The European Constitution

and what it means for Britain

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PREFACE

I HAVE SERVED ON THE Convention on the Future of Europe for the past 15 months representing the House of Commons. I present this pamphlet as a report on the main debates, an examination of the principal issues, and a warning of what the proposals will mean.

The Convention has now produced a draft European Constitution. This will go forward to an Intergovernmental Conference later this year. Further changes will be made, some welcome, some unwelcome. But the scale and scope of the undertaking will remain – a new constitutional order for the Union and its member states, with profound implications for parliamentary democracy and the principles of self-government.

Whatever the merits or otherwise of the proposed European Constitution, I am sure that it can only be properly decided by the people as a whole in a referendum.

David Heathcoat-Amory MP
June 2003

CHAPTER ONE

INTRODUCTION

BRITAIN IS TO GET A WRITTEN CONSTITUTION. It has not been drafted here and it has not been requested by Parliament or the people. Once in place it will take precedence over all British laws and constitutional practices. It will not be amendable except by the consent of others. This is the European Constitution.

In 1973, Britain joined what was a free trade area, protected by an external tariff. In 1975 our membership was endorsed in a national referendum, held by the Labour Government after some cosmetic adjustment to the terms of membership. The ballot paper referred explicitly to 'staying in the Common Market'. Since then, the European Economic Community (EEC) evolved into the European Union, enormously extending its role into social and political areas which were previously the preserve of member states.

The EU has become unrecognisably different from the organisation which people voted for in 1975. But it is just possible to argue that it is still a treaty relationship between nation states which have formed an association for common purposes.

The European Constitution will found a new Union, separate from member states, endowed with new powers and its own legal personality. Most domestic policy areas will be opened up for legislation at Union level. National vetoes will largely disappear. The Union will coordinate the economic and employment policies of member states. Foreign policy, defence, criminal justice and police matters will for the first time come under the single structure of the Union. A European President and a European Foreign Minister will take on many of the tasks now performed by

national ministers. The Constitution and the laws of the Union will have primacy over everything enacted by member states. The EU Charter of Fundamental Rights will become legally binding. The European Court of Justice (ECJ) will essentially become the supreme court of all the citizens of the new Union. The European State will have arrived.

Only the British Government claims that the Convention spent 15 months on a 'tidying up exercise'. All other members of the Convention recognise that what is being attempted here is new. For the first time ever, all the existing EU treaties will be repealed. Some articles will be amended and incorporated into the Constitution. Other parts of the Constitution – such as Part One on the Constitutional Structure – will be almost entirely new. The sections on foreign policy and defence, and criminal justice and immigration are unrecognisably different from the existing treaty articles. These new articles run to over 80 pages. Whatever amendments are secured by the Government, the essential architecture of the Constitution and new Union is settled. Its adoption will be a momentous event, comparable to the original founding of the EEC in 1957.

How did this happen? How did a free country with a long history of parliamentary democracy come to submit itself to an external jurisdiction in this way? If Britain signs the Constitution, and transfers powers to the Union in the way described, will the country remain self-governing in any real sense? Above all, can this be stopped? And if so, how?

CHAPTER TWO

THE ROAD TO BRUSSELS

THE FOUNDING Fathers of the European Union – Monnet, Hallstein Schuman, Spaak, and others – had no doubt that Europe must be run by supranational institutions. Economic integration would be the forerunner of political integration. Moreover this project had to be carried through by a bureaucratic élite, separate and insulated from the discords and rivalries of national governments.

This vision for Europe was checked by Charles de Gaulle and his belief in a 'Europe des patries'. After his retirement in 1969, the process of European integration was resumed. By the time of Britain's accession in 1973 it was clear to informed observers that the label Common Market did not accurately describe the contents of the bottle.

Many of the changes were incremental and hardly noticed. The ECJ extended the scope of Community action through case law, by appealing to the overall purpose of Community law rather than its literal interpretation. The general primacy of Community law over national law, and the direct action of Community regulations on individual citizens, were both established in this way despite never having been spelled out in any treaty.

It is striking that for nearly 30 years there was no major treaty revision. Then in 1986 the pace of economic integration was accelerated by the Single European Act which set a deadline of 1992 for the completion of the Single Market. National vetoes were replaced by qualified majority voting across many new areas of commercial policy. It was a precedent that the prime minister, Margaret Thatcher, would bitterly regret.

Thereafter the pace quickened and three new treaty changes followed over 10 years: Maastricht, Amsterdam and Nice. The motive force behind the Treaty of Maastricht was the drive towards a single European currency, from which John Major secured a UK opt-out, still enjoyed today.

Maastricht also set up a ‘pillared’ structure whereby the existing European Community was joined by two new areas of policy cooperation: Common Foreign and Security Policy, and Justice and Home Affairs. Policy in these areas was to remain under the control of national governments. The two new EU ‘pillars’ were therefore expressly designed to protect their intergovernmental character. It is a feature of the new European Constitution that this pillared structure will be collapsed and replaced by a single entity holding powers in these areas too.

Ratification of the Maastricht Treaty was a fraught affair, and not only in Britain. In France the referendum only succeeded by a hair’s breadth. The German Constitutional Court deliberated long before agreeing to the transfer of powers demanded by the Treaty. Denmark rejected the treaty in a referendum but then accepted it with some opt-outs a year later.

Public opinion was showing some obstinate resistance to the treaty aim of an ‘ever closer union’. The problem was an evident lack of democracy in the working of the EU. This may have been justified in the aftermath of the second world war when the priority was reconstruction and reconciliation. Fifty years later something more is required, particularly in a continent which is supposed to have invented democracy.

The EU is strongly resistant to such ideas. It is a technocratic organisation, élitist in outlook, centralised in structure and, like all bureaucracies, eager to accumulate power. To take an example, the creation of the Single Market in 1992 was intended by the British to be a liberating measure, eliminating barriers to trade and allowing free markets to flourish. In practice, it has been used to open up a vast new regulatory chapter of harmonised standards and controls.

The Single Market has been used in this way to extend EU powers into new areas of domestic policy undreamt of when the project was launched. Public health is hardly a trade issue and indeed the relevant Treaty article specifically reserved to member states, 'the organisation and delivery of health services'. But because health is a service, and services can be traded, the European Court of Justice has ruled that public health can indeed be covered by Single Market legislation.[1] It shows what a determined European Commission and an activist court can achieve in extending the remit of the EU, overriding the clear intention of member states when the original treaties were signed.

This creeping enlargement of EU powers, and the never-ending stream of regulations and directives, has fed public suspicion about the true nature of the European project. To this has been added concerns over mismanagement and fraud. In 1999 the entire European Commission was forced to resign in the face of well-founded allegations of nepotism and maladministration.

