States

63% of EU citizens think that the European Union should provide itself with a Constitution (-4 since Autumn 2001). The strongest level of support for this idea exists in Italy (81%).
Opponents of the project represent only a tenth of the population across the EU. They are clearly in the minority in each Member States, even though they comprise 28% of respondents in Denmark and in Finland. It must however be noted that there is a high level of indecision, since 27% of all respondents did not have an opinion on the subject. The level of non-response to this question approximated 40% in Ireland, the UK and Portugal.[167]

2. Candidate states:

Two-thirds favour a European Constitution. 66% of citizens in the candidate countries think that the European Union should have a Constitution. In none of the 13 candidate countries are there more than 20% of opponents to such a Constitution, but half of the people in Lithuania and 40% in the Czech Republic and in Bulgaria have no opinion on this subject.[168]

X Conclusion

The Laeken Declaration did not set out a clear timetable for the Convention, but simply asked it to "draw up a final document which may comprise either different options, indicating the degree of support which they received, or recommendations if consensus is achieved".[169]

According to the 'roadmap' outlined by Mr Giscard on 20 December 2002, the Praesidium, having embarked on an examination of draft constitutional treaty articles in juridical format, would present all Part I treaty articles to the Convention by the end of April 2003. In parallel, an inter-institutional official group from the Council, EP and Commission would draft Part II articles. The Praesidium would present a final draft to the European Council in Thessaloniki on 20-21 June 2003.

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[167] Eurobarometer 57 (Spring 2002)
[168] *Candidate Countries Eurobarometer 2002* at: http://europa.eu.int/comm/public_opinion/archives/cceb/2002/cceb_2002_highlights_en.pdf
[169] Presidency Conclusions, Laeken European Council 15 December 2001

In March 2003 the Praesidium presented a new 'roadmap' in CONV Doc. 586/03, which set out a revised timetable with new 'spillover' plenaries, to take account of the work that would be needed to consider and reconcile the views expressed in the proposed amendments. The Praesidium has revised its timetable for the publication of parts of the constitutional treaty, tabling amendments to them and holding debates. Two "inter-sessional informal plenaries" are being held on 5 and 26 March for speakers unable to participate in the preceding plenaries. These 'spillover plenaries' will be chaired by Vice Presidents Dehaene or Amato rather than Giscard, and more of them are to be expected in April and May.

The Praesidium is considering establishing a second discussion forum to look at budgetary procedure. Some Convention members are beginning to doubt the wisdom of attempting to draft a full constitutional treaty in the time available. Mr Giscard appears to be relaxed about the possibility of seeking an extension of the Convention's work until the autumn, although others think this would affect the Convention's credibility.

Following the conclusion of the Convention, some Member States (including the UK and Sweden) want a breathing space for their parliaments to consider the outcome of the Convention before launching an Intergovernmental Conference. The EU candidate states have also called for a delay in the timetable to ensure that a new treaty is not concluded until they become full members in May 2004.[170] Although the Laeken Declaration had envisaged a reflection period of around six months between agreement on a text and the launching of an IGC, the forthcoming Italian Presidency is keen to press on with the process quickly.

[170] see CONV 599/03, 7 March 2003

Appendix I Other Constitutional Proposals

By the end of 2002 a great number of draft constitutions had been put to the Convention. Below are references and links to some constitutional texts contributed to the Convention.

- *Constitution of the European Union*, Commission Feasibility Study ('Penelope'), President Romano Prodi, with Commissioners Barnier and Vitorino, 4 December 2002, at: http://europa.eu.int/futurum/documents/offtext/const051202_en.pdf
- Commission Communication to the Convention, 22 May 2002, "A Project for the European Union", COM(2000)247, point 2 "A Constitutional Treaty", p.18
- Andrew Duff, *A Model Constitution for a federal Union of Europe*, CONV 235/02, at http://register.consilium.eu.int/pdf/en/02/cv00/00234en2.pdf
- Elmar Brok, EPP-ED *Constitution of the European Union – Discussion Paper*, 10 September 2002, CONV 325/02, at: http://www.teameurope.info/press/EDD_Docu_2.pdf
- Robert Badinter (former president of French Constitutional Council), *Ma Constitution pour l'Europe*, 26 September 2002, CONV 31/02
- F. Dehousse and W. Coussens (European Policy Centre), *The Constitution of the European Union*, 17 September 2002, at: http://www.theepc.be/PDF/Basictreaty.pdf
- Party of European Socialists, *Priorities for Europe*, 3 October 2002, at:
- *Draft Constitutional Treaty of the EU and related Documents* (Cambridge Draft/FCO), 28 October 2002, CONV 345/1/02, rev1, at: http://register.consilium.eu.int/pdf/en/02/cv00/00345-r1en2.pdf
- Convention Secretariat (Giscard), *Preliminary draft Constitutional Text*, 28 October 2002,CONV 369/02, at: http://european-convention.eu.int/docs/sessPlen/00369.en2.PDF
- *EPP Draft Constitution* (Frascatti Draft of 10 November 2002), up-dated version, 5 December 2002, CONV 325/1/02/REV1, at: http://www.epp-ed.org/Press/pdoc02/them01constitution-ue.doc
- *Draft Constitution for the European Union*, Elena Omella Paciotti, 19 November 2002, CONV 335/02, at: http://register.consilium.eu.int/pdf/en/02/cv00/00335en2.pdf
- Michael Roth and Günter Gloser (SPD members of *Bundestag*): *Verfassung für die Europäische Union (Constitution for the EU*, in German only) at: http://metpol.de/konvent/
- Eurosceptic Constitution, Jens-Peter Bonde with the assistance of David Heathcoat-Amory, November 2002, Democracy Forum

A. The Commission Feasibility Study (Pénélope)

In July 2002 the Commission President, Romano Prodi, and the two vice-presidents, António Vitorino and Michel Barnier, commissioned a team of legal experts, headed by the French Director General for Transport and Energy, François Lamoureux, to draft a constitutional treaty in a secret project, codenamed *Pénélope*. The draft was made available to the Commission on 2 December 2002 and details appeared in *Le Monde* on 4 December. This so-called "Feasibility Study" was published as a working document on the Europa *futurum* website.[171]

The authors claim that, by reducing the number of pages of the existing Treaties from 225 pages to 125, their text fulfils the Jack Straw criterion of fitting in a pocket.[172] The Commission's draft is different from and much more detailed than the Praesidium's first draft, although it is generally based on a similar structure. It consists of three parts: 'Principles', 'Fundamental Rights' and 'Policies'. It criticises the Praesidium's "rigid classification of categories of powers (exclusive, concurrent, national)[173] and proposes instead a threefold hierarchy of "principal policies", "flanking policies" and "complementary actions". Some Treaty chapters have hardly been altered (e.g. EMU, competition, social policy and Euratom, except for the removal of obsolete provisions), while others are 'modernised' or "rewritten from first principles".[174] The document retains the Article 308 catch-all provision,[175] extending it to all areas of the Union's policies and replacing unanimity with a "reinforced majority" in the Council, with the European Parliament given a power of assent, rather than the present consultation.

The draft is based on the general principles of subsidiarity and proportionality and the Union having only such powers as are conferred upon it by the constitution. Powers not so conferred remain with the Member States.[176] Article 32 concerns subsidiarity and proportionality: "The national parliaments of the Member States may on a case-by-case basis draw the institutions' attention to risks of breach of these principles". It incorporates the mechanics of the WG I procedure in an Additional Act on supplementary institutional provisions.

Many aspects of the working document are similar to, or expand upon, the proposals contained in the earlier Commission Communication.[177] It includes, for example, the

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171 http://europa.eu.int/futurum/index_en.htm

172 Feasibility Study, Contribution for a Preliminary Draft, Constitution of the European Union Working Document, 4 December 2002, "Method", p. IV. Reference to *Economist* article, 11 October 2002

173 Feasibility Study, Contribution for a Preliminary Draft, *Constitution of the European Union Working Document*, 4 December 2002, "Method", p. III

174 Ibid.

175 The current Treaty provision of a legal basis for action to attain the objectives of the Union in the absence of a specific Treaty Article.

176 Feasibility Study, Ibid, p.VII

177 *Economist* 11 October 2002

position of Secretary of the Union to take responsibility for the CFSP. Other aspects of the document are:

- An Additional Act on defence to enable Member States to establish a capacity to undertake military operations outside the Union's borders "in response to international crises" or within the Union in response to attacks

- Four other Additional Acts on the peaceful use of atomic energy, the association of overseas countries and territories, supplementary institutional provisions and territorial application, protocols, transitional and miscellaneous provisions

- The various elements of the EU's external policy (CFSP, economic relations, sustainable development, development cooperation and the external component of internal policies) are brought into one framework, although with differing procedures. The European Council adopts the principles and broad guidelines and the Council remains at the centre of decision-making by QMV.

- Systematic use of QMV and abolition of unanimity voting in the Council, even for revision of the Constitution, except for the admission of new members to the Union.

