Briefing paper for the Constitutional Affairs Committee of the European Parliament

Contribution to a symposium held by the Constitutional Affairs Committee of the European Parliament on the Future of the Constitutional Process in the European Union

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It would be useful to preface my responses to the four questions posed by the Rapporteurs for the Constitutional Affairs Committee with **some very brief comments on the Constitutional Treaty**. The first point is precisely that: to me it is a Constitutional Treaty, not a Constitution as such. Clearly in legal terms the measure is a treaty requiring unanimous ratification according to national constitutional requirements before it could come into force. So far as the document was 'developmental' *vis-à-vis* the status quo in relation to the EU's existing partial and evolving constitutional framework it did strength many important constitutional elements. These included aspects of the structure of the polity (legal personality; 'depillarisation', etc.) and indeed it made some strides towards increasing the effectiveness of the Union and its capacity to operate as a legitimate forum for governance in which citizens are given both participatory and representative mechanisms through which they can express their preferences. However, it would none the less be wrong at this stage to call the document 'a Constitution', given the heritage of the concept of constitution. Moreover, in retrospect it is impossible not to reach the conclusion that emphasising the constitutional element caused problems within the ratification process. There was very little appetite at national level to understand the document in the rather ambiguous way that is favoured by many scholars and commentators, and which avoids reading a 'nation state' meaning into the concept of constitution and constitutionalism at the EU level, and consequently the document fell foul of many legitimate and illegitimate fears about European 'super-statery'.

No impartial observer could deny the double achievement of the Constitutional Treaty: on the one hand it did arise out of a broader and more participatory process than previous treaties, allowing a much stronger input in particular from parliamentarians and to a certain extent from parties (national and supranational); and yet, at the same time, it preserved the features of an intergovernmental bargain keeping the national governments moderately happy. Consequently, as a document it preserved the delicate balance of the bargain which underpins the European integration process as well, if not better, than previous substantial amending treaties such as the Treaty of Maastricht. To that extent, and also to the extent that it would have embodied major reforms in the area of Justice and Home Affairs and in relation

to some aspects of the democratic legitimacy of the EU, its loss – if that is what we are looking at it – is greatly to be regretted.

At the same time, too much of the time there has been a disconnect between the weak constitutionalism of the Constitutional Treaty and the incremental constitutionalism of the underlying EU legal order (also weak in relation to democratic legitimacy of course, but at least underpinned by the output legitimacy of judicial decision-making based on the rule of law). I would suggest that at least as much attention should be paid to the latter as to the former, in the long term at least. To put it another way, it is probably as important for those concerned with the constitutional future of the Union to have careful regard to what is happening in the Court of Justice (e.g. in relation to the interconnection between the so-called Maastricht pillars) as it worry about future Treaty amendments changing the institutional system. This is particularly important, because this element of deepening of European integration, in relation to justice and home affairs, is occurring at the same time as a dramatic widening (enlargement) has placed new challenges in front of the coherence and uniformity of the EU legal order, because of the new legal orders which have been brought within its multilevel constitutional system. This is what I mean by referring to **constitutionalism without the Constitutional Treaty**.

I turn now to the specific questions posed by the Rapporteurs for the Constitutional Affairs Committee.

1. **The ratification of the Constitution has stalled. Is it your view that it should be salvaged? If so, how -- and when?**

It is in my view highly unlikely that the Constitutional Treaty **will be** salvaged, and I am certainly not convinced that it necessarily **should be** even if that were possible. However, it does seem to me that the latter is an essentially hypothetical question, because to suggest that the Constitutional Treaty can be salvaged seems to me to ignore the strength and peculiarities of the political processes which have led to the ratification process stalling in the first place. These are political processes which are primarily national in character and have much to do with weakness of political leadership at the national level, but the specific resonance of these processes at the European level lies in the profound and continuing disconnect between national and European politics. Moreover, whatever its merits (and they are many), the Constitutional Treaty is a tarnished document and sadly even the process whereby consensus was reached on the document is a somewhat tarnished process in the eyes of many citizens.