Faced with a growing 'democratic deficit' in the EU, the European Parliament claimed a greater role in decision-making, believing that it alone could restore democratic legitimacy to the project. So the European Parliament was given more responsibilities in each treaty revision, and now has powers equal to the Council of Ministers in most areas. Despite this, the average turn-out in elections to the European Parliament has steadily fallen, from 63% in 1979 to 49% in 1999 (despite compulsory voting in three countries). In Britain it fell more dramatically, to 24% (with parts of Liverpool as low as 8%). The adoption of the list system in Britain, whereby electors vote for a slate of candidates drawn up by the parties, has probably contributed to the malaise.

In referendums, the voters have continued to show a disconcerting degree of independence. In 2000 the Danes said no

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[1] See, for example, the Decker judgement (ECJ ref. C-120/95), which ruled that social security rules precluding reimbursement for health supplies obtained abroad were invalid.

to joining the euro in a surprise referendum result. The following year Ireland rejected the Nice Treaty but was told to try again. The decision was reversed in 2002.

The prospect of 10 new countries joining the EU was a further stimulus to action. If existing decision-making was remote and unaccountable it was likely to get even worse after enlargement.

So it was that in December 2001 the European Council at Laeken in Belgium announced that a Convention on the Future of Europe would be set up, under the chairmanship of Valéry Giscard d'Estaing, former president of France and one of the architects of modern Europe.

The Convention would consist of two MPs from each national parliament, a government representative from each country, 16 members of the European Parliament and two Commission representatives. The candidate countries which were negotiating to join would all be represented in the same way, making 105 members in all. In addition there would be an equal number of alternate members to act as substitutes.

The Laeken Declaration proclaimed the success of the EU but conceded that it was 'behaving too bureaucratically' and, 'the European institutions must be brought closer to the citizens'. The Convention was directed to define the respective powers of the Union and member states, to simplify the rules and create 'more democracy, transparency and efficiency', with particular reference to the role of national parliaments.

The Declaration left no doubt about the scale of the problem or the importance of finding a solution, stating, 'The Union stands at a crossroads, a defining moment in its existence'. With this lofty mission and broad mandate the Convention assembled for the first time on 28 February 2002 in the vast European Parliament building in Brussels.

CHAPTER THREE

THE CONVENTION ON THE FUTURE OF EUROPE

It's not Philadelphia

Parallels were soon drawn between the European Convention and the one held in Philadelphia in 1787 which drew up the American constitution. Although a somewhat fanciful comparison, it might have been a useful starting point for a discussion in the Convention on whether Europe is suitable for a constitution, or federal institutions.

In Philadelphia they drafted a federal constitution for America in four months (ratification by the states took much longer). A short Bill of Rights was added almost immediately, defining ten liberties and procedural rights. The unresolved issue of slavery, and continuing tension between the federal government and advocates of states' rights, led to the civil war 70 years later. Since then the US Constitution has never been seriously questioned. It has been amended remarkably little and the whole document still runs to only about 15 pages.

The Founding Fathers had to find a form of central authority to replace the British Crown, defeated six years before. The population of the states at the time was less than four million, they nearly all spoke one language, and they shared a common political culture. The English civil war of the previous century had broken the principle of arbitrary royal power. This opened the way to constitutional monarchy and parliamentary government. The revolt of the American colonies can be seen as an extension of this struggle, and many of the political and religious forces on the

parliamentary side in the English civil war were replicated in the American War of Independence.

The Philadelphia Convention therefore gave institutional effect to a tradition of self-government and political rights which arose from the Anglo-American experience. Is this a useful guide to what is possible in Europe? What ingredients are necessary for a successful federal system? Is it possible to have supranational institutions which are democratic and enjoy popular support?

The most famous book published on this subject was written by a French aristocrat, Alexis de Tocqueville, who visited America in 1831 and described the vigour and success of the American federal system in *Democracy in America*. De Tocqueville realised that the American system relied on a number of preconditions. Chief amongst these were a common language, a habit of self-government, a set of shared moral values amongst the governing class, and a widely held belief in equality and equal liberty. De Tocqueville saw that the American Constitution was not just a legally enforceable document, but depended for its success on the 'manners and customs' of the people.

De Tocqueville of course never studied the case for a European constitution. But applying his rules should make us cautious about such an enterprise. Europe is composed of varied and diverse states with widely differing historical experiences. Some have a continental character while others, like Britain, have a maritime history and instinctively look outwards to the wider world. This has led to differences in legal traditions, and attitudes towards the role of the state and the origin of rights. This diversity will increase as the Union takes on ten new members in 2004, each with its own language.

There is no European People, no single electorate or coherent public opinion. In short there is no European *demos* on which to found a supranational democracy or federation. Nor can such a *demos* be created by artificial means such as European anthems, flags and EU information campaigns. As de Tocqueville observed, these things lie in the manners and customs of the people and are

a product of history and experience. It follows that the European Union ought to be content, for the foreseeable future, with a treaty relationship between participating states that can trade and cooperate together and agree common rules to tackle common problems, but not give up powers to supranational institutions governed by a constitution.

Nothing of this sort was debated in the European Convention. Political theory, historical precedents, and radical alternatives were all ignored, or drew the lofty rebuke that the EU is unique and therefore comparison with other forms of government is impossible. But it is a novel conceit that the teachings of history and political science do not apply to Europe.

The Laeken Declaration was certain about the need to find a more democratic Europe, but only suggested that 'this might lead in the long run to the adoption of a constitutional text in the Union'. Despite this caution it became clear very quickly that a European constitution was indeed the aim, replacing the existing treaties. The first draft from the Convention was described as a Constitutional Treaty; thereafter it became simply the Constitution.

Brussels talking to Brussels

President Giscard d'Estaing announced that the work of the Convention would be divided into three phases – listening, deliberating and proposing. A 'civic forum' was set up, inviting contributions from the public. A day was set aside to listen to 'representatives of civil society'. This turned out to be a succession of lobby groups, most of them familiar in Brussels and frequently dependent on EU funding for their existence.[2]

A Youth Convention was organised in July with the same number of representatives as the Convention itself, and the same rules of debate. Some of the more independent youth members signed a petition criticising the way the conclusions were

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[2] See Bruges Group Occasional paper No 45 for details of EU expenditure on dependent political bodies.

organised in advance by the main political groups and then orchestrated by the secretariat without proper debate. The Youth Convention was generally deemed not a success and was not repeated despite an earlier intention to do so.

The existing EU institutions more than made up for the lack of contributions from the ordinary public. The Convention rapidly became less of a deliberative body and more of an institutional bargaining forum. In this process the national parliamentary members were at a disadvantage despite being in a majority (56 out of 105). Coming from many different parliaments and political cultures, they were the tourists of the Convention and repeatedly failed to act or speak as a coherent body of opinion.

