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A critical analysis of the EU draft Constitution

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"This is crossing the Rubicon, after which there will be no more sovereign states in Europe with fully-fledged governments and parliaments which represent legitimate interests of their citizens, but only one State will remain. Basic things will be decided by a remote 'federal government' in Brussels and, for example, Czech citizens will be only a tiny particle whose voice and influence will be almost zero. … We are against a European superstate."

- Czech President Vaclav Klaus, *Mlada Fronta Dnes*, 29-9-2003

"We've got to be explicit that the road to greater economic success does not lie in this cosy assumption that you can move from a single market through a single currency to harmonising all your taxes and then having a federal fiscal policy and then effectively having a federal State."

- Gordon Brown, British Chancellor of the Exchequer, *The Guardian*, 5-11-2003

"An enlarged Union based on Nice is not in the interest of any Member State … This is not a threat. This is a messenger delivering news."

- German Foreign Minister Joschka Fischer, *Irish Times*, 14-11-2003

"I don't think any of us would want to put our fate in the hands of the big countries now".

- Netherlands Finance Minister Gerrit Zalm, *Irish Times,* 29-11-2003

"One basic formula for understanding the Community is this: 'Take five broken empires, add the sixth one later, and make one big neo-colonial empire out of it all.' "

- Professor Johan Galtung, Norwegian sociologist, *The European Community, a Superpower in the Making,* 1973, p. 16

SECTION HEADINGS

1. A CONSTITUTION AND A TREATY

A Constitution is the supreme law of a State, which has primacy over the laws of its provinces or regions in any case of conflict. It is the ultimate source of legal authority for the territory it governs. It is enforced by a Supreme Court, in the EU's case its Court of Justice in Luxembourg. A Treaty is an agreement between sovereign States, the High Contracting Parties. What the EU Governments are now considering is a "*Draft Treaty Establishing a Constitution for Europe,"* to give it its proper title. It is not a *"Draft Constitutional Treaty for the European Union,"* as some people who wish to distract attention from its revolutionary character as an EU Constitution, misleadingly call it. It re-founds the EU on an entirely new legal basis, its own Constitution, as in the case of any normal State. It gives the EU legal personality for the first time and makes it an international actor in its own right, separate from and superior to its Member States. The new Constitution repeals all the existing EU Treaties from the Treaty of Rome to the Treaty of Nice, which become null and void (Article IV- 2). It turns the EU into an entirely new legal entity, different from and successor to the EU that now exists. Article IV-3 provides for the EU based on this Constitution to be the legal successor to the rights, obligations, institutions and property of the present EU. At the same time the Constitution changes the rules of running the EU in the interest of the Big States. It adds considerably to existing EU powers. It is misnomer of course to call it a Constitution for "Europe." Properly it is "A Constitution for the European Union." Such ancient European nations as Russia, Switzerland, Norway, Iceland are not covered by it. The arrogant pretence that the EU is Europe is a piece of propaganda "spin" that has gone on for years.

2. A MORE CENTRALISED, MORE UNEQUAL, MORE UNDEMOCRATIC EU

The original European Economic Community (EEC) established by the Treaty of Rome 1957 was a free trade area with a protectionist agricultural policy attached. The proposed EU Constitution aims to turn the EU into a highly centralised Federal-type State under the political hegemony of its bigger members, in particular France and Germany. The EU already has many of the features of a Multinational State. It makes laws and decides policy for its member countries and their citizens. Its legislative *acquis* consists of over 20,000 laws, amounting to some 100,000 pages of legal text. It has its own currency and Central Bank, its own military "rapid reaction force," its own common foreign and security policy. It has its government executive in the EU Commission, its legislature in the Council of Ministers and EU Parliament, its Supreme Court in the EU Court of Justice. It has an embryonic police force in Europol, an embryonic judiciary in Eurojust, a common European arrest warrant currently in preparation and common policies on various justice, criminal, immigration, visa and asylum matters. It has its State symbols in the EU flag, EU anthem, EU passport, EU car number plates, EU Olympics, EU youth orchestra, annual Europe Day etc., through which its ideologues and propagandists seek to foster a kind of supranational nationalism. It has its own territory and external borders and a common frontier policing and immigration policy. Does there exist anywhere in the world an entity with these features that is not a State?

An EU Constitution is an essential step towards full EU statehood. Conferring legal personality on the EU separate from its Member States enables it to sign international treaties in its own right and act internationally like any other State. Article I-10 gives the Constitution primacy

over the national Constitutions of its Member States. It gives the Union a permanent Political President, with representative functions similar to the American or French Presidents, a Foreign Minister and a European Public Prosecutor. It abolishes the rotating six-monthly EC/EU presidencies that have existed since 1957. It gives it a Code of Fundamental Rights, which the Court of Justice will apply, greatly extending the powers of that body. It extends the EU's power to decide policy and make laws by abolishing the national veto in some 27 new governmental areas, including civil and criminal law and procedure, so that national parliaments and citizens will no longer decide them. It changes the rules for EU law-making to the advantage of the Big States and the disadvantage of the Small by making size of a country's population central to EU law-making. This makes it easier for the big Member States to push through the EU laws they want on the Council of Ministers and block the ones they do not want. If this Constitution is adopted, the only major power of government the EU State will not possess will be the power to levy taxes directly. The Eurofederalists are convinced this is only a matter of time.

The draft Constitution of four parts, 465 articles and 250 pages that is now before the Intergovernmental Conference (IGC) masquerades as being the definitive EU treaty, but it does not succeed in defining a permanent settlement for the EU, or any lasting balance between Union powers and those of its Member States. The EU's permanent constitutional revolution is set to continue. The Constitution envisages the continuation of the EU escalator, carrying the peoples of Europe's nations towards ever further integration, with ever more powers shifting from the national to the supranational level of Brussels, and continual further erosion of the democracy and independence of Europe's nation states. See Section 10 below for examples of this.

Like the treaties of Nice and Amsterdam, the Constitution is being presented as necessary to facilitate EU enlargement. But what have an EU Foreign Minister, an EU Public Prosecutor, an EU military arm and new EU powers to harmonise civil and criminal law to do with enlarging the EU? The Constitution's advocates say that it aims to "simplify" or "codify" the existing EU treaties. Simplicity is not the highest political value. Dictatorship, after all, is a very simple form of government. Bureaucratic centralisation and law-making by Big States over Small may be simple, but are they democratic? Should not democrats be concerned that the 10 new EU Member States, only a few months after they have ratified their Accession Treaties to the EU, which were negotiated on the basis of the Nice Treaty, are being asked to ratify a Constitution that puts them formally under the control of what is virtually an EU State, with decision-making rules quite different from Nice's, which are geared to giving much more power to the Big EU States?