- For future revisions of Parts I and II of the Constitution (Principles and Fundamental Rights), a majority of a Convention and its components and five-sixths of the Council would be required, and the revisions would enter into force after five-sixths of national ratifications had taken place.

- Other, less onerous, requirements for revision of Part III of the Constitution (Additional Acts, institutional law, European law (i.e. current Regulations and Directives), the Finance Law enacting the budget, the adoption of financial perspectives and own resources)

- Revision of codecision procedure, with introduction of a 6-month time limit for first reading.

- Introduction of a category of "institutional law" (similar to "organic law") governing the organisation of the institutions and the working of the Union, including own resources.

- Ratification of the new constitution by Member States as under Article 48 TEU, but permitting each State, at the time of ratification, to make a Declaration confirming its desire to remain in the Union. If a Member State does not make such a Declaration, it would leave the Union but retain its established rights, to be enshrined in an agreement among the Member States.

- Financing of the Union with own resources, guaranteeing its financial autonomy, possibly with Community taxes

The authors draw some important distinctions between their draft and the Praesidium draft:

> … this institutional architecture differs form that drawn up by the Praesidium of the Convention on a few points. This contribution highlights the fact that the European Council is one formation – the most important – of the Council, and not a separate institution. Thus, the approach taken precludes a Presidency of the European Council or of the Council [of Ministers] with tasks other than those of chairing meetings or organising business. Moreover, it does not take over the idea of a Congress, nor the possibility of intergovernmental action within the Union, which carries the risk of a covert reintroduction of the "pillars".[178]

The Praesidium did not welcome this rival to their own draft treaty and at his press conference on 6 December Mr Giscard d'Estaing thought it insufficiently readable for use in civic instruction classes, and also out-of-date in its thinking.

B. European People's Party

The centre-right European People's Party (EPP), the majority party in the EP since June 1999, set out its vision of a federal Europe and a constitution for the Union in its 'Basic Programme' and in more recent publications. The EPP Action Programme for 1999-2004 stated:

> 10. As proposed by the Draft Constitution of the European Parliament, the European Union needs a constitution in order to define the specific decision-making processes of the different institutions of the Union, and the competences of the Union, individual Member States, and regions, in accordance with the principles of subsidiarity. Furthermore, this Constitution must include a Bill of Rights which accords with the European Convention on Human Rights. While awaiting this outcome, the EPP proposes to reinforce the constitutional character of the Union by, for example, coordinating the texts of the various treaties into one single text which would include within it a catalogue of fundamental rights.
>
> 11. The EPP believes that the European Union must be as close as possible to its citizens. Consequently, the EPP feels it is necessary to improve the accessibility of the citizens to Community legislation. We advocate a simplification of the law

[178] Feasibility Study, Contribution for a Preliminary Draft, *Constitution of the European Union Working Document*, 4 December 2002, "Method", p.V

> and the introduction of a hierarchy of legislation to help promote the transparency and consistency of the Community legal system.[179]

At its party congress in Estoril in October 2002 the EPP discussed a paper entitled "A Constitution for a Strong Europe", which can be accessed at: http://www.eppe.org/archive/CONST-EN-10-2002.pdf. The main proposals contained in the draft were:

- A stronger role for the Commission president
- All Council of Ministers meetings to be held in public
- Directives and regulations to be replaced
- The Commission President to be directly elected by EP
- The Merging of CFSP High Representative and External Affairs Commissioner to create a foreign relations Commissioner

The EPP produced a second discussion paper in November 2002. The new version attempts to consolidate earlier drafts with the structure of the Praesidium's "skeleton", but adding flesh to the bones of the latter. The text was drafted after a meeting of the EPP Convention Group in Frascati, Italy, 8 to 10 November 2002. In a press release on 12 November Elmar Brok, the chairman of the EPP Group on the Convention, underlined the following points about the work in Frascati:

- Consideration should be given to the question of the competencies and the institutional questions being dealt with in the first part of the constitution and not in a long second part dealing with Union policies and their implementation.
- The problem remains of defining which policy areas must fall under the exclusive competence of the Union, which are shared competences or supplementary competences of the Union.
- Should the Common Agricultural Policy fall under the competence of the Union or should it be a shared competence. The Frascati discussion showed that the majority of the EPP Convention members understood the CAP as a community task.
- The majority of the EPP Convention Group rejected the idea of creating a "Super President of the European Council".
- The President of the European Commission should be proposed by the Council to the European Parliament in the light of the results of the European elections. This proposal should be confirmed by the EP acting as a "Chamber of Citizens".
- The Commission President is the only executive president in the EU.
- Within the "Chamber of Member States" (the Council), a distinction should be made between a legislative and an executive Council. The presidency in the

[179] EPP Action Programme 1999 – 2004, adopted by XIII EPP Congress, 4 - 6 February 1999, "On the way to the 21st century".

legislative Council would still be for a rotating term but possibly extended to twelve months.

- Creative solutions should be found for the executive council. This could be headed by the Commission President, the Commissioner for Foreign Relations or a national foreign affairs Minister for a longer period.
- Giscard d'Estaing's proposal for a "Congress of peoples" needed to be questioned.[180]

C. The UK Constitutional Treaty (the "Cambridge Text")

The Cambridge Text, as it has become known, was the result of a study commissioned by the Foreign Office and drawn up by a group of constitutional experts from Cambridge University, headed by Professor Alan Dashwood. Presenting the text to the Convention, Peter Hain said that it was "not a statement of Government policy, but it is a serious, imaginative and valuable contribution to all our endeavours".[181]

The Cambridge text opens with a separate "Proclamation of the Constitutional Treaty" which the authors preferred to a traditional preamble to the constitutional text. The Proclamation sets out in "inspiring" language the achievements and aims of the Treaty. Part 2 is the draft constitution and Part 3 is the draft amending treaty. The constitutional treaty is divided into three parts: the first contains "constitutional" elements such as the definition and nature of the Union, citizenship, the limits of Union powers, the institutions and instruments by which the Union acts. The second part contains more detailed institutional, procedural and financial provisions and the third part contains general principles on possible enhanced cooperation between Member States in certain matters. Only Part One is drafted in full in the document. Some important elements of the draft are:

- There is no distinction between the Union and the Community and the Union has legal personality.
- Institutional and procedural arrangements for Third Pillar matters (Police and Judicial Cooperation in Criminal Matters) are assimilated into First Pillar arrangements.
- Second Pillar arrangements (CFSP) remain differentiated.
- Annexed to the constitutional treaty are the Act concerning Economic and Social Policy and the Act concerning Foreign, Security and Defence Policy. These three are the primary instruments of the Union order.
- The Union is established as a "constitutional order of sovereign States".

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[180] http://www.epped.org/Press/showpr.asp?PRControlDocTypeID=1&PRControlID=1466&PRContentID825&PRContentLG=en

[181] CONV 345/1/02, REV1, Contribution 122, 16 October 2002 at http://www.register.consilium.eu.int/pdf/en/02/cv00/00345-r1en2.pdf

- The Charter of Fundamental Rights is not incorporated but is referred to in Article 2.

Mr Hain told the European Scrutiny Committee:

> It contains some very good ideas such as clear dividing lines between the European Union and Member State roles, which is not defined often as clearly as it is in his test in the existing treaties but it differs from government policy in a number of areas too. I am sure you do not want me to give a running commentary on Dashwood but we thought it was a valuable contribution to the debate, not least because there was a Florence text produced by the European University Institute at Florence which was a text we did not like and which was in a sense going the super state way. We wanted to put another contribution into the debate. In practice what will happen is we will negotiate from January onwards and, indeed, the presidium of the Convention secretariat is hard at work already trying to do some drafting around fleshing out the Giscard skeleton. We will negotiate around that and bring into play some of Professor Dashwood's ideas where these things seem appropriate.[182]

[182] Minutes of Evidence to ESC, 20 November 2002, 16 December 2002, HC 103-I, at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/103-i/2112002.htm

Appendix II Proposed Amendments to Articles 1-16 and 24-33

British Government Amendments

Peter Hain proposed the following amendments, with explanations, to the Praesidium:

Article 1

1. Reflecting the will of the peoples and States of Europe to build a common future, the High Contracting Parties establish a European Union [by/under] this Constitution within which the Member States shall co-ordinate certain policies at a European level to achieve goals that they cannot achieve on their own. To this end the Member States shall confer certain of their competences on the Union, which shall administer those competences in common.

2. *Praesidium draft is okay.*

3. The Union shall be open to all European States which share and respect the values on which the Union is founded [and which are committed to promoting them together].

Explanation

The opening Article to the Constitution should give the impression that it is not the Constitution that grants competences, but the Member States, through the Constitution.