By contrast, the European Parliament (EP) and the European Commission were both playing at home. The EP, although politically diverse, had its own institutional ambitions, particularly to take more power from the Council of Ministers and prevent any repatriation of powers to member states or national parliaments. The most focused institution of all was the Commission. As the self-proclaimed repository of the European Ideal, the Commission worked full time, on stage and behind the scenes, to consolidate existing powers and obtain new ones.

Members of the Convention usually joined one of the transnational political groups. These met regularly before the main sessions of the Convention, supposedly to agree a common line on the business to be discussed. The two main ones – the right of centre European Peoples Party and the leftist European Socialist Party – have avowedly federalist aims. Indeed the suggested European constitutions published by these groups were even more centralising and statist than the one eventually proposed.

The Convention itself met in main session about once every three weeks, for two days at a time. A Praesidium of 13 Convention members, chaired by the Presidency, drew up the agenda, gave direction and shape to the proceedings and decided the conclusions. It included as members the two vice presidents of the Convention, Jean Luc Dehaene of Belgium and Giuliano Amato of

Italy, both former prime ministers and committed federalists. Since the main sessions tended to consist of a succession of somewhat disconnected speeches from Convention members, the real power lay with the Presidents and the Praesidium in interpreting the result and looking for the elusive 'consensus'.

The secretariat of the Convention was drawn from the officials of the Council of Ministers, augmented by the Commission and the EP. Such staff are professional insiders, members of the European club. To them, criticising the integration process is like calling into question the entire enterprise. The mindset of the Convention was therefore firmly integrationist and instinctively hostile to suggestions that EU powers should be devolved or limited.

National parliaments: rubber stamp or real role?

The next phase of the Convention consisted of smaller working groups, meeting in Brussels every week. They consisted of 20 or 30 Convention members, chaired by a member of the Praesidium. Two working groups dealt with the role of national parliaments and the application of the subsidiarity principle, under which the Union is supposed to act only if an objective cannot be sufficiently achieved by member states acting alone.[3]

The Laeken Declaration referred specifically to the need to involve national parliaments better, so as to reconnect the EU to the people. The British Parliament certainly feels itself to be on the receiving end of a torrent of European directives and regulations which it can do very little to influence or amend. EC Directives are enacted jointly by the EP and the Council of Ministers, and must then be incorporated into national legislation in each state. Regulations are usually directly applicable in all member states without the need for further action. 102,567 such regulations have been applied to the UK since accession in 1973.[4]

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3 The working group reports, and all documents relating to the Convention, can be found at www.european-convention.eu.int

4 House of Lords parliamentary answer [HL649], 13 January 2003.

The counterweight to this legislative itch is supposed to be the subsidiarity principle. In the debates on the Maastricht Treaty, this was presented as the new big idea, limiting EU action to what is essential. But despite being written into treaty law in 1992, it never became an enforceable check on the creeping enlargement of EU power.[5] None of the existing institutions had an interest in limiting its own powers.

Perhaps recognising this failure, the Convention working group came up with the idea that national parliaments should in future be able to complain if the Commission proposed laws which encroach unnecessarily on national policy-making. New legislation might therefore be stalled before the damage is done. This is now being trumpeted as a radical new powerful role for national parliaments, by which they can insist on a clear division of responsibilities between the Union and member states.

Unfortunately, on closer inspection the new power to enforce the subsidiarity principle becomes only a suggestion. As the Draft Constitution states, if a third of national parliaments request it:

> …the Commission shall review its proposal… After such a review, the Commission may decide to maintain, amend or withdraw its proposal.[6]

This is very weak, and was strongly criticised by the House of Commons European Select Committee which correctly observed that although national parliaments will convey their views, 'there is no requirement for any of the EU institutions to take the slightest notice'.[7]

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5 The term 'subsidiarity' does not even appear in the index of the judgements of the ECJ.

6 Paragraph 6 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality. Note that, unless otherwise stated, all Treaty references in this pamphlet are to the Draft Constitution Volume I published on 28 May 2003 and the Draft Constitution Volume II published on 27 May 2003.

7 ESC Press Notice No 24, 16 October 2002.

Gisela Stuart, a British parliamentary member of the Convention and chairman of one of the working groups, tried to strengthen the proposal with a 'yellow card – red card' system. Under this, one third of national parliaments objecting would be a yellow card, triggering a review. Two-thirds objecting would be a red card, requiring a withdrawal of the proposed law. This idea was fiercely resisted by the EP and the Commission and was duly dropped.

The proposals on subsidiarity were further weakened by removing the right of an objecting national parliament to refer the matter to the European Court, although curiously this right is retained for the Committee of the Regions.

All this is a defeat for national parliaments. The promised new role as a real counterweight to the centralising tendency in Europe has turned out to be a missed opportunity. It is certainly not the breakthrough in national parliamentary powers claimed by the British Government.

Who does what

Another working group, on which the author of this pamphlet served, examined 'complementary competences'. 'Competence' is eurospeak for 'power' so this group examined how the power to implement policies should be divided between the Union and member states.

The working group drew up a list of complementary or supporting measures, in which member states would retain primary control and the Union's role would be only to 'assist and supplement' national policies without itself legislating. This approach was resented and resisted by those members of the group who wanted a more centralised Union and were afraid that such a list would inhibit the further transfer of powers.

By the time the draft articles of the Constitution were published three months later, the centralising view had prevailed. A number of policy areas were switched to a different category of 'shared competences'. This is defined to mean that if the Union legislates in such an area, member states are forbidden to do so.

The list is a long one and includes justice and home affairs, transport, energy, social policy, 'economic, social and territorial cohesion', the environment, consumer protection, and aspects of public health. No powers are to be returned to the member states.

The inclusion of energy as a shared competence is notable because there is no reference to energy in the existing treaties. The draft Constitution includes an entirely new article which gives the Union power to, 'ensure security of energy supplies in the Union'. This has obvious implications for Britain's oil and gas reserves and there will be no national veto as majority voting would apply.

Apart from being a major extension of Union powers into areas where its involvement has been mostly peripheral, the concept of shared powers brings no certainty to the division of powers. Government ministers have claimed that a European Constitution, although thought undesirable until recently, will at least set out clear limits to the Union's powers and responsibilities.[8]

But defining powers as 'shared' is really no definition at all. Is it shared 50 – 50, or 90 – 10? The US Constitution has no such category of powers. It muddles rather than clarifies the question of who does what.

Rubber Articles

Another issue on which the recommendation of the working group was overridden was the treatment of the Single Market. It is a well known abuse that the Commission uses treaty articles designed to create a Single Market in order to advance other aims.

