

# WHAT THE EU CONSTITUTION DOES

## A 14-POINT CRITICAL SUMMARY

*With an Appendix listing the 69 further national vetoes that would be abolished by the Treaty Establishing a Constitution for Europe and increase the EU's powers*

## **What some of the Constitution's authors say about it:**

*"The EU Constitution is the birth certificate of the United States of Europe."*

– German Minister for Europe Hans Martin Bury, Die Welt, 25-2-2005

*"The Constitution is the capstone of a European Federal State."*

– Guy Verhofstadt, Belgian Prime Minister, Financial Times, 21-6-2004

*"Our Constitution cannot be reduced to a mere treaty for co-operation between governments. Anyone who has not yet grasped this fact deserves to wear the dunce's cap."*

– Valéry Giscard-d'Estaing, President of the EU Convention, Speech in Aachen accepting the Charlemagne Prize for European integration, 29-5-2003

*"It wasn't worth creating a negative commotion with the British. I rewrote my text with the word federal replaced by communautaire, which means exactly the same thing."*

– Valéry Giscard d'Estaing, Wall Street Journal Europe, 7-7-2003

*"We know that nine out of ten people will not have read the Constitution and will vote on the basis of what politicians and journalists say. More than that, if the answer is No, the vote will probably have to be done again, because it absolutely has to be Yes."*

– Jean-Luc Dehaene, Former Belgian Prime Minister and Vice-President of the EU Convention, Irish Times, 2-6-2004

*"In Europe one needs to act 'as if' - as if what was wanted was little, in order to obtain much, as if States were to remain sovereign to convince them to concede sovereignty ... The Commission in Brussels, for example, should act as if it were a technical instrument, in order to be able to be treated as a government. And so on by disguise and subterfuge"*

– Giuliano Amato, Italian Prime Minister and later Vice-President of the EU Convention which drafted the Constitution, interview with Barbara Spinelli, La Stampa, 13-7-2000

*"The Convention brought together a self-selected group of the European political elite, many of whom have their eyes on a career at a European level, which is dependent on more and more integration, and who see national parliaments and governments as an obstacle ... Not once in the sixteen months I spent on the Convention did representatives question whether deeper integration is what the people of Europe want, whether it serves their best interests or whether it provides the best basis for a sustainable structure for an expanding Union. The debates focused solely on where we could do more at European Union level ... None of the existing policies were questioned ... Consensus was achieved among those who were deemed to matter and those deemed to matter made it plain that the rest would not be allowed to wreck the final agreement."*

– Gisela Stuart MP, British Labour Party representative on the EU Convention and member of its Praesidium which drafted the Constitution, The Making of Europe's Constitution, Fabian Society, London, 2003

*"Creating a single European State bound by one European Constitution is the decisive task of our time."*

– German Foreign Minister Joschka Fischer, Daily Telegraph, 27-12-1998

## CONTENTS

Introduction	4
Where the EU Constitution came from	4
14-Point Summary	6
1. Giving the EU the constitutional form of a State	6
– The five steps that would make us real citizens of an EU Federation	8
– A multinational Federation without a democratic basis	11
2. Institutional changes made by the EU Constitution	13
3. The new EU's exclusive and treaty-making powers	14
4. The new EU's shared powers with its Member States	14
5. The new EU's supporting, coordinating and complementary powers	15
6. The new EU's foreign policy and military powers	15
7. The new EU's crime, justice and policing powers	17
8. The new EU's powers to decide our rights	18
9. The new EU's powers to extend its own powers	19
10. Setting in stone the EU's present undemocratic structure	20
11. Making the euro constitutionally mandatory	21
12. Establishing an ideological Constitution	22
13. Laying down contradictory constitutional objectives	23
14. Positive things in the EU Constitution	24
The alternative to the EU Constitution	25
Appendix 1: Abolishing 69 further national vetoes to add to EU powers	27
Appendix 2: The Constitution's title and Preamble	38
Source	40

## **INTRODUCTION**

This is a 14-point summary of the proposed European Union Constitution which is contained in the Treaty Establishing a Constitution for Europe that was signed in October 2004. Some 10 countries will be holding referendums on this during 2005 and 2006. Download the Reader-Friendly Edition of the EU Constitution, which will give you its full text, together with a useful index, glossary and other information, from [www.euabc.com](http://www.euabc.com)

The Constitution has 448 Articles and is divided into four parts, indicated by Roman numerals. Its first Article is therefore Article I-1 and its last Article IV-448. It has 36 Protocols and 48 attached political Declarations. Altogether it is some 400 pages long.

### **WHERE THE EU CONSTITUTION CAME FROM**

In 2001 the Laeken Declaration of EU Presidents and Prime Ministers set up the Convention on the Future of Europe to consider the widely acknowledged problem of the lack of democracy in the EU, and how to make the EU less centralised and bring it closer to its peoples. This Laeken Declaration referred to the possibility of restoring powers from the EU to its Member States and mentioned the drafting of a Constitution only as another possibility, "in the long run". But instead of making proposals for a more democratic and less centralised EU, the Euro-federalists who dominated the Convention rushed headlong into drafting a Constitution which proposes replacing the existing EU by a new Union in the constitutional form of a supranational European Federal State.

The Constitution they drafted does not propose repatriating a single power from Brussels to the EU Member States. Instead it aims to abolish a further 69 national vetoes and shifts the relevant policy areas and decisions to Brussels, which would make for an even more centralised and undemocratic EU than the EU that exists at present. These are listed in the Appendix to this document.

Establishing a new European Union in the constitutional form of a European Federation was very much a project of French President Jacques Chirac, supported by Germany. It was President Chirac who insisted at the 2000 Nice summit that his predecessor, Giscard d'Estaing, be appointed President of the drafting Convention. Giscard decisively influenced the Constitution text and it was he who decided that a consensus existed on the final draft, without taking a single vote on the thousand or so amendments that had been submitted to it by the Convention members. At the subsequent summit meeting of EU governments in December 2003 Spain and Poland would not agree to the Constitution's proposed shift to a primarily population-based voting system for making European laws, something that France and Germany regarded as crucial, although it would have reduced Spain and Poland's relative voting weights. The Madrid terrorist bombing in spring 2004 brought down the Spanish Government and its successor changed Spain's policy. Left as the lone objector, Poland then caved in. In these new circumstances it was relatively easy for Irish Taoiseach Bertie Ahern to secure the necessary consensus amongst all 25 government leaders, simultaneously doing a signal

favour for President Chirac, during Ireland's EU presidency in June 2004. The Presidents and Prime Ministers signed the Constitution the following October.

The fundamental reason why so many national political leaders take a wholly uncritical view of this proposed EU Constitution is that every transfer of national power to Brussels increases their own personal power at EU level, where they make laws for 450 million Europeans on the 25-member EU Council of Ministers. At national level Ministers are part of the executive arm of government. They must have the support of elected national parliaments for their policies. Shifting power from the national to the EU level however has the effect of transforming these same Ministers into supranational legislators for over half a continent. This naturally appeals to personally ambitious Ministers and aspiring Ministers in opposition. This huge increase in the power of a small number of politicians comes at the expense of a reduced say for ordinary people in the various EU countries, the loss of their right to decide who will make their laws and to elect and dismiss their rulers, and with that their national democracy and independence.

The European Commission is another hugely self-interested party as regards the proposed Constitution. The Commission is the body of unelected persons, nominated by national governments, who have the monopoly in proposing European laws to the Council of Ministers under the treaties and who administer the continually existing European Community. Once characterised by French President Charles de Gaulle as "an areopagus of technocrats without a country responsible to nobody", the Commission stands to gain a great increase in its power if the Constitution should be ratified. The Constitution's abolition of some 69 further national vetoes would greatly increase the Commission's functions and the areas it can propose European laws for. The Commission has no role in the ratification of European Treaties, which are a matter exclusively for the Member States and their Governments, the High Contracting Parties, in accordance with their own constitutional requirements. Yet the Commission has decided to allocate many millions of EU taxpayers' money to propagandize for the Constitution in the Member States, especially those holding national referendums. Individual Commissioners are ignoring the proper restraints of their official positions to make pro-Constitution propaganda. The European Parliament has allocated money for a similar purpose, although it too has no function in the ratification of treaties. Almost certainly these actions are in breach of European law as being *ultra vires* the Commission's and European Parliament's powers and functions. One can accept that the Commission has an information function regarding European treaties once they are ratified and the Commission has got new duties with regard to them. But it has no such function before a treaty is ratified, for one or more States may decide not to ratify it. A law-case before the Court of Justice to challenge the legality of the Commission's actions would take years. Meanwhile the Commission is abusing the referendum process with impunity in country after country. This is a serious assault on democratic norms. It threatens the integrity of the referendum process in several Member States and is another reason why democrats should reject the Constitution.

## **14-POINT SUMMARY**

### **1. GIVING THE EU THE CONSTITUTIONAL FORM OF A STATE**

The most important thing the Treaty Establishing a Constitution for Europe sets out to do is to create an entirely new, different and vastly more powerful European Union entity in the constitutional form of a Federal European State, without changing the "EU" name. Therefore people will not be aware of the constitutional significance of what is happening.

An EU Federation may be regarded as a good or a bad thing, but it would be ludicrous if the educated, politically sophisticated peoples of Europe were to agree to turn their countries into provincial or regional states of such an EU Federal State, and themselves into real citizens of it, without their realising that was happening. Which is why they need to understand the key Articles of the Treaty.

Historically speaking it is no small thing to attempt to impose a highly centralised supranational Federal polity on the ancient peoples, languages and cultures of the 25 EU Member States, whose loyalty is to their own countries. Yet that is what the Treaty-cum-Constitution proposes to do. European integration has proceeded for over half a century on the basis of treaty after treaty being "sold" to national publics as entailing incremental changes of little consequence that were desirable for jobs and growth, or "progress" in international affairs. There has been virtually no popular awareness, not to mind endorsement, of the political purpose behind those treaties. The proposed Constitution makes this harder to conceal. Democracy is like health. Just as often one comes to understand the value of health only when one gets ill, people may come to understand the value of democracy only when they have lost it. Then they may have to spend a long time seeking to get it back. The Treaty Establishing a Constitution for Europe is essentially a project to deprive the peoples of our continent of their democracy. If it should be ratified and come into force, they are likely to explode when they discover that.

To understand what the proposed EU Constitution does, one must grasp what the present EU is and how the Treaty Establishing a Constitution for Europe would radically change it. The Constitution is not just a matter of "simplifying", "merging" or "tidying up" the existing European treaties, as its advocates pretend in countries where it has to pass the test of popular referendums. What is involved is a radical alteration of the underlying reality these treaties represent. It would be a transformation in the political-legal existence of 25 of Europe's States and of their peoples. There may be advantages to such a change of national course, or advantages for some, but people should be at least aware that that is what is at issue.