Greater integration depends upon people seeing it clearly recognised that the Union remains a Union of states, as well as of people, and that sovereignty flows from the member states to the Union, not the other way round. Is that what is meant by a "federal basis"? We have tried to clarify this because, as drafted, there is an implication of some inherent power in the Constitution other than the powers delegated by the Member States. On that basis, this Constitution would represent a significant shift in the institutional balance. It needs to be clear that, within the Union, some powers are exercised on a Community basis and some remain the primary responsibility of the member states. I consider that 'within which the policies of the Member States…' is too broad – it suggests that all policies might be co-ordinated.

Paragraph 3 has been amended to clarify that the values are those of the Union and that it is the states whose values are at issue, not their people.[183]

Article 2

The Union is founded on the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights, values which are common to the Member States.

Explanation

The Treaty should not conflate values with aims and objectives. The aims of the second sentence in the Praesidium draft would be better suited to the Preamble.

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[183] Peter Hain, proposed amendment to Article 1, at: http://european-convention.eu.int/Docs/Treaty/pdf/Art1Hain.pdf

It would be useful to have clarification on the intended meaning of 'solidarity' if it is to remain in the values.[184]

Article 3

1. *Delete. Because of the link between competences and objectives, we would prefer to see a more specific list of objectives (as in Article 2 TEU). The language in the Praesidium draft would seem to be more appropriate for the Preamble.*

2. The Union shall work for a Europe of sustainable development based on balanced economic growth, social justice and a high level of protection and improvement of the quality of the environment, and sustainable and non-inflationary growth with a free single market and an economic and monetary union and aiming at full employment, at generating a high degree of competitiveness and convergence of economic performance and at raising the standard of living and quality of life. It shall promote economic and social cohesion, equality between men and women, and solidarity among Member States while respecting their diversity.

3. The Union shall work for an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls,
asylum, immigration, and the prevention and combating of crime.

4. The Union shall seek to advance its values in the wider world. In doing so, it shall contribute to sustainable development, solidarity and mutual respect among peoples, eradication of poverty, the [promotion of] [protection of] human rights, respect for international law and peace between States.

4bis. It shall assert its identity on the international scene through the implementation of a common foreign, security and defence policy.

5. These objectives shall be pursued by appropriate means, depending on the extent to which relevant competences are attributed to the Union by means of this Constitution.

Explanation:

As drafted, this Article contains a mixture of narrative, aspirations, and objectives. Given the link between objectives and competence, the text must ensure that we do not extend competence in an unintended way through these objectives.

I suggest reordering paragraph 2 for clarity. 'The discovery of space' is too specific for an Objective of the Union; our text places 'diversity' in this paragraph where it seems to fit better.

I have redrafted paragraph 3 based on Article 2 TEU, which provides a clearer explanation.

Paragraph 4 is amended for clarity. 'children's rights' is oddly over-specific – should replace with 'human rights'; and we should replace 'commitment', which is vague, with 'obligation', which means legally binding.

The new paragraph 4 bis is based on language in Article 2, TEU on CFSP.[185]

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184 http://european-convention.eu.int/Docs/Treaty/pdf/Art2%20Hain.pdf

185 http://european-convention.eu.int/Docs/Treaty/pdf/Art3%20Hain.pdf

Article 5

1. The Union recognises the rights, freedoms and principles in the Charter of Fundamental Rights. The scope, applicability and legal effect of the Charter are described in Part VII of that Charter.
2. The Union may accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Accession to that Convention shall not extend the Union's competences as defined by this Constitution.
3. See comment below.

Explanation

We cannot accept the Charter of Fundamental Rights being 'an integral part of the Constitution' as it stands.

In paragraph 2, I have replaced 'affect' by 'extend' for clarity. The paragraph confers a power upon the Union to accede to the ECHR but it does not address the issue of the Union procedures applicable to ECHR accession. The modalities of accession would need to be discussed in detail at a later date, at which time we would need to ensure our derogations were protected. The agreement of the Contracting Parties to the ECHR to an amendment to the ECHR to enable Union accession would also be needed.

The point in paragraph 3 is currently a principle of Community case law – and would be better remaining as such. Its formalisation here could have implications for CFSP, as it is extended from a principle of the Community to a principle of the Union[186].

Article 6

In the field of application of this Constitution and without prejudice to any of its specific provisions, any discrimination between nationals of Member States on grounds of nationality shall be prohibited.

Explanation

As currently drafted, the principle of non-discrimination could extend beyond the boundaries of the Union. So needs to be re-drafted to make clear that the principle applies to nationals (i.e. legal and natural persons) of the Union. However, we will need to consider carefully the implications for CFSP.[187]

Article 8

1. The use of Union competences is limited by the principles of conferred powers, subsidiarity, proportionality and loyal cooperation of the Union with the Member States in carrying out their tasks.
2. In accordance with the principle of conferred powers, the powers of the Union derive solely from the decision of the Member States to confer certain competences on the Union as defined in this Constitution. The Union shall act within the limits of the competences conferred upon it by this Constitution.

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186 http://european-convention.eu.int/Docs/Treaty/pdf/Art%205%20Hain.pdf
187 http://european-convention.eu.int/Docs/Treaty/pdf/Art6%20Hain.pdf

Competences not conferred upon the Union by the Constitution remain with the Member States.
3. In accordance with the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States including, where powers have been granted to them by the laws of the relevant Member State, by their regional or local authorities, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
4. *Praesidium draft is okay*.
5. *Praesidium draft is okay*.
Article 6 of TEC also contains an Integration Principle – consideration might be given to whether such should be included here or elsewhere.
Explanation
Our suggested draft of paragraph 1 is attempting only to clarify.
Our suggested draft of paragraph 2 is attempting to clarify the principle of conferred powers.
The redrafted text of paragraph 3 repeats the proposal made in my submission to the Convention (CONV 526/03) to reflect the extent of application of the subsidiarity principle.
Article 6 of TEC also contains an Integration Principle – consideration might be given to whether such should be included here or elsewhere.[188]

Article 9

1. Delete.

2. In exercising the Union's non-exclusive competences, the institutions shall apply the principles of subsidiarity and proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality annexed to this Constitution. The procedure set out in the Protocol shall enable national parliaments to ensure compliance with these principles.
3. Delete. See para 2 and comment below.
4. Delete.
5. Delete.
6. The Union shall respect the national identities of its Member States, inherent in their sovereignty, their fundamental structures and essential State functions, especially their political and constitutional structure, including the organisation of public administration at national, regional and local level, and their responsibilities for the maintenance of law and order and for national security.
Explanation
Paragraph 1 is an attempt to codify the existing case law and illustrates that to do so may result in over-simplification. So best left for case law. All the caveats that would be required to make this accurate would also make it far too complex for a constitution. As a rule, we would like to see the principle of proportionality in conjunction with that of subsidiarity throughout the text. We have added it to

[188] http://european-convention.eu.int/Docs/Treaty/pdf/Art8%20Hain.pdf

paragraph 2 in both the first and second sentences. By doing this, paragraph 3 can be deleted as unnecessary. This paragraph could go into Article 8 as paragraph 5.
Paragraph 4 (and paragraph 5) is another iteration of the principle of loyal cooperation (see Article 8, 5). Nothing is lost through its deletion. It should be removed in the spirit of simplicity and clarity.
Paragraph 5 extends the strict definition of the principle of loyal cooperation found in the TEC to the Union as a whole. This could have implications for CFSP. As the principle of loyal cooperation is clearly stated already in Article 8, paragraph 5, this can be deleted.
Paragraph 6: An inherent responsibility of any State is the maintenance of law and order and the protection of national security. This is sufficiently important to justify a specific reference in this article which deals with fundamental principles.[189]

Article 10

1. By this Constitution, the Member States confer on the Union certain exclusive and shared competences and define areas where the Union may take supporting action. The Union may exercise its competences only to the extent laid down in this Constitution. The conferment of powers on the Union shall not in itself restrict the powers of the Member States in respect of the same subject matter except in the area of exclusive competence [expressly] conferred on the Union by this Constitution.

1.bis When the Constitution confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts; the Member States may do so only if empowered by the Union.

2. In the area of shared competence, the Union and the Member States shall have the power to legislate and adopt legally binding acts in this area. When the Union has acted in respect of a certain matter, the Member States shall respect the obligations imposed on them by the relevant Union measures [and the relevant provisions of this Constitution].

3. Delete. The Praesidium paragraph has been deleted, as it is inappropriate here and goes beyond the current Treaties.

4. The Union shall have a common foreign and security policy as defined by [the Member States through] the European Council which it shall implement in accordance with the relevant provisions in Part II of the Constitution. This will include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide.

4. Praesidium draft is okay.

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189 http://european-convention.eu.int/Docs/Treaty/pdf/Art9Hain.pdf

5. Praesidium draft is okay.

Explanation

Overall, this Article should make clear that the Member States confer competence, through this Treaty, and do not have it conferred upon them. Paragraph 1 should be substantially redrafted to reflect this, and also to explain the various ways in which competence might be partitioned. This would clarify and simplify the whole of the rest of the Article. The statement of exclusive Union competence makes sense as Article 2 and flows from our suggested Article 1. It is similar to the Praesidium's suggested Article 1.