This centres on the use of Article 95 of the present Treaty, the most notorious of all the 'rubber articles'. It allows the Commission to bring forward measures to harmonise laws and

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8 See, for example, Jack Straw's article, 'A Constitution for Europe', *The Economist*, 12 December 2002:

> 'A constitutional treaty, which sets out the role and missions of the institutions, would be an important step towards giving Europe's citizens greater confidence in the Union's work.'

regulations to establish the internal market. Majority voting applies. The trouble is that just about anything can be traded or can cross frontiers, so the internal market is a very elastic concept. Thus the Commission has used Article 95 to promote directives on such diverse subjects as money laundering, art market levies, summer-time arrangements, metrication, combating terrorism, anti-personnel landmines, civil protection, and balance of payments support.[9]

The working group recognised the problem and recommended that Article 95 should only be used when genuinely necessary to complete the Single Market. This was ignored. The draft Constitution contains no such restriction, and therefore provides no defence against a continuation of this 'competence creep'.

The same is true of Article 308, the 'flexibility clause' which allows the Community, acting unanimously, to take new powers to achieve a treaty objective. It is supposed only to be used, 'in the course of the operation of the common market'. In practice it has been used for such varied purposes as the setting up of new executive agencies and the granting of loans to non-EU countries, none of which is allowed by the existing treaties.

The working group saw that, if incorporated into the Constitution, this could be used as a back-door way of amending the Constitution without having to go through the proper procedures. Accordingly the group recommended that any flexibility clause should contain strict conditions, including a ban on amending the Constitution by this route. This too was ignored. The flexibility clause of the new Constitution (Article 17) supplies a means to extend the powers of the Constitution without going through the proper ratification process in each member state. The Union wants the powers that derive from a constitution but is unwilling to accept its discipline.

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[9] 73 such regulations and directives have been identified. For a fuller list see the author's submission to working group V on 7 August 2002; available on the Convention's website (www.european-convention.eu.int)

The Union gets a legal personality
One working group looked at whether the Union should get its own legal personality, which would enable it to sign international agreements and play a full part on the world stage, like a state.

At present, only the European Community (the first 'pillar' of the EU) has such a capacity by treaty law. In the field of foreign and security policy, and in criminal justice and policing (the two intergovernmental pillars), much stricter rules apply. There the EU has no explicit legal personality. The Council can conclude international agreements, acting on behalf of member states, but unanimity always applies and the ECJ has no jurisdiction. The British Government has always been particularly insistent on keeping this intergovernmental method intact.

The working group decided that the new Union should absorb the two intergovernmental pillars into a single organisational structure. It also recommended that the Union should have a single explicit legal personality. This has profound implications because the Constitution grants the Union 'exclusive competence' to sign international agreements.[10] Only the Union, with its new-found legal personality, will be able to negotiate and sign international agreements, and will do so across the board.

The Constitution also asserts its own primacy, and that of Union law, over the law of members states. This is not found in the existing EU treaties and rests only on the case law developed by the ECJ.[11] The primacy of the Constitution is of course an entirely new concept.

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[10] Article 12 (2) asserts this exclusive right:

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

See also Title V, Part Three which describes the procedure in detail.

[11] Article 10 (1) states:

> 'The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.'

...and a Charter of Fundamental Rights

The EU Charter of Fundamental Rights was negotiated in 2000 and the British Government made clear that it was only acceptable as a political document. It could not be made legally binding because of the general nature of the rights proclaimed and their uncertain effect on national parliaments and courts. The Europe Minister at the time, Keith Vaz, famously claimed that the Charter would have no more legal effect than a copy of the *Beano*. There was always an element of self-deception about this assurance and the Commission accurately predicted at the time that the Charter would increasingly be used as a legal reference. It concluded, 'It is reasonable to assume that the Charter will produce all its effects, legal and other, whatever its nature'.[12]

The draft Constitution now puts the matter beyond doubt. The whole text of the Charter of Fundamental Rights is reproduced in Part Two of the Constitution. These rights are very extensive and generally expressed. For instance, Article 28 confers the right, 'to take collective action .....including the right to strike'. No limitation is put on this right, eg in respect of emergency services, the armed forces or the intelligence services.

Member states can apply to restrict or limit the Charter rights but such derogations are only allowed under very strict conditions, even when national security reasons are given.[13] Balancing a right against a particular justification for departing from it is essentially a political decision, but in future it will be the ECJ in Luxembourg, not Parliament, which will make the decision.

The Charter of Fundamental Rights also limits working hours 'for every worker', grants access by everyone to health care, social security and housing assistance, and guarantees a high level of

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[12] 'On the legal nature of the Charter of Fundamental Rights', Commission Communication, 11 October 2000.

[13] Compare the Kriel v Germany case C-285/98 in which the 1976 Equal Treatment Directive was used by the ECJ to require the German army to let women serve in front line tank units.

environmental and consumer protection.[14] If a British Government in future wishes to cut social security payments to people refusing to take jobs, or to failed asylum seekers, such restrictions will have to be requested from the ECJ.

The British Government has recently stated its impatience with the 1951 Geneva Convention on Refugees which governs asylum policy and which is widely held to be inappropriate to modern immigration conditions. But the Charter of Fundamental Rights entrenches the Geneva Convention and will in future be part of the European Constitution.[15] Any change will therefore be impossible. Government policy is to review Britain's international commitments while at the same time making such a review impossible.

It may be claimed in defence of the Charter that its scope is limited to the Union and its agencies, and applies to member states only when they are implementing Union law. Purely domestic laws should, so the argument runs, be safe against interference. However, the most important policy areas covered by the Charter are described in the new Constitution as being 'shared' (see page 13 above), for instance, social policy and 'economic and social cohesion'. So these policies may now come under the purview of the Charter and the ECJ. Further, the ECJ is never a neutral observer and has consistently decided in favour of more centralisation, being an EU institution itself. Claims that a legally binding Charter will create no more rights are therefore very misleading. In reality incorporation of the Charter as a legally-binding document will open the way to further extensions of Union power and again undermines the claim that a European Constitution will bring clarity and finality to the division of responsibilities between Union and member states.

The Government's aim is now one of damage limitation. It hopes to insert additional 'horizontal' clauses into the Charter to protect domestic laws. It also wants to make legally-binding the

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14 Articles 31, 34, 35, 37 and 38 of the Charter.

15 Article II-18.

commentary or explanation which accompanies the Charter in its present form and which supposedly moderates its use. As the Charter stands, this commentary is explicitly stated to have no legal value and it would be a novel departure to give it full legal status. The Government is paying a heavy price for not having stood its ground during the early stages of the Convention, and is now having to make the best of a bad job.