What is called the "European Union" at present is a descriptive term for various forms of cooperation between its Member States. This is clear from Article A of the Maastricht Treaty on European Union, 1992, which gave us the existing EU. One of these forms of

cooperation is the European Community (EC), which goes back to the 1957 Rome Treaty. This still exists. It has legal personality separate from its Member States, all 25 of which still belong to it. During the 1960s the EC Court of Justice declared Community (EC) law to be supranational and to have primacy over national law in any case of conflict between the two, although this was never laid down in any European Treaty. The European Community (EC) covers mainly the economic and single market area, including the euro-currency. This is called the "Community pillar" of the present European Union. Here the Community Member States are regarded as having "pooled" their sovereignty and the EC Commission as having the exclusive right to propose EC laws.

In all other areas of government the EU Member States have retained their independence and sovereignty, and cooperate with one another as free and equal partners internationally or "intergovernmentally": in foreign and military matters, in the area of crime and justice, and in relation to national policy on health, education, social security, culture etc. These are called the "intergovernmental pillars" of the present EU, the areas where Member States still retain some their sovereignty. If the proposed Constitution were to be ratified we would lose our independence from European law in relation to them.

The proposed Treaty Establishing a Constitution for Europe would equip the EU with teeth. The "European Union" that we are currently members of refers to these two different forms of cooperation taken together: the supranational "Community pillar" on the one hand, and the "intergovernmental pillars" on the other. The new Treaty-cum-Constitution would abolish the "pillar structure" of the present treaties and merge them into one unified system, all governed by the supranational law of what would constitutionally and legally be quite a new and different Union. What we call the EU at present does not have legal personality or an independent corporate existence in its own right. Strictly speaking, there is no such thing as "European Union" law, only "European Community" or "EC" law. Supporters of the Constitution mix up the terms "Union" and "Community" continually. This has the effect of preventing people realising that the proposed new European Union, based on its own Constitution, would replace the existing European Union and European Community and would in legal and political terms be fundamentally different from the EU that currently exists, which was established by the 1992 Maastricht Treaty. The proper title of that Maastricht Treaty was The Treaty **on** European Union, not "**of**" Union. Maastricht did not establish an EU State with legal personality and independent corporate existence that we could be made real citizens of. It is the Treaty Establishing a Constitution for Europe that would do that if it were ratified. This new treaty would in effect be the "Treaty of European Union", for it would establish the EU for the first time as a distinct legal entity in the constitutional form of a European Federation.

This new European Union would become our real legal sovereign and supreme ruler for the first time, instead of our own national State or country. The process of ratifying the new treaty would mean changing our national Constitutions precisely to recognise this change, and to accept the primacy of supranational law and government over national law and government in all governmental areas actually or potentially. The Treaty Establishing

a Constitution for Europe would make us real citizens of what in effect would be a United States of Europe, as continental politicians like France's Giscard d'Estaing, Belgian's Guy Verhofstadt, Germany's Hans Martin Bury and others readily admit - see the quotations above. We would no longer be just honorary or notional citizens of an EU that has no legal personality, which we are told we are at present; for one can only be a citizen of a State. We would instead become real citizens of a real EU State and would owe it and its institutions the first duty of citizenship, which is to obey one's State's laws.

## **THE FIVE STEPS THAT WOULD MAKE US CITIZENS OF AN EU FEDERATION**

The Treaty Establishing a Constitution for Europe would give the EU the constitutional form of a European State in five logical legal steps:

**STEP ONE** to an EU Federation would be to repeal all the previous European treaties from the 1957 Treaty of Rome to the 2003 Nice Treaty and thereby abolish the existing European Union and European Community. Article IV-437 provides: "This Treaty establishing a Constitution for Europe shall repeal the Treaty establishing the European Community, the Treaty on European Union and ... the acts and treaties which have supplemented and amended them."

**STEP TWO** would be to establish in their place what would be constitutionally, legally and politically quite a new European Union, founded like any State upon its own Constitution. Article I-1 provides: "Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union..." The plain meaning of these words is that the new European Union would be a different Union from that which currently exists. A Constitution in this context, as distinct from a Treaty, is an independent source of legal authority for a State. The Constitution lays down that the new Union would be the legal successor of the existing Union and Community and that it would take on board the 100,000 or so pages of existing Community law, as the European Community would be henceforth defunct(Art.IV-438). Those pushing the Constitution may well have the hope that because the same name, "European Union", is used before and after, people will not notice the profound legal-political significance of the change being proposed.

**STEP THREE** to an EU State would be to lay down that the Constitution of this new Union and the laws made under it shall have primacy over the law, including the constitutional law, of its Member States, just as in any Federation, without any qualifications or exclusions that would reserve some policy areas for "intergovernmental" action among States that still retained some sovereignty. If that had been done, as in the original Maastricht Treaty, it would have kept such policy areas beyond the reach of supranational Federal law. Article I-6 provides: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States." This primacy of supranational European law has never been stated in a European Treaty before. Unlike the present EU and the treaties it



is based on, which recognise that Member States remain independent and sovereign in certain policy areas - as the "pillar structure" of the Maastricht Treaty shows - the proposed Constitution would bring all areas of government policy within the scope of either the direct laws or the coordinating powers of the new European Union. The Constitution rather than a series of treaties would become the fundamental source of legal authority for this new EU, supplanting the national constitutions of the Member States in that respect, although these constitutions would still continue to exist. This would be the same as in the Federal USA, where individual states still retain their state constitutions, in some cases from their pre-Federal Union days. National constitutions and laws would however have to be changed in the course of ratifying the Treaty Establishing a Constitution for Europe, precisely in order to recognise the constitutional primacy of the new Union. The ratification process of this Treaty is therefore a process whereby the 25 Member States formally strip themselves of their constitutional sovereignty as States and subordinate themselves to the authority of a supranational entity that possesses all but two of the key features of a fully-developed Federation. (For these two features see Step 5 below.)

If Article I-6 gives the proposed new European Union direct federal authority and power, Article I-1 gives it indirect coordinating power. The constitutional and political superiority of the EU over its Member States is first asserted in the important second sentence of Article I-1, which establishes the new EU: "The Union **shall** coordinate the policies by which the Member States aim to achieve these objectives (i.e. the objectives they have in common), and shall exercise on a Community basis the competences they confer on it." Convention Chairman Valéry Giscard d'Estaing has helpfully explained in a press interview what exercising EU powers "on a Community basis" means: "It wasn't worth creating a negative commotion with the British. I rewrote my text with the word federal replaced by communautaire (i.e. "on a Community basis") which means exactly the same thing." So the new Union established by the Constitution would exercise manifest federal authority and powers. This second sentence of Article I-1 makes it constitutionally mandatory ("The Union shall coordinate") on this new, superior EU entity to coordinate all the policies by which its Member States aim to achieve their common objectives. These objectives are set out in Article I-3 and are about as wide and all-encompassing as could be. They include, *inter alia*, promoting the Union's values, which are set out in Article I-2, as well as promoting the well-being of its peoples and its interests vis-a-vis the wider world. This second sentence of Article I-1 has the legal-constitutional effect of giving the proposed new Union sweeping general coordinating powers of government over 450 million people. Legally speaking, Article I-1 is an important indirect buttress of the direct powers of Federal European government provided for in Article I-6.

**STEP FOUR** to a Federal EU would be for the EU Constitution to give this new European Union legal personality and its own separate corporate existence for the first time. This would allow it to make treaties in its own right with other States and conduct itself as a State in the international community of States. Article I-7 provides: "The Union shall have legal personality." This Article would make the new EU legally separate from its Members, just as the Federal USA is separate from its constituent member states like

Texas, New York, California etc., which retain their own state constitutions but are subordinate to the Federal US Constitution. In the USA local states still have taxation powers, different laws on the death penalty, marriage, education, social security etc., but they do not delude themselves that they are independent states. The Federal USA is sovereign over them and is recognised as such by other States. Likewise in the former Soviet Union such states as Ukraine, Byelorussia etc. had their own foreign ministers, separate seats at the UN, state governments etc., but they recognised their subordination to the sovereign Federal USSR, as did everyone else.

**STEP FIVE** would be to make us all real citizens of a real European Union with its own legal personality for the first time. Article I-10 provides: "Every national of a Member State shall be a citizen of the Union ... Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Constitution." This is real citizenship, not a pretend citizenship as at present. For one can only be a citizen of a State, an entity possessing legal personality, whose government and institutions make laws one must obey. Obedience to those laws is the first duty of citizenship. The pre-Constitution EU does not have real citizens. The post-Constitution EU would have. The pretence that we are already EU citizens in some vague honorary sense serves to deceive people into thinking that the proposed Treaty-cum-Constitution would make no real change to their legal-political status, whereas it would fundamentally change it. It is the counterpart of the pretence that a fully-fledged European Union that we are already fully members of already exists, established by the Treaty on European Union (Maastricht), so that people will not notice the transition to a real European Union in the constitutional form of a supranational state by means of the Treaty Establishing a Constitution for Europe, for it will have the same name although its legal-political reality will be profoundly different. "Citizenship of the Union shall be additional to national citizenship and shall not replace it," states the Article. But our Union citizenship would be our primary citizenship henceforth. It would be made so if the Treaty is ratified so as to make the EU Constitution and law made under it primary and superior over national Constitutions and law - with national Constitutions being amended to recognise this.

By these five legal steps the Treaty Establishing a Constitution for Europe would establish a new European Union in the constitutional form of a European Federation, within which the present sovereign Member States would, by corollary, be reduced to the constitutional status of provincial states or regions. Their citizens in turn would have the new European Union with its Constitution installed over them as their new sovereign ruler and government. This new EU would not yet have all the powers of a fully-fledged Federation. The two principal powers it would lack would be the right to levy taxes and to compel its component Members to go to war against their will, although the new Union would be able to go to war on the basis of a sub-set of its Member States as long as the others "constructively abstained".

Apart from these two aspects of taxes and war, the new Union would have all the key features of a developed Federal State: a population, a territory, a Constitution, citizenship, a currency, armed forces, a legislature, executive and judiciary, a Foreign Minister and diplomatic corps, some 100,000 pages of federal law, the right to impose fines and other

sanctions on its Member States for failing to obey that law, the right to conclude international treaties with other States - and now of course its own flag, anthem and annual public holiday, which would be given a legal basis in the Treaty Establishing a Constitution for Europe for the first time(Art.I-8). If the Constitution is ratified and brings the new Federal EU into being, its advocates are confident that it only a matter of time before it would get these remaining taxation and military powers to complete the structure of a fully-fledged Federation.

## **A MULTINATIONAL FEDERATION WITHOUT A DEMOCRATIC BASIS**

Advocates of the Treaty Establishing a Constitution for Europe contend that in the new Union it would establish, the Member States would still have primacy of authority because it is they that would have conferred powers on the Union, under the so-called "principle of conferral"(Art.I-11). They forget that this is how classical-type Federal States have historically developed: by smaller political units coming together and transferring powers to a superior, e.g. 19th century Germany, the USA, Canada, Australia. This contrasts with Federations that have been formed by originally unitary States adopting federal form and devolving power to provinces or regions, e.g. post-War Germany, Russia, Austria, India, Nigeria. Where else after all could Brussels get its powers if not from its Member States, just as the Federal States whose capitals were 19th century Berlin, Washington, Ottawa and Canberra did before it? In the latter cases however the political units that came together to form a Federal State belonged wholly or mainly to one nation, with a common culture, language and history. This gave these Federations a popular democratic basis, and with it a natural legitimacy and authority, in total contrast to the EU Federation-in-the-making, with its many nations, peoples and languages. Therefore the provision of Article I-11 of the EU Constitution: "The limits of Union competences are governed by the principle of conferral", does no more than state the obvious.

