RESEARCH PAPER 03/60
7 JULY 2003

The draft Treaty establishing a European Constitution: technical and constitutional issues in Parts I and IV

The Convention on the Future of Europe presented its draft Treaty establishing the Constitution to the European Council in Thessaloniki on 20-21 June 2003.

The draft Treaty is divided into four Parts. Those aspects of Part I concerning the institutions, and Parts II and III, covering fundamental rights and European Union policies, are discussed in Research Paper 03/58. The present Paper discusses those aspects of Part I with direct implications for the constitutional relationship with the Member States. It also looks at Part IV, the final provisions in the draft Treaty, which include how to amend the Treaty and when it enters into force.

Paul Bowers

INTERNATIONAL AFFAIRS AND DEFENCE SECTION

Vaughne Miller

INTERNATIONAL AFFAIRS AND DEFENCE SECTION

HOUSE OF COMMONS LIBRARY

Recent Library Research Papers include:

List of 15 most recent RPs

03/45	Welsh Assembly Elections: 1 May 2003	14.05.03
03/46	Scottish Parliament Elections: 1 May 2003	14.05.03
03/47	Unemployment by Constituency, April 2003	14.05.03
03/48	Enlargement and the *European Union (Accessions) Bill* [Bill 98 of 2002-03]	19.05.03
03/49	Whither the Civil Service?	20.05.03
03/50	The Conflict in Iraq	23.05.03
03/51	Iraq: law of occupation	02.06.03
03/52	The *Courts Bill* [HL] [Bill 112 of 2002-03]	05.06.03
03/53	The euro: background to the five economic tests	04.06.03
03/54	Employment Equality Regulations: Religion and Sexual Orientation	06.06.03
03/55	Unemployment by Constituency, May 2003	11.06.03
03/56	The Convention on the Future of Europe: institutional reform	12.06.03
03/57	Economic Indicators [includes article: The RPI to HICP – a new inflation measure for the UK]	01.07.03
03/58	The draft Treaty establishing a European Constitution: Parts II and III	07.07.03
03/59	UK Election Statistics: 1945-2003	07.07.03

Research Papers are available as PDF files:

- *to members of the general public on the Parliamentary web site, URL:* ***http://www.parliament.uk***
- *within Parliament to users of the Parliamentary Intranet, URL:* ***http://hcl1.hclibrary.parliament.u****k*

ISSN 1368-8456

Summary of main points

- The draft Treaty establishing the Constitution aims to draw together the strands of the various European treaties and protocols, and to put them into a single text.

- There is debate as to whether it adds important new substance to the existing treaties.

- There is also a question of how a written constitution for the European Union will sit alongside national constitutions.

- This Paper looks at the constitutional implications of the draft Treaty other than those which derive from policy areas (these are discussed in Research Paper 03/58). It is concerned with the over-arching structure of relations between the Union and the Member States.

- Most of what is in the draft Treaty is carried over from the existing treaties, sometimes with tidying changes. Some important new provisions are added.

- An example is the clear statement that European law has primacy over national law. This is a new addition to the treaties, but it is not a new fact, having been established by the European Court of Justice already.

- The draft Treaty includes detailed provisions on amendment and withdrawal.

- It also defines the division of powers between the Union and the member states.

CONTENTS

I Introduction

The Convention on the Future of Europe agreed more or less final drafts of Volumes 1 and 2 of the Treaty establishing the Constitution on 12 and 13 June 2003.[1]

Volume 1 contains Parts I and II, plus three protocols. Part I deals with the objectives of the European Union, its competences, institutions, finances and membership. Part II is the Charter of Fundamental Rights. The protocols cover the role of national parliaments, the application of subsidiarity and proportionality, the apportionment of seats in the European Parliament and weighted votes in the Council of Ministers. Volume 1 is contained in CONV 820/1/03, 27 June 2003, which can be accessed at http://european-convention.eu.int/docs/Treaty/cv00820-re01.en03.pdf.

Volume 2 contains Parts II, III and IV. Part III concerns the policies of the Union, while Part IV is the general and final provisions. The Praesidium has asked for more time to complete the revision of Part III. Volume 2 is contained in CONV 805/03, which can be accessed at http://european-convention.eu.int/docs/Treaty/cv00802.en03.pdf.

The substantive policy articles of the draft Treaty are contained in Parts II and III. These are discussed in Research Paper 03/58, *The draft treaty Establishing a European Constitution: Parts II and III*, 7 June 2003. This Paper concerns those aspects of Part I having special relevance to constitutional matters, and Part IV, which includes how the Treaty would enter into force and how it could be amended.

---

[1] The "Draft Treaty establishing a European Constitution" is often more loosely described as the draft European Constitution

II Part I

Part I of the draft Treaty establishing the Constitution contains various basic provisions that set out the structure of the new European Union, its values, and the conditions for membership and withdrawal.

The basic provisions in the *Treaties Establishing the European Communities* (TEC) are in Parts One and Two, Articles 1 to 22, and those in the *Treaty on European Union* (TEU) are in Title I, "Common Provisions," Articles 1 to 7.

A. Establishment, values and objectives

Article I-1 of the draft Treaty establishes the new European Union. It opens:

> Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise in the Community way the competences they confer on it.

The "ever closer union" of the TEU has gone, and there is reference to "a common future."

An earlier draft had referred to a "federal basis" for Union action:

> 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

Article I-1 refers to the Member States conferring competences on the Union. Article 5 TEC states that "the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein." The change is slight, but it places the accent on the role of the Member States, rather than the Treaties, in conferring competences.

Article I-1 (2) provides that "the Union shall be open to all European States which respect its values and are committed to promoting them together." At present Article 49 TEU provides that "any European State which respects the principles set out in Article 6 (1) may apply to become a member of the Union."

Article I-2 sets out the Union's values:

> The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination.

At present the values of the European Union are in Article 6 (1) TEU, where they are given as "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law," the rights guaranteed by the European Convention on Human Rights and "respect for the national identities of the Member States."