...as well as the European Convention on Human Rights

All member states are responsible for their actions under the European Convention on Human Rights (ECHR) in Strasbourg. Britain signed the ECHR in 1950 and the Human Rights Act 1998 made it directly judiciable in our national courts.

The same Convention working group which recommended legal incorporation of the EU Charter of Fundamental Rights concluded that the Union should, in its new guise of statehood, also accede to the ECHR. To some, this would be more logical as an *alternative* to making the EU Charter legally binding. However, when faced with alternatives, the Union normally does both.

The ECJ in Luxembourg will be the supreme court of the Union (and of member states when implementing Union law), and the European Court on Human Rights in Strasbourg will police the international law obligations of the Union. This dual system of human rights will create confusion and duplication.

In some cases the rights described in the two documents are the same, but the case-law of the two courts has differed over the years. This could create conflict. In other cases, rights are differently defined. For instance the EU Charter prohibits ‘double jeopardy’; that is trying someone twice for the same offence. By contrast, the ECHR allows for a second trial in some circumstances. Which is to prevail?

This is of more than theoretical importance. The Government is introducing double jeopardy in the Criminal Justice Bill 2003. Will this run foul of the EU Charter when it becomes legally binding or will it be allowed under the more permissive ECHR?

The Government cannot claim that this is a domestic law of no concern to the Union because it has already passed the European Arrest Warrant which brings this into the international arena. What is certain is that this will further confuse the public, and become a rich source of litigation as lawyers argue the respective merits and scope of the two sources of human rights. And because it will normally be the most intrusive that will prevail, it will give a further twist to the steady transfer of decision-making from elected representatives at home to judges in Strasbourg and Luxembourg.

Has Europe an economic future?

A special working group was formed after demands from some members to look at Social Europe. This came up with a long list of Union objectives which it wished to see in the Constitution. These included social and territorial cohesion, a social market economy, lifelong learning, social inclusion, children's rights, and the promotion of quality of work and 'services of general interest'. Most of these found their way into the draft Constitution in some form together with the unexpected addition of the 'discovery of space' as a Union objective, apparently a personal interest of Giscard. After some discussion the discovery of space was dropped as an objective, although it is still included as a 'shared competence' of the Union. The Social Europe working group also successfully requested that the existing treaty aim of 'high employment' should be replaced by a Constitution objective of 'full employment'.

Another working group considered Economic Governance and agreed that, 'economic policy coordination should be reinforced'. This suggestion has huge consequences. Article 14 of the draft Constitution states that:

> The Union shall adopt measures to ensure coordination of the economic policies of the member states.

The same article was later changed to include 'employment policies' as well. The compulsory coordination of economic and employment policies of all member states is a significant transfer of responsibility and decision-making from national governments to

the Union, going far beyond the existing EU treaties. It would certainly cover the overall level of taxation, interest rates and public expenditure in each country, as well as pensions policy and employment taxes. Article 14 goes on to assert that:

> The Union may adopt initiatives to ensure coordination of member states' social policies.

So the Union advances in all policy areas: economic, employment and social.

The Economic Governance working group expressed this old-fashioned belief in centralised economic management but did not carry out any study or even refer to the economic problems of the EU. This ignored the real issue which is the evident failure of the EU economic model as an engine of growth and employment. The EU is a low growth, high unemployment zone, characterised by high taxes, particularly on employment, and a habit of over-regulation. In world terms, Europe is becoming less and less competitive but this wider dimension was hardly ever mentioned and never discussed in the Convention.

These problems are marked in Germany, which has traditionally been Europe's economic motor and budget paymaster. Because of its membership of the euro, Germany is unable to reduce its interest rate or regain competitiveness through a lower exchange rate. Nor can Germany boost the economy through expenditure or tax cuts, because of the rules of the ironically named Growth and Stability Pact. It is a chilling reminder of what can happen to a country which loses control of its own economy, and this no doubt influenced the Government in its decision to shelve Britain's entry into the euro.

The only solution left to Germany is long-term labour market and welfare reform. But even there the belated efforts of the German Government run counter to the thrust of EU policy. European Governments may try to move towards flexible markets, lower business costs and less regulation, but they are still being met by a blizzard of social and employment regulations from the EU.

The body of existing EU laws and regulations, known as the *acquis communautaire,* now runs to 97,000 pages. Enlargement of the EU should have been an opportunity to prune back this huge volume of law, or at least to simplify it. Instead, the applicant states are supposed to implement and enforce it to the letter. This will impose a heavy burden of cost on economies already struggling with large deficits and the challenge of world competition. Requests by some Convention members to include a study of this issue were ignored.

Nor has there been much effort to prepare the EU for enlargement. Some applicant states will have a Common Agricultural Policy imposed on them just when the EU is trying to get rid of it. Other new states will have to raise their tariff barriers against their poorer neighbours to the East. The illogical and unfair budgetary system will continue: Britain will still make an annual contribution to the Union of £3.2 billion.[16] Greece will continue to receive four times as much aid in one year as the Czech Republic – with the same population but twice as poor – will get over the next seven years.[17]

The EU also has an ageing and shrinking population. This will put further strains on the pension, tax and benefit systems in most member states. If economic integration accelerates in the new Union as planned, these problems will increasingly be the subject of common action, under the requirements of solidarity and burden-sharing in the draft Constitution.

None of this was examined or debated in the Convention or the working group on Economic Governance. So the question of who will pay for Social Europe remains unresolved.

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16 This is the average net contribution over the past five years (HM Treasury Cm 5547). The gross contribution is of course far higher.

17 *The Economic Background to European Enlargement,* European Research Group, May 2003.

Crime and punishment

The Commission and the EP have long resented that criminal justice and policing matters are decided between member states under the 'third pillar' of the EU. Early on in the Convention it was made clear that this would change and all would come under the new Union.

Accordingly, a working group was formed, titled Freedom, Security and Justice, of which the author was a member. The group started by examining asylum and immigration matters. A majority, with the support of the representative of the British Government, recommended that there should be a single Union policy, to be decided by majority voting, covering the rules and controls on all aspects of asylum and immigration. Article III-161 of the draft Constitution accordingly proposes that the Union shall develop a policy with a view to:

> ...ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders.

It also proposes 'an integrated management system for external borders'. On asylum, the Constitution provides for a common policy covering the admittance, status, treatment and allocation of asylum seekers between member states.[18] The Union shall ensure 'the efficient management of migration flows'.[19] All such policies:

> ...shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.[20]

In plain terms, this means that the Union will decide who goes to what country and on what terms. Proposals can only be made by the Commission, and voting is by qualified majority.