Once power is conferred on the Federal level under the EU Constitution, however, there is no provision for a Member State to get it back short of withdrawing from the Union. The EU Constitution would indeed allow for this(Art.I-60), as the Constitutions of other Federations have done before it. Joseph Stalin's 1936 Constitution for the USSR contained a provision permitting states to leave it. The southern Confederate states of the USA thought they possessed a right of withdrawal until their attempt to exercise it in practice precipitated the 1860s American civil war. It is hard to find historical examples of individual provincial states exercising a constitutional right of withdrawal from a Federal State. Much more common is for the multinational Federations themselves to break up, so that everyone leaves, as it were, e.g. the USSR, Czechoslovakia, Yugoslavia, the West Indies Federation. The historical tendency seems to be for multinational, multilingual Federal States to break up, as the international community of States continues to increase. The number of States in the world has gone from some 60 when the United Nations was established in 1945, to nearly 200 today, and the 21st century will certainly see many more new States formed out of existing multinational ones as the process of Nation State formation gets under way in Africa, South Asia and the Middle East.

Those seeking to play down the fact that the proposed EU Constitution is envisaged by its drafters as the fundamental law of another multinational Federation point to the provision of Article I-11 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." They claim that this puts real restraint on Union power. But again this provision does no more than state the obvious: that the Constitution lays down that the Union and its Member States should respect their mutual powers and functions, as should the authorities of all States governed by law. The real political issue is who would interpret what the EU and Member State powers are? Who would decide in the event of disputes between the Federal and provincial state levels as to their respective fields of competence? The answer is the European Court of Justice, that supranational body that would be the new Union's Supreme Court. A Constitution means what the Supreme Court established to interpret it says it means. The European Court of Justice has been notorious for decades for seeking to expand European supranational power to the utmost through its case-law. The experience of the USA and other Federations has shown that historically their Supreme Courts have exercised an enormous federalizing influence by imposing common legal standards on their different political sub-units. There is no comfort for concerned democrats or "sovereignists" in Article I-11.

Nor is there in the further provision of the same Article: "Competences not conferred upon the Union in the Constitution remain with the Member States". Again this states the obvious. It is very similar to the 10th amendment to the American Constitution, adopted in 1791, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This 10th Amendment has not prevented the USA from becoming a fully-fledged Federal State, although in several respects it is less centralised than the present EC/EU. Article I-11 offers no reassurance against similar further centralisation in the new European Union. The defining characteristic of Federations as compared with Unitary States is precisely the division of law-making, executive and judicial powers between Federal and provincial state levels, with the former being constitutionally primary or superior, but with each level supposed to respect the competences of the other - as the Constitution lays down for the proposed new European Union.

There is no reassurance for concerned democrats either in Article I-5.1, which requires the Union to respect the "national identities" of its Member States and "their essential State functions." "Identity" is not the same as independence and is not a justiciable category. A people keeps its identity in servitude as well as freedom - Kurds, Chechyns and Palestinians for example. As for "respect (for) essential state functions", again any law-governed Federation and its constituent states should naturally respect the governmental functions carried out at its different levels. So this provision is another tautology, without potential for practically affecting the actual distribution of powers between the Union and its Member States should the Constitution come into force.

## **2. INSTITUTIONAL CHANGES MADE BY THE EU CONSTITUTION**

The Constitution would replace the system of weighted voting for making EU laws that was agreed in the Nice Treaty to allow for EU enlargement, by a new "double majority" system of States and populations (Art.I-25). This would mean that 55% of the Member States, at least 15, could outvote 10 as long as they included 65% of the EU's total population. It would mean that Germany, as the most populous EU country, would become the Member State with most influence on EU law-making, probably to be replaced in that position by Turkey in due course, with its projected population of 100 million in ten years time, if it should join the Union as envisaged. A substantially population-based law-making system such as that proposed in the Constitution violates the classical principle of the legal equality of States.

The Constitution would abolish some 69 further national vetoes on areas of EU public policy-making or decision-making, in addition to those already abolished by the Nice Treaty and earlier treaties. The abolition of the national veto in so many policy areas, which means that countries could increasingly be out-voted by other countries on new EU laws, would cost us crucial influence in the EU Council of Ministers. This is the 25-member body that makes EU laws based on proposals from the European Commission. On the Council each Member State has one Minister out of 25 and has a percentage of the EU's total population weight.

Influence is based on power: without the power to veto EU laws, we can make our views about them known but there is no reason why they should be taken into account. The proposed shift to a mainly population-based system for EU law-making would make it easier for Big States to get their way, especially if they combine, as France and Germany continually do, and would reduce the relative voting strength of medium-sized States as compared with the Nice Treaty voting system. It would make EU laws easier to pass, which means there would be more of them. Advocates of the Constitution claim this would be an increase in "efficiency", but more EU laws would not necessarily mean better ones. An outright dictatorship can be very efficient and "productive" in issuing laws as measured by quantity. Their quality or appropriateness is a rather different matter.

The "European Council" of Presidents and Prime Ministers would be given a loftier constitutional status in the new Union than at present (Art.I-21;ex-Art.4TEU). Whereas the various Councils of Ministers would make EU laws for specific governmental policy areas, with some powers of amendment given to the European Parliament, the European Council would not be a legislature but would "provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof". The Constitution would give the European Council a permanent rather than sporadic institutional role by creating a full-time EU President for up to five years - two and a half years, renewable once - by majority vote of the Presidents and Prime Ministers (Art.I-22). This new EU President would be a considerably more powerful figure than the existing six-monthly rotating European Council presidents. He or she would chair

meetings of the European Council, "drive forward its work" and ensure its "preparation and continuity", yet would not be directly elected by voters or even the European Parliament. The European Council President would in effect become the Head of State of the new Federal European Union and would be likely to outlast in office many of the national Presidents and Prime Ministers. This President would be empowered to call the national Presidents and Prime Ministers together for special meetings when necessary, in between their regular quarterly meetings. He or she would have the primary role in representing the new Union to the wider world: "The President of the European Council shall, at his or her level and in that capacity, ensure the external representation of the Union on issues concerning its foreign and security policy, without prejudice to the powers of the Union Minister for Foreign Affairs." This permanent Council President must not hold national office and the job is doubtless envisaged as going to a retired national President or Prime Minister if the Constitution were to be ratified. The relation between the European Council President, who would have a major role in EU foreign policy, and the President of the Commission, would be analogous to that between the French President and Prime Minister, the one concerned mainly with the external government of a Federal EU, the other with the internal.

The Constitution would also provide for a rotating EU Commission whose membership would be one-third less than the number of Member States. This means that individual Member States would have no representative for five years out of every fifteen on the body that proposes EU laws to the Council of Ministers, which then makes them on the basis of the Commission's proposals (Art.I-26).

### **3. THE NEW EU'S EXCLUSIVE AND TREATY-MAKING POWERS**

The Constitution would give the new Union sole and "exclusive" legal power to decide policy as regards trade tariffs and quotas, monetary policy for the eurozone, competition rules for the internal market, fisheries conservation and trade agreements with other countries (Art.I-13). The EU's exclusive power to sign international treaties with other States in these areas would be extended to cover international agreements arising from other Union policies, for example international conventions on civil and criminal law or migration (Art.I-13.2). Together with the treaties to be signed under the Common Foreign and Security Policy or by the new EU Foreign Minister (See Point 6 below), the Constitution could be expected to deprive Member States of most of their present treaty-making powers (Art.III-323).

### **4. THE NEW EU'S SHARED POWERS WITH ITS MEMBER STATES**

The Constitution lists a wide range of government policies where power is stated to be "shared" between the EU and its Member States (Art.I-14). These include the internal market, social policy, agriculture and fisheries, environment, consumer protection, transport, energy, the area of freedom, security and justice, and "common safety concerns in public health matters".

This is a peculiar kind of sharing, for as the new Union would be constitutionally primary or superior, the power of elected governments to make laws unless the EU decides not to would be essentially residual and on sufferance. Thus Article I-12 provides: “The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.”

## **5. THE NEW EU’S SUPPORTING, COORDINATING, COMPLEMENTARY POWERS**

The Constitution would give the EU the power to take "supporting, co-ordinating or complementary action" in a further range of vaguely-defined areas including the "protection and improvement of human health", industry, culture, tourism, education, youth, sport, vocational training, civil protection and administrative co-operation(Art.I-17).

It would give the EU powers to co-ordinate or ensure the coordination of economic, employment and social policies(Arts.I-15). A Federal coordinator is naturally superior to the constituent States it coordinates and, as indicated above, Article I-1 would give the new Union a general mandate to coordinate all the policies by which its Member States sought to achieve objectives they have in common, which in turn are extremely wide and general. Articles III-203 to 207 set out the Union's role in relation to employment policy. Article III-210 lists the many areas of social policy in which the EU would have the right to "support and complement" the activities of Member States. Article III-147 would allow the EU to enforce the "liberalisation" and privatisation of "services", which could include public services like health and residential care, education, social security and housing, water and waste management, as well as cultural services. Services now encompass two-thirds of economic activity in developed modern States. Having harmonised European laws for manufacturing, the Commission now wishes to do the same for services, although national conditions for the various service occupations and professions vary hugely and attempts to iron out national differences would affect far more people, due to the labour-intensive character of the services sector.

## **6. THE NEW EU'S FOREIGN POLICY AND MILITARY POWERS**

The Constitution would give the new Union the power to "define and implement" a common foreign and security policy which would "cover all areas of foreign policy" and which Member States would be required to "actively and unreservedly support ... in a spirit of loyalty and mutual solidarity". It would impose on Member States a new obligation to "comply with" the Union's actions in foreign policy, in contrast to the existing treaty requirement to "support" these (Art.I-16;ex-Art.11TEU).

A State could be referred to the EU Court of Justice for breach of its obligations under this Article I-16 to support the common foreign and security policy "actively and

unreservedly" and to "comply with" the Union's actions in this area, as the Court would not be precluded from acting in relation to it by the foreign policy exclusions set out in Article III-376.

Member States would be constitutionally obliged to consult one another in the EU Council "on any foreign and security policy issue which is of general interest in order to determine a common approach" and "before undertaking any action on the international scene or any commitment which could affect the Union's interests" (Art.I-40.5). Clearly these provisions rule out an EU Member State pursuing an independent foreign policy if the Constitution should be ratified.

The Constitution would create an EU Foreign Minister, who would be responsible for conducting the common foreign and security policy and would preside over the Council of national Foreign Ministers, where he would chair meetings called to consider his own proposals. Only States have Foreign Ministers. The nationally elected Foreign Ministers would come and go while the EU Foreign Affairs Minister would preside for five years (Art.I-28). The Constitution also provides that "When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the Union Minister for Foreign Affairs be asked to present the Union's position," presumably on their behalf (Art.III-305.2). The Constitution would create an EU diplomatic service, the "European External Action Service"(Art.III-296.3). EU Governments have already set steps in train to establish this, even though the Constitution that would provide for it has not yet been ratified.