Article I-3 sets out the Union's objectives. At present these are in Article 2 TEU and Article 3 TEC. The draft Constitution gives the following objectives:

> 1. The Union's aim is to promote peace, its values and the well-being of its peoples.
>
> 2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted.
>
> 3. The Union shall work for a Europe of sustainable development based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
>
> It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of children's rights.
>
> It shall promote economic, social and territorial cohesion, and solidarity among Member States.
>
> The Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
>
> 4. In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter.
>
> 5. These objectives shall be pursued by appropriate means, depending on the extent to which the relevant competences are attributed to the Union in this Constitution.

The aim of peace is currently declared in the Preambles to the TEU and the TEC, and it is also contained in Articles relating to the Common Foreign and Security Policy (CFSP). The Preamble to the TEU states that the parties are

> resolved to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence […], thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world.

The Preamble to the TEC states that the parties are "resolved by thus pooling their resources to preserve and strengthen peace and liberty."

Many Convention members thought peace deserved a higher place in the Union's aspirations to reflect the post-War spirit in which the then European Economic Community was conceived.

The present Treaties do not refer to the "well-being" of citizens but to the aim of "raising the standard of living and quality of life."[2] They provide for an area of freedom, security and justice,[3] a single market (called "common market" in Article 2 TEC), sustainable development,[4] environmental protection,[5] the promotion of scientific and technological development,[6] social protection,[7] equality,[8] social cohesion[9] and solidarity,[10] respect for linguistic and cultural diversity,[11] fair trade,[12] protection of human rights,[13] and respect for the principles contained in the UN Charter.[14]

The draft Treaty gives new emphasis to "mutual respect among peoples," the eradication of poverty, respect for children's rights and the aim of a "social market economy."

Article I-4 sets out "fundamental freedoms" to be guaranteed in the Union, which are the freedoms of movement of persons, goods, services and capital, and the freedom of establishment. These are the basis for the internal market, the path towards which is established under Article 3 TEC. This states that the activities of the Community shall include "an internal market characterised by the abolitions, as between Member States, of

---

2 Article 2 TEC
3 Article 2 (4) TEU
4 Preamble and Article 2 TEU, and Articles 2 and 6 TEC
5 Preamble TEU, Articles 2, 6, 95 and 174-76 TEC
6 Articles 157 and 163-166 TEC
7 Article 2 TEC
8 Articles 2, 3, 137 and 141 TEC
9 Articles 2, 43 and 158-62 TEU, Articles 2 and 16 TEC etc
10 Preamble and Articles 1, 11 and 23 TEU, and Preamble and Article 2 TEC
11 Articles 149 and 151 TEC
12 Preamble and Article 82 TEC
13 Preamble, Articles 6 and 11 TEU, Article 177 TEC
14 Article 11 TEU and Preamble TEC

obstacles to the free movement of goods, persons, services and capital." Provisions on the four freedoms are contained in Titles I and III of Part Three TEC, "Community Policies," Articles 23 to 31 and Articles 39 to 60.

Article I-4 also prohibits "any discrimination on grounds of nationality." This prohibition is contained in Article 12 TEC.

B. Relations with the Member States

Article I-5 defines the relations between the Union and the Member States. The Union is to respect the national identities of the States, inherent in their fundamental structures. These structures are described as political and constitutional, and they include regional and local self-government. The Union is to respect the "essential State functions" of the Member States, and these are described as "including for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security."

Respect for the national identities of the Member States is contained at present in Article 6 TEU, which provides that "the Union shall respect the national identities of its Member States." Article I-5 expands on this, although it still does not define "respect." Reference to the "territorial integrity of the State" is new. This could have special resonance for Gibraltar, the British Overseas Territory claimed by Spain.

The maintenance of internal law and order is an element of Article 33 TEU, which states that Title VI TEU (Provisions on Police and Judicial Cooperation in Criminal Matters) "shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security." Article 35 TEU further limits EU action and the jurisdiction of the European Court of Justice (ECJ) in this context, stating that

> the Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Among those former Third Pillar areas moved to the First (Community) Pillar under the Treaty of Amsterdam, Articles 64 and 68 TEC are further reminders that internal law and order are the responsibility of the Member States.

Article I-5 concludes:

> Following the principle of loyal cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.

> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the objectives set out in the Constitution.

The expectation of "loyal cooperation" is expressed here as a guiding principle. Currently, this language is restricted to Article 11 TEU (CFSP), which provides that "the Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity." Article 1 TEU obliges the Union to act with "consistency and solidarity." Article 23 TEU requires that Member States, "in a spirit of mutual solidarity," shall not do anything likely to conflict with nor impede Union action if they decide to abstain from participation in a CFSP measure.

C. Legal status of the Union

Article I-6 confers legal personality on the Union, whereas at present only the European Community has legal personality, under Article 281 TEC.[15] This means that the Union may engage in the activities of legal persons under national and international laws, such as acquiring property, being party to legal proceedings or concluding treaties. Details of these capacities are given in other articles. Provisions on the legal capacity of the Union are in Article III-328, those on its contractual liability are in Article III-333 and those on its privileges and immunities are in Article III-336. At present legal capacity is in Article 282 TEC, contractual liability is in Article 288 TEC, and privileges and immunities are in Article 291 TEC.

D. Fundamental rights

Article I-7 consists of three provisions on fundamental rights. First, the Union is to recognise the contents of the Charter of Fundamental Rights, as given in Part II of the draft Treaty. Secondly, the Union will seek accession to the European Convention on Human Rights, to which all Member States are individually party in any case. Finally, fundamental rights,

> as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Most Convention members were in favour of giving the Charter of Fundamental Rights an enhanced status through incorporation, further supported by Union accession to the Council of Europe's European Convention on Human Rights (ECHR). However, incorporation has been a contentious issue for the UK.