However, the most important point is that the **intergovernmental bargain** on which the consensus also rested, as well as the more participatory process of the Convention, could not be assumed, two or even three years on, to be one with which the Member States are comfortable. The same point can probably be made about the intergovernmental bargains which underpinned other amending treaties. This is certainly true once they had entered into force and some unforeseen consequences had started to show themselves in relation to the effects of the Treaties which the Member States had signed up to, and it is probably also true in some cases before they entered into force (e.g. in the case of Nice) when the intergovernmental bargain was already unravelling. However, the circumstances surrounding the ratification of the

Constitutional Treaty are sufficiently special, with the two successive ratification defeats in two founding Member States of the European Union, that it would be wrong to ignore the fact that the intergovernmental bargain is already fast unravelling as elections are held, governments change, and circumstances develop. The ratification process has already shown how weak was the commitment of some Member States to the bargain they signed up to in Rome on 29 October 2004. It would be naïve to imagine that their commitments are becoming stronger, not weaker as time goes by.

2. If there were to be a renegotiation of the Constitution what should be its main features? Recalling the need for consensus, what provisions, in particular, would you change?

I believe that it would be unwise to start any future Treaty amendment negotiations explicitly on the basis of the text of the Constitutional Treaty, but rather it would be important to go back to the existing EU and EC Treaty texts, and look again at what is unsatisfactory about them, and why amendment as such would be a positive contribution to the process of European integration. Even so, the sad outcome of the political miscalculations which led to the 2005 referendum defeats is that it cannot be safely assumed that at any point in the future there will necessarily be further Treaty amendments, outside the context of accession treaties (and there will probably be few enough of those…). The referendum 'genie' is out of the bottle. Any future proposed Treaty amendments will be carefully scrutinized at all levels in all Member States for their 'constitutional' content, thus fuelling the case for referendums to form an essential part of any national ratification process. Those citizens who felt 'deprived' of a referendum in 2004/2005 will develop vigorous claims that one should be held on future Treaty amendments. In some Member States, of course, it is now also proposed to put at least some accession treaties to a referendum.

On the other hand, looking on positive side, it is probably correct to assume, as some are doing within the European Parliament, that the best chance of turning the referendum issue around would be via a set of referendums held on the same day probably associated with European Parliament elections, assuming some of the conditions related to 'citizen reconnect' outlined below and suggested by other contributors to this symposium have been followed. These conditions could perhaps have a positive impact upon the national debates on European integration (and on the disconnect between national and European debates), which are currently a major factor blocking the possible adoption of a more rational set of Treaty arrangements, such as were suggested by the Constitutional Treaty. They need, as a minimum, to create the conditions under which – regardless of whether referendums are actually held – there are constructive debates about the politics of European integration within national politics.

If there are to be treaty amendments, then priority should be placed on reforming the justice and home affairs provisions to ensure a more complete set of structures of judicial and democratic accountability within the EU in relation to measures to be adopted (and indeed in relation to those which have already been adopted). In terms of the completeness of the EU as a governance system, it is the loss of these provisions which most severely undermines its credentials and claims to be legitimate.

While the loss of the inclusion of the Charter of Fundamental Rights as a formal part of the legal texts is to be regretted, this is not an insuperable obstacle to the continued judicial protection of fundamental rights, in the national courts, in the Court of Justice, and also in the European Court of Human Rights which has begun the process of scrutinising ECJ practices. In view of the latter development, a priority should be to create a legal basis for the EU to accede formally to the ECHR.

The question arises as to whether an accession treaty would be the appropriate place to locate measures amending (a) the qualified majority system and (b) the size and composition of the Commission.

The provisions on the 'simplification' of instruments were not a success story for the Convention, and should not be retained in the event of any attempted renegotiation. This matter needs more thought. There also seems little to be gained by pressing for the provisions on competences which appear in Part I to be readopted. These add very little of substance to the provisions on legal bases which appear in Part III, while at the same time failing to tell the story about what it is, in truth, that the EU can do and actually does do. The much-maligned Commission Penelope document in this area got the approach right, by focusing on the principal and other policies of the Union, rather than on the rather abstruse notion of 'exclusive competence'.

3. If there is not to be a renegotiation of the Constitution, what institutional or policy reforms should be prioritised -- and how?