The EU Foreign Minister and diplomatic service would clear the way for the new EU to negotiate, sign and ratify international treaties on foreign policy and security matters on behalf of its Member States (Arts.III-323,325). It would delete the clause in the current treaties which allows Member States to opt out of international agreements if they state these have to comply with their own constitutional procedures (Art.III-325;ex-Art.24.5TEU). States vary in this respect. Some require parliamentary ratification for international agreements. Others do not. For example the Republic of Ireland requires an international agreement that affects national sovereignty to be put to popular referendum. A government may deny that an agreement does this, and the matter may fall to the national Supreme Court to determine, as has happened in Ireland (cf. the 1987 Crotty case on the Single European Act, which found the Irish Government's contention was wrong and led to a constitutional referendum to ratify the Act). This change could significantly affect some Member States and would make it easier for the EU to negotiate and sign foreign treaties on behalf of its Members.

The Constitution would require all Member States, including the neutral ones, to "make civilian and military capabilities available to the Union for the implementation of the common security and defence policy" and to "undertake progressively to improve their military capabilities" (Art.I-41.3) This provision amounts to a constitutional obligation on Member States to work towards a more militarized EU.



The provision in the Nice Treaty that the “progressive framing” of a common EU defence policy “**might** lead to a common defence, **should** the European Council so decide” (Art.17.1 TEU) becomes in the proposed Constitution that it “**will** lead to a common defence, **when** the European Council, acting unanimously, so decides” (Art.I-41.2). Clearly the formal ending of the neutrality of the neutrals is only a matter of time.

No one is going to attack the EU, so talk of an EU Common Security and Defence Policy is objectively ludicrous. EU "Defence" Policy is not geared to defence, but to offence, to military action that may be undertaken anywhere in the world outside the Union's borders, in pursuit of political goals that are decided essentially by the EU's Big-State Members. While the Constitution makes obeisance to the principles of the United Nations Charter (Art. I-41.1), there is no requirement that EU-sponsored military missions outside its borders should have a UN mandate.

The Constitution would permit a sub-group of Member States to be formed in the military and defence area by qualified majority vote, even though some EU Members may be opposed to this (Art.III-312). The members of such a sub-group, established under what the Constitution calls "permanent structured cooperation", would be empowered to make special military arrangements among themselves, establish EU "battle-groups" and undertake military missions abroad without involving other EU members "in accordance with the principle of a single set of forces" (Protocol No.23, recitals). This "principle of a single set of forces" points to an emerging EU army and ancillary forces operating under “structured cooperation”. This “permanent structured cooperation” mechanism would be a way for the EU’s military heavyweights to get around the slowness of the neutrals to embrace EU militarization.

The Constitution also includes the EURATOM Protocol (No.36), which amends the European Atomic Energy Treaty that supports nuclear power, and continues the EURATOM Community in being indefinitely under the Constitution's provisions.

## **7. THE NEW EU'S CRIME, JUSTICE AND POLICING POWERS**

The Constitution would open the possibility of movement towards an EU criminal justice system on the continental model, which does not have trial by jury, operates by means of inquisitorial magistrates and permits preventive detention in some countries. An EU criminal justice system would be achieved by means of harmonisation of national laws and mutual recognition of judicial and extra-judicial decisions (Arts.I-42,III-260,269,270) and by giving the new EU the power to lay down common definitions of criminal offences and sanctions for serious crime with a cross-border dimension (Art.III-271).

The role of Eurojust, which was established under the 1992 Maastricht Treaty (Art.K3) to link justice and prosecution systems across the EU, would be extended from "co-ordination" of criminal prosecutions to include also their "initiation", and the extension of Eurojust's "structure, operation, field of action and tasks" would be permitted by

European laws (Art.III-273.1;ex-Art.31.2TEU). An EU Public Prosecutor's Office is proposed(Art.III-274), to undertake EU prosecutions in national courts, initially for offences of fraud against the new Union, but open to extension by unanimous agreement of the EU Presidents and Prime Ministers to cover any serious crime with a cross-border dimension.

Europol, the EU's embryonic federal police force, whose officers would enjoy immunity from criminal prosecution for their official actions (Protocol No. 7), would be given new powers, including the collection and processing of information and "the coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams"(Art.III-276;ex-Art.30TEU).

## **8. THE NEW EU'S POWERS TO DECIDE OUR RIGHTS**

State Constitutions normally contain a Bill of Rights, so the EU Constitution must have one too. The Constitution would for the first time give the EU Court of Justice the power to decide our basic rights. This would be in all areas covered by EU law, which is now very large and growing, and would include the actions of Member States in implementing EU law. Most EU policies and decisions can be construed as having a human rights dimension. This proposal would remove the final say on rights issues in these areas from national Constitutions and Supreme Courts, and the Court of Human Rights in Strasbourg, which is different from and independent of the EU Court of Justice in Luxembourg. There are significant national differences in some sensitive areas of human rights law, for example in relation to marriage and succession, drugs, religious dress and symbols in schools, the rights of parents in education, the right to life etc., which make it inappropriate for a supranational court like the ECJ to attempt to lay down a universally acceptable common standard of human rights, even in the wide policy areas covered by EU law.

The Treaty Establishing a Constitution for Europe would give the new Union the power to decide peoples' rights by including the EU's Charter of Fundamental Rights as Part II of the four-part Constitution. This would make the Charter legally binding on Member States and their citizens and would give the EU Court of Justice the power to apply it in particular cases. EU human rights law would override any contrary national law and would have direct effect in all areas of EU law. The special Preamble to the Charter in Part II of the Constitution states that it will be interpreted in the light of the Explanations set out in Declaration 12. One of these allows the death-penalty to be imposed "in time of war or during the immediate threat of war" - presumably for EU-conducted operations, for all Member States have abolished the death penalty nationally(Art.II-62; Declaration12). The Constitution also includes Article II-112, which sinisterly allows "limitations" of basic rights in the general interests of the EU. Article II-114 would forbid any political campaigning to reverse any aspects of the Charter.

The Constitution states that the Charter "does not establish any new power or task for the Union." But the EU does not marry anybody, or provide health or education services, or deal with matters like reproductive cloning, academic freedom, the rights of children and the elderly, conscientious objection to military service etc. Why then should it list these and many other things as rights in the Charter when they are wholly outside its powers and functions and up to now have been the exclusive responsibility of the national Constitutions and Supreme Courts of the Member States? What is the point of listing them if they are not enforceable?

Giving the EU Court of Justice the power to decide our rights does not strengthen or improve them one iota. The incorporation of the Charter of Fundamental Rights in the proposed EU Constitution is more about power than rights. It would give wide scope for reaching into some of the most intimate areas of our lives to a Court that is notorious for using its case-law to extend EU powers to the utmost. This development would also install a new tier of expensive lawyers and judges between citizens and the final court of appeal that would decide their rights. All 25 Member States have already signed up to the European Convention on Human Rights and recognise the jurisdiction of the Court of Human Rights in Strasbourg. The human rights situation is not so defective in any EU country that it would bring about a real improvement for its citizens if the EU Court of Justice in Luxembourg were empowered to enforce a common standard of rights in areas affected by EU economic and social policy.

## **9. THE NEW EU'S POWERS TO EXTEND ITS OWN POWERS**

The Constitution would give the EU power to extend its own powers by two devices which avoid the need for new treaties and having to get these approved by citizens in a ratification process that would require approval by National Parliaments or citizen referendums in all 25 Member States.

Firstly, the Escalator or "*Passerelle*" Clause (Art.IV-444) would allow the European Council of Presidents and Prime Ministers to move EU law-making from unanimity to majority voting for the many policy areas set out in Part III of the Constitution, as long as they agree unanimously amongst themselves and no national Parliament objects. In practice, if the EU Presidents and Prime Ministers wanted to use this escalator clause strongly enough, they would normally be able to command majorities in their national parliaments; so this right of parliamentary veto is not a major safeguard against creeping extensions of EU power by means of this device. There is a special escalator clause for the common foreign and security policy, whereby the Presidents and Prime Ministers may unanimously authorise the Council of Ministers to act by qualified majority, without National Parliaments being involved or having any power of veto (Art.I-40.7). Neither is a veto given to National Parliaments in respect of the special escalator clause for the "multiannual financial framework", which determines the annual ceilings for each category of EU spending (Art.I.55.4). The Constitution's provisions dealing with internal Union policies and actions may also be amended by means of a "simplified revision procedure" involving a *passerelle* (Art.IV-445) so long as these do not increase the

powers of the Union as laid down in the Constitution - which could be largely a matter of political judgement - and are approved by the Member States in accordance with their respective constitutional requirements. The latter is not the same thing as a new Treaty requiring universal ratification under Article IV-443, but it creates a possibility for national input and for national veto. Part III also contains separate *passerelle* articles dealing with (a) Social policy, which could affect the termination of employment contracts, and the representation and collective defence of workers and employers' interests (Art.III-210.3); (b) Environment, which could affect town and country planning, water resources, land use and the choice between different energy resources (Art.III-234.2); and (c) Criminal Procedure, where the powers of the European Public Prosecutor's Office may be extended by the European Council by unanimity (Art.III-274.4) There is no provision in these Articles giving a veto power to National Parliaments. The proposed Constitution could effectively be amended by these various "*passerelles*" without new treaties having to be drawn up and sent around for unanimous ratification, in some cases by popular referendums. Convention Chairman Giscard d'Estaing dubbed these escalator or *passerelle* articles "a central innovation" of the Constitution. It is not hard to see why.

Secondly, the Flexibility Clause (Art.I-18) provides that if the Constitution has not given the EU sufficient powers to attain its very wide objectives, the Council of Ministers "shall adopt the appropriate measures" by unanimity. This replaces an existing Community Treaty article (Art.308TEC) which applies only to the internal market, but which has been very widely used there in recent decades, and extends its scope to all policy areas of the new EU, economic policy, monetary policy for the eurozone, civil and criminal law matters, foreign policy, social policy, industry, culture, education, public health etc. These two clauses would mean that the Constitution is not a full guide to its own provisions. If it were to be ratified it is highly likely that the EU's powers would be significantly expanded by means of these two articles over time.

## **10. SETTING IN STONE THE EU'S CURRENT UNDEMOCRATIC STRUCTURE**

The Constitution would give all the above powers to the new EU, while setting in stone the Union's present undemocratic structure. It would not repatriate a single power from the EU back to National Parliaments, despite this having been mooted in the Laeken Declaration which established the Convention that drew up the Draft Constitution. The unelected European Commission would retain its monopoly of proposing EU laws and would have that extended to cover important new policy areas (Art.I-26.2) - see the Appendix below. The 25-member Council of Ministers, which is irremovable as a group, would get increased powers to make EU laws on the basis of proposals from the Commission (Art.I-23). The European Parliament would continue without the power to initiate any laws, although that is the primary function of any real parliament. While the Euro-Parliament's right to propose amendments to laws being considered by the Council would be extended to cover new areas, it would remain unable to impose those amendments on either the Council or Commission. The European Central Bank would

remain politically unaccountable through a commitment by all MEPs, EU officials and national governments "not to seek to influence the members of the decision-making bodies of European Central Bank" (Art.III-188).