---

[15] And corresponding articles in the Euratom Treaty and the former Coal and Steel Community Treaty

Respect for the ECHR and adherence to the human rights traditions of the Member States are currently mentioned in Article 6 TEU. Under the draft Treaty there would be a triple guarantee of human rights, through the Charter, the ECHR and national traditions. This gave rise to some criticism in the Convention on the grounds of duplication and of possibly conflicting jurisdictions, if the Union had its own human rights guarantees as well as being bound to the ECHR. The EU's existing human rights role and the position of the Charter are discussed in Library Research Paper 00/32, *Human rights in the EU: the charter of fundamental rights*, 20 March 2000, which can be accessed at: http://hcl1.hclibrary.parliament.uk/rp2000/rp00-032.pdf.

The Praesidium commented on an earlier draft of this article:

> it is clear that this paragraph, as amended by the Praesidium, cannot be interpreted as ruling out the possibility of accession to other human rights conventions, a possibility which is opened up pursuant to other legal bases laid down in the Constitution (namely the various policies linked to such conventions, and even the flexibility clause in Article I-17). This paragraph may ask that the Union seek accession only in the specific case of the ECHR; however this particular formula is not in any way intended to rule out the possibility of accession to other conventions. As the Praesidium has already pointed out, only the European Convention on Human Rights is mentioned in this paragraph because of the fact that a Court of Justice opinion in 1996 had rejected Community competence to accede to that Convention on the basis of considerations specific to it.[16]

E. Citizenship

Article I-8 concerns citizenship of the Union. It provides that "every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship; it shall not replace it." The rights of citizens are spelled out, and they include the rights to move and reside freely within the territory of the Member States, to vote and stand as candidates in municipal and European Parliament elections in their Member State of residence under the same conditions as nationals of that state, the right to diplomatic and consular protection by other Member States where their own State is not represented, and the right to contact the institutions of the Union in writing in any of the Union's languages and to obtain a reply in the same language.

At present Article 2 TEU states that the Union aims to "strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union," and provisions on this citizenship are set out in Articles 17-22 TEC. The provision that Union citizenship is additional to national citizenship is contained in Article 17 TEC, where it is worded as "citizenship of the Union shall complement and not replace national citizenship." The present Treaties specify the same

[16] CONV 724/03

rights and duties as contained in the draft. The provisions of Article 22 TEC on monitoring the application of the citizenship provisions and a procedure for strengthening the rights contained in it are not included in this draft article.

F. Competences and division of powers

Article I-9 is the first of Title III in the draft Treaty, on Union competences and actions. This Title is new to the Treaties insofar as it explicitly defines the limits of Union competence, which are conferred by the Member States, and stipulates that competences not conferred upon the Union in the Constitution remain with the Member States. In other words, there is a presumption in favour of Member State competence, which the present subsidiarity Article has not made clear. The principle of conferral itself is not new. Article 5 TEC already provides that "the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein." Powers conferred by the Treaty are powers conferred on the EC/EU by the Member States and given legal effect by the Treaty. However, the draft Treaty establishing the Constitution gives an explicit treaty base to the method of applying the principles of subsidiarity and proportionality via the two protocols mentioned in this article. These protocols are discussed in more detail below. Sub-section 3 of this article is almost identical to the second paragraph of existing Article 5 TEC (defining subsidiarity), with one significant exception: it includes regional and local government within the sphere of application of subsidiarity. It does not prescribe how subsidiarity should be applied at sub-state level, but it does not exclude this level as the present Treaty does.

Article I-10 is central to the constitutional relationship. It sets out the relationship between, on the one hand, the draft Treaty establishing a European Constitution and EC law and, on the other, national law:

> 1. The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.
>
> 2. Member States shall take all appropriate measures, general or particular, to ensure fulfilment of the obligations flowing from the Constitution or resulting from the Union Institutions' acts.

The explicit reference to the primacy of EC law is new, but it is not a new concept. This sub-section confirms the status of the EU as a separate political order and the principle of the supremacy of Community law over that of the Member States. This is the first time that the supremacy of EC law is given an explicit legal and constitutional basis, but the principle was established in the early case-law of the ECJ, notably in *Costa v ENEL*.[17] The ECJ ruled:

---

[17] The principle has also been enshrined in some Member States' constitutions.

> […] 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.
>
> 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.[18]

The requirement for Member States to take all appropriate measures to fulfil their obligations under the constitution is contained in Article 10 TEC.

Articles I-11 to I-13 deal with the competences of the Union. Where the Union has exclusive competence the Member States may not legislate, other than to implement Union acts, unless empowered to do so by the Union. Where there is shared competence Member States "shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence." In some areas of Member State competence the Union may act to support, coordinate or supplement their actions. The scope of these competences, exclusive and shared, are defined in **Articles I-12 and I-13**. Exclusive Union competence applies in the areas of monetary policy (for those states adopting the Euro), common commercial policy, customs union and marine conservation under the common fisheries policy.

David Heathcoat-Amory, who was one of the UK's parliamentary representatives on the Convention, was critical of the inclusion of marine resources as an area of exclusive EU competence, which he called an "illegitimate extension" that had not been discussed in the Working Group looking at competences (of which he was a member).

> We certainly did not assent to the proposition that that policy area should become an exclusive competence, which of course means that member states are forbidden to legislate in that area. That is not just of concern to Scotland. Each member state ought to take fright when there is a power grab in a constitution to take over areas of policy that ought to be more properly shared or devolved downwards to those who can make decisions closer to the people concerned and to the resources in question.[19]

---

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

[19] Standing Committee on the Convention, 7 May 2003 cc17-8 at

Two substantive competences are provided by Article I-11. The Union "shall have competence to coordinate the economic and employment policies of the Member States" and it "shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy."

The coordination of economic and employment policies is detailed in Article I-14, and the CFSP is detailed in Article I-15.

The present Treaties refer to "spheres of competence," "shared competence," "Community competence" and "exclusive competence," but they do not clearly define categories of competence as exclusive or shared. The provisions governing Community action in areas such as transport and energy are contained in the body of the Treaty, not categorised. Articles 1-11, I-12 and I-13 are therefore new, and they are reminiscent of federal constitutions.