The question these proposals pose for European democrats is whether the peoples of the different countries of Europe are willing to abandon their national democracy and independence in favour of rule by this profoundly undemocratic supranational EU State and Government in the making. This rule has been foisted on them stealthily over decades in a series of treaties whose implications their mainstream national political leaders failed to spell out to them, and which citizens are only now beginning to understand? Just as people often only appreciate the value of health when they get sick, they realise the value of democracy only when they have lost it and find themselves ruled by politicians, mostly foreign, over whom they have no control.

3. WHERE THE CONSTITUTION COMES FROM … THE UNDEMOCRATIC CONVENTION

Are the peoples of Europe willing to put themselves, their children and their grandchildren under the rule of an EU Constitution, superior to their national Constitutions, that has been drafted by an appointed not elected, Convention, on which their country was represented by just three nominated politicians? The Convention that drafted the Constitution was fundamentally undemocratic. Its members, 105 in all, consisted of two representatives from each national parliament of the EU Member and Applicant countries, one from each national Government, and representatives of the European Parliament and EU Commission. The Draft Treaty says the Constitution was adopted *"by consensus"* at the EU Convention. The consensus was largely inside the heads of its chairman, former French President V.Giscard d'Estaing, and his 12-person Praesidum. No votes were taken on the over 1000 amendments submitted. Minority and dissenting views were ignored, for example the *"Alternative Report: The Europe of Democracies,"* advocating a more decentralised EU and a slimline treaty for a "Union of Democracies" that was signed by eight members of the Convention. (See Appandix 3).

A similar non-elected Convention was used to draw up the EU Charter of Fundamental Rights, whose contents were never discussed by any national parliament. The Convention proposed that this Charter be made legally binding as Part 2 of the EU Constitution. For the Euro-State-builders what they term this *"convention method"* has the advantage of enabling major new initiatives for closer integration to be taken, without their desirability or otherwise being considered in advance by the peoples of the Member States, or by their elected representatives in their national parliaments. The Convention's composition of nominated parliamentarian and government representatives aimed to provide a facade of democratic legitimacy for the elitist project of foisting a Constitution on the EU which citizens neither sought nor wanted and for which there has been absolutely no popular demand.

The decision to draw up an EU Constitution came from the top down, not the bottom up. As Appendix 3 shows, the Convention flouted the Laeken Declaration of the EU Heads of State and Government that set it up. This Declaration, adopted at the EU summit meeting at Laeken, Brussels, in January 2001, called for *"more democracy, transparency and efficiency"* in the EU and for reforms that would bring the EU closer to citizens. It referred to the possibility of *"restoring tasks to the Member States"* and the possibility *"in the long run"* of adopting a constitutional text for the EU. However, no sooner had the Convention come together than the Eurofederalists who dominated it proceeded headlong to draw up this Constitution for a more centralised, more undemocratic, more unequal EU, one more under the hegemony of the Big States, with 27 new policy areas being shifted from national parliaments to Brussels, and not a single power being repatriated to the Member States.

4. RE-FOUNDING THE EU ON A STATE CONSTITUTION TO OVERRULE NATIONAL CONSTITUTIONS

The proposed Constitution changes fundamentally the legal relation between the EU and its Member States. Hitherto the EU has been the creation of its Member States under the treaties. The Union has had no legal existence apart from its Members. The Draft Constitution changes that. It makes the EU an international actor in its own right, with its own legal personality,

separate from and superior to its Members. Article I-1 states: *"…this Constitution establishes the European Union…"* Yet the present European Union was established by the 1992 Maastricht Treaty. The Constitution proposes a new and quite different European Union, on a totally different legal basis from what has existed since the 1957 Treaty of Rome.

Article I-12 (2) takes away from Member States most of their their power to sign treaties with other States. Up to now the EU has negotiated treaties on behalf of its members in relation to tariffs and trade matters. This Article gives the EU power to sign treaties that affects any *"internal Union act."* This greatly extends the EU's treaty-making powers. In future the EU rather than its Member States will negotiate and sign international treaties and conventions relating to criminal law for example, extradition, foreign and security policy and much else.

Article I-5 (2) provides: *"Following the principle of loyal cooperation, the Union and the Member States shall … assist each other in carrying out tasks which flow from the Constitution."* The word "loyal" is significant. It implies that the Member States owe an obligation of loyalty to the Union and again underlines the EU's constitutional/political superiority over its Member States and its Federal State character. The Article goes on: *"The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the objectives set out in the Constitution."* The import of this is that national governments must give priority to Union objectives, even in areas of policy that have not been transferred to the EU, because of the overarching scope of the Union's objectives. But what if the Union's objectives conflict with national political objectives, especially if the latter have been democratically confirmed by an electoral mandate at home - for example a country's desire to oppose the EU Rapid Reaction Forces's involvement in a war, or to resist EU tax harmonisation, or a government's commitment to expand public spending to counter deflation, even if that might be in breach of the EU's Growth and Stability Pact? This Article I-5 implies an obligation on Member States to refrain from any action at national level that is contrary to the interests of the Union or likely to impair its effectiveness. The Court of Justice will assuredly take that view when reaching its legally binding judgements.

Article I-5(1) makes a gesture to "sovereignists" by stating that the Union "*shall respect the national identities of its Member States …"* This is merely rhetoric, for national identity is not a justiciable concept. National identity is quite different from national democracy or independence, which the Constitution fundamentally subverts. A people keeps its identity in servitude as well as freedom, as shown by the many nations around the world that have an identity but no independence, e.g. Kurds, Palestinians, Chechyns.

Most importantly of all, Article I-10(1) provides: *"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."* Note the comma after "Constitution." The EU Constitution has primacy over the Member State Constitutions and their constitutional law. Clearly States that put themselves under a Constitution containing such an Article can no longer regard themselves as independent or sovereign in the way the world's other 170 or so States are. The EU Member States become more like Bavaria, Virginia, Quebec or New South Wales - subordinate states or provinces within a superior European Federal State, which has primacy in representing them internationally. This Article is conclusive as regards the federal character of the EU. In Federal States government power is exercised at the federal and local State level. An earlier version of the Draft Constitution explictly referred to the EU exercising *"certain common competences on*

a federal basis." British and Irish politicians objected, fearful of how their voters might react to such frankness. The Constitution now speaks of exercising common competences *"in the Community way."* (Article I-1) This is a Federal Statist way, even if the words "Federal" and "State" are not used.