With increased use of Qualified Majority Voting in the Council of Ministers, the chances of being out-voted on EU laws and their being imposed on a country regardless of whether its Government, Parliament or people opposed them, would increase. The beneficiaries of this centralizing, undemocratic structure would be some dozens of top politicians and judges, some hundreds of senior bureaucrats at supranational and national level, and a cohort of publicists, ideologues and recipients of EU patronage across the 25 Member countries. The losers would be the 25 National Parliaments, which would be deprived of more of their power to make laws - and the 450 million citizens of the EU Member States who would thereby lose the power to elect their own law-makers and decide by whom they are governed.

The fundamental problem of the EU's lack of democracy would remain. Democracy is government of the people, by the people, for the people. But an EU democracy is impossible because there is no European people or demos that could confer legitimacy and "right authority" on EU law-makers and governors. Nor can a European "demos" or people be artificially created by EU flags and anthems and other symbols of an EU super-nation, combined with EU laws foisted on whole countries from above. The reality is that there exists no European people, except in a statistical sense, but only Europe's many peoples, who wish to be governed by their own rulers whom they elect and can dismiss, as is not possible with the EU. If historical experience teaches anything, it is that if this EU Constitution is foisted on the peoples of Europe by deception and "spin" in referendums and parliamentary ratifications that are travesties of democracy, their revolt against those who are responsible would be only a matter of time.

## **11. MAKING THE EURO CONSTITUTIONALLY MANDATORY**

Article I-8 provides that "The currency of the Union shall be the euro." This is so even though at present 13 of the 25 Member States still retain their national currencies and the Constitution formally enshrines the legal opt-outs of Britain and Denmark from the single currency (Protocols 13 and 14). The Constitution refers to non-euro countries as "Member States with a derogation". This includes Sweden, which would be constitutionally committed to adopting the euro even though its citizens voted by a big majority to retain the Swedish crown as their national currency in the 2003 referendum. The Accession Treaties of the 10 recent EU Members also commit them to adopting the euro. By ratifying the Constitution all EU States would be accepting a constitutional obligation to do this in time, regardless of the legal opt-outs of the UK and Denmark, which the Constitution implicitly regards as exceptional and temporary. The Protocol on the Euro-Group (No.12) refers to special arrangements amongst the eurozone countries "pending the euro becoming the currency of all Member States of the Union". All 25 signatory governments have agreed to this and clearly accept that the euro will become their currency in time, as the Protocol is an integral part of the Treaty. Articles III-198 to

202 deal with the transition to the euro for the 13 Member States with a derogation. They are required to treat their exchange rate as "a matter of common interest"(Art.III-200; ex-Art.124.1TEC) and the Commission is required to report periodically on their progress in "fulfilling their obligations regarding the achievement of economic and monetary union"(Art.III-198.1; ex-Art.121TEC).

## **12. ESTABLISHING AN IDEOLOGICAL CONSTITUTION**

The Constitution of any normal State lays down the rules and institutional framework for making laws and deciding policies, but it leaves the ideological content of those measures to political debate between political parties of the Left, Right and Centre. The EU Constitution is different in that while it lays down decision-making rules, it also lays down a rigid economic ideology which those rules must implement.

This is economic neo-liberalism mixed with the corporatist traditions of Big States like Germany and France, whose population size would give them disproportionate influence on EU law-making under the new voting system the Constitution proposes. Article III-185.1 reflects the economic conditions of the inflationary 1980s by making price stability the primary objective of the European Central Bank and the national Banks it governs, rather than such policy objectives as maximising economic growth, employment or social cohesion across the EU. This effectively makes the deflationary economic policy of the European Central Bank constitutionally mandatory. Most economists believe that the ECB's policy based on its narrow terms of reference has contributed significantly to the current high unemployment levels of the continental eurozone countries, in particular Germany and France.

Laissez-faire and economic competition based on the unimpeded movement of goods, capital and labour throughout the 25 EU countries, are laid down as the constitutionally mandatory mode of maximizing welfare in the new European Union (Art.I-4): "...Any discrimination on grounds of nationality shall be prohibited." Yet the central reason why people wish to have their own government in the first place, is precisely so that it may discriminate in their favour, advance the interests of its own citizens, firms and economic actors, and take their special needs and problems into account. Although the Constitution does not forbid public enterprise as such, it forbids the use of such enterprises for national planning purposes, for the establishment and enforcement of social priorities, or for anything that involves national discrimination (Art.III-166). The same Article would permit the EU to decide what counts as a public service and what are the boundaries between public and private provision, which could affect health, education and cultural services, as the Constitution would make "liberalisation" of services mandatory (Art.III-147). Article III-156 provides that there shall be no control on the movement of capital either within the Union or between the Union and the rest of the world, even though such controls may be considered necessary on occasion to serve the public interest. The Stability and Growth Pact, which imposes rules on national budgets so that governments must avoid excessive deficits, has been regularly flouted by the Big States but has led to smaller States like Portugal and Ireland being censured (Art.III-184;Protocol 10). Under

the heading "Economic Policy", the Constitution provides (Art.III-178) that Member States shall conduct their economic policies in order to contribute to the achievement of the Union's objectives, as defined in Article I-3, one of which lays down: "The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources ..." These provisions of economic policy raise fundamental philosophical and ideological issues between parties and interest groups on the political Left and Right in every modern country. It is foolish to seek to fix them as constitutional principles for 25 very different European countries into the indefinite future.

### **13. LAYING DOWN CONTRADICTIONARY CONSTITUTIONAL OBJECTIVES**

The Court of Justice (ECJ), as the Supreme Court of the new EU, would interpret the Treaty Establishing a Constitution for Europe if it is ratified. In its case-law the ECJ follows the continental legal tradition of interpreting treaties and legal documents in relation to their "objectives and purposes", in contrast to the Anglo-Saxon tradition of emphasising the literal wording of legal provisions in the present tense. This has led the ECJ to lay down in the 1992 European Economic Area (EEA) Agreement Case that identically worded provisions in two separate treaties can be interpreted to have different legal effects, depending on the objectives of the treaties in question. In this connection British jurist Martin Howe has pointed out that changing the legal basis of the EU from a series of treaties to a self-contained Constitution would fundamentally alter the Court's view of the objects and purposes of the legal texts it is applying. Henceforth all EU laws and framework laws would be interpreted by the Court as having the force of constitutional law. It would be quite proper of the Court of Justice to see all areas of national government as either actually or potentially subordinate to the EU Constitution.

The Constitution imposes the duty on the new Union it establishes to coordinate the policies by which its Member States aim to achieve the objectives they have in common (Art.I-1). These objectives would provide the basic guidelines for the Court of Justice in interpreting the treaty. William Rees-Mogg, former editor of *The Times*, aptly demonstrates the contradictory character of some of them in an article in that paper (25 Feb.2005):

"The treaty is indeed complex. If the convention had followed the example of the framers of the American Constitution, it might have produced a skeleton constitution. Unfortunately, the constitution includes quantities of material of a quite unsuitable kind, in an apparent attempt to dictate not only the structure but the long-term political objectives of the European Union.

"For instance, Title 1 includes a statement of objectives which would be better suited to a party manifesto than to a constitutional document. Article I-3 reads: "The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment

and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.”

"We have to take this seriously, but these aspirations are neither defined nor justiciable. Suppose they were brought in front of the European Court of Justice, on the complaint that the European institutions were failing to achieve these objectives.

"What is “sustainable development”? How can Europe achieve “balanced economic growth”? What does “balanced” mean in that context? Is “economic growth” desirable in all circumstances? What is a “social market”? In what ways does it differ from an ordinary “market economy”? Can a “social market economy” be “highly competitive”, or will its social character be a hindrance to its competitiveness? What is the appropriate level of full employment? Is it 3 per cent unemployment, as Lord Beveridge once suggested? Is it the 10 per cent which is the current German level? What is “social progress”? Can it be measured by income differentials? Or by educational standards? Might there not be a conflict between social progress and economic growth? How does one measure the “improvement of the quality of the environment”? Indeed, what is “the quality of the environment”? How should Europe promote “scientific and technological advance”? By subsidies? How would they fit in with fair competition?

"Whenever one dips into the constitution one is liable to sink into a bog of unexamined propositions. I cannot think of any document of comparable historic importance which raises so many questions or answers so few. As an American scholar has observed, the European Constitution, if it were American, would raise numerous Supreme Court cases in every paragraph."

Deciding court cases in the light of such constitutional objectives would give wide scope to the Court of Justice's well-recognised propensity to use its case-law to extend the EU's powers to the widest extent possible, and with that its own powers and those of its 25 nominated judges.

#### **14. POSITIVE THINGS IN THE CONSTITUTION**

One positive change proposed is that the Council of Ministers should meet in public when deliberating and voting on draft EU laws, although this would be likely to be a formality for the TV cameras. The negotiating and bargaining leading up to the laws would still be in private (Art.I-24.6).

A second change is that the Constitution would require National Parliaments to be formally notified of new laws the Commission proposes. If one-third of the 25 Parliaments thought these laws went too far and violated the so-called principle of subsidiarity, they could object. The Commission would then have to review its proposal, but could still decide to go ahead with it (Protocol 2 on Subsidiarity). Supporters of the Constitution claim that this is a significant new power for National Parliaments. Yet the provision is not new, for the Parliaments can object already. It is not a power, as they can



object all they like and the Commission can go on ignoring them. What National Parliaments get in this provision of the Constitution is a new right to be ignored. A proposal in the drafting Convention that if two-thirds of national Parliaments objected, the proposal would have to be abandoned altogether, was dropped.

"Subsidiarity", the notion that higher organs of law-making and decision-taking should not do things that are better done by lower organs, would remain essentially a political rather than legal concept. It would be primarily a matter of political judgement, although the Constitution would allow governments to bring cases alleging infringement of the principle of subsidiarity by an EU law before the Court of Justice, a court that has never balked at making political judgements. National Parliaments cannot take cases to the Court of Justice, although they may ask their governments to do so. This seems a rather unlikely event when governments may take such cases on their own account.

A third change would be that one million EU citizens could petition the Commission to propose a new EU law to the Council of Ministers in furtherance of the Constitution, but neither the Commission nor Council need accede to such a petition (Art.I-47.4).

A fourth change is the provision that a Member State could withdraw from the new Union. Such a provision has featured in other Federal Constitutions. The procedure proposed would tend in practice to discourage withdrawals (Art.I-60).

Nevertheless these are positive proposals, but they could all be introduced without setting up a new EU in the form of a Federal European State, as described in Point 1 above, abolishing a further 69 national vetoes, giving the ECJ a wide-ranging competence over our basic rights, and creating a new, more centralised, undemocratic and militarized Union than the EU that currently exists.

## **THE ALTERNATIVE TO THE CONSTITUTION**

Far from being merely a "tidying-up exercise" or a "merger and simplification" of the existing European treaties and powers, as the Constitution's advocates assert, the Treaty Establishing a Constitution for Europe amounts to a basic change in the nature of the European Union. It establishes a new Union that would be fundamentally different from the present one, while retaining the same name. This may well prevent people realising until too late the profound political-constitutional change being proposed.