Paragraph 2 explains areas of shared competence, in a way that flows naturally from the explanation of exclusive competence in paragraph 1 and 1 bis, and will make subsequent Articles simpler.

I have slightly redrafted 'Competence to define and implement' as it is potentially misleading in the context of a single institutional structure.[190]

Article 11

1. The Union shall have exclusive competence in the following areas:
– customs union,
– common commercial policy, except as provided in Article [equivalent of present Article 133]
– monetary policy for the Member States who have adopted the euro,
– the conservation of marine biological resources under the common fisheries policy.
2. Delete. This is currently case law. Attempting to codify it in this way results in oversimplification. So best left for case law. All the caveats that would be required to make this accurate would also make it far too complex for a constitution.

Explanation

The Community does not have exclusive competence in relation to measures to ensure free movement in the internal market. This was recently confirmed by the European Court of Justice in the case of R (British American Tobacco & Imperial Tobacco) –v- Secretary of State for Health – Case C-491/01; judgement, 10 December 2002, not yet reported. In that case, the Court said of Article 95: "…that provision does not give it [the Community legislature] exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning…" (paragraph 179). On the same principles, it follows that the Community does not have exclusive competence in the area of competition, under Articles 81-86 EC. If the Community were to have exclusive competence in these areas, the Member States would have no power to take any measures (eg, in relation to the protection of health or consumer protection) which could affect free movement, nor to establish rules to promote competition. Plainly the Member States currently exercise powers in these areas. The Community has power to harmonise the rules in these areas, but authority to take

[190] http://european-convention.eu.int/Docs/Treaty/pdf/Art10Hain.pdf

action in these areas is effectively shared. While the ECJ has held that the Common Commercial Policy is an area of exclusive competence, its decisions were based on Article 133 EC (formerly Article 113 EC) in its pre-Nice form. The changes to Article 133 introduced by the Treaty of Nice both add new areas of Community competence and introduce exceptions – see paragraphs (5) and (6) of Article 133. Draft article 11 must take account of these changes, in order accurately to codify the jurisprudence. This draft does so by way of a general exception. It is contrary to the aim of simplification to refer the reader to another part of the Treaty, as this draft does, but the alternative would be a relatively lengthy exposition, which would unbalance article 11.[191]

Article 12

1. The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles x and x [currently 11 and 15].
2. Delete.
3. Delete.
4. Delete.

Paragraphs 5 and 6: The language of these paragraphs is OK, but see below.

Explanation

Shared competences should be a residual category. They should therefore not be listed explicitly. To have an 'indicative list' of some shared competences is the worst of both worlds. So this Article should come after what are currently Articles 11, 13, 14 and 15.

Paragraph 1 has been redrafted to make clear that those areas not covered by exclusive competences or areas for supporting action are shared competences. If this is done sufficiently clearly, paragraphs 2-4 will be unnecessary. The areas covered by Articles 12.5 and 12.6, do not sit easily in either the category of shared competence or that of supporting measures. These paragraphs should come under a separate Article which should also include economic policy. The new article could be entitled "Policies combining shared competence and supporting actions."[192]

Article 13

1. Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union and coordinate them in accordance with procedures for multilateral surveillance established by the Council.
2. Delete.
3. Delete.

Explanation

Economic policy should be part of the proposed new article on policies that have aspects of shared competence and supporting measures. However, as drafted the

[191] http://european-convention.eu.int/Docs/Treaty/pdf/Art11Hain.pdf
[192] http://european-convention.eu.int/Docs/Treaty/pdf/Art12Hain.pdf

language moves too far from the current Treaties. Hence my suggested redraft of paragraph 1.[193]

Article 14

The Union shall implement common action on behalf of the Member States in the area of the common foreign, security and defence policy through non-legislative [means] [instruments] in order:
- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the Charter of the United Nations;
- to strengthen the security of the Union in all ways, while not prejudicing the specific character of the security and defence policy of certain Member States and respecting the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty;
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders;
- to promote international cooperation;
- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.[194]

Article 15

1. The Union may take coordinating, complementary or supporting action. Union activity in an area for supporting action shall not prevent Member States from exercising their competence in that area.
2. The areas for supporting action are:
- employment
- industry
- education, vocational training and youth
- culture
- protection against disasters including the consequences of terrorist attacks within the EU
- trans-European networks, except for aspects dealing with inter-operability of networks
- public health, except as provided in [Part Two of this Treaty]
- police co-operation
- consumer protection
3. Delete.
4. Praesidium draft is okay.

[193] http://european-convention.eu.int/Docs/Treaty/pdf/Art13Hain.pdf
[194] http://european-convention.eu.int/Docs/Treaty/pdf/Art14Hain.pdf

Explanation

My paragraph 1 redraft clarifies that Union activity in an area of supporting action does not prevent Member States from exercising competence in the same area. This draft does not include the 2nd sentence of the Convention draft (ie scope determined by Part Two) since this is already explained in Article 10.

The UK view is that there is no need for Union exercise of these competences to involve harmonisation of Member State laws or regulations. As the Convention draft notes, exercise of these competences also does not prevent Member States from exercising competence themselves. On specifics, we have removed Sport and added Trans-European Networks, Public Health and Consumer Protection. Trans-European networks is listed as a "shared competence" under the Convention draft. The existing

Community competences for trans-European networks (Articles 154-156 EC) only require harmonisation in relation to inter-operability. Otherwise exercise of Union competence in this area should not require harmonisation and therefore this draft lists this competence under "supporting action". Public health is listed in the Convention draft as a "shared competence". Existing Community competence (Article 152 EC) is mainly limited to complementary action, with harmonisation not permitted except in particular areas (quality standards for organs, substances of human origin, blood and blood derivatives as well as measures in the veterinary and phytosanitary fields). The UK view is that it is not appropriate to extend "shared competence" in this subject area. Public health should therefore be categorised as an area of supporting action, except for those areas where harmonisation is specifically permitted. In order not to overload Part One with too much detail, this draft refers the reader to Part Two for details of aspects of public health where harmonisation is permitted. Consumer protection: Harmonisation measures are in any event permitted under Article 95 EC (a shared competence) if they further the internal market. Other consumer protection measures are supplementary only under current Treaties (see Article 153 EC). These measures should not require harmonisation. The UK therefore includes consumer protection as an area of supporting action in so far as such measures are not internal market measures.[195]

Article 16

1. 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, shall take the appropriate measures. Where the Commission has sole right of initiative, the Council, acting unanimously, on a proposal from the Commission and after obtaining the assent of the European Parliament, shall take the appropriate measure.
2. Using the procedure for monitoring the subsidiarity and proportionality principles referred to in Article 9, the Commission shall draw Member States' national parliaments' attention to proposals based on this Article.
3. Praesidium draft is okay.

[195] http://european-convention.eu.int/Docs/Treaty/pdf/Art15Hain.pdf

Explanation
We have added 'proportionality' here to subsidiarity, as elsewhere.[196]

Article 24: The legal acts of the Union
1. In exercising the competences conferred on it in the Constitution, the Union shall use as legal instruments, in accordance with the provisions of Part Two, European laws, European framework laws, [delete European regulations], European decisions, recommendations and opinions. A European law shall be a legislative act having general application. It shall be binding in its entirety and directly applicable in all Member States.
A European framework law shall be a legislative act which shall be binding, as to the result to be achieved, on the Member States to which it is addressed, but shall leave the national authorities entirely free to choose the form and means of achieving that result.
[delete: A European regulation shall be a non-legislative act having general application for the implementation of legislative acts and of certain specific provisions of the Constitution. It shall be binding in its entirety and directly applicable in all Member States].
A European decision shall be a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions adopted by the institutions shall have no binding force.

2. When considering proposals for legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the Constitution.

Explanation :
Article 24 (1) : We delete the definition of European regulation as we do not think that there is a need to have a European regulation as a primary instrument. However, in this Article a definition of delegated regulations and implementing regulations, as referred to in Article 27 and 28, will need to be provided. (We will submit language later).
Article 24 (2) : Could it be clarified as to whether this is intended to prevent the use of atypical acts and Council conclusions, declarations and resolutions? We could not support such a loss of flexibility[197].

Article 25 : Legislative acts
1. European laws and European framework laws shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council in accordance with the rules of the legislative procedure referred to in Article X (*Part Two of the Constitution*). If the two institutions cannot reach agreement on an act, it shall not be adopted. [delete: Specific provisions shall apply in the cases referred to in Article z (ex-third pillar)].

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196 http://european-convention.eu.int/Docs/Treaty/pdf/Art16Hain.pdf
197 http://european-convention.eu.int/amendments.asp?content=24&lang=EN

2. In the specific cases provided for by the Constitution, European laws and European framework laws shall be adopted by the Council. {delete: 2 bis. Specific provisions shall apply in the cases referred to in Article Y (CFSP) and Article Z (ex third pillar)]

3. When acting under any procedure for the adoption of a European law or a European framework law, the European Parliament and the Council shall meet in public.