The largest Member States, in particular Germany and France, have little fear of EU law having primacy over national law - indeed they are positively pressing for that outcome - because they see themselves in the leadership of this EU Superpower they are creating by virtue of their political and economic weight based on their large populations. Historically, the larger EU Members have all been big powers with colonial empires. With the exception of Britain, they were all defeated,conquered and occupied in World War 2, following which the lost their colonies and found themselves in a world dominated by the USA and USSR. Their ruling elites came to the conclusion that if they could no longer be big powers individually, they could be so collectively through an EU over which they held joint hegemony. At the same time, the development of a more powerful and centralised EU frees its top politicians, its Heads of State and Government and individual Ministers of the Member States, from the democratic and popular controls that operate, and can only operate, at national State level. It secures for them an enormous increase in their personal power and influence, as they are transformed from executives responsible to national parliaments at Member State level into legislators for 450 million Europeans on the EU Council of Ministers, although at the cost of eroding the democracy of their own parliaments and peoples.

The primacy of supranational EU law over national law, characteristic of Multinational Federal States, has never been stated in an EU Treaty before, as Article I-10 of the Draft Constitution states it. This doctrine has been developed over the years in the case-law of the EU Court of Justice, but it has not been accepted by, for example, the German, French and Italian Constitutional Courts. These have denied in various court judgements that EU law has the supremacy of federal law. They have held that EU law is binding in national law only to the extent that national law allows. The draft Constitution abrogates this position by formally recognising that the EU Court of Justice, like the supreme court of any Federal State, has the legal power to define its own powers. It has *"kompetenz kompetenz,"* as the German lawyers call it, the legal power or competence to decide its own competences. Article I-10 seeks to overcome the reservations of national Constitutional Courts and Supreme Courts regarding the supremacy of EU law and replaces national law with EU law as the supreme source of constitutional authority. This amounts to a Constitutional revolution. But it is the logic of giving the Union legal personality separate from its Member States and extending EU supranationalism to all areas of government.

A relevant point here is that EU governments accepted the ECJ's assertion of the primacy of EU law in the 1960s, when the then EEC dealt with a far narrower range of issues than the EU does today. It is one thing for Member States go along with a principle established by the EU Court and applied to a restricted range of matters like customs duties or tariffs. It is quite another to concede national sovereignty to an EU Constitution whose writ covers everything from tax policy to criminal law to foreign policy and fundamental human rights.

Article I-23 (1) provides that the terms *"European laws"* and "*European framework laws"* shall replace the words "regulations" and "directives" used at present. This is only a change of name, for EU regulations and directives are of course laws, but the use of the more common word

"law" is another indication that this is meant to be the Constitution of an EU State, for only States make laws.

States also need State symbols. The EU flag and anthem have been pushed by the Commission and the EU-State-builders for decades, without any legal basis in the treaties. Article IV-1 of the Constitution now supplies this. The Article provides that the Union flag will be the twelve gold stars on a blue background, its anthem Beethoven's Ode to Joy, its motto "Unity in Diversity," its currency the euro, and that 9 May each year will be celebrated as "Europe Day" - analogous to the national days of its EU's Member States.

In the light of the these radical changes it is quite dishonest of some national politicians to pretend that this EU Constitution is only "a tidying up exercise" as regards the existing EU treaties.

5. CREATING AN EU CITIZENSHIP ... ONE CAN ONLY BE A CITIZEN OF A STATE

Article I-8 deals with Union citizenship. It provides that *"Every national of a Member State shall be a citizen of the Union,"* this new and re-founded EU that is now constitutionally separate from its Member States. One can only be a citizen of a State. The Article goes on: *"Citizens of the Union shall enjoy the rights and be subject to the duties provided for in this Constitution."*

Whilst one can create a Multinational EU State whose citizens are endowed with civic nationality, those citizens will never look on the EU as they do on their own national States, or regard EU citizenship as anything more than an artificial construct. The reason is that it is within national communities alone that there exists sufficient solidarity, mutual identification and mutuality of interest amongst people as to induce minorities freely to consent to majority rule, and obey a common government based on that. Such solidarity, which normally requires a common language to enable people to communicate with one another, is the basis of a shared citizenship that people feel is real to them. This solidarity is also the basis of a stable political democracy. It underpins a people's allegiance to a government as "their" government, and their willingness to finance that government's tax and income-transfer system, thereby tying the richer and poorer social classes and regions of particular nation States together.

People do not - indeed cannot - look on the EU like that, however ambitious the imaginings of the Euro-State-builders. So the EU is doomed, regardless of the provisions of this proposed Constitution, to remain a politically fragile construct, without the breath of real democratic life. The EU's citizens will never be willing to die for the EU, and will only notionally live for it. It is impossible that it should ever have real claim on their allegiance. The reason is that there is no European people, no European *"demos,"* except in the statistical sense. There is no European "we" that is comparable to an Irish, French, Polish or Greek "we." Hence an EU State or Constitution can never have the legitimacy, authority and respect of its citizens that national States and Constitutions are freely accorded and which they are entitled to demand. A democratic EU, like a meaningful EU citizenship, must therefore remain an impossibility.

6. FIVE WAYS IN WHICH THE CONSTITUTION GIVES MORE POWER TO THE EU

The EU increases its powers and competences in five main ways under the Draft Constitution:

(a) *USING SIZE OF POPULATION TO MAKE EU LAWS:*

Article I-24 (1) replaces the qualified majority weighted voting system agreed in the Nice Treaty by a new system in which, from 2009, a simple majority of Member States can make EU laws, as long as they represent 60% of the EU's population. This simple majority of States plus a population majority of 60% is known as the "double majority" rule. A simple majority in an EU of 25 would be 13. Under the weighted voting system set out in the Nice Treaty, the qualified majority needed to pass an EU law had to be at least 72% of the votes in a 25-member EU. Under the proposed Constitution it will be half by number of Member States and 60% by population size. The proposed new scheme will thus make EU laws much easier to pass - as long as the Big States with large populations agree to them. The Big States will also find it easier to assemble a blocking minority to prevent measures they do not like, because of their population weight. Under these new rules some 40% of the power to make EU laws will be concentrated in the hands of the four largest nations, Germany, France, Britain and Italy. Most small and middle-ranking States lose power correspondingly and consequently will be more likely to find themselves submitting to EU laws they disagree with. Under the Constitution's proposed system, in an EU of 25 States 12 States could be outvoted and have a measure imposed on them by 13, as long as the latter contains 60% of the EU population.