The Praesidium commented on Article I-11(1):

> The terms "or for the implementation of acts adopted by the Union" have been added to take account of the fact that, even in areas of exclusive competence, Union law is generally implemented by the Member States without the need for them to be empowered by the Union in accordance with the general principle referred to in Article I-10(2). It is only when implementation must exceptionally be carried out by the Union that the Union act provides explicitly for such implementation. The aim of the addition to paragraph 1 is to ensure that implementation of Union law by the Member States in an area of exclusive competence does not require empowerment by the Union (which is currently the case).[20]

The provision that "the Union shall have competence to coordinate the economic and employment policies of the Member States" compares to present Article 99 TEC, which provides that "Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council".

The Praesidium commented on Article I-12 as follows:

> The areas referred to in this paragraph are areas which currently fall within the exclusive competence of the Union. The Praesidium thinks that the list of areas of exclusive competence (like areas of supporting action) should be restrictive. However, the list of areas of shared competence should not be restrictive as the latter is a residual category. This is all the more necessary given that in areas of exclusive competence it is the Union alone which can legislate and adopt legally binding acts.[21]

---

http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/st030507/30507s05.htm

20 CONV 724/03 26 May 2003

21 CONV 724/03 26 May 2003

Article I-12 (2) concerns the conclusion of international agreements:

> The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable the Union to exercise its competence internally, or affects an internal Union act.

The ECJ took the view in the *ERTA* case in 1971 that the Community had an exclusive power in this regard after it had adopted a common rule[22] and subsequent cases extended the powers of the Community in the conclusion of international agreements.[23]

The debate in the Convention on the issue of competences is discussed in Library Paper 03/23, *The Convention on the Future of Europe: proposals for a European constitution*, 18 March 2003. Mr Heathcoat-Amory commented in the debate on the institutional proposals on 7 May 2003:

> I am increasingly worried about that, because it represents a substantial additional shift of power and decision making from member states to the Union. For instance, a number of supporting measures, which are explicitly described as such in the existing treaties—for instance, on public health in existing article 152, where measures are explicitly described as "complementing national policies"—are in the draft constitution described as "shared competencies". According to the definition, that means that if the Union legislates, member states will not be able to legislate in that area. I believe that the concept of shared competencies does not tell us much about who does what. I am worried that, instead of closing the gap between the Union and the people, as we are required to do under our mandate to reduce the democratic deficit, we are in danger of widening it by allowing more decisions to be taken further away from the ordinary voter.[24]

---

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

23 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 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".

24 7 May 2003, c7 at http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/st030507/30507s02.htm

Article I-14, on economic policy, is as follows:

> 1**.** The Union shall adopt measures to ensure coordination of the economic policies of the Member States, in particular by adopting broad guidelines for these policies. The Member States shall coordinate their economic policies within the Union.
>
> 2. Specific provisions shall apply to those Member States which have adopted the euro.
>
> 3**.** The Union shall adopt measures to ensure coordination of the employment policies of the Member States, in particular by adopting guidelines for these policies.
>
> 4. The Union may adopt initiatives to ensure coordination of Member States' social policies.

This draft article gives the Union a greater role in the adoption of measures in the area of economic, employment and social policy. Article 3(i) TEC ("Principles") states that one of the activities of the Union is "the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment" and Article 99(1) TEC states that "Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council …" **Article I-14(1)** of the draft Treaty states that the "Union shall adopt measures to ensure coordination of the economic policies of the Member States".

The Government has objected to this draft article and Peter Hain, the Government representative on the Convention, argued that the new should Treaty adhere to the wording of the current Article 99 TEC.[25]

Article 125 TEC requires the Member States and the Community to "work towards developing a coordinated strategy for employment", whereas under draft Treaty **Article 1-14(3)** the Union "shall adopt measures to ensure coordination of the employment policies of the Member States". Article 136 TEC

Article I-14(4) gives the Union an option to adopt initiatives to ensure coordination of Member States' social policies, whereas current Article 140 TEC states that the Commission "shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this chapter".

---

[25] Convention Plenary debate 5 March 2003, *European Report*, 8 March 2003

Article I-15, on CFSP, is as follows:

> 1. The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy, which might lead to a common defence.
>
> 2. Member States shall actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the acts adopted by the Union in this area. They shall refrain from action contrary to the Union's interests or likely to impair its effectiveness.

The general provisions on the CFSP at present are in Articles 2 and 11 TEU. The Article does not list the objectives of the Union in CFSP matters, however, as these are defined in Article III-188 within the context of overall external action of the Union.

The provisions for implementing CFSP are set out in Article I-39 and detailed in Articles III-190 to III-204. The majority of the provisions for CFSP remain unchanged from the text of the current EC Treaty, although a number of clauses have been changed to provide clarity. The most significant innovation is the introduction of a Union Minister for Foreign Affairs (see below).

Article I-17, the "flexibility clause," allows the Council to take action in limited circumstances even if the draft Treaty does not provide for this:

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

However, this cannot be used to entail harmonisation of national laws or regulations if the draft Treaty excludes such harmonisation.

The Praesidium commented on this article, as follows:

> This paragraph attempts to strike a balance between the need for flexibility in the delimitation of competences and the need to observe the limits on the Union's competences. Hence the reference in this paragraph to the Union's objectives is intended to impart a degree of flexibility to the system whilst the reference to the framework of the policies defined in Part Three seeks to give an assurance that measures adopted on the basis of this provision will comply with the limits on the competences attributed to the Union by the Constitution. Accordingly, this provision could not be used to extend the competences of the Union by establishing a new policy, but only to carry out a measure relating to a policy already provided for by the Constitution.