Explanation
Article 25 (2 bis) :
This provision has been inserted in paragraph 2 bis because CFSP has its own procedures for adopting its own distinctive instruments. And different legislative procedures will be required for ex-third pillar[198].

Article 27: Delegated regulations
1. European laws and European framework laws may delegate to the Commission the power to enact delegated regulations in order to supplement or amend certain non-essential elements of the law or framework law.
The objectives, content and scope and duration of the delegation shall be explicitly defined in the laws and framework laws. A delegation may not cover the essential elements of an area. These shall be reserved for the law or framework law.

2. The conditions of application to which the delegation is subject shall be explicitly determined in the law or framework law in accordance with the provisions referred to in Part Two;

delete: [they consist of one or more of the following possibilities:
- the European Parliament and the Council may decide to revoke the delegation;
- the European Parliament and the Council may decide to revoke the delegation;
- the delegated regulation may enter into force only if no objection ahs been expressed by the European Parliament or the Council within a period set by the law or framework law;
- the provisions of the delegated regulation are to lapse after a period set by the law or framework law. They may be extended, on a proposal from the Commission, by decision of the European Parliament and of the Council. For the purpose of the preceding paragraph, the European Parliament shall act by a majority of its members, and the Council by a qualified majority.]

2 bis. The provision in paragraph 1 and 2 above do not apply in the common foreign, security and defence policy. Specific provisions shall apply in the cases referred to in Article Z (ex third pillar)]

[198] http://european-convention.eu.int/amendments.asp?content=25&lang=EN

Explanation
We find the title confusing, as regulations have an existing meaning. Can we use something else?
Article 27 (2) :
Conditions of application for delegated acts and implementing acts are best set out in Part Two to keep Part One clear and simple. These should provide for positive assent from the Council. The conditions of application also need to provide for a conciliation procedure when either the Council or the European Parliament call back the proposed act.
Article 27(2 bis) :
We have introduced this paragraph because provisions in paragraph 1 and 2 should not apply to CFSP. Under this policy, no primary legislation is adopted and therefore there is no need for delegated legislation. Specific provisions should apply to JHA[199].

Article 28: Implementing acts
1. Member States shall adopt all measures of national law necessary to implement the Union's legally binding acts.
2. [delete: where uniform conditions for the implementation of the Union's binding acts are needed] These legally binding acts may confer implementing powers on the Commission or [delete: or, as appropriate and in the cases provided for in Article 9 (CFSP)] on the Council.

[delete: 3. Implementing acts of the Union may be subject to control mechanisms which shall be consonant with principles and rules laid down in advance by the European Parliament and the Council in accordance with the legislative procedure]

3. The conditions of application to which the implementation is subject shall be expressly determined in the law or framework law, in accordance with the provisions referred to in Part Two.

4. Implementing acts of the Union shall take the form of European implementing regulations or European implementing decisions.
4 bis. Specific provisions shall apply in the cases referred to in Article Y (CFSP) and Article Z (ex third pillar)

Explanation
Article 28 (2) :
There is no need to specify in horizontal terms where the legislator may confer implementing powers. This reduces flexibility. CFSP is dealt with in paragraph 4 bis below.
Article 28 (3) :
Part Two should set out in more detail the conditions of application to complement the parallel provision in Article 27. This would include the existing procedure, whereby Council Decisions lay down the procedures by unanimity.

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[199] http://european-convention.eu.int/Docs/Treaty/pdf/27/Art27Hain.pdf

Article 28 (4 bis) :
This provision has been inserted in paragraph 4 bis because CFSP has its own procedures for adopting its own distinctive instruments. And different legislative procedures will be required for ex-third pillar.[200]

Article 32: Principles common to acts of the Union
1. Unless the Constitution contains a specific stipulation, the institutions shall decide, in compliance with the procedures applicable, on the type of act to be adopted in each case, in accordance with the principle of proportionality set out in Article 8.
2. European laws, European framework laws, European decisions, European delegated regulations, [delete: and] European implementing regulations and European implementing decisions shall state the reasons on which they are based and shall refer to any proposals or opinions required by this Constitution and shall list in an annex the entities which have been consulted in accordance with obligations laid down in this Constitution [on the draft laws and framework laws/proposals for laws and framework laws].

Explanation
Article 32 (2) :
We add the obligation that they shall also state whom they consulted in coming to their proposal and would refer the reader to rules laid out in Part Two. This would encourage consultation, especially, for example, across the EU regions[201].

Article 33: Publication and entry into force
[delete: 1.European laws and European framework laws adopted in accordance with the legislative procedure shall be signed by the President of the European Parliament and by the President of the Council. In other cases they shall be signed by the President of the Council. European Union laws and European Union framework laws shall be published in the Official Journal of the European Union and shall enter into force on the date specified in them or, in the absence of such a stated date, on the twentieth day following that of their publication.
2. European regulations of the Commission or of the Council and European decisions which do not specify those to whom they are addressed or which are addressed to all Member States shall be published in the Official Journal of the European Union and shall enter into force on the date specified in them or, in the absence of such a stated date, on the twentieth day following that of their publication.
3. Other decisions shall be notified to those to whom they are addressed and shall take effect upon such notification].

Explanation
While we understand the reason behind placing this article in Part One in the name of clarity and transparency, we would like to see this article ***in its entirety***

[200] http://european-convention.eu.int/Docs/Treaty/pdf/28/Art28Hain.pdf
[201] http://european-convention.eu.int/Docs/Treaty/pdf/32/Art32Hain.pdf

moved to Part Two of the constitutional treaty, where such detail is better placed. This would also serve to keep Part One as simple as possible.
N.B. In moving this article to Part Two, we would also propose to amend paragraph two to read a follows :
« Article 33 (2) :
European [**delete**: regulations of the Commission or of the Council and European] decisions which do not specify those to whom they are addressed or which are addressed to all Member States and European delegated regulations and European implementing regulations shall be published in the Official Journal of the European Union and shall enter into force on the date specified in them or, in the absence of such a stated date, on the twentieth day following that of their publication. »[202]

David Heathcoat-Amory's Amendments

Mr Heathcoat-Amory proposed (on occasion with Jens-Peter Bonde) the following amendments to the Praesidium draft articles presented so far:

Article 1
1.1 Delete « common » ; insert after « future »«based on peaceful cooperation between free and independent states»
Explanation
Commonality is a vague term that could be interpreted as leading to a unitary system
1.1 Delete « Constitution » insert « Treaty »
Explanation
A constitution establishes a state : a Treaty is an agreement between states
1.1 After « union entitled » insert « Europe of Democracies »
Explanation
This nomenclature sets out in plain language that the institution is an association of free states and their parliaments
1.1 Delete from « within which » to end ; insert « within which the member states shall coordinate policies in areas where they cannot effectively legislate on their own»
Explanation
This insert sets out that European integration is not an objective in itself
1.1 Delete from « and which » to end
Explanation
Establishing a federal system creates a country called Europe, whereas national parliaments are best placed to represent the peoples of Europe
1.1 Insert after « common future» « as expressed by national referendums»

[202] http://european-convention.eu.int/Docs/Treaty/pdf/33/Art33Hain.pdf

Explanation

This text is of such importance to the future of Europe that the people should be invited to indicate their support, particularly as it is meant to have been adopted in their name

1.1 Delete article 1.1 replace with « Reflecting the will of the peoples and States of Europe to build a common future, the High Contracting Parties establish a European Union by this Treaty within which the Member States shall co-ordinate certain policies at a European level to achieve goals that they cannot achieve on their own, and to this end shall confer certain competences of the Member States on the Union, which shall administer those competences in common. »

Explanation

As the opening Article to the Constitution, the Praesidium's draft sends the wrong signals. It must give the impression that it is not the Constitution that grants competences, but the Member States, through the Constitution, freely entered into. Greater integration depends upon people seeing it clearly recognised that the Union remains a Union of states, as well as of people, and that sovereignty flows from the member states to the Union, not the other way round. Is that what is meant by a "federal basis"? We have tried to clarify this because, as drafted, there is an implication of some inherent power in the Constitution other than the powers delegated by the member states. On that basis, this Constitution would represent a significant shift in the institutional balance. What needs to be clear, in other words, is that, within the Union, some powers are exercised on a Community basis and some remain the primary responsibility of the member states. The Fundamental Principles could be clearer in this respect. 'within which the policies of the Member States…' is too broad – it suggests that all policies might be co-ordinated.

1.1a New clause « Respecting the rules of the World Trade Organisation, and desirous of effecting through commerce an increase in the living conditions of the citizens of Europe's nations and of those with whom they trade »

Explanation

This recalls the reality that the EU operates in a global market – and that it must also be globally competitive

1.2 Delete and replace with « The Union shall be a Treaty Association of free and self-governing European states, and shall acknowledge and respect the historic national diversity of its members » The original clause is abstract, and similar assurances in other constitutions have failed to protect the identities of their constituent states

1.3 Delete from « whose peoples » ; insert before « European States » « democratic »

Explanation

Reference to « values » may, in time, become subjective and politically-motivated. It is better to keep the issue straightforward : in a democracy, the people can speak out for themselves. The behaviour of the state is safeguarded by its signature of the European Convention of Human Rights.