The fact that voting rarely takes place on the Council of Ministers and decisions are mostly taken by "consensus" does not lessen the key importance of these voting weights. If Member States know they would be outvoted if a vote were to be taken on the Council, they usually make a virtue of necessity by joining the consensus and pretending to a *"communautaire"* attitude. So votes are not needed or are taken rarely. However, without formal voting Member States go through a mental exercise of "shadow voting" before deciding whether to join the majority consensus or hold out against it. The ability to form coalitions to establish a blocking minority is crucial if a State is to be able to prevent EU laws being imposed on it that are against its interests or that it does not want. It is much harder for the smaller States to do this under the draft Constitution. (See on this point the revealing article by R.Baldwin and M.Widgren, *"Decision-making and the Constitutional Treaty*," Baldwin@hei.unige.ch mika.widgren@tukkk.fi)

(b) *MORE EU LAWS FOR THE COMMISSION TO PROPOSE AND THE EU PARLIAMEN TO AMEND:*

As individual countries can be more easily outvoted and EU laws become easier to pass under the proposed Constitution, the powers of the Commission and EU Parliament, which derive from their role in EU law-making, increase correspondingly. The Commission, with its monopoly in proposing EU laws and setting the legislative agenda, gets a wider range of measures to propose. The European Parliament, with its power to amend EU laws emanating from the Council of Ministers, gets more laws it can amend. The Draft Constitution also extends the range of laws coming from the Council of Ministers that the Parliament is given power to amend under the so-called *"co-decision procedure."* This gives the Parliament the power to block EU laws if the Council does not accept its amendments. The EU Parliament increases its legislative power in some 44 new areas in this fashion. As the European Parliament is the EU institution that is

most committed to supranationalism, centralisation and reducing the powers of national parliaments, an institutional power-play in which it cooperates closely with the EU Commission, this is further evidence of how the Constitution worsens rather than improves the EU's level of democracy.

(c) *ABOLISHING THE NATIONAL VETO IN 27 NEW POLICY AREAS … A FURTHER COUP BY NATIONAL EXECUTIVES AGAINST NATIONAL LEGISLATURES*

Under the Draft Constitution majority voting on the Council of Ministers replaces unanimity in some 27 new policy areas, in addition to the 35 areas agreed in the 2002 Treaty of Nice and the 19 areas in the 1998 Treaty of Amsterdam. Appendix 1 below gives a provisional list of the new areas where the national veto is abolished. They include judicial cooperation in civil and criminal matters; approximation of laws on criminal procedures; the definition of offences and criminal sanctions; border controls; asylum and immigration; civil protection; Europol and Eurojust; structural and cohesion funds; culture; commercial policy; energy; and initiatives by the EU Foreign Minister at the request of the European Council.

It is proposed to make the remit of the EU's Common Commercial Policy significantly wider by laying down as an EU aim *"the progressive abolition of restrictions … on foreign direct investment"* and the lowering of "*other barriers"* than customs ones, for which the EU may conclude international treaties by majority vote (Arst.III-216 and 217, formerly Arts.131 and 133 TEC, and Art. 227). This opens the way for the EU 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.

Article I-14 gives the EU power to adopt measures to coordinate the economic, employment and social policies of Member States. Articles III-62 and III-63 provide for majority voting on company taxes relating to *"administrative cooperation or combating tax fraud and tax evasion",* once the Council has decided unanimously that these are desirable. This is the thin end of a potentially wide wedge affecting national taxes. Article III-157 introduces a Union policy on energy and provides for EU laws aimed at ensuring security of energy supply in the Union and the functioning of the energy market, and promoting enegy efficiency and the development of new forms of energy. Oil industry spokesmen fear that this would give Brussels power over national oil and gas reserves, exploration rights and licensing and energy negotiations with third countries, and that national policy would become subject to EU laws based on majority voting.

The extension of qualified majority voting to make EU laws and the abolition of national vetoes has an alarming effect in subverting the separation of powers between the executive, legislative and judicial arms of government that has traditionally been the basis of democratic States. In the first decades of the EEC majority voting was confined mostly to trade matters. For an EU law to pass it had to be supported by a high percentage of weighted votes and a clear majority of Member States. Over time majority voting has been extended to more and more policy areas and the threshold for a blocking minority has grown, making it easier to pass ever more EU laws. The Draft Constitution extends majority voting much further.

National Parliaments and citizens lose power correspondingly, for every time lawmaking shifts to Brussels, they no longer have the final say in the areas concerned. Simultaneously, individual Government Ministers, who are members of the executive arm of government at national level

and must have a national parliamentary majority behind them for their policies, are turned into legislators for several hundred million EU citizens as members of its 15-person, or 25-person, Council of Ministers. European integration and supranationalism mean that national politicians thus obtain a huge accretion of personal power at the expense of their national parliaments and electorates. This is true even if they may be outvoted on the EU Council. This process is essential to understanding why Government Ministers tend to be so europhile, so willing to cooperate in reducing the power of their own national parliaments and peoples. The more policy areas shift from the national level to Brussels, the more power shifts simultaneously from national legislatures to national executives, and the more the personal power of individual Ministers increases. Anecdotal evidence suggests that keeping in with their fellow members in the exclusive Council of Ministers "club" of EU legislators becomes personally more important to many of them, rather than being awkward in defence of their own peoples' interests. Behind the closed doors of the EU Council national politicians, especially those from small countries, can deplore the fact that the lack of "community spirit" of their parliaments and peoples - that is, their reluctance to surrender more power to Brussels - may force them on occasion to vote against the EU consensus, while they assure their colleagues *sotto voce* that their hearts are still in the right place. EU integration is therefore not just a process of depriving Europe's nation States and peoples of their national democracy and independence. Within each Member State it represents a gradual coup by government Executives against Legislatures, by politicians against the citizens who have elected them. It turns the State itself into an enemy of its own people, turns national politics into provincial politics, disillusions citizens - who are gradually becoming aware that little of importance is decided any longer by the representatives they elect - reduces electoral participation rates and points towards a developing crisis of democracy across much of Europe.