At present, Britain has an opt-out from the EU border control policy. If this survives, we will not be directly affected by all of

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18 Article III-162 (2).
19 Article III-163 (1).
20 Article III-164.

these developments. But if the opt-out ends or fails, it will be impossible to establish controls on who is admitted to this country and on what terms.

The working group next recommended that power should be given to the Union to 'approximate' criminal laws and penalties across all member states for a list of crimes with a cross-border dimension, or when criminal legislation is necessary, 'to ensure the effective implementation of a Union policy'.[21] Criminal procedures would also be harmonised, including the rules of evidence in trials and the rights of the accused. Majority voting would apply, and the ECJ would for the first time have jurisdiction in this area. This is a very big change: at present states must act unanimously, the ECJ has only a peripheral involvement, and there are no powers to harmonise criminal justice systems.

This has particular significance for the British common law tradition where jury trial procedures differ greatly from the inquisitorial system on the continent. Harmonisation would mean big changes to the distinctive English and Scottish legal systems and there would be no national veto to prevent it. Criminal justice bills in the House of Commons would become of secondary importance, filling in the gaps between Union laws enacted in Brussels. These proposals alone show up as false the Government's claim that the proposed Constitution is simply about 'tidying up' the present EU treaties.

Objections were raised to these suggestions in the working group, but the chairman John Bruton, former prime minister of Ireland, and the secretariat seemed determined to push through a highly integrationist set of proposals. The group's final report made almost no reference to minority opinions or alternative suggestions.

Remarkably, the articles which then went into the draft Constitution went even further than the working group's recommendations. For instance, the Constitution now provides for a European Public Prosecutor with powers of investigation and

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21 Article III-167.

prosecution in each member state.[22] This was not recommended by the working group. It provides a good example of the Convention's relentless drive, from the top, to achieve a single integrated Union with all the powers, responsibilities and organs of a state, and to do this by ignoring objections and overruling the recommendations of its own working groups.

The British Government is committed to removing the European Public Prosecutor from the final Constitution. However, the current draft also expands the role of Eurojust, the existing joint prosecuting authority. These powers may get in by the back door. Eurojust gets a right to initiate prosecutions in each state.[23] Europol too gets additional tasks, including the collection and analysis of information and carrying out actions by 'joint investigative teams'.[24] The rules of Eurojust and Europol will be decided by majority voting instead of the present unanimity.

Criminal justice policy goes to the heart of what a nation state is for. It is about the coercive power of the state over its citizens and therefore raises delicate issues of accountability and control. People need to feel a sense of ownership of the system if they are to agree to its decisions and forgive its lapses. The system must also be responsive to the choices which voters make in elections. All this is possible within the confines of a nation state. It is not possible if these choices are transferred upwards, away from the electors, to the most remote tier of government of all, the Union. Indeed such a transfer is likely to increase public alienation, and is contrary to the Laeken Declaration which instructed the Convention to move the Union 'closer to its citizens'. Also, if immigration and asylum policy is removed from national decision-making and given to the Union, the resulting sense of powerlessness could fuel extremist parties offering instant remedies.

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22 Article III-170.

23 Article III-169.

24 Articles III-171 to III-173.

When these points were made in the Convention debate, the Commission representative claimed in reply that centralising at Union level would bring increased efficiency and effectiveness in tackling cross-border crimes and illegal immigration, as the public demanded. It is hard to take this claim of EU efficiency seriously when the whole Commission had to resign in 1999 over allegations of mismanagement and corruption, and when there are continuing and repeated scandals about the administration of EU programmes.

Cooperation between states, the sharing of information and intelligence, treaties on extradition and mutual assistance, have all been developed in response to the spread of international crime. This could undoubtedly be expanded. It does not require the creation of a Union with comprehensive law making powers in this most sensitive of all policy areas.

The Union abroad, and how it will defend itself

Perhaps the area which defines a country's sovereignty most clearly is foreign policy and defence. The working groups which examined this reported on time but the Iraq crisis then caused consternation in the Convention by rudely exposing the absence of a European foreign policy. The draft articles were accordingly delayed until last but the outcome was little changed. Indeed it was judged even more necessary, 'to provide in the Constitution for more effective institutional mechanisms to underpin the… development of the common foreign and security policy.'

External action is very widely defined to include not just foreign policy and defence but also aid, economic and financial relations with other countries, and the negotiation of international agreements. In fact the Union is to be given exclusive competence to sign international agreements covering any 'internal act' or, 'to achieve one of the Union's objectives'. Therefore in areas such as transport, communications, public health, energy, commercial policy and criminal justice, it will be forbidden for member states to make their own agreements with other countries or

organisations. This is a very marked extension of Union responsibility. Majority voting is laid down as routine for the negotiation of such agreements.

A permanent Foreign Minister, elected in the Council by majority vote:

> …shall conduct the Union's common foreign and security policy.[25]

After much debate, it was decided that the Union's Foreign Minister will be 'double hatted' and will be a member of the Commission (and one of its vice presidents) as well as chairing the Foreign Affairs committee of the Council of Ministers. This creates a conflict of interest since he will be bound by the collegiate rules of the Commission as well as being part of the Council of Ministers. But such were the institutional rivalries that this compromise was inevitable.

As to the content of policy, 'the European Council [that is, the heads of government, meeting quarterly] shall identify the Union's strategic interests and objectives', acting unanimously.[26] The actual policy would then be decided by the Council of Ministers, chaired by the Union's Foreign Minister. Majority voting would apply, 'when adopting a decision on the initiative of the Minister for Foreign Affairs further to a request from the European Council'.[27] This is a confused compromise between those wanting general majority voting in foreign policy and those wanting none.

Money for the foreign and security policy will come from the Union's budget, decided by majority voting. Special arrangements will give rapid access to funds in urgent cases.

A solidarity clause requires the Union to mobilise all available assets, including military ones, to prevent a terrorist threat or protect the population from any such attack. This is a very general power. The text is littered with other references to loyalty and mutual solidarity, and the requirement that:

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25 Article I-27.

26 Article I-39 (2).

27 Article III-196 (2)(b).

> Member states shall ensure that their national policies conform to the positions of the Union.[28]

National embassies are obliged to cooperate and help implement the common policy, along with the new 'delegations of the Union', which operate under the authority of the Union's Foreign Minister. At the United Nations, Britain as a member of the Security Council, 'shall request that the Union's Foreign Minister be asked to present the Union's position'.[29] In other international organisations and conferences, member states taking part, 'shall uphold the Union's positions. The Union's Minister for Foreign Affairs shall organise this coordination'.