In this new Union in Federal constitutional form, the 25 Member States and their peoples would substantially lose their national independence and democracy and would find themselves constitutionally reduced to provincial state or regional status.

If the proposed Constitution is rejected, the present EU will continue on the basis of the Treaty of Nice. That Treaty was "sold" to citizens across Europe as being the EU enlargement treaty; whereas now the Constitution is being sold again as necessary for the "efficient" running of the enlarged EU. The voting system agreed in the Nice Treaty was drawn up with the enlarged EU of 25 or more States in mind and is closer to the notion of the Member States as equal "partners" than the population-based scheme proposed in the Constitution.

The Convention on the Future of Europe which drafted the Constitution failed to do the job it was mandated to do by the Laeken Declaration. Before it came together there was absolutely no discussion in any of Europe's democratically elected National Parliaments on the principle of whether the EU should have a Constitution at all, on whether deeper integration was desirable, or on what kind of future relations the peoples and Parliaments of Europe wanted with the EU or between their States.

By rejecting the EU Constitution citizens can force a proper debate on the kind of Europe they really want. They would certainly prefer a more democratic and less centralised EU, with the restoration of significant powers from Brussels to the Member States, as was mooted in the Laeken Declaration that established the Convention. When National Parliaments have first discussed the kind of Europe their peoples want, a new Convention on the Future of Europe might then be called, put on a more democratic basis than Giscard d'Estaing's Convention and told to make proposals for an EU of that kind, in interaction with National Parliaments and citizens.

Assuredly that would be a Europe with democratic National Parliaments elected by Europe's own citizens in the lead, and not the small but powerful political and bureaucratic elites that are currently campaigning at both national and supranational levels to push through this Constitution for an EU Federation.

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## **APPENDIX 1: ABOLISHING 69 FURTHER NATIONAL VETOES**

- Giving more powers to the EU at the expense of National Parliaments and citizens
- Over 100 new powers altogether

There are 63 Articles in the Treaty Establishing a Constitution for Europe that would either give the EU new powers to make laws and take decisions by qualified majority voting (QMV), or would abolish a veto that Member States currently have over EU laws in particular policy areas by moving them from unanimity to majority vote. Some Articles abolish more than one veto, so that the proposed Constitution would abolish some 69 national vetoes altogether and shift the powers concerned to the new European Union.

The abolition by the Constitution of these 69 or so remaining national vetoes would be a far more extensive transfer of powers to the new EU than the 35 policy areas in which national Parliaments lost their right to legislate under the 2003 Nice Treaty, or the 19 areas lost under the 1998 Amsterdam Treaty. EU Governments should be urged to publish White Papers listing and describing these fully for their citizens

The loss of some 69 further national vetoes would increase the powers of the 25-member Council of Ministers in their capacity as EU legislators and decision-makers, as well as the powers of the non-elected Commission by widening its monopoly in proposing supranational legislation. It would also increase the powers of the European Parliament to propose amendments to laws from the Council of Ministers in many of the new policy areas. If one include the formal new decision-making powers for the EU institutions - the new powers for the Commission, Council, Court and Parliament to propose laws, adopt them, take decisions, issue regulations or decide court-cases - it is valid to say that the EU and its would obtain well over 100 new powers and competences under the Constitution.

One should also note that the listing here of specific extra powers for the EU takes no account of the increase in its powers resulting from the widening of the Union's objectives in Article I-3 and the explicit and implicit powers the Constitution gives the new EU to achieve those objectives or to use the Flexibility Clause (Art.I-18) to acquire the further powers to achieve them if the Council of Ministers should decide that its existing powers are inadequate.

Below is a list of the 69 further national vetoes the Constitution would require to be surrendered. The Article numbers in the existing European Union Treaty (TEU) or European Community Treaty (TEC) which the proposed changes refer to are given in brackets where relevant. The first 38 vetoes listed relate to wholly or mainly new powers or functions the proposed Constitution would give to the new EU. The other 31 relate to policy areas where an existing unanimity requirement would be replaced by majority voting for making European laws under the proposed Constitution. The national vetoes that would be abolished are grouped by reference to the broad policy areas they relate to, indicated by asterisks.

The compilers of this list have drawn on the valuable legal material on the web-site of the Vote No Campaign, Britain, <http://www.vote-no.com> , making some emendations to it, and wish to acknowledge their debt to that. They have also drawn on the web-sites of the Democracy Movement, <http://www.democracymovement.org.uk> , and The European Alliance of EU-critical Movements(TEAM), <http://teameurope.info> These three websites contain much useful additional material that is relevant to the EU Constitution and the argument of this 14-point summary. For the historical background to the EU Constitution, the most revealing account in English of the development of European integration from its beginnings to date is C.Booker and R. North, *The Great Deception, The Secret History of the European Union*, Continuum, London and New York, ISBN 0-8264-71056-6, 2003.

### **38 NEW POLICY POWERS FOR THE NEW EU**

#### *EU Decision-making*

1. DELEGATING LAW-MAKING POWERS TO THE COMMISSION to issue regulations for implementing "non-essential elements" of EU legislation(Art.1-36).The Council would decide what would be essential and non-essential.
2. THE ESCALATOR OR "PASSERELLE" CLAUSE, whereby all the Part III provisions of the Treaty-cum-Constitution that require unanimity may be switched to qualified majority vote by unanimous agreement of the European Council of Presidents and Prime Ministers, so long as a national Parliament does not object and the European Parliament agrees - military and defence matters excepted (Art.IV-444). This escalator clause would also allow for shifts from "special legislative procedures", which require a higher threshold for qualified majority voting, to the "ordinary legislative procedure". There is also an escalator clause allowing a shift from unanimity to majority voting on the common security and foreign policy, without National Parliaments having a veto(Art.I-40.7);and similarly for the escalator clause for deciding the EU's multiannual spending ceilings for different categories of expenditure(Art.I-55.4). An escalator clause is also provided for determining those aspects of family law with cross-border implications that might be decided by EU laws (Art.III-269.3). Another escalator clause would apply to sub-groups of Member States engaged in closer integration amongst themselves under "enhanced cooperation" (Art.III-422). Part III also contains separate *passerelles* articles dealing with Social policy (Art.III-210.3), Environmental policy (Art.III-234.2) and Criminal Procedure (Art.III-274.4) The Constitution's provisions dealing with internal Union policies and actions may also be amended by means of a "simplified revision procedure" involving a "*passerelle*" under certain conditions (Art.IV-445).
3. DECIDING THE NUMBER AND ROTATION SCHEME OF THE LAW-MAKING COUNCIL OF MINISTERS AND THEIR PRESIDENCIES: at present six-monthly but expected to change under the Constitution to eighteen-monthly presidencies shared between three countries at a time (Art.I-24).

4. PROCEDURAL RULES OF THE EUROPEAN COUNCIL OF PRESIDENTS AND PRIME MINISTERS: currently decided by consensus; under the Constitution they would be decided by simple majority vote(Art.III-341.2).

5. ELECTING THE NEW PRESIDENT OF THE EUROPEAN COUNCIL OF PRESIDENTS AND PRIME MINISTERS, effectively the EU Head of State, for up to five years (two and a half years, renewable once) by qualified majority vote (Art.I-22).

6. INTER-INSTITUTIONAL AGREEMENTS BETWEEN THE COUNCIL, COMMISSION AND PARLIAMENT to make arrangements for their cooperation, "which may be of a binding nature"(Art.III-397; ex-Art.218.1TEC). Agreements may cover anything and the Council may decide by QMV.

7. EUROPEAN ADMINISTRATION TO SUPPORT THE INSTITUTIONS, BODIES, OFFICES AND AGENCIES OF THE UNION in carrying out their missions. European laws shall establish provisions for "an open, efficient and independent European administration" to that end and going wider than existing Staff Regulations (Art.III-398).

8. RULES FOR THE CITIZENS' INITIATIVE, whereby one million citizens from a "significant number" of Member States may petition the Commission to make a proposal to the Council of Ministers for an EU law that citizens consider necessary for implementing the Constitution (Art.I-47.4).

### *EU foreign and military policy*

9. ELECTING THE NEW UNION MINISTER FOR FOREIGN AFFAIRS to "conduct the Union's common foreign and security policy" (Art.I-28).

10. FOREIGN POLICY IMPLEMENTING DECISIONS on the basis of the strategic policies and positions of the European Council of Presidents and Prime Ministers adopted unanimously, or based on proposals of the EU Minister for Foreign Affairs (Art.III-300.2).

11. CREATING A EUROPEAN EXTERNAL ACTION SERVICE, in effect an EU diplomatic corps, whose organisation and functioning would be based on proposals by the EU Minister for Foreign Affairs (Art.III-296).

12. URGENT FINANCIAL AID TO THIRD COUNTRIES (Art.III-320).

13. HUMANITARIAN AID TO THIRD COUNTRIES within the framework of the external action of the Union, including the establishment of a European Voluntary Humanitarian Aid Corps(Art.III-321).

14. STATUTE, SEAT AND OPERATIONAL RULES OF THE EUROPEAN DEFENCE AGENCY, an "agency in the field of defence capabilities development, research, acquisition and armaments" (Art.III-311.2).

15. ESTABLISHING MILITARY SUB-GROUPS OF EU STATES that would be empowered to make special military arrangements among themselves, establish EU "battle-groups" and undertake military missions abroad "in accordance with the principle of a single set of forces", without involving other EU members (Protocol No.23, recitals), to be known as "permanent structured cooperation" (Art.III-312).

16. ADMISSION OF LATER MEMBERS TO SUCH MILITARY SUB-GROUPS: Once "permanent structural cooperation" is established for a sub-group of Member States the admission of new members at a later date would be decided by qualified majority vote of those Council members participating in it, not all Council members (Art.III-312.3).

17. SUSPENDING A MEMBER STATE FROM SUCH MILITARY SUB-GROUPS: A participating Member State in such a military sub-group may be suspended from membership of permanent structured cooperation by qualified majority vote of the other members if they decide it no longer fulfils the criteria or meets the relevant military capabilities required (Art.III-312.4).

18. IMPLEMENTATION MEASURES UNDER THE TERRORISM AND DISASTER SOLIDARITY CLAUSE (Art.I-43), including terrorist prevention but excluding measures with defence implications, which would require unanimity (Art.III-329.2).

### *Civil and criminal law, justice and policing*

19. MUTUAL RECOGNITION OF LEGAL JUDGEMENTS BY MEMBER STATES AND EVALUATION OF MEMBER STATES' IMPLEMENTATION OF UNION POLICIES IN THE AREA OF FREEDOM, SECURITY AND JUSTICE: European regulations or decisions by the Council may lay down arrangements for this, without prejudice to ECJ powers (Art.III-260).

20. PROTECTION OF PERSONAL DATA BY EU INSTITUTIONS AND MEMBER STATES WHEN IMPLEMENTING EU LAW, which under the Constitution would encompass police and justice matters, and foreign policy, and go wider than at present (Art.I-51.2; ex-Art.286TEC).