(d) *"COMMUNITISING" ALL GOVERNMENT POLICY UNDER THE EU*

The draft Constitution, Article I-18 (1) abolishes the present "three-pillar" structure of the EU and sets all areas of EU policy in *"a single institutional framework."* It thereby gives the EU Commission and Court a policy competence in the former "second-pillar" area of security and foreign policy and the "third-pillar" area of justice and home affairs. The Constitution thus eliminates "intergovernmental" policy areas between Member States, where EU law has not applied up to now and the Commission and EU Court have no function. It "communitises" and makes supranational all the main areas of public policy under the EU. The proposed Constitution thus gives the decisions of the EU Court of Justice the force of law in Member States on present second-pillar and third-pillar issues. Legally this gives the EU the full constitutional structure of a Federal State. The only significant State power the EU will not have obtained if the Constitution goes through is the power to tax people directly.

(e) *WIDENING THE CONSTITUTIONAL JURISDICTION OF THE COURT OF JUSTICE*

Apologists for the EU Constitution say that while it gives the Union some new powers, most of it consists of the provisions of the existing EU treaties transposed unchanged into Part III of the Constitution, so that the treaty bases of EU laws will stay the same. *"This argument is fallacious because it ignores two vital points*," says British European law expert Martin Howe QC in his valuable study, *"A Constitution for Europe, a Legal Assessment of the Draft Treaty,"* on which the present analysis draws on a number of points. *(*2003, available from *www.congressfordemocracy.org.uk)*

"First, in EC law the scope of specific Treaty bases is interpreted by reference to general principles and the Constitution would alter the ground rules on which those general principles are based. Secondly, alterations to the basis of Qualified Majority Voting and extension of the 'co-decision' procedure would make it much easier to force through legislation against the wishes of a dissenting minority of states … The European Court pointed out in the EEA Agreement case that it interprets the legal texts which it enforces largely by reference to their 'objects and purposes.' This means, as pointed out in that case, that identically worded provisions in two different treaties can be interpreted to have very different effects. Clearly, 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 which it is applying. This would radically affect its interpretation and application of treaty provisions as well as of the scope of directives and regulations. In practice, there would be a presumption that the Member States are only permitted to exercise power in the residual areas left to them under the Constitution, and even in those areas they would have to fit in with any over-arching EU policies or foreign policy imperatives in accordance with their general duty to 'facilitate the attainment of the Union's tasks and refrain from any measure which could jeopardise the objectives set out in the Constitution.' *(Art. I- 5(2)) ' "*

7. A NEW POLITICAL PRESIDENT FOR THE EU

Article I-21 provides for a political president of the EU, elected by qualified majority vote, to chair the European Council of Presidents and Prime Ministers for a two and a half year term, renewable once. This person, who will almost certainly be a former President or Prime Minister, is to be the EU's top politician, to *"drive forward the work"* of the EU summit meetings and represent the EU internationally *"at his or her level…without prejudice to the responsibilities of the Union Minister for Foreign Affairs."* Again Martin Howe comments (op. cit.,):

"These are the classic functions of a Head of State. He would receive ambassadors to the EU and sign Treaties and important laws in its name. For the first time, meetings of heads of state or government would be presided over, not by one of their own number, but by someone at a higher level. This is a profound change. There would be a Head of State of the European Union, superior to the Heads of State of the Member States."

The Constitution's proposal for two cohabiting Presidents, one of the European Council and one of the Commission, is modelled on the French Constitution. The proposed five-year political President of the European Council, with a particular brief for EU foreign policy, is like the Pesident of the French Republic. The Commission President with his new powers to select individual Commissioners, allocate and reshuffle their portfolios and require their resignation if need be, is like the French Prime Minister. In November 2003 a majority of the Swedish Parliament - one of the few national assemblies to debate the proposals of the Draft EU Constitution *before* it was adopted - voted that Sweden should oppose this plan for an EU political President, on the ground that the new position would be too powerful and end as a tool in the hands of the big Member States. The Swedes want to keep the present system of rotating EU presidencies between Member States. They also voted to keep the current system of one Commissioner with full voting rights per Member State.

8. GIVING THE UNELECTED COMMISSION POWER TO MAKE LAWS DIRECTLY

Article I-35 empowers the Council of Ministers by majority vote to give the Commission power to make laws itself - so-called delegated regulations, supplementing or amending *"non-essential elements*" of European laws or framework laws. But what is non-essential? Unless every Member State has a representative with voting rights on the Commission, the peoples of the Member States could periodically find themselves bound by a stream of EU regulations, superior to national law, emanating from a law-making Commission on which none of their citizens participates in making the decisions.

Article I-25 (3) proposes that there should be a maximum of 15 voting members on the EU Commission, the body of non-elected persons that has the monopoly of proposing all EU laws, and which France's President de Gaulle once described as *"A conclave of technocrats without a country, responsible to nobody."* This contrasts with the Treaty of Nice position where each Member State retains a Commissioner until the EU reaches 27 members. The Nice Treaty already gives the Big States decisive political control of the Commission by abolishing the unanimity requirement for appointing both the Commission President and individual Commissioners that has prevailed since the 1957 Treaty of Rome, and by giving the President the power to shuffle and reshuffle the portfolios to Commissioners and obtain their individual resignation if required. The Nice Treaty thereby turns the Commission into a quasi-EU Government or Executive that is effectively under the thumb of the Big States through their key role in appointing the Commission President. The Draft Constitution proposes to halve the number of portfolios the Commission President has to allocate. The Intergovernmental Conference may abandon this idea and keep one Commissioner per Member State, but introduce instead a hierarchy among the Commissioners. The Commission President, once elected by majority vote of the Presidents and Prime Ministers and approved by the European Parliament, choses the Commissioners from a list of three persons submitted by each Member State, with one of different gender to the other two, on the basis, *inter alia,* of their *"European commitment."* (Art.I-26 (2)). That presumably refers to their zeal for further EU integration and eliminating what is left of the national democracy and independence of their countries of origin.