The ECJ is excluded from jurisdiction over foreign policy and defence, but not from the other aspects of external relations, including commercial policy, cooperation and aid, sanctions and international agreements. But even without the ECJ's jurisdiction over foreign policy, the repeated obligation on member states to work loyally within the Union's policy making framework will have the same effect, particularly as, 'the Council and the Minister for Foreign Affairs shall ensure that these principles are complied with'. Also, the ECJ has a general duty to 'ensure respect for the law in the interpretation and application of the Constitution',[30] which could ensnare a country which breached the obligation set out in Article I-15 (2):

> Member states shall actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the acts adopted by the Union in this area. They shall refrain from action contrary to the Union's interests or likely to impair its effectiveness.

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[28] Article III-194.

[29] Article III-201 (2) states:

> '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 Minister for Foreign Affairs be asked to present the Union's position.'

[30] Article I-28.

The articles on defence require that member states make military and civilian capabilities available to the common security and defence policy but the Council must act unanimously in implementing defence policy. Closer cooperation between willing member states is provided for, the aim being a mutual defence pact within the Union, excluding the traditionally neutral members like Ireland and Finland.[31] This would be a further step towards a militarised Union, at a distance from NATO. Britain would be in the position of providing the troops while others provide the policy.

A European Armaments, Research and Military Capabilities Agency is to be set up with the aim of coordinating research, managing procurement programmes and improving the effectiveness of military expenditure.[32] This could become an agency for European weapons procurement, and its rules will be decided by majority voting. It would certainly constrain the ability of member states to order weapons independently, or to collaborate with the United States. It is further likely to have a long-term effect on the maintenance of industrial armaments bases, with implications for national capabilities, and jobs.

It is difficult to see how all of this can be reconciled with the Prime Minister's repeated assertion that foreign policy must remain a matter between the governments of member states. The present proposal is that the European Council acting unanimously will set the 'general guidelines'. The actual policy will then be decided by the Council by majority voting on a recommendation of the Union's Foreign Minister. Thereafter, it is the Foreign Minister who will conduct and implement the policy on behalf of member states. Even if majority voting is excluded, the entire thrust of these proposals,

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[31] Article I-15 (1) states:

'The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy, which might lead to a common defence.'

[32] Article III-207.

with their new institutions, common agencies and solidarity requirements, is towards an enforceable single foreign and defence policy for the Union, replacing national policies. This would be a decisive change from the intergovernmental method laid down in the Maastricht treaty, with incalculable consequences for Britain's status as an independent state.

Institutional Musical Chairs

The last major issue for the Convention was how to balance the demands of the existing EU institutions. In January 2003 the French and German foreign ministers, both of whom served on the Convention, presented a joint plan, calling for a full time President of the European Council, elected by other prime ministers, and also a stronger President of the Commission, elected by the European Parliament. Peter Hain, the British Government representative, said in the Convention that he agreed with their speeches, 'word for word', but in the House of Commons was much more sceptical and rejected the idea of an elected Commission president.

As usual the French-German plan was the result of trade-offs and compromises, rather than any principled attempt to improve decision-making or democracy. The French, backed by the British and Spanish, traditionally advocate a strong Council. The Germans always support the Commission and in this they were joined by almost all the small states and accession countries, afraid that a permanent European President would mean dominance by the big states. Such countries also wish to retain the six monthly rotating presidencies which at present brings the business of running European business to each state in turn, and perhaps helps to make the EU appear less remote to its people.

The post of permanent Council President survives in the draft of the Constitution, but Giscard and the larger states paid a heavy price for achieving this. Any idea that it represents a victory for intergovernmentalism or control by prime ministers is false: the role allocated to the European Council as a whole has been reduced while powers given to the other institutions have been increased.

The European Council was to have been specified as, 'the highest authority of the Union', with special responsibility for external action and immigration and justice matters.[33] It will now only define the Union's, 'general directions and priorities'.

The Commission, by contrast, is to get explicit executive powers, which are not given in the present treaties, and will have a duty to, 'ensure the application of the Constitution'.[34] The Union's Foreign Minister will be a vice president of the Commission. The Commission's sole right of initiative on new laws is asserted.[35] This did not go unremarked in the Convention debate. No truly democratic state would allow an unelected body sitting in private to decide what laws should be made.

The President of the Commission is to be elected by the European Parliament on a proposal from the European Council. The President-Elect will then select the other members of the Commission from lists of candidates submitted by member states. Each Commissioner shall be chosen for their 'European commitment' in addition to the present requirements of 'competence and independence'.[36] The Commission itself will be responsible to the EP. This is a significant change: at present the Commission derives many of its powers, over matters such as implementing rules, from the Council acting unanimously.

The Commission is also to acquire the right to pass a new type of law called a 'non-legislative act'. This is part of a complete reorganisation of law making powers of the Union. What are now promulgated as EU Regulations will in future be known as European laws. Such a law will be 'binding in its entirety and directly applicable in all member states'.[37] EU Directives will

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33 Draft sent to Praesidium 22 April 2003.

34 Article I-25 (1).

35 Article I-25 (2) states:

> 'Except where the Constitution provides otherwise, Union acts can be adopted only on the basis of a Commission proposal.'

36 Article I-26 (2).

37 Article I-32 (1).

become European framework laws, and will continue to require national legislation for their implementation.

The new non-legislative act will enable the Commission to pass laws which shall be directly binding on member states – that is, without enactment by national parliaments. The use of this power shall be delegated to the Commission by the Council and the EP, by majority voting. This removes the law-making process even further from the people.

The European Parliament also acquires substantial new powers, often at the expense of national parliaments. It is proposed that the routine method of Union lawmaking shall be the EP and the Council, acting by majority voting on the basis of co-decision. The draft Constitution includes 36 new areas in which this method will apply in future, often replacing an existing unanimity requirement.

The EP will also legislate on criminal justice and policing, since the existing intergovernmental method, which gives governments and national parliaments a veto, will be abolished. Indeed by using the new European law, defined above, the institutions of the Union will by-pass national parliaments and enact laws which are directly applicable to all people in all countries.

The institutional haggling has resulted in more powers for all: more titles and more politicians, a veritable Europe of Presidents. No decision or area of policy is to be returned to member states, contrary to the suggestion in the Laeken Declaration. The democratic deficit is set to grow.

CHAPTER FOUR

THE CONSTITUTION

Tidying up?

On 26 May 2003 the Presidency produced a unified draft European Constitution, taking into account all the debates and proposed amendments.[38]

The system for considering amendments was strange to anyone used to a parliamentary procedure. No votes were ever taken and little effort was made to group amendments into sections to be decided on systematically. Each member was limited to three minutes speaking time (later reduced to two minutes) per session.

In reality the whole undertaking was controlled and orchestrated from the top. The real debates took place in the Praesidium, or between the Presidency, secretariat and member states in private. Even the working groups, where members at least had a chance to discuss matters at greater length, were regularly overridden or their conclusions ignored.