21. DEFINITION OF CRIMINAL OFFENCES AND SANCTIONS FOR SERIOUS CRIME WITH A CROSS-BORDER DIMENSION, for which EU laws may lay down minimum rules: "These areas of crime are the following: terrorism, trafficking in human being and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime"(Art.III-271; cf.ex-Art.31TEU).

22. EU LAWS ON CRIME PREVENTION TO PROMOTE AND SUPPORT THE ACTION OF MEMBER STATES IN THIS AREA, but excluding any harmonisation of the laws and regulations of the Member States (Art.III-272).

23. ADMINISTRATIVE AND FINANCIAL MEASURES TO PREVENT AND COMBAT TERRORISM: European laws to "define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities"(Art.III-160; cf.ex-Art.60TEC).

### *The euro and monetary union*

24. MEASURES TO STRENGTHEN THE COORDINATION AND SURVEILLANCE OF BUDGETARY DISCIPLINE FOR THE EUROZONE COUNTRIES AND TO SET OUT ECONOMIC POLICY GUIDELINES FOR THEM: Euro-currency members would have no veto and non-euro members would not have a vote (Art.III-194).

25. DECIDING ON UNIFIED REPRESENTATION FOR EUROZONE MEMBERS IN INTERNATIONAL FINANCIAL BODIES AND CONFERENCES (Art.III-196.2;cf.ex-Art.111TEC).

26. APPOINTING A PRESIDENT OF THE EUROZONE FINANCE MINISTERS FOR TWO AND A HALF YEARS "pending the euro becoming the currency of all Member States of the Union"(Protocol No.12).

27. MEASURES FOR INTRODUCING THE EURO AS THE CURRENCY OF NEW MEMBER STATES WHEN ADOPTING IT, which are wider than those provided for under the Treaty of Nice (Art.III-191;ex-Art.123.4TEC).

### *New policy areas for EU action*

28. EUROPEAN INTELLECTUAL PROPERTY RIGHTS: EU laws to create and provide uniform intellectual property rights throughout the EU and set up "centralised Union-wide authorisation, coordination and supervision arrangements"(Art.III-176).

29. PUBLIC HEALTH INCENTIVE MEASURES: European laws may be made by majority vote "to establish incentive measures designed to protect and improve public health and in particular to combat the major cross-border health scourges, as well as measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States" (Art.III-278.5; ex-Art.152TEC).

30. IMPLEMENTING MEASURES FOR THE EUROPEAN RESEARCH AREA, a new term in the treaties, in relation to which European laws shall establish measures complementary to the activities of the existing "multiannual framework programme" for research, widening the ambit of existing EU action in relation to scientific and technological research (Art.III-251.4; ex-Art.166TEC).

31. EUROPEAN SPACE POLICY AND PROGRAMME: European laws to be drawn up establishing measures for a European space policy that may "promote joint initiatives,

support research and technological development and coordinate the efforts needed for the exploration and exploitation of space", including a possible European space programme (Art.III-254).

32. EUROPEAN ENERGY POLICY: EU laws to ensure functioning of the energy market and security of energy supply, promote energy efficiency and saving and the development of new and renewable forms of energy, with possibly significant implications for national budgets, e.g. energy reserve requirements (Art.III-256).

33. TOURISM: EU laws to complement action by the Member States to promote "the competitiveness of Union undertakings in the tourism sector", encourage a favourable environment for undertakings in this sector, and promote exchanges of good practice between Member States (Art.III-281).

34. SPORT: A new policy area is given to the EU here, in addition to "Education, Youth and Vocational Training" where incentive measures may already be adopted by QMV (Art.III-282.3): "The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function." EU laws "shall establish incentive measures, excluding any harmonisation of the laws and regulations of the Member States." The 25-Member Council of Ministers is required also to adopt recommendations for this sector.

35. CIVIL PROTECTION: "Union action shall aim to support and complement Member States' action at national, regional and local level in risk prevention... (and) "promote operational cooperation within the Union between national civil-protection services." EU laws in this area could allow EU powers to spill over and affect national emergency services more generally (Art.III-284).

36. PUBLIC SERVICE TRAINING COURSES AND EXCHANGES directed at improving civil service administrative capacities at national level for implementing Union laws. Member States would not be obliged to avail of such support (Art.III-285)

#### *Other*

37. VOLUNTARY WITHDRAWAL FROM THE UNION (Art.I-60): The Union's terms for the withdrawal agreement would be negotiated by majority vote among the remaining members, with the withdrawing State excluded.

38. REPEAL OF EAST GERMAN EXEMPTION FROM EU STATE AID POLICY, which may be implemented five years after the Constitution would be ratified (Art.III-167.2;ex-Art.87.2TEC).



***EXISTING POLICY AREAS WHERE THE CONSTITUTION WOULD REPLACE UNANIMITY BY MAJORITY VOTING FOR MAKING EUROPEAN LAWS***

***EU Decision-making***

39. RULES FOR EXERCISING THE IMPLEMENTING POWERS OF THE COMMISSION (Art.I-37;ex-Arts.10and 202TEC).

***Trade in services***

40. DEFINITION OF PUBLIC SERVICES, known as "services of general economic interest", where majority voting could decide what counts as a public service and the boundaries between public and private elements therein (Art.III-122; ex-Art.16TEC). See also Articles III-147 and 148 on liberalisation of services.

41. TRADE AGREEMENTS IN SERVICES AND THE COMMERCIAL ASPECTS OF INTELLECTUAL PROPERTY under the Common Commercial Policy, including agreements covering social, health and education services, unless Member States can show that such agreements would "risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them"(Arts.III-315.4; ex-Art.133.5TEC). Trade agreements in cultural and audiovisual services become subject to QMV unless that would "risk prejudicing the Union's cultural and linguistic diversity". Article III-315 would open the way for the EU to use trade agreements in services to pressurise less developed countries to abolish national controls on foreign investment as well as on their health, education and cultural services, and encourage privatisation of the latter in such countries.

42. TRANSPORT RULES THAT MIGHT ADVERSELY AFFECT PARTICULAR REGIONS (Art.III-236; ex-Art.71.2). The Constitution would delete the provision of the existing treaty whereby a Member State may demand a unanimous vote when it believes that a proposal adopted by qualified majority might adversely affect living standards, employment, or the operation of transport facilities in certain areas.

43. REPEAL OF EAST GERMAN EXCEPTION REGARDING TRANSPORT AIDS, which may be implemented five years after the Constitution would be ratified (Art.III-243; ex-Art.78TEC).

***Civil and criminal law, justice and policing***

44. JUDICIAL COOPERATION IN CIVIL LAW MATTERS HAVING CROSS-BORDER IMPLICATIONS: European laws "shall establish measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring

- (a) the mutual recognition and enforcement between Member States of legal judgements and decisions in extrajudicial cases;
- (b) the cross-border service of judicial and extrajudicial documents;

- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- (d) cooperation in the taking of evidence;
- (e) effective access to justice;
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- (g) the development of alternative methods of dispute settlement;
- (h) support for the training of the judiciary and judicial staff" (Art.III-269; ex-Art.65TEC).

This is significantly wider than the provisions of Article 65 of the existing Community Treaty, where unanimity was to prevail for five years after the entry into force of the Treaty of Amsterdam. The provision for a limited control by the Court of Justice in relation to matters of interpretation in this area, set out in Article 68TEC, is deleted. Article III-269.3 would require a European law or framework law establishing measures concerning matters of family law with cross-border implications, to be decided on the basis of unanimity. An escalator or "*passerelle*" clause is provided here for shifting by unanimity to majority voting for determining those aspects of family law with cross-border implications that might be decided by EU laws (Art.III-269.3).

45. JUDICIAL COOPERATION IN CRIMINAL LAW MATTERS: EU laws to govern mutual recognition of judgements and judicial decisions relating to cross-border crime, and the approximation of laws and regulations of Member States relating to police and judicial matters with a cross-border dimension, including rules on the admissibility of evidence, the rights of individuals in criminal procedure and the rights of victims of crime (Art.III-270; ex-Art.31.1TEU).

46. CUSTOMS COOPERATION BETWEEN MEMBER STATES AND THE COMMISSION (Art.III-152; ex-Art.135TEC). The scope of qualified majority voting has been widened here by the deletion of the clause in the present Community Treaty that "These measures shall not concern the application of national criminal law or the national administration of justice."

47. EU LAWS INCREASING THE POWERS OF EUROJUST, which links Member State prosecuting authorities, including the initiation of criminal investigations, proposing the initiation of prosecutions and the coordination of such investigations and prosecutions (Art.III-273;ex-Art.31.2TEU).

48. EU LAWS TO ENHANCE CROSS-NATIONAL POLICE COOPERATION, including "the collection, storage, processing, analysis and exchange of relevant information" and supporting staff training and exchanges (Art.III-275.2; ex-Art.30TEU).

49. EU LAWS TO DETERMINE EUROPOL'S STRUCTURE, OPERATION, FIELD OF ACTION AND TASKS, including the collection and processing of information and "the coordination, organisation and implementation of investigative and operational

action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams" (Art.III-276.2; ex-Art.30TEU).

50. COMBATING FINANCIAL FRAUD AGAINST THE UNION (Art.III-415.4; ex-Art.280.4TEC): The Constitution proposes to expand the scope of European laws in this area, which is already decided by QMV, to cover relevant national criminal law by deleting the phrase in the present treaty that measures against fraud "shall not concern the application of national criminal law or the national administration of justice".

### ***Border controls, asylum, immigration***

51. BORDER CONTROLS: European laws shall lay down a common policy on visas and short-stay residence permits, border controls, the integrated management of the EU's external borders and ensuring the absence of any controls on persons crossing internal borders within the EU (Arts.III-265,268; ex-Art.62TEC). (NB. The Community Treaty allowed unanimity to be replaced by majority voting in this and the two following areas below five years after the coming into force of the Treaty of Amsterdam. This was done by European the Council shortly before the EU Constitution was signed for some but not all of these provisions.)

52. COMMON ASYLUM POLICY: European laws shall lay down measures for a common European asylum system providing a uniform status for asylum seekers, common procedures for granting or withdrawing asylum status, common standards for treating asylum seekers and deciding which Member State is responsible for dealing with asylum applications etc. (Arts.III-266,268; ex-Arts.63-64TEC).(v.Note to No.51 above)

53. COMMON IMMIGRATION POLICY: European laws shall lay down measures for a common immigration policy governing conditions of entry and residence, the issue of long-term visas and residence permits, conditions governing freedom of intra-EU movement and residence for third-country nationals residing legally in a Member State, dealing with illegal immigration and residence, the repatriation of unauthorised immigrants and combatting trafficking in human beings(Arts.III-267,268;ex-Art.63TEC).(v. Note to No.51 above)

54. IMMIGRATION AGREEMENTS WITH THIRD COUNTRIES: The EU may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who no longer qualify for being a legal immigrant or asylum seeker in a Member State (Art.III-267.3). This is a new provision not in the existing treaty, but is inserted here as it relates closely to No. 52 above(Art.III-267.3).