1.3 Delete, replace with « The Union shall be open to all European States which share and respect the values on which the Union is founded. »

Explanation

'open to all European States whose peoples share the same values' – this must be more specific: The same values as who? Which values? All the same values, or

just some? To make this clearer: It should be the states whose values are at issue, not their people

The values must be explicitly those of the Union This replacement draft clarifies which values, but without the inelegance of referring directly to Article 3.

1.4 Insert new article, « The Union shall operate on the principles of transparency, timely and widespread access to working documents, and openness with respect to meetings»

Explanation

The Union presently ranks alongside North Korea as the most closed form of government. There are many hundreds of hidden working groups making important decisions without democratic oversight, planning for restricted Council meetings, and drafting for a European Parliament that operates under done deals between arbitrators from political groups. Legislation is often only learnt about by the public when it has already become law and is having some adverse effect. The effect on public opinion towards the EU is obvious.

1.5 (new article) Members of this Treaty Association are free to withdraw from the Union, after giving one year's notice »

Explanation

This reassures citizens of the Union that it is a voluntary union, with a right of exit as well as entry

1.6 (new article) « The Treaty organisations of the Union shall be managed according to the principles of professionalism, openness and accountability»

Explanation

This supports the work of the Court of Auditors and OLAF. It also supports the bravery of whistleblowers.[203]

Article 2

2 Insert after Member States «which have signed the European Convention on Human Rights as a prerequisite of treaty membership »

Explanation The Union does not need to sign the Convention if member states have. This is a more logical approach, and one which does not confer upon the Union an attribute of statehood.

2 Delete « human dignity »

Explanation Although a worthy concept, dignity is a subjective term once placed in a lawyer's brief.

2 Insert after « human rights » « as set out in national laws »

Explanation Many of these terms are subjective. Treaty creep will place priority in the rights expressed in this article, as interpreted by the courts, over the rights as determined by national parliaments, and those set out elsewhere in Community agreements.

2 After « human rights », insert « freedom of speech »

Explanation This supports the bravery of whistleblowers. The institutions are currently masked by silence.[204]

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[203] http://european-convention.eu.int/Docs/Treaty/pdf/Art1%20Heathcoat-Amory.pdf

[204] http://european-convention.eu.int/Docs/Treaty/pdf/Art2%20Heathcoat-Amory.pdf

Article 3

3.1 Delete « its values »

Explanation

The original clause could allow the Union to carry out propaganda campaigns against its citizens or member states.

3.2 Delete « free single market», insert «a free and competitive market»

Explanation

We must emphasise the economic mechanism on which social values depend.

3.2 After « economic and monetary union », insert « for participating states »

Explanation

Certain states remain outside of the Euro Zone. Such must be respected.

3.2 Delete « and shall develop » to « discovery of space »

Explanation

There is no evidence to suggest that these competences are better managed at a federal level.

3.2 Delete « discovery of space », insert « discovery of democracy »

Explanation

This undiscovered country lies closer to home, and equally unexplored by the EU.

3.2 Delete article and replace with « The Union shall work for a Europe of sustainable development based on balanced economic growth, social justice and a high level of protection and improvement of the quality of the environment, and sustainable and non-inflationary growth with a free single market and an economic and monetary union and aiming at full employment, at generating a high degree of competitiveness and convergence of economic performance and at raising the standard of living and quality of life. It shall promote economic and social cohesion, equality between men and women and solidarity among Member States while respecting their diversity. »

Explanation

'The discovery of space' is too specific for an Objective of the Union; 'equal opportunities for all' is too broad and could have wide legislative implications; and this recommendation places 'diversity' in this paragraph where it fits better.

3.4 Delete from « In defending » to « wider world » . Replace with « The Union will encourage internationalism and the participation of its members in world institutions»

Explanation

This replaces the cultural imperialism inherent in the original text, with an encouragement of member states to participate in global fora, with wider principles of good governance.[205]

Article 4

Delete article

Explanation

The Union should not have legal personality. This is key in transforming an intergovernmental association of nations into a state. It also opens the way for

[205] http://european-convention.eu.int/Docs/Treaty/pdf/Art3%20Heathcoat-Amory.pdf

aggrieved parties to challenge the Commission in the courts for failing to interpret the Constitution or Charter of Fundamental Rights in their favour, thus putting the ECJ into the role of legislative motor.[206]

Article 5

5.1 Delete

Explanation

The integration of the Charter overturns the consensus reached by its authors. Integrating the text establishes a new legal hierarchy. It sets European law against established national practice, and creates immense legal uncertainty which can only be settled through the ECJ acting as a constitutional arbiter, a role for which it was manifestly not established.

5.2 Delete

Explanation

This creates ambiguity of institutions, between the ECJ and the ECHR.

5.3 Delete

Explanation

As the explanatory note explicitly states, this article is intended to expand Union competences by case law, and not through the treaties. This is most undemocratic. A better and simpler solution would be to require members of the Union to be signatories of the European Convention on Human Rights.[207]

Article 6

6 Delete

Explanation

As drafted, this article has unconsidered consequences. It ends all forms of disqualification based on nationality. For instance : nationality requirements for entry to the civil service ; EU quotas, for instance over fisheries ; asylum white lists ; visas ; service in armed forces, law courts, national parliaments ; and so on. The article is a blanket statement that allows substantial legal challenge. It may also as set out take precedence over certain opt-outs of lesser treaty standing, for instance restrictions on property ownership.[208]

Article 7

7.1 Delete

Explanation

Citizenship is an attribute of statehood. You cannot be a citizen of a treaty. This provision as it stands may affect, inter alia, the status of courts martial ; the person of the Crown and its institutions (including hospitals); the privileges of parliaments and

diplomats, not least the immunities that arise therefrom. Even if retained, more consideration needs to be given to the consequences of this article.

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206 http://european-convention.eu.int/Docs/Treaty/pdf/Art4%20Heathcoat-Amory.pdf

207 http://european-convention.eu.int/Docs/Treaty/pdf/Art5%20Heathcoat-Amory.pdf

208 http://european-convention.eu.int/Docs/Treaty/pdf/Art6%20Heathcoat-Amory.pdf

7.2 Delete from « Citizens of the Union » to « this Constitution ». Insert « This treaty sets out certain rights and consequences, which are held by all subjects and citizens of the member states of the European Communities »

Explanation

The original sets the Union up as the awarder of rights and privileges rather than the member states, and as requiring duties in return

7.2 Delete from « Citizens of the Union » to « this Constitution ». Insert « Member State citizens shall enjoy certain rights and privileges »

Explanation

The original suggests the Union rather than member states is the awarder of rights and privileges, and as requiring duties in return

7.2 Delete « Union's languages » ; insert «official languages of the member states of the Union »

Explanation

The official languages of the member states should be recognised as the bedrock of communication, even if the official response is delayed.[209]

Article 8

8.1 and 8.2 Delete. Insert « The Union shall only act in instances where Member States can demonstrably achieve more through acting together than by acting alone. These actions must pass the tests of subsidiarity, proportionality and cost-effectiveness »

Explanation

The draft terminology need clarifying by a series of clear, and if possible objective, tests.

8.2 Delete « Constitution » (three times), insert « Treaties ».

Explanation

A constitution is a framework for a state (this amendment is consequential).

8.3 Delete « in areas which do not fall within its exclusive competence».

Explanation

This deletion is consequential to the removal of exclusive Union competences.

8.3 Delete «sufficiently».

Explanation

This amendment removes some of the ambiguity in assessing the difficulty of the degree and its measurement, and makes subsidiarity a more objective test.

8.3 Delete «be better achieved», insert « only be achieved ».

Explanation

This amendment likewise removes some of the ambiguity in assessing the difficulty of the degree and its measurement, and makes subsidiarity a more objective test.

8.5 Delete paragraph

Explanation

'Loyal cooperation' requires clarification.[210]

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[209] http://european-convention.eu.int/Docs/Treaty/pdf/Art7%20Heathcoat-Amory.pdf

[210] http://european-convention.eu.int/Docs/Treaty/pdf/Art8%20Heathcoat-Amory.pdf

Article 9

9.1 Insert at close « except in so far that laws passed 'notwithstanding the act of accession' hold primacy »

Explanation

National parliaments hereby retain final sanction to overturn Union law. If used, this reserve power would obviously necessitate a Council meeting to resolve the differences. However, this amendment is needed (1) as a mechanism for withdrawal from the treaties (2) because otherwise national parliaments surrender their sovereign powers to a higher federal authority (3) because the resulting sense of powerlessness in a national crisis has no safety valve other than outright withdrawal, and (4) on a practical note, because (as Thomas Paine observed) Parliament is sovereign in all things, except to circumscribe its own power. Nevertheless, just because national parliaments retain supremacy, does not mean to say that they will exercise it except in rare cases of major national importance. This amendment therefore maintains the Luxembourg compromise in the form of a vote by a parliament.