> The amendments tabled on this paragraph go in opposite directions. While some of the amendments seek to reduce the scope of this provision to certain of the policies defined in Part Three (notably the internal market and Economic and Monetary Union), others seek to remove any reference to Part Three, in order to enlarge the scope of Article I-17.[26]

Mr Heathcoat-Amory commented,

> the [working] group recommended that any flexibility clause should contain strict conditions, including a ban on amending the Constitution by this route. This too was ignored. The flexibility clause of the new Constitution (Article 17) supplies a means to extend the powers of the Constitution without going through the proper ratification process in each member state. The Union wants the powers that derive from a constitution but is unwilling to accept its discipline.[27]

G. Accession, suspension and withdrawal

Articles I-57 to I-59 cover membership issues. **Article I-57** concerns the accession to the Union of new members, which is currently dealt with in Article 49 TEU. There are changes to the details of the procedure, but accession remains subject to ratification by all the existing and prospective Member States. Under the existing procedure a state wishing to accede makes an application to the Council. The Council decides the matter by unanimity after consulting with the Commission and having received the assent of the EP, by an absolute majority. Under the new procedure the application would still be made to the Council, but it would then notify the EP and the national parliaments of the application. The Council would act by unanimity, again after consulting the Commission and "obtaining the consent" of the EP. According to the explanatory notes the changes to this wording, from assent of the EP by absolute majority to consent of the EP, are "of a purely technical nature."

The accession arrangements would be embodied in a treaty, as at present, and would be subject to ratification by all member states and by the acceding state(s). This is necessary because the accession treaties effect amendments to the principal treaties, for instance in the composition of the institutions.

Article I-58 deals with deviation from the values of the Union and corresponds with current Articles 7 TEU and 309 TEC. A reasoned proposal that a member state risks breaching the Union's values may be put forward by one third of the member states, by the EP or by the Commission, for consideration by the Council. The latter may adopt a decision by a four fifths majority, and having obtained the consent of the EP, to determine

---

26 CONV 724/03, 26 May 2003

27 Centre for Policy Studies, *The European Constitution and What it Means for Britain*, June 2003 at http://www.cps.org.uk/dhaconv.pdf

that "there is a clear risk of a serious breach by a Member State of the values mentioned in Article 2."

Further, the Council may adopt a decision by unanimity, having obtained the consent, rather than the present "assent," of the EP, and on a proposal by one third of the Member States or by the Commission, determine the existence of a serious and persistent breach of the values mentioned in Article 2. The state in question may "submit its observations."

Following this, the Council may adopt a decision by QMV suspending "certain of the rights" of the state in question, including its voting rights. The state in question will not be released from its obligations under the Treaty during this period. The Council may vary or revoke these measures "in response to changes in the situation which led to their being imposed," and again it does so by QMV.

In either of these situations, a finding that there is a risk of a serious breach, accompanied by recommendations, or a finding that there is a serious and persistent breach, accompanied by suspension of rights, the vote of the state in question will not be taken into account. The consent of the EP will be on the basis of a two thirds majority of votes cast, representing a majority of MEPs.

"Serious and persistent breach" is not defined. The question of definition arose, without answer, at the time of the Amsterdam IGC when the suspension clause was agreed.

Article I-59 sets out a procedure for withdrawal from the Union.

A state wishing to withdraw must notify the European Council, which will consider the matter and set out negotiating guidelines. The Union will conduct negotiations with the state on this basis, and will conclude an agreement setting out the arrangements for withdrawal and taking into account "the framework for its future relationship with the Union." The Council of Ministers, having obtained the consent of the EP, will conclude the agreement, acting by QMV. The withdrawing state will not participate in discussions or decisions about it in the European Council or in the Council of Ministers.

The withdrawing state will be released from its obligations under the draft Treaty on entry into force of the withdrawal agreement, or two years after its notification to the European Council. This period may be extended by agreement.

It might appear that a withdrawing state would need some kind of intermediate status, rather as exists for those states seeking accession. The Praesidium argued that it was not necessary to stipulate this in the draft Treaty, since **Article I-56**, on the Union and its immediate environment, would allow special arrangements to be made if need be.

There is no provision for withdrawal in the existing EC Treaties. Under general treaty law a state may withdraw from a treaty lacking a withdrawal clause if all the states parties consent.[28] It must give at least three months notice, except in cases of emergency, and if another state party objects during that time, arbitration must be sought.[29] A state may withdraw without consent if it is established that the parties intended to admit the possibility of denunciation or withdrawal, or if "a right of denunciation or withdrawal may be implied by the nature of the treaty."[30] The final point is a matter of interpretation. A state withdrawing in this way must give at least 12 months notice,[31] and this notification must be given to all the other states parties.[32] It might be argued that Article I-59 therefore has more political than legal significance.

The explanatory notes on the draft Treaty give the rationale for the two approaches to withdrawal in Article I-59 (by agreement or after at least two years):

> The Praesidium considers that, since many hold that the right of withdrawal exists even in the absence of an explicit provision to that effect, withdrawal of a Member State from the Union cannot be made conditional upon the conclusion of a withdrawal agreement. Hence the provision that withdrawal will take effect in any event two years after notification. However, in order to encourage a withdrawal agreement between the Union and the State which is withdrawing, Article I-57 [presumably a misprint for I-59] provides for the possibility of extending this period by common accord between the European Council and the Member State concerned.

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.[33]

---

28 *Vienna Convention on the Law of International Treaties* 1969, Article 54.
29 *Vienna Convention on the Law of International Treaties* 1969, Article 65, citing Article 33 of the UN Charter on arbitration.
30 *Vienna Convention on the Law of International Treaties* 1969, Article 56.
31 *Vienna Convention on the Law of International Treaties* 1969, Article 56.
32 *Vienna Convention on the Law of International Treaties* 1969, Article 65.
33 HL Deb, 11 January 2000, WA 96-7.

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.[34]

[34] 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

III Part IV

Treaties commonly have a final section covering matters such as entry into force and the processes for making amendments, for acceding to the treaty or for denouncing it. The draft Treaty establishing the Constitution contains its general and final provisions in Part IV. In a treaty of this type, these can be sensitive articles. Some provisions that might be thought of as typically "final" are located in other Parts of the draft Treaty.