9. EU POWERS AND NATIONAL ONES … THE ECJ DECIDES WHICH IS WHICH

Article I-12 (1) sets out the **areas of exclusive EU legislative competence**, that is, powers: monetary policy for the eurozone, the common commercial policy, the customs union, fish conservation. It also extends further the area of exclusive competence by providing that the EU alone shall conclude any international agreements that is necessary *"to enable the Union to exercise its competence internally, or affects an internal Union act."* At present the EU negotiates international treaties on behalf of its Members mainly in relation to trade and tariff matters. This Article of the Constitution would give the EU power to negotiate and sign treaties on its own behalf in relation, for instance, to international conventions governing extradition, migration, the environment, banking standards and the like. This Article, together with the Common Foreign and Security Policy articles, *"would deprive the Member States of most of their present treaty-making powers,"* states Martin Howe (op.cit.).

Article I-13 set out the **areas of shared competence between the EU and Member States**: the internal market; the area of freedom, security and justice; agriculture and fisheries, excluding

conservation; transport; energy; social policy for certain areas; economic and social cohesion; environment; consumer protection; common safety concerns in public health. Article I-11 (2) 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."* It is thus the Union, not its Member States, that has primacy even in these shared areas. In jurisdictional disputes it is the EU, through the Court of Justice, that will decide the policy boundaries, that is, whether it is the Union or national States will make the laws. It is not even stated that Union competences must be "*expressly"* conferred, which would limit them somewhat. The Court of Justice can decide that the EU has had powers implicitly conferred on it.

A gesture towards placating concerned "sovereignists" is Article I-9(2)*: "Competences not conferred upon the Union in the Constitution remain with the Member States."* This is like the 10th Amendment to the US Constitution, adopted in 1791, which says 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."* However, the 10th Amendment has not prevented the USA from becoming a fully-fledged Federal State, with provincial states like New York, Idaho and Kansas quite subordinate to the Federal authorities in Washington. The similar Article in the EU Constitution can offer no such reassurance either.

Article I-11 (3) provides that *"The Union shall have competence to promote and coordinate the economic and employment policies of the Member States."* This gives the EU a very large and imprecise jurisdiction. Article I-11 (4) provides that *"The Union shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy."* Article I-16 provides for the Union to "*take supporting, coordinating or complementary action"* vis-a-vis its Member States. The areas for such action at European level are stated to be *"industry; protection and improvement of human health; education, vocational training, youth and sport; culture, and civil protection."* Indeed virtually no field of public policy would remains unaffected by EU action. On the face of it, Article I-16 could cover EU supporting or coordinating action in areas where it has no competence at present. Again who decides such matters? Could the Union support a Member Government in a national referendum, on the grounds that this was in the Union's interests? The Constitution does not provide that EU supporting and coordinating action will take place only at the request of Member States. The Union retains the power of initiative here. These divisions of spheres of competence cover budget matters also and could affect the financing and co-financing of policies and projects at both national and EU levels.

Genuine respect for the principle of subsidiarity(Article I-9(3)) would indicate a major repatriation of powers to the Member States from the supranational level, a fundamental shift of gear from centralisation to decentralisation. The Constitution provides for asolutely nothing like that.

10. AMENDING THE CONSTITUTION WITHOUT FURTHER TREATIES … THE ESCALATOR AND FLEXIBILITY ARTICLES

Article I-24 (4) provides that: *"Where the Constitution provides in Part 3 for the Council of Ministers to act unanimously in a given area, the European Council can adopt, on its own initiative and by unanimity, a European decision allowing the Council of Ministers to act by*

qualified majority in that area." This extraordinary provision enables a summit meeting of EU Presidents and Prime Ministers to move policy areas from unanimity to majority voting without having to draw up new treaties and get them ratified by parliamentary vote or referendum. It allows the EU to abolish national vetoes on any item without the agreement of national parliaments. National parliaments are to be given four months notice before this is done, but their permission is not required. This Article is a way around the present Treaty revision process for future amendments to the EU's major policies, for Part 3 of the Constitution, where the Article applies, covers 342 of the Constitution's 465 articles. It enables a caucus of the EU's top politicians to shift legislative power from elected national parliaments to the EU without having to get permission from their parliaments or their citizens. Effectively it endows them with the power of autocrats. Peter Hain, Labour Party leader of the British House of Commons, has dubbed this escalator Article *"a formula for permanent revolution."* Convention President Giscard d'Estaing, referred to it as the *passerelle* or "bridge" clause and called it *"a central innovation"* of the draft Constitution (European Parliament, 4-9-2003). It is not hard to see why.

In addition, Article I-17, titled the *"flexibility clause,"* states that if the Constitution has not given the EU sufficient power to attain one of its very wide objectives, the Council of Ministers, acting unanimously, *"shall take the appropriate measures."* Originally Article 235 of the 1957 Treaty of Rome, this provision was seldom used before the 1980s, but since then it has been the basis of a major extension of EU policy-making and legislation into areas that were not specifically provided for in the treaties, and which some authorities regard therefore as quite illegal. Certainty of provision and precision of expression are the foundations of legality. This article effectively permits the EU to do what it likes, as long as the Council of Ministers acts unanimously. It has enabled the EU to take extra powers to itself without further treaty renegotiation. It offers wide scope to the EU to implement policy in whatever way it wishes, without constitutional control, in pursuit of its very wide objectives. Moreover, this Article I-17 replaces the existing Article 308, which applies to the single market, and extends its scope to everything in the Constitution. Such a provision has no place in any democratic Constitution.

11. FINANCING THE UNION FROM ITS OWN RESOURCES

Under the heading "*The Union's Resources"* Article I-53 lays down that *"The Union shall provide itself with the means necessary to attain its objectives and carry through its policies*" and *"the Union's budget shall be financed wholly from its own resources."* It provides that *"A European law of the Council of Ministers shall lay down the limit of the Union's resources and may establish new categories of resources or abolish an existing category."* Such a law would requires unanimity on the Council of Ministers and approval by the Member States. In theory it could open the way to ending national contributions by Governments to the EU and to total reliance instead on EU levies and taxes imposed on citizens and economic actors. Full financing from *"own resources"* would make the EU budget wholly independent of its Member States, as is the norm with national Federations. Articles III-308 to 320 give the detailed proposals for financing the EU and drawing up its budget. With the next financing cycle coming up in a couple of years, and most of the ten new Member States seeking net transfers from the EU, some of these details are likely to be causes of contention as between likely net contributors and net beneficiaries.

12. AN EU FOREIGN MINISTER … A TWO-TIER MILITARY EUROPE … COMMON EU DEFENCE MOVES FROM "MAY" TO "WILL"

Article I-15 (2) provides: *"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."* A constitutional duty of "loyalty" to and "solidarity" with an EU foreign policy, makes a mockery of the pretensions of Member States, especially small ones, to have an independent national foreign policy. Some legal opinion holds that this article is justiciable before the EU Court of Justice (v.Articles III-282 and 209), with States being liable to heavy fines for failure to comply(Articles III-265 to 267). One implication is that Member States will be constitutionally obliged to present the common EU foreign policy position when they are members of the UN Security Council.