Many of the changes proposed by the Constitutional Treaty in the area of democracy and transparency can be instituted without formal treaty amendment. This is not to suggest that some form of cherry-picking of the 'best bits' of the Constitutional Treaty should occur. On the contrary, the suggestions below are either elements which the institutions of the European Union and the Member States have been considering for some time but which happen to be included in the Constitutional Treaty, or issues which any polity which is concerned about re-emphasising legitimacy and transparency in relation to how it does its business might consider when routinely reflecting about the effectiveness of its institutions:

- The Council can easily shift to legislating in public, by simple majority of the Council members agreeing to amend the Council's Rules of Procedures. This is likely to be on a proposal from the Presidency, as the UK has promised already for this autumn. There should be a gradual commitment to bring the television cameras more and more into the Council room, and into the rooms of committees and working groups operating under the aegis of the Council/Coreper.
- Citizens' initiatives can be instituted either by informal means, or by means of the adoption of a decision by the Council proposed by the Commission on the basis of Article 308. They could be an interesting mechanism to connect the institutions to wider public opinion, bypassing the sometimes parochial concerns of the national governments.
- One or more interinstitutional agreements can be put in place to take into account input from national parliaments in relation to the subsidiarity principle; national parliaments themselves can use their existing powers

under national governmental systems to ensure their input is taken seriously, and they could helpfully improve the quality of their deliberation over matters of EU policy-making to enhance their input.

- There is an argument for adopting the spirit if not always the letter of the reforms proposed by the Constitutional Treaty to enhance the political stability and leadership within the EU institutions, especially the Commission and the Council, although it is obviously impossible to institute the most important reform, namely the appointment of the Foreign Minister as a Vice President of the Commission, without Treaty reform.
- Away from democracy directly, but remaining with governance and with the need for joined-up and coherent policy-making for the delivery of effective and legitimate governance, it would be useful for the Parliament to support so far as it can the introduction of the spirit of the various mainstreaming clauses which the Constitutional Treaty inserted at the beginning of Part III, especially in relation to the mainstreaming of social questions within EU policy-making and the mainstreaming of the non-discrimination principle.

4. What should the EU do to reconnect with the citizens?

- The most urgent work for the European Parliament is to connect, institutionally speaking, with the political institutions which themselves directly engage the citizens at national level (national governments, national parliaments and as appropriate regional and local political authorities) in order to ensure greater honesty and transparency in national policies on European integration. This can be done through new forums, through the exchange of personnel, and through the exchange of information. This may go some way towards overcoming one of the greatest obstacles to citizen acceptance of the case for European integration (even though it seems unlikely to get them much more involved than they already are), namely the misinformation that appears in many national newspapers. While the UK is particularly prone to this failing, it appears that there are elements of this problem to be found in many other Member States as well. The Union and the process of European integration that such articles describe is simply meaningless to many of those involved in the process, and thus the problem lies in overcoming the disconnect.
- Substantively, the urgent work for the European Parliament lies in relation to Justice and Home Affairs, where it is still largely excluded from the formal arena of policy-making, and where it can make an important contribution by expressing the diffuse interests of citizens and political institutions in relation to this field of EU policy-making.

I would conclude that I remain hopeful that processes of polity-building and constitution-building in the European Union can and will continue on an incremental basis over the coming years. The distinctive feature of the period 2001-2005 involved an overwhelming concentration on the challenge of developing the documentary part of the European Union legal and constitutional order, perhaps at the expense of an adequate focus either on the continuing incremental processes which occur within and between all of the institutions, including, but not confined to, the Court of Justice and

the Court of First Instance, or on how the EU and its Member States can effectively adjust in the mid 00's to the simultaneous challenges of deepening and widening, posed by the burgeoning *acquis* in the field of justice and home affairs and the dramatic enlargement of 2004. Both of the latter questions implicate important questions about legitimacy, both *vis-à-vis* the constitutional fabrics of the Member States, which are experiencing new challenges as the EU moves into the sphere of criminal law and criminal procedure in response to external challenges such as international terrorism and crime, and as regards the involvement and consent of citizens in decision-making. It will certainly imperil the ongoing process of European integration if those elements are neglected in the future and for the longer term.