The main work of Part IV is to repeal and replace the existing EC Treaties and to allow for amendment of the new Treaty. These two moves are subject to ratification by all member states, subject to their own constitutional procedures. This means that some states will hold referendums, but that there is no obligation to do so.

The final provisions in the TEC are in Part Six, Articles 281 to 314. The final provisions in the TEU are in Title VIII, Articles 46 to 53.

A. Repeal and succession[35]

Part IV of the draft Treaty establishing the Constitution begins with provisions connected with the European Union's succession to the European Community. They aim to allow the new Union to take over smoothly from the Community.

Article IV-1 deals with the repeal of the existing EC Treaties. It specifies the two main components of these, the TEC and the TEU, and it makes reference to a Protocol in which will be listed all the acts and treaties which have supplemented or amended them. Article IV-1 states that the TEC, the TEU and the acts and treaties listed in the Protocol will be repealed as from the date of entry into force of the Treaty establishing the Constitution (see below).

Article IV-2 provides that the new European Union will succeed to all the rights and obligations of the European Community and of the existing European Union arising from previous treaties, protocols and acts. The rights and obligations include those which are internal and those arising from international agreements, and they include all the assets and liabilities of the Community and the Union, and their archives. The Article states that the provisions of the acts of the European institutions, adopted under the various treaties and other instruments, will remain in force. It refers to a Protocol, which will give conditions under which the acts of the institutions will remain in force. According to the explanatory notes, the Protocol will list the categories of acts to be taken over by the new European Union, and the rules for implementing them.

---

[35] These headings are used for ease of comprehension. They are not taken from the Treaty.

Article IV-2 also provides that the case law of the ECJ will be maintained "as a source of interpretation of Union law." This was amended from the previous draft, which wanted the case law to be maintained "as a preferential source of interpretation of the Constitution and acts prior to its entry into force."

B. Amendment

Article IV-6 sets out the procedure for amending the Treaty.

Article 48 TEU contains the current amendment procedure:

> The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded.
>
> If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area.
>
> The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

Article IV-6 is as follows:

> 1. The government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaty establishing the Constitution. The national Parliaments of the Member States shall be notified of these proposals.
>
> 2. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments of the Member States, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The European Council may decide by a simple majority not to convene the Convention should this not be justified by the tenor of the proposed amendments. In the latter case, the European Council shall define the terms of reference for the conference of representatives of the governments of the Member States.
>
> The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to the conference of representatives of the governments of the Member States provided for in paragraph 3.

> 3. The conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaty establishing the Constitution.
>
> The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

Paragraph 1 introduces a new right for the EP to propose amendments, and it also provides that national parliaments be informed of any proposed amendments.

Paragraph 2 introduces a new stage in the process.

Under Article 48 TEU, the Council would consult the EP and, where appropriate, the Commission, and it would then decide whether to convene an IGC (as set out in the second paragraph of Article 48) to determine the amendments to be made.

Under **Article IV-6(2)**, the Council will consult the EP and the Commission ("where appropriate" has been dropped), and it will then decide whether to pass the proposed amendments directly to an IGC or first to a Convention, made up of

> representatives of the national Parliaments of the Member States, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission.

The Convention, if used, will examine the proposed amendments and adopt by consensus a recommendation to an IGC, which then will be convened to decide on the proposals.

The Council will make the decision on referral (to the Convention and then IGC, or directly to an IGC) by simple majority, on the judgement of whether direct referral to an IGC is "justified by the tenor of the proposed amendments."[36] If it does refer a matter directly, the Council must "define the terms of reference" for the IGC.

The text places the option of referral to the Convention first, and it mentions direct referral to an IGC afterwards. The explanatory notes make clear that "the Praesidium proposes to adopt as a general rule" the referral to the Convention. Direct referral to an IGC is regarded as a "streamlined" process, for use in less sensitive areas.

Arguments were put forward for applying different methods of amendment to different Parts of the Treaty, but the Praesidium took the view that it was not possible fully to distinguish the Parts in this way, as more or less suitable to the full process or the streamlined process. It also argued that treating the Parts differently might lead to efforts

---

[36] The explanatory notes paraphrase the grounds on which the Council might choose to move directly to an IGC by reference to the "scale" of the amendments, rather than the "tenor."

to move articles from one Part to another in order to subject them to different amendment procedures.

As in the existing EC Treaties, amendments will enter into force only after they have been ratified by all the Member States, in accordance with their own constitutional requirements. In the explanatory notes the Praesidium put forward the view that it would be "politically unacceptable in some quarters" if entry into force were not linked to comprehensive ratification in this way, although it pointed to the streamlined amendment procedure again as a means of simplifying the process.

C. Ratification and entry into force

Article IV-7 covers ratification and entry into force of the Treaty. Like most major multilateral treaties, the draft Treaty establishing the Constitution is subject to ratification. It will enter into force on a date as yet unspecified, provided that all the EU member states have ratified it by that time. If they have not, it will enter into force on the first day of the month after the final ratification. If, two years after the Treaty is signed, four fifths of the member states have ratified, but one or more have "encountered difficulties" in doing so, the matter will be referred to the European Council.

Entry into force thus depends on universal ratification. There are two main reasons for this. It would be controversial to allow the Treaty to come into force without unanimity. It would also be impracticable, since the Treaty repeals the existing treaties, but these can be repealed only if all member states consent. If the new Treaty came into force before all member states had ratified, then its provisions on repeal would become paradoxical. Its content would have to be treated as a form of amendment on a grand scale, and this too would be subject to universal ratification, under Article 48 TEU.

The Praesidium suggested that paragraph 3 of this article, concerning the referral to the European Council in the event of a minority not ratifying, be reproduced in a declaration annexed to the final act of signature for the Treaty, in order to make the paragraph applicable to the ratification of the Treaty itself. This is because paragraph 3 envisages a situation that could arise only before entry into force, and it sets out steps to be taken in that event. To make those steps operative, they must be embodied in some instrument effective prior to entry into force for the Treaty. Article IV-7 will not be in force itself, as it is part of the Treaty. A declaration annexed to the act of signature could provide the necessary authority.