The Constitution provides for an EU Minister for Foreign Affairs, distinct from national Foreign Affairs Ministers (Articles I-27 and I-40 (4)) The Foreign Minister shall be a Vice-President of the Commission, which will give the non-elected Commission a role in EU foreign policy, security and defence for the first time. Only sovereign States have Foreign Ministers. This is further evidence of the EU moving towards statehood and becoming an international actor in its own right, distinct from its individual Member States. The very word "Foreign" before "Minister" implies that people outside the EU superstate are foreigners, while those inside it are not. The EU Foreign Minister will chair the Councils of national Foreign Ministers. As he will be appointed by majority vote of the Presidents and Prime Ministers at an EU summit, it is possible that under this Constitution Member States will be represented internationally by an EU Foreign Minster they do not want. The Union Foreign Minister *"shall conduct political dialogue on the Union's behalf and shall express the Union's position in international organisations and at international conferences"*(Art.III-197 (2)). An EU diplomatic corps is also to be set up, to be called the European External Action Service (Art.III-197 (3)), to service the EU Foreign Minister and his foreign policy. A Declaration attached to the draft Constitution states that this body will consist of staff from the Commission and Council and diplomats seconded from national diplomatic services.

Another development in the foreign policy section of the Constitution is that the Nice Treaty's provision that the progressive framing of a common defence policy *"**might** lead to a common defence, **should** the European Council so decide"* becomes in the draft Constitution*: " **will** lead to a common defence**, when** the European Council, acting unanimously, so decides.*" (Article I-40 (2)) This means that by adopting the Constitution all Member States, including the current four neutrals, Ireland, Sweden, Finland and Austria, become constitutionally committed at the Union level to the ultimate goal of a common defence. It is a matter of when, not whether, for the end result is quite explicit. This is the goal the EU Common Foreign and Security Policy has been pointing to for years, eroding the position of neutral and non-aligned States by gradual small steps in each EU successive treaty. Article I-40 (3) requires **all** Member States 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."* This means there would be an EU constitutional obligation on every Member State to provide military resources to the EU for its security and defence and to increase its national military spending. The same Article provides for a European Armaments, Research and Military

Capabilities Agency to be established to assist with this. The rationale of this provision is to ensure that arms orders are placed with EU firms so far as possible.

The EU's Common Security and Defence Policy may use civil and military assets for foreign interventions *"in accordance with the principles of the United Nations Charter,"* but the Constitution does not actually require such missions to have a UN mandate (Art.I-40 (1)). The tasks envisaged for these missions are wider than the current Petersberg tasks and amount to a *carte blanche* for foreign intervention by EU forces. They *"shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peacemaking and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories."*(Art.III-210 (1))

Pending all EU Member States adopting a mutual defence pact, the draft Constitution extends the principle of "enhanced cooperation," which was introduced by the Treaty of Nice, to security and military matters. This is to be called *"structured cooperation"* and points the way to a two-tier Europe in defence and military affairs (Art.I-40 (6 and 7) and Arts. III-213 and 214)). It provides for a minority of EU Members, led by the Big States and even against the wishes of some other EU Members, using the common foreign, security and defence policy for their own purposes, as well as the EU agencies set up to serve it. This inner group of States shall be bound by a mutual defence guarantee and shall work closely with NATO. This is a further major step towards a two-tier, two-class EU and a further break with the notion of the EU as a partnership of legal equals that prevailed up to the Treaty of Nice. The EU Minister for Foreign Affairs will take part in the deliberations of this inner group and in effect will be able to present the other Member States that are not involved in "structured cooperation" with continual foreign policy and military *faits accomplis*, using the collectively provided EU resources that have been financed by all, to do so.

13. THE EU CHARTER OF FUNDAMENTAL RIGHTS … THE ECJ TO DECIDE OUR RIGHTS

Up to now national Supreme Courts and the European Court of Human Rights in Strasbourg have been the final determinants of peoples' basic rights in the EU Member countries. The Draft Constitution proposes that the EU Court of Justice in Luxembourg be given a human rights competence in the vast areas of policy affected by EU law. Fundamental rights are a core element of national Constitutions. They go to the heart of a country's juridical system and State sovereignty. Of course the EU and its institutions should respect and abide by human rights. It is a different matter entirely however to give the EU Court of Justice in Luxembourg, with its politically appointed judges, the power to decide human rights issues itself, including rights that extend far beyond those included in the Convention on Human Rights, and simultaneously take key elements of that power away from national Supreme Courts. Human rights standards in the EU Member States are not so defective that they require a supranational EU Court to lay down a superior norm or seek to impose a common standard across the EU Member States and their Constitutions. There is no good reason for giving the EU a human rights jurisdiction and for refusing to permit national Supreme Courts and Constitutions, and the Human Rights Court in Strasbourg, to decide human rights issues affected by the EU Institutions and the operations of

European law. The only reason for doing this is the desire to impose uniformity of human rights standards across the EU, despite significant differences in values between various countries, just as the EU seeks to establish uniform economic laws and a common commercial market. This is to make economic expediency the key criterion governing human rights matters. See Appendix 2 below for an analysis by a human rights authority of why the EU should not decide the fundamental rights of citizens of the Member States, which elaborates on this point.