55. EUROPEAN LAWS TO PROVIDE INCENTIVES AND SUPPORT FOR MEMBER STATES IN PROMOTING THE INTEGRATION OF THIRD-COUNTRY NATIONALS RESIDING LEGALLY IN THEIR TERRITORIES, but excluding any harmonisation of the laws and regulations of the Member States (Art.III-267.4). This is a

new provision not in the existing Treaty, but is inserted here because it relates closely to Nos.52 and 53 above.

### ***The euro and monetary union***

56. CHANGES TO VARIOUS POWERS OF THE EUROPEAN CENTRAL BANK relating to open market and credit operations, setting minimum reserve requirements, fining financial institutions, conducting foreign exchange operations and regulating bank clearance systems. The changes would give the Commission the right to propose that they be made by QMV, whereas previously only the Bank itself could propose that (Art.III-187.3; Protocol No.4; ex-Art.107.5TEC).

57. APPOINTING THE EXECUTIVE BOARD OF THE EUROPEAN CENTRAL BANK (Art.III-382.2;ex-Art.112TEC). This important group, consisting of the President, Vice-President and four others, runs the day-to-day operations of the Bank. The Constitution would substitute appointment by majority voting for appointment "by common accord" of the EU Presidents and Prime Ministers.

### ***Particular EU policy areas***

58. DIPLOMATIC AND CONSULAR PROTECTION FOR EU CITIZENS OUTSIDE THE UNION (Arts.I-10.2, III-127; ex-Art.20TEC).

59. SOCIAL SECURITY FOR MIGRANT WORKERS, which could spill over in ECJ case law and affect social security systems generally (Art.III-136; ex-Art.42TEC).

60. LAW ON SELF-EMPLOYMENT AND MUTUAL RECOGNITION OF QUALIFICATIONS, something that could also spill over and affect wider employment law (Art.III-141; ex-Art.47TEC).

61. CULTURE: majority voting to replace unanimity for incentive measures on many aspects of cultural policy, excluding any harmonisation of the laws and regulations of Member States. "Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and complementing their action in the following areas:(a) improvement in the knowledge and dissemination of the culture and history of the European peoples; (b) conservation and safeguarding of cultural heritage of European significance; (c) non-commercial cultural exchanges; (d) artistic and literary creation, including in the audiovisual sector" (Art.III-280; ex-Art.151TEC).

### ***European Court of Justice***

62. AMENDING THE STATUTE OF THE EUROPEAN COURT OF JUSTICE; at present requiring unanimity (Art.III-381; ex-Art.245TEC).

63. ESTABLISHING SPECIALISED COURTS ATTACHED TO THE EU COURT OF FIRST INSTANCE TO DECIDE CERTAIN CLASSES OF ACTIONS OR

PROCEEDINGS BROUGHT IN SPECIFIC AREAS. At present judicial panels may be established by unanimity. Under the Constitution European laws may establish these specialised courts by qualified majority vote (Art.III-359; ex-Art.225aTEC). Their actual members must be appointed unanimously.

64. COURT OF JUSTICE JURISDICTION ON EUROPEAN INTELLECTUAL PROPERTY RIGHTS. This may be conferred by a European law adopted by QMV. At present unanimity is required for conferring jurisdiction in relation to Community "industrial" property rights (Art.III-364; ex-Art.229aTEC). See new provision on European intellectual property rights at No.28 above.

65. ADVISORY PANEL FOR CHOOSING CANDIDATES FOR JUDGES AND ADVOCATES-GENERAL OF THE COURT OF JUSTICE, the operating rules for which would be laid down by majority vote, which could mean less say by Member States over how ECJ judges are chosen (Art.III-357; ex-Art.223 TEC).

### *EU "own resources" and budget*

66. IMPLEMENTING MEASURES FOR THE UNION'S "OWN RESOURCES" SYSTEM, to be adopted by majority vote (Art.I-54.4; ex-Art.269TEC). The "own resources" referred to, which finance the EU Budget, consist of the existing own resources that Member States collect and contribute to the EU - customs duties, agricultural levies, 1% of the national VAT base and a national income related contribution - and "new categories of own resources" that might be unanimously agreed in future and approved by the Member States "in accordance with their respective constitutional requirements."

67. EU FINANCIAL RULES FOR PROVIDING FUNDS TO THE COMMISSION AND MEASURES TO MEET CASH REQUIREMENTS would be decided by majority voting rather than unanimity from 2007 (Art.III-412.2; ex-Art.279.2TEC).

### *Third country agreements and external sanctions*

68. ASSOCIATION AGREEMENTS WITH THIRD COUNTRIES AND COOPERATION AND ASSISTANCE AGREEMENTS WITH EU CANDIDATE COUNTRIES PRIOR TO THEIR ACCESSION TREATIES: The Constitution replaces the present unanimity requirement for these by majority voting (Art.III-319; ex-Art.181a.2TEC).

69. ECONOMIC BOYCOTT AND INTERRUPTION OR RESTRICTION OF AID IN RELATION TO NATURAL OR LEGAL PERSONS AND GROUPS OR NON-STATE ENTITIES: Economic sanction decisions affecting third countries may be taken by qualified majority vote under the existing Community Treaty and would be extended by the Constitution to people or non-State groups (Art.III-322.2; ex-Art.301).

## **APPENDIX 2: THE CONSTITUTION'S TITLE AND PREAMBLE**

Preambles to treaties, constitutions and laws can be important. The continental European legal tradition which governs the jurisprudence of the EC Court of Justice interprets legal documents in terms of their objectives and the intentions of their makers. Preambles can be valuable guides to these. The Anglo-Saxon tradition accords Preambles no such importance.

The Constitution of the USA, which is 15 pages long, commences with the words "We the people..." The Treaty Establishing a Constitution for Europe, which is some 400 pages long, follows the formula of listing the Heads of State of the 25 EU Member countries, who then announce that "Drawing inspiration from ... Believing that... Convinced that ... Determined that ... and Grateful to..." something or someone or other, have designated certain named Presidents, Prime Ministers and Foreign Ministers as their plenipotentiaries, who have agreed the Treaty whose text then follows, with their signatures at its end

The Preamble's first paragraph reads: "Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law ... "

This claim that the universal values of human rights, freedom, democracy and the rule of law have developed from the cultural, religious and humanist inheritance of "Europe" is ahistorical and arrogant. It ignores the world's other cultures and civilisations, some of them much older than the European, which have contributed to these universal values also. It ignores Europe's uniquely bloody history of wars, colonialism, and imperialism with its bitter legacy to this day to Africa, Asia, Latin America and the Middle East. It ignores the fact that it was the USA that twice rescued Europe from German military conquest and fascist dictatorship in the 20th century, in the latter case with the major help of Russia.

The great majority of Europeans believe in God. A million people signed a petition calling for the Preamble to contain a reference to the Deity. Pope John Paul 2 appealed for that. But France's President Jacques Chirac vetoed any such reference.

The title of the Treaty and the Preamble claim that this is a Constitution for Europe, when it is only for the EU. In four out of the six paragraphs of the Preamble, the word "Europe" is used where the term "EU" should be used. This is implicitly insulting to those European countries that are not EU members.

The Preamble's second paragraph refers to "Europe, reunited after bitter experience." Yet Europe has never been politically united, anymore than Africa or Asia have, except for brief periods of dictatorship when much though not all of it was under the Roman Empire, and later Napoleon Bonaparte and Adolf Hitler.

This “Europe, reunited after bitter experience... wishes to deepen the democratic and transparent character of its public life.” This implies that “Europe” has got a “public life” apart from its member countries and States? What is it? Where is it? The peoples of Europe are stated to be "proud of their own national identities and history", but the Preamble omits any reference to their democracy and right to rule themselves. There is no reference to deepening the democratic and transparent nature of the public life of Europe's peoples and nations, but only of "Europe" itself, which is the Preamble's synonym for the new Federal EU.

The Preamble goes on to express the conviction that “the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny (and that)... Europe offers them the best chance of pursuing ...the great venture which makes of it a special area of human hope.”

Are the peoples of Europe really "united ever more closely " and determined "to share a common destiny"? Not the Russians or the Swiss or the Norwegians or Icelanders, or the Serbs, Croats, Albanians, Macedonians, Moldovans, Ukrainians and White Russians, who belong to European States outside the EU. Not to speak of the Catalans, Basques, Flemings, Scots, Welsh etc., ancient peoples who have no State of their own but are members of one or other of the EU's multinational States. It is simply untrue to say that "the peoples of Europe" are united in their determination "to forge a common destiny". In truth most of the EU's peoples are being given no say whatever in this Treaty-cum-Constitution that is being foisted on them from above. Only a minority of EU States are holding referendums on it.

"United ever more closely" echoes the phrase "determined to lay the foundations of an ever closer union" in the 1957 Treaty of Rome, which implied a continual never-ending process of integration, embodied in treaty after treaty. The insertion of this phrase would continue to license the Court of Justice to decide future court cases in terms that advance such closer integration, constitutionally and politically.

"Europe" as "a special area of human hope"? Is it any more special than any other continent or area? Has Europe not often been an area of human hopelessness? What of all the human hopelessness Europe has engendered, on its own territory and in other continents, by the actions of some of its political elements over the centuries?

In pursuing "the great venture which makes of it (i.e. Europe) a special area of human hope" Europe's peoples are stated to be united "in awareness of their responsibilities to future generations and the Earth" - Earth with a capital letter. The implication seems to be that responsibilities to a personified Earth, with capital "E", are more serious than to "earth" in lower-case! What exercise in exegesis might the ECJ some day make of that? This is surely strange nonsense for the Preamble to a Constitution.

The Preamble's final paragraph reads: “Grateful to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe ...” Yet no one asked the Convention to draft a Constitution. It was a

self-assumed task by the Euro-federalists who dominated it. The Laeken Declaration which established the Convention mandated it to make proposals for a more democratic and transparent EU, one closer to citizens. It spoke of the possibility of repatriating powers from the EU to its Member States, whereas the Draft Constitution proposed the opposite. The Declaration referred to an EU Constitution only as a possibility "in the long run". By no stretch of the imagination is it true to say that the 105 members of the Convention that drafted the Constitution really prepared it "on behalf of the citizens and States of Europe." Each country had only three representatives. Each Government has only one. None of the National Parliaments which had two representatives each had discussed beforehand the principle of whether they wanted deeper integration. None of them discussed the implications of dissolving the existing European Union and Community and replacing it by a new Union in the constitutional form of a supranational European Federation where the laws for 450 million people would be made by committees of 25 persons on the EU Councils of Ministers.

The Member States which formed the European Union and which have given the EU its reason to exist are not mentioned in the text of the Preamble. Instead "Europe", by which is meant the EU, is presented as the sole guardian of the rights of the citizens of these States and nations. The Preamble would seem to write Europe's nations and States out of history.

By any reasonable standard the Preamble is an embarrassment. Yet its failure to mention the EU's nations in its text, but only "Europe" - by which it means the new European Union founded on its own Constitution, could significantly affect ECJ decisions in future constitutional cases if the Treaty Establishing a Constitution for Europe were to be ratified. This Preamble might then be adduced as evidence of the intentions of the governments that drew up and signed the Treaty, and EU law-cases might come to be decided in the light of these formulations.

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