The last draft differed little in essentials from the first. The architecture of the new Union, its legal personality, its wide objectives, its new exclusive and shared powers, its take over of criminal justice matters, the creation of a Foreign Minister, the solidarity obligations, general majority voting and the compulsory coordination of economic policy: all were in. Some objectionable features were modified, such as the label 'federal'. But this was more than offset by the addition of an obligation on the Union to

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[38] An alternative 'Europe of Democracies' has been submitted by nine Convention members, including the author of this pamphlet. This was published on 30 May 2003 on the Convention website (ref. CONV 773/03).

coordinate the employment policies of member states.[39] Other late proposals included a provision for majority voting on some aspects of company taxation and the administration of indirect taxes, and for the harmonisation of cross-border social security measures. Also a Protocol on the Euro Group appeared calling for an 'ever-closer coordination of economic policies within the euro area', and providing for yet another European president, this time for the euro area.[40]

The draft Constitution will to go to an Intergovernmental Conference (IGC) of member states, probably starting in Rome in October. The accession states, although not yet members, will participate in the deliberations. The IGC will undoubtedly amend the Constitution and there will be many battles before it is finally settled. The British Government already has a list of 'red-line' issues which it is committed to reverse. These include:

- economic and employment coordination by the Union;
- all references to majority voting on foreign policy and taxation;
- the European Public Prosecutor;
- majority voting on criminal procedures;
- any interference by the Charter of Fundamental Rights in domestic law;
- harmonisation of social security.

But in negotiations, concessions are not one way. There are trade-offs and bargains struck. The Government will have to give way on other matters in order to secure essential changes. Because the Government was so conciliatory during the Convention's first year, they lost valuable ground and are now desperately trying to get things out of the Constitution which should never have been allowed in. And by concentrating on some headline issues, all the other proposals will go through.

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39 Article I-14 (3).

40 Protocol on the Euro Group, Annex II.

The case for a national referendum

In recognition of the importance of the issues at stake most other member states have announced that the outcome will be put to national referendums. Denmark and Ireland are required to hold referendums which affect their constitutions, and they have been joined by France, Spain, Portugal, Austria and Italy. Others have still to declare, and in Germany, where national referendums cannot be held, there is an active movement to change the constitution to permit one. In the Convention itself a German campaigning group called More Democracy has obtained signatures from 95 members calling for national referendums to be held, and suggesting June 2004 as the date, to coincide with the next EP elections.

Support for referendums goes right across the political spectrum and includes federalists as well as eurosceptics. Those who have argued for the Constitution believe that it will be hopelessly weak unless founded on clearly expressed public support. Others argue that constitutions should always be approved by people, not governments.[41] Those who are against believe that it would be outrageous to deny people a vote on a new constitutional settlement changing the way they are governed, particularly as the Constitution opens with the words, 'Reflecting the will of the citizens and states of Europe…..'.[42]

What if a country voted 'no'? The Commission identified this problem early on and came up with ingenious suggestions whereby the Governments of the member states concerned should announce their loyalty to the new Union in advance and thereby commit themselves to overturning an adverse referendum result. Or it suggested that other member states might simply found the constitution by a completely new treaty and leave the dissident states behind.

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41 This is the position of radicals: see for example, Tom Paine *The Rights of Man*, 'Of Constitutions'.

42 Article I-1 (1).

The legal experts eventually quashed such hopes. The existing EU treaties are clear: any change requires the unanimous agreement of all member states. The new Constitution means abolishing the treaties. So every member state has a veto and there is no way round that. A country, or group of countries, saying 'no' would prevent the Constitution and the new Union coming into being. They could not be evicted from the EU: there is no procedure for doing so.

In practice, if a country voted no to the Constitution, the matter would eventually have to be resolved politically. The state concerned would probably allow the others to go ahead, having negotiated an associate membership of some kind, from a position of considerable strength. So voters need not be intimidated by threats that voting to reject the Constitution means expulsion, isolation and oblivion. It would in fact lead to a negotiated settlement giving the country concerned the relationship with the Union that it wanted.

The British Government decided early on that, whatever the outcome of the Convention, no referendum would be held even if the constitutional implications were far-reaching. This caused puzzlement in the Convention. Was not the British Government most insistent that the EU must become more democratic, reconnected to its citizens? Was it not true that 34 referendums had been held in Britain since 1997, on everything from setting up a Welsh Assembly to deciding whether Hartlepool should have a mayor?

Nor does the Government have a mandate to ratify such a major constitutional change without a referendum. The 2001 Labour manifesto contained no reference to the Convention or any proposal for a European Constitution. By contrast, the Maastricht treaty changes were signed by John Major before the 1992 General Election and featured in that General Election manifesto for ratification afterwards. Also, the major issue at Maastricht was the European single currency on which a referendum will eventually be held.

THE CONSTITUTION

The European Constitution founds a new Union, with incalculable consequences for the way we are governed, by whom, from where and by what powers. The Government's refusal to admit a referendum is based on deceit and cowardice: deceit, in trying to disguise the importance of the undertaking; cowardice, in not having confidence in their own arguments. This must be challenged by all who believe that democracy is more important than expedience, and that Constitutions must be decided by the people.

GLOSSARY OF EU TERMINOLOGY

European Council
Quarterly meeting of heads of state or prime ministers to give overall direction to the European Union. The presidency rotates between member states, for six months at a time.

Council of Ministers, or Council
Composed of government ministers, one from each state, meeting to decide policy or agree EU Directives and Regulations. Participants may be foreign ministers, or others appropriate to the subject under discussion, eg finance, agriculture etc. The chairmanship rotates between member states, as with the European Council. In practice, most decisions are taken by committees of officials or working groups.

European Commission
The full time civil service and 'government' of the EU. 20 Commissioners (one from each state; two from the larger states) each have specific portfolios and are appointed for 5 years at a time. The Commission initiates proposals for legislation, guards the treaties, executes policy and administers the budget.

European Parliament (EP)
626 members, elected every 5 years by a party list system. The UK currently contributes 87 members. The EP generally has equal powers or 'co-decision' with the Council over legislation. Also agrees the budget and scrutinises expenditure. Based in Brussels and Strasbourg.

European Court of Justice (ECJ)
The highest court of the EU, from which there is no appeal. It rules on treaty obligations, and breaches of Community law by institutions or member states. Based in Luxembourg. Not to be confused with the European Court of Human Rights in Strasbourg.

European Union (EU)
Composed of the supranational institutions of the European Community, covering most policy areas ('the first pillar'), and the two intergovernmental pillars dealing with foreign and security policy, and justice and home affairs.

Intergovernmental Conference(IGC)
The heads of state or governments, meeting to agree treaty changes. Each member state has a veto.

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