Article I-7 (2) proposes that the EU shall "seek accession" to the European Convention on Human Rights, as its Member States have done. Accession to this Convention is confined to the Member States of the Council of Europe, which the EU is not. This is another example of the EU acting, or attempting to act, as a State. The EU's admission to the Convention would require amendments to it and would have to be agreed by European States that are not members of the EU. (See again Appendix 2, Note 1, below)

The Constitution gives the EU Charter of Fundamental Rights, which has been a declaratory political document up to now, binding legal force. The Charter is inserted as Part 2 of the four-Part Constitution. It has its own Preamble, separate from the Preamble to the Constitution as a whole. *"The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part 2 of this Constitution"* (Art.I-7 (1)). Article II-51 states that *"The provisions of this Charter* are *addressed to the Institutions, bodies and agencies of the Union"* and to the Member States *"when they are implementing Union law."* The EU Court of Justice is thus given the power to decide rights under the Charter. Many elements of the Charter of Fundamental Rights are matters for Member States and have nothing to do with the EU as it has developed up to now - for example the death penalty (Art.II-2), reproductive cloning and the sale of human body parts (Art.II-3), protection of personal data (Art.II-8), the right to marry (Art.II-9), conscientious objection to military service (Art.II-10), academic freedom (Art.II-13), freedom of conscience and religion (Art. 2-10); rights to education and health services (Arts.II-14 and 35), the rights of the child and the elderly (Arts.II-24 and 25). Some rights listed in the Charter refer to areas of shared competence between the EU and its Members, e.g. consumer rights (Art.II-38) and the right to effective legal remedies (Art.II-47). Others are mainly nationally based, for example health care (Art.II-35), education (Art.II-14), the rights of the child (Art.II-24), collective bargaining (Art.II- 28), the right of access to placement services (Art.II- 29) and the right to social and housing assistance (Art.II-34). There is no point in putting social and economic rights of this kind into the Constitution unless the Court of Justice is to be given power to decide them. Yet Article II-51 (2) states: *"This Charter does not … establish any new power or task for the Union, or modify powers and tasks defined in other Parts of the Constitution."* If the EU has no power or resources with which to provide or oblige the provision of these benefits, why include them in the Constitution? On past experience the absence of a Treaty basis for some of these rights may not be sufficient to prevent the Court of Justice from imposing obligations on Member States to apply all the provisions of the Charter, even in these uncharted waters.

Many of the rights set out in Part 2 of the Constitution sound splendid - except that citizens already possess them under their national Constitutions and the European Convention on Human Rights. Human rights cover virtually every field of human life. While there is widespread consensus on what constitutes peoples' core human rights, there is no agreement on some highly sensitive areas - due legal process, for example. Common law countries such as Britain and

Ireland have *habeas corpus*, oral hearings, trial by jury and the presumption of innocence until proven guilty, whereas some continental EU States permit preventive detention, without the right to be brought before a court. There States assume defendants guilty, unless they can prove their innocence. Some EU countries legalise hard drugs and license prostitution. Others forbid these. Property rights, rights of succession, family law, rights relating to children, marriage and education, the gender exclusiveness of religious and clergy, rights attaching to State Churches, the treatment of refugees, legal aid, environmental controls, neutrality, censorship of publications, attitudes to God and religion and much else, differ significantly between EU Member States. Everyone agrees that people have a right to life. But when does life begin, when does it end? Countries differ widely in their laws on abortion and euthanasia, which relate to the beginning and end of life. Should such matters be decided by a common standard laid down in the case-law of the ECJ, which is applicable right across the European Union? All true democrats will resist the attempt to enforce a uniform standard of rights on the EU, whatever their views on specific substantive human rights issues.

Article II-52 (1) provides for derogations from the Charter as follows*: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law … limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or by the need to protect the rights and freedoms of others."* Article II-53 provides that *"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law … and by the Member States' constitutions."* It will be the Court of Justice that will decide *"the fields of application"* on the basis of particular human rights cases that come before it. If the Charter becomes justiciable in EU law and a citizen sues for breach of rights, the ECJ will have major scope for deciding the boundaries between the EU and national levels, and for extending the scope of the former as widely as possible. The Court of Justice is already notorious for "competency-creep," that is, for using its case-law to extend EU power and the boundaries of its own jurisdiction to the utmost extent possible, reducing in the process the power of national Courts and Constitutions. Making the Fundamental Rights Charter legally binding through the Constitution greatly widens the possibilities for economic and social policy-making by the ECJ, as against elected parliaments and governments. It gives the Court the final right to decide what is consonant with *"human dignity," "integrity of the person," "liberty and security," "respect for private and family life,"* the *"right to marry," "freedom of expression, assembly and association"* etc., and much else, in all areas covered or affected by EU law.

The truth is that putting the EU Charter of Fundamental Rights into an EU Constitution has more to do with power than rights. All State Constitutions set out the rights of citizens and establish a Supreme Court to adjudicate them. So the EU State Constitution must have one too. The historical experience of national and multinational Federations has been that common human rights standards, enforced by a central legislature and a Federal Supreme Court, can be a powerful weapon in imposing uniformity as regards civil rights across a territory, and subordinating national and local courts and Constitutions to central rule. This has been the experience in the USA, despite provisions of the original American Constitution - similar to the EU Constitution's Article II-51 - that they should apply only at Union level and in implementing Union law. That principle has long gone by the board in America, as the US Federal Supreme Court has helped centralise power in the US Federal State. There is no reason for thinking this would not happen in the EU. What justification can there be for assimilating

human rights standards, which differ widely between Member States, to a common norm imposed by the ECJ, by analogy with a common market and a common currency? The economy and the market are not the supreme values for most people. The Constitution implicitly invites the ECJ to assume they are. (See Appendix 2 on this point.)

Article II-52 permits limitations of the rights and freedoms recognised by the Charter to *"meet objectives of general interest recognised by the Union."* In principle this offers wide scope for limitation by the EU of the rights set out in the Charter. If a right is "fundamental" it must be valid in all circumstance. That is why most modern State Constitutions regard fundamental or "human" rights as superior and prior to all positive law, and as based not on man-made law, but on the law of nature or natural law. But natural law is not a principle accepted in the EU Treaties or the Draft Constitution. How can a court, even an EU Court, override a fundamental right, or permit it to be limited in the interests of the Union, even without the express consent of its Member States? The Union's objectives, set out in Article I-3, are broad in scope and many-sided. The Charter begs the question of what constitutes a greater or lesser protection of a right. For example, euthanasia and taking hard drugs are legal in the Netherlands, but most countries forbid them. Any uniform system of EU fundamental rights would give the ECJ ultimate decision on such matters. There are many other similar issues where the rights accorded by one EU country differ significantly from those of others. The Constitution adds nothing new to the rights of citizens of the EU Member States. It may in fact weaken certain rights when these come to be interpreted in the EU Court, if that court should obtain a human rights competence under the Constitution.

Moreover, transferring the ultimate protection of these rights to the EU, as against national Supreme Courts or the Strasbourg Court of Human Rights, would involve further procedural delays and additional expense for individuals, all to enhance the status of the Union and its Court of Justice, but conferring no benefit on individuals and in no way strengthening the real rights of citizens of the EU countries.

As with all EU social policy-making, the Charter of Fundamental