9.1 Delete.

Explanation

This is an attempt to codify the existing case law and illustrates that to do so may result in over-simplification. So best left for case law. All the caveats that would be required to make this accurate would also make it far too complex for a constitution.

9.2 Delete. Insert « The principle of subsidiarity shall be enforced by conferring First Reading on national parliaments ; Second Reading and the Committee Stages to the European Parliament ; and Third Reading on national parliaments. »

Explanation

The only way to ensure that subsidiarity is more than just an ignored and vague item in a dictionary is to put national parliaments properly in the legislative programme, at the outset and at the close.

9.5 After Constitution, insert « except in so far as such measures fall from objections made by the member state at the time of the framing of the common policy »

Explanation

Otherwise, national governments are constrained into enforced neutrality on an issue in which its vital national interests are at variance with a policy determined by QMV.

9.5 Delete « The union shall act loyally towards the Member States ». Insert « The member states of the Union shall strive to maintain the greatest degree of cooperation and mutual benefit, in which task they will be faithfully served by their civil service, the European Commission

Explanation

The original texts reads as if it sets up a feudal structure between the member states on the one hand, and the EU, personified by the Commission, on the other.

9.5 Delete.

Explanation

This paragraph extends the strict definition of the principle of loyal cooperation found in the TEC to the Union as a whole. This could have implications for CFSP. As the principle of loyal cooperation is clearly stated already in Article 8, paragraph 5, this can be deleted.

9.6 At close, add « This clause takes precedence over harmonisation »

Explanation

Otherwise, the original clause is too imprecise and subjective to prevent any number of harmonising measures.

9.6 Delete replace with « The Union shall respect the national identities of its Member States, inherent in their sovereignty, their fundamental structures and essential State functions, especially their political and constitutional structure, including the organisation of public administration at national, regional and local level, and their responsibilities for the maintenance of law and order and for national security. »

Explanation

An inherent responsibility of any State is the maintenance of law and order and the protection of national security. This is sufficiently important to justify a specific reference in this article which deals with fundamental principles. Including a reference to the sovereignty of states helps to explain what the Union must respect.

9.7 New section. Insert « In cases where one quarter of national parliaments object to a proposal, that motion shall be reconsidered by the Council. In cases where one half of national parliaments object, the Union is prevented from pursuing that proposal. »

Explanation

This establishes the « yellow card/red card principle » (version one)

9.7 New section. Insert « In cases where one third of national parliaments object to a proposal, that motion shall be reconsidered by the Council. In cases where two thirds of national parliaments object, the Union is prevented from pursuing that proposal. »

Explanation

This establishes the « yellow card/red card principle » (version two)

9.7 New section. Insert « In cases where one national parliament objects to a proposal, that motion shall be reconsidered by the Council. In cases where more than one national parliament objects, the Union is prevented from pursuing that proposal.»

Explanation

This establishes the « yellow card/red card principle » (version three).[211]

Article 10

10.1 Delete

Explanation

There should be no exclusive competences : the Union should operate through voluntary agreements by participating states.

10.1 Delete « Constitution confers », insert « Treaty grants » [falls if above adopted]

Explanation

The powers of the Union are arise from and are attributed by Member States

[211] http://european-convention.eu.int/Docs/Treaty/pdf/Art9%20Heathcoat-Amory.pdf

10.1 Delete replace with « By this Treaty, the Member States confer on the Union certain exclusive and shared competences and define areas where the Union may take supporting action. The Union may exercise its competences only to the extent laid down in this Treaty. The conferment of powers on the Union shall not in itself restrict the powers of the Member States in respect of the same subject matter except in the area of exclusive competence expressly conferred on the Union by this Treaty. »

Explanation

This Article should make clear that the Member States confer competence, through this Treaty, and do not have it conferred upon them. Paragraph 1 should be substantially redrafted to reflect this, and also to explain the various ways in which competence might be partitioned. This would clarify and simplify the whole of the rest of the Article.

10.2 Delete « Constitution confers on the Union », insert « Treaty provides for Union activity in »

Explanation

The Union is a sum of its parts, not a state

10.2 Delete from «The Member States shall exercise». Insert « When an agreement has been reached by common accord, Member States shall refrain from legislating in the same area »

Explanation

The emphasis is here placed on national legislation, rather than what national parliaments are forbidden to do

10.3 Delete

Explanation

Member States, not the Union's institutions, should coordinate their economic policies between themselves

10.4 Delete

Explanation

The Union in the present treaties is the association of states coming together for common purposes, as made clear in Article 1 of both the Treaty on European Union and the Treaty Establishing the European Communities, which state that « the High Contracting Parties establish among themselves a European Union/Community ». By contrast, the Union set up by this constitution will be a legal body separate from the Member States.

10.5 At end, add «and incurring only administrative costs»

Explanation

Without this amendment, the intensity of the Union's action can be augmented by the high level of expenditure involved

10.6 At end, add «In any event of conflict between the two Parts of this Treaty, that element which is most favourable to the rights of the nation state is supreme»

Explanation

Where one part of the treaty evolves independently of the other, a conflict in interpretation may occur.

10.6 At end, add «and the amending procedures for each part shall in all cases be identical»

Explanation
It is essential to establish beyond doubt that all parties of this Treaty shall be amended in the same way.[212]

Article 11

11.1 After « Euro » insert « excepting those elements which impinge upon policies involving optout states »
Explanation
Decisions should not be made by opt-in states which affect the rights of opt-out states
11.1 Delete fourth indent relating to fisheries
Explanation
The CFP is an ecological, social and economic disaster and should be returned to national control – as has recently been called for by a Forum paper from ordinary fishermen
11.2 Delete. Replace with « The Union shall act as the representative of all the member states in concluding international agreements in areas where it is so mandated in this Treaty and when so authorised by common accord»
Explanation
The constitutional draft is a major shift of power towards the Commission. In the original draft, in international arenas where the Union has any competence, Member States can only be represented by the Union. Where an international agreement may carry secondary effect in a competence in which the Union plays a part, the role of Member states can be taken over by the Union. Furthermore, the original draft expands the powers of the Union into areas involving intellectual property rights, criminal justice, and other contentious fields.
11.2 Delete entire article .
Explanation
This is currently case law. Attempting to codify it in this way results in over-simplification. So best left for case law. All the caveats that would be required to make this accurate would also make it far too complex for a constitution.[213]

Article 12

12. Delete « principal»
Explanation
The original text allows for the addition of further competences without end
12.1 Delete and replace with « The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles 11 and 15. »
Explanation
This paragraph has been redrafted to make clear that those areas not covered by exclusive competences or areas for supporting action are shared competences. If this is done sufficiently clearly, paragraphs 2-4 will be unnecessary.

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[212] http://european-convention.eu.int/Docs/Treaty/pdf/Art10%20Heathcoat-Amory.pdf
[213] http://european-convention.eu.int/Docs/Treaty/pdf/Art11%20Heathcoat-Amory.pdf

12.3 Delete. Insert « Member States may exercise their legislative prerogative in this area. In the absence thereof, the Union may engage in exercising joint competence. »

Explanation

The original wording is the wrong way round.

12.3a Insert new clause « The Union will undertake to apply sunset clauses to its activities.»

Explanation

In areas where competences have not been successfully shared, better programmes can consequently be run by national governments on the basis of the experience learned, and therefore time-limited legislation is needed to ensure that these programmes are extended on the basis of success and common accord.

12.4 Delete « area of freedom, security and justice »

Explanation

The Union's pillared structure with its intergovernmental parts should not be collapsed. The intergovernmental method is essential for democracy as it keeps decision-making closer to the citizens

12.4 Delete « agriculture»

Explanation

The CAP can only be reformed by restoring control to national parliaments. Currently, citizens pay twice – once to pay the tax subsidies, and again at the checkout because of the higher cost of the produce. This hits poor families the most. Only by putting the system back under national control will agricultural spending be disciplined and accountable.

12.4 Delete « and fisheries»

Explanation

The CFP has been a complete disaster (see the recent Forum submission by ordinary fishermen to understand why). Only by restoring national control, and to let internal subsidiarity take effect, can we restore common sense to a policy which is causing social disaster and ecological havoc, before our seas go the way of the Canadian Grand Banks

12.4 Delete «transport»

Explanation

We need to reconsider why the union should have a role in matters which can be very local.