D. Other

Article IV-3 gives the geographical application of the Treaty. This Article reproduces Article 299 TEC, *mutatis mutandis*, except for the provisions in paragraph 2 of Article 299 concerning special provisions for the French overseas departments, the Azores, Madeira and the Canary Islands. These are to be included in Part III in an article as yet unspecified.

Article IV-4 provides that the Treaty will not preclude regional unions between Belgium and Luxembourg, nor between those two states and the Netherlands, insofar as the objectives of those unions are not achieved by the Treaty. It reproduces Article 306 TEC, *mutatis mutandis*.

Article IV-5 provides that the protocols to the Treaty form an integral part of it. The explanatory notes recommend that the Convention should point out to the Council "that the future of the Protocols annexed to the current Treaties will need to be considered before the end of the IGC."

Article IV-8 provides that the Treaty establishing the Constitution is concluded for an unlimited period.

Article IV-9 provides that the versions of the Treaty in the official languages are equally authentic, and that they be deposited in Rome.

IV Implications

A. A"tidying up" exercise or a "refounding of the Union"?

The UK Government representative on the Convention, Peter Hain,[37] described the process of the Convention as a "tidying up exercise".[38] However, this view is not shared by other observers.

Lord Stoddart told the Standing Committee on the Convention:

> the Convention is comparable to the original treaty of Rome—it is a refounding of the Union, but on a different basis. It is not a consolidating measure; it is not a reorganisation of the treaties; it is nothing like Maastricht, Amsterdam or Nice. It is an entirely new enterprise, and founded on a different basis. We are writing a constitution for Europe and for the United Kingdom. Something that important should be treated with extreme caution and discussed on a very long time scale.[39]

Gisela Stuart, one of the UK parliamentary representatives on the Convention, told the Standing Committee: "I think that we have gone beyond consolidation. This is quite an extension".[40] The Foreign Secretary, Jack Straw, said in a Foreign Office seminar on 17 June 2003 that the draft constitution served UK interests well, while Danish anti-EU groups believe the draft Treaty will serve *their* purpose:

> The EU Constitution will make the Union a proper state with centralist decision processes and a marked concentration of power which will, in particular, reduce the influence of small countries. The EU Constitution will necessitate a change in the Danish Constitution. The Convention has done a good job for the No movement, and thanks for that!" said Ditte Staun, spokesperson for the Danish People's Movement Against EU, to the EUObserver.[41]

David Heathcoat-Amory argued that the constitution is "a new constitutional order for the Union and its member states, with profound implications for parliamentary democracy and the principles of self-government."[42]

---

37 Former Minister for Europe, who continued as the Government's representative after becoming Secretary of State for Wales

38 Interview 18 May 2003, reported in *Daily Mail* 19 May 2003: "But Mr Hain was thrown on the defensive when interviewer Jeremy Vine reminded him how he told a Commons committee last month the new treaty will have ' substantial constitutional significance.' 'Well of course it will,' Mr Hain conceded, before claiming that 'three-quarters of it' would simply be 'tidying up' clauses in existing treaties".

39 Lord Stoddart Standing Committee on the Convention 7 May 2003 c21 at http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/st030507/30507s06.htm

40 Gisela Stuart ibid c38 at http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/st030507/30507s10.htm

41 *EUObserver*, 17 June 2003 at http://www.euobserver.com/index.phtml?aid=11743

42 Centre for Policy Studies *The European Constitution and What it Means for Britain* June 2003 at http://www.cps.org.uk/dhaconv.pdf

The draft Constitution, like EU principles and philosophies before it (e.g. subsidiarity) means different things to different parties. The Convention and its work have been compared on numerous occasions to the Philadelphia Convention that drew up the US Constitution in 1787. However, there are some significant differences in the hopes, expectations, composition and working methods of the two bodies. In the case of the USA, there was general agreement after the declaration of independence from Britain in 1776 and during the ensuing war of independence that only a central government would keep the Union together. All the delegates spoke the same language. The Convention met *in camera* to settle only a decade or so of *acquis*. The delegates were creating a new independent state. The EU Convention, on the other hand, has been a meeting of 105 participants from 27 different states speaking several different languages, with numerous other observers and onlookers, huge publicity, a range of views as to the future shape of the Union (evident from the vast number of amendments tabled to Praesidium proposals) and with over 40 years of *acquis* to deal with. The outcome is also likely to be very different: the US Constitution is about 15 pages long, whereas the EU constitution looks set to be around 230.

B. Implications for national constitutions?

British constitutional arrangements are not reducible to a single textual source. Rather, they derive from a range of sources, practices and understandings.[43] All the other EU member states have documents embodying their constitutions in a single text. The difference between these approaches can be overstated. There are textual elements in the British system already, and in any system some constitutional arrangements will evolve through practice, regardless of what is written down. Nevertheless, at the very least, there is a difference of emphasis. What sorts of implications might there be for national constitutions in the creation of a single constitutional treaty, and a constitutionally-based Union?

A dry view is that the constitutional relationship between the UK and the EU would not be affected by the draft Treaty, since the basis for that relationship will continue to be the *European Communities Act* 1972. However, as noted above, concerns have been raised that the innovations in the draft Treaty either create significant changes in the underlying relationship, or that they set in motion a drift towards more substantial change.