12.4 Delete «energy»

Explanation

There is no treaty base presently for any Union action here

12.4 Delete «social policy»

Explanation

Best left to member states who have a greater understanding of their society

12.4 Delete «economic and social cohesion»

Explanation

Cohesion funds were principally designed to facilitate less developed economies participating in the Euro. As the four primary recipients have since been deemed to have converged sufficiently so to join, this form of aid line should be closed, and the assistance concentrated on helping the poorer countries of this world

12.4 Delete « public health »

Explanation
The working group on Complementary Competences resolved that this should be a supporting measure, as a majority of public health policy matters had been allocated to Member States under the present treaties
12.4 Delete « trans-European networks »
Explanation
The working group on Complementary Competences resolved that this should be a supporting measure
12.4 Delete whole clause
Explanation
The working group on complementary competences decided not to set out a list. It also did not agree to the inclusion of TENs or Public Health.
12.5 Delete whole clause
Explanation
There is no evidence that Union policies are more efficient at allocating resources than the current multinational agreements. The need for centralised control and funding is not therefore proven.
12.6 Delete whole clause
Explanation
The Communities' Development budget has been characterised by fraud and mismanagement, as detailed by the Court of Auditors, which has for many years declined to verify the accuracy and completeness of the accounts.[214]

Article 13

13.1 Delete and replace with « Economic policy shall be considered an area of common interest. Member states will coordinate their activities as they deem appropriate through the sharing of information »
Explanation
Under the existing treaties, this area is deemed best left to Member States. But a distinct entity called the « Union » is here instructed to act in very sensitive issues which go to the heart of what a Member State is meant to do. This will widen the democratic deficit.
13.1 Delete and replace with « Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union by co-ordinating them within the Council, and in particular by establishing broad guidelines for these policies. »
Explanation
This is an area of policy that has aspects of shared competence and supporting measures. As drafted the language moves too far from the current Treaties.
13.2 Delete and replace with « Member states shall, in the conduct of their economic policies, recall the spirit of cooperation and friendship upon which this Treaty is founded »
Explanation
Member states should be free to conduct their policy as their electorate instructs
13.3 At end, insert « Likewise, the rights and privileges of opt-out states shall be

[214] http://european-convention.eu.int/Docs/Treaty/pdf/Art12%20Heathcoat-Amory.pdf

respected No legislation shall be enacted by opt-in states which have an affect on the latter, without the unanimous consent of the latter»

Explanation

Opt-outs were obtained by states through negotiations, in which they gave their consent for the other countries to go ahead in return for having their own rights respected. This arrangement should be honoured in good faith.[215]

Article 14

14 Delete. Replace with « Where governments acting in concert adopt a common position, participant states will endeavour to maintain a commonality of purpose

Explanation

The original wording may have been appropriate in an association of member states, but not in a constitution where the Union has an identity and an incorporated Common Foreign and security Policy.

14 At close insert « This article does not prevent nation states from pursuing independent foreign and defence policy in areas on which a common approach on an issue has not been unanimously determined » [This falls if the above is adopted]

Explanation

Member States which have a stated objection to a common policy should be permitted to represent the views of their nationals, particularly if such was made clear when the policy was being formulated.[216]

Article 15

15.2 Delete « employment »

Explanation

Employment is the result of job creation. If this does require either legislation or deregulation to encourage, it is better achieved closer to the local market, ie by national governments, rather than abstractly for the whole continent

15.2 Delete « education »

Explanation

The Union should play no part in education, except for sharing best practice information

15.2 Delete « vocational training »

Explanation

The Union should play no part in this, except for sharing best practice information

15.2 Delete « youth»

Explanation

There is no reason for Union interest in this field, so diverse and open-ended as to be nonsensical (the Commission classifies « Young Farmers » as anyone under 40)

15.2 Delete «culture»

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[215] http://european-convention.eu.int/Docs/Treaty/pdf/Art13%20Heathcoat-Amory.pdf

[216] http://european-convention.eu.int/Docs/Treaty/pdf/Art14%20Heathcoat-Amory.pdf

Explanation
There is no reason for Union interest in this field, unless it seeks to supersede national identity with a European one. The budget spent in this area should be transferred to the Council of Europe
15.2 Delete «sport»
Explanation
There is no reason for Union interest in this field, unless it seeks to supersede national identity with a European one. The budget spent in this area should be transferred to the Council of Europe
15.2 Delete «protection against disasters»
Explanation
The Council of Europe is better placed to act as the home for this agency
15.2 Add to list « public health »
Explanation
The working group on complementary competences set this competence as a supporting measure
15.3 Delete. Insert « Member States shall share data on best practice in their employment policies»
Explanation
National governments must be free of any grandiose trans-continental five year plan schemes which do not take into account the economic varieties within.[217]

Article 16

16.1 At close, insert « The authorisation for such actions shall automatically lapse after one year »
Explanation
There is a good case for allowing a « Martian Clause » in the treaty, to cover for unexpected developments which need urgent response. However, such should not be permitted to act as a front for the expansion of competences by the back door. A sunset clause (which, after all, can be renewed on an annual basis) prevents this. It is extremely unusual for a constitution to include a clause allowing it to be modified without recourse to parliaments or member states' constitutional requirements, which is what the original permits.
16.1 After « assent » insert « through an absolute majority of all members »
Explanation
In a crisis, this will not be difficult to achieve, and will focus popular attention on the issues at hand
16.2 At close, insert « The action will be annulled if a national parliament withholds its consent »
Explanation
Democracy requires no less.[218]

[217] http://european-convention.eu.int/Docs/Treaty/pdf/Art15%20Heathcoat-Amory.pdf
[218] http://european-convention.eu.int/Docs/Treaty/pdf/Art16%20Heathcoat-Amory.pdf

Mr Heathcoat-Amory also co-sponsored, with a group of eurosceptical Convention members and alternates,[219] the following amended articles.

Article 24(1)
Delete fourth paragraph, starting 'A European regulation….'[220]

Article 25: Legislative acts (*Article 29 will stipulate that legislative acts cannot be used for the CFSP).*

1. European laws [delete and European framework laws] shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament, THE NATIONAL PARLIAMENTS and the Council in accordance with the rules of the legislative procedure referred to in Article X (*Part Two of the Constitution*). If the two institutions cannot reach agreement on an act, it shall not be adopted. Specific provisions shall apply in the cases referred to in Article Z (*ex-third pillar*).

2. In the specific cases provided for by the Constitution, European laws and European framework laws shall be adopted by the Council AND THE NATIONAL PARLIAMENTS.

3. When acting under any procedure for the adoption of a European law [delete or a European framework law], the European Parliament and the Council shall meet in public. AGENDAS, WORKING DOCUMENTS AND MINUTES SHALL BE AVAILABLE FOR ALL ELECTED MEMBERS OF PARLIAMENTS UNLESS A QUALIFIED MAJORITY IN THE COUNCIL DECIDES NOT TO. THIS DECISION CAN BE APPEALED TO THE OMBUDSMAN OR THE EUROPEAN COURT OF JUSTICE.[221]

Article 26: Non-legislative acts
The Council and the Commission as well as the European Central Bank, shall adopt European regulations or European decisions in the cases referred to in Articles 27 and 28 and in cases specifically laid down in the Constitution. THEY EXPIRE AFTER A CERTAIN PPERIOD OF TIME , IF THEY ARE NOT CONFIRMED BY QUALIFED MAJORITY VOTING IN THE COUNCIL AND THE EUROPEAN PARLIAMENT.[222]

Article 27
Delete whole article
Explanation
The legislative power (Council and Parliament) should not delegate law-making powers to a non-elected official body, particularly by qualified majority vote.[223]

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[219] With Irena Belohorska, Jan Zahradil,. Jens-Peter Bonde, William Abitbol, Peter Skaarup, Per Dalgaard, Esko Seppänen and John Gormley
[220] http://european-convention.eu.int/amendments.asp?content=24&lang=EN
[221] http://european-convention.eu.int/amendments.asp?content=25&lang=EN
[222] http://european-convention.eu.int/Docs/Treaty/pdf/26/Art26Bonde.pdf
[223] http://european-convention.eu.int/Docs/Treaty/pdf/27/Art27heathcoatamory.doc.pdf

Article 28: Implementing acts

1. Member States shall adopt all measures of national law necessary to implement the Union's legally binding acts.

2 MEMBER STATES ARE NOT OBLIGED TO IMPLEMENT A EU-LAW IF THEIR NATIONAL PARLIAMENT VETO THE LAW ON GROUNDS OF VITAL INTERESTS AND THEIR PRIME MINISTER WILL DEFEND THIS VETO ON THE NEXT EUROPEAN COUNCIL MEETING.

2. Where uniform conditions for the implementation of the Union's binding acts are needed, those acts may confer implementing powers on the Commission or in specific cases and in the cases provided for in Article [CFSP], on the Council.

3. Implementing acts of the Union may be subject to control mechanisms which shall be consonant with principles and rules laid down in advance by the European Parliament and the Council in accordance with the legislative procedure.

4. Implementing acts of the Union shall take the form of European implementing regulations or European implementing decisions.[224]

[224] http://european-convention.eu.int/Docs/Treaty/pdf/28/Art28Bonde.pdf

Appendix III Bibliography

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