The draft Treaty gives the Union a more coherent identity, and it will have many of the features of a nation state.[44] At the same time it will not *be* a nation state. It will not be sovereign, and it will have power to act only "within the limits of the competences

---

[43] These include Acts of Parliament, common law, judicial decisions, parliamentary law and customs, and constitutional conventions

[44] There is an interesting consideration of the EU's constitutional basis, *Does the European Union have a Constitution ?Does it need one?* By Jean-Claude Piris, 2000, at http://www.jeanmonnetprogram.org/papers/00/000501.html

conferred upon it by the Member States,"[45] and by virtue of that conferral. This is consistent with the present position, under Article 5 TEC. The Union will not be a nation state, but it will retain its current powers to legislate directly in the affairs of states, there will be an expansion of the areas in which it may do so, and it will have characteristics such as citizens, legal personality, a Charter of Fundamental Rights, a President, a Foreign Minister, and, of course, a single written constitution. Not all of these characteristics are new. Many are limited or heavily contextualised. The question is whether they form a new force for assertion (whether conscious or by implication) by the Union over and above the sovereignty of nation states.

Article I-5 is relevant. It deals with relations between the Union and the Member States. The Union is to respect "the national identities" of Member States

> inherent in their fundamental structures, political and constitutional, including for regional and local self government. It shall respect their essential State functions, including for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security.[46]

This implies that the member states have essential functions, and that these include but are not limited to matters of defence, law and order, and security. However, the Union's "respect" for these functions is not defined.

Article I-5 goes on:

> […] following the principle of loyal cooperation, the Union and the Member States shall, in full mutual respect, assist each other to carry out tasks which flow from the Constitution.

Some features of this would cause concern among sceptics. For instance, "loyalty" normally implies that one party is loyal *to* another, and in political terms the word carries a connotation of being a loyal subject. At the same time, the draft Treaty establishing the Constitution places emphasis on mutuality in these areas of respect and cooperation.

Article I-9 covers the scope of Union competence. It provides that "the limits of Union competences are governed by the principle of conferral," and it goes on to state that,

> under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.

---

[45] Article I-9 of draft Constitution

[46] The role of *national* parliaments, rather than regional and local government, is missing from this, but it is the subject of a protocol attached to Part I of the Constitution..

The draft Constitution does not contain a ringing statement that Member States are sovereign and independent; nor do its values, as expressed in Article I-2, contain anything comparable to the United Nations' "sovereign equality of all its Members."[47] Such a move might go some way towards calming fears of a federalist ambition. Balancing this, Article I-9 gives greater clarity than does the present EC Treaty that the Union derives its powers and its legitimacy from the Member States.

Leaving aside the substantive changes as between the existing TEU and TEC and the draft Treaty establishing the Constitution, what impact will the creation of a single constitution have? The European treaties have constitutional implications, and this has always been the case. The combination of these treaties into a single text is trivial at one level. After all, membership in one, but not all Treaties, was not previously an option. Nevertheless, insofar as all constitutions are woven into the politics to which in turn they give shape, the creation of a single European treaty using the word (or root) "constitution" can hardly be without effect.

An interesting question is what differences there might be in the effect on those states with a written constitution as compared to the UK. With a written constitution it is generally easier to distinguish constitutional laws from the rest of the law, and sometimes to give them a special status, while in the UK there is no strict distinction. Some argue that the *European Communities Act* 1972 has created a special situation already, and that the draft Treaty will inherit the privilege of the existing EC Treaties over above UK law. Others would point to the capacity of Parliament to revoke the *European Communities Act* as evidence that the draft Treaty can have no irrevocable effect.

A written national constitution provides a clear basis for arguing under **Article I-5** that the Union has not respected fundamental constitutional structures. At the same time, it could be argued that an unwritten constitution, which effectively is a diverse constitution, is better placed to accept changes without losing its over-arching character. British constitutional arrangements have incorporated textual elements for centuries. Since the mid-20th century, the UK has entered into a number of treaties introducing an international textual element in wide-ranging constitutional areas. The United Nations Charter and the European Convention on Human Rights are examples. Each establishes institutions capable of overriding national sovereignty (the UN Security Council, the International Court of Justice and the European Court of Human Rights). These can be seen as examples of deferred consent, meaning that the UK agreed when it became party to these treaties that it would consent in the future to certain matters being decided, and measures imposed, without its particular consent at the time (although the veto in the Security Council is an important rider). The conferral of competences on the Union goes much further than these.

---

[47] UN Charter, Article 2 (1).

It might be thought contradictory to argue that a document contains no constitutional implications when it includes provisions on citizenship and the role of national parliaments, and when it allows for changes in the scope of decisions that may be made without the national veto. Given the diverse sources of British constitutional arrangements it is arguable that the draft Treaty, if adopted, would be one among those sources. It is a matter of debate what relative weight it would have, and the extent to which this would exceed the weight of European treaties and law at present.[48]

[48] For a discussion of sovereignty, see Library Research Paper RP 96/82, Constitution: principles and development, 18 July 1996 at http://hcl1.hclibrary.parliament.uk/rp96/rp96-082.pdf

V Ratification procedures in the Member States

The final text agreed by the IGC will be subject to the Member States' own treaty ratification procedures. However, there have been calls from Convention members and interest groups for a Europe-wide referendum on the constitution. The British Government does not support a referendum. There is likely to be a referendum in Ireland and Denmark. In addition, the governments of France, Spain, Portugal, Italy, the Netherlands and Austria, have suggested they might hold a referendum to approve the constitution.

David Heathcoat-Amory told the Standing Committee on the Convention on 7 May 2003:

> Support for referendums goes right across the political spectrum. That is not a Eurosceptic position; it is just as frequently held by ardent federalists. However, everyone agrees that something of such importance must be rooted in the expressed will of the people, particularly when the Laeken declaration was expressed in terms of a failed democracy and the need for Europe to renew itself on such secure foundations. I am therefore confident that almost all Governments and countries will eventually hold referendums on the outcome.
>
> ---
>
> It is clear that the scale of what is afoot justifies a referendum. As we are in good company with those European countries that will hold one, we should have a referendum and I have signed a motion to that effect in the Convention. It is not simply a narrow Eurosceptic position as there are at present 74 signatures to the motion. It has cross-party, multinational support and is in line with the reason why the Convention exists, which is to promote democracy and ask people what they think of such matters.[49]

[49] Cc22-24 at : http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/st030507/30507s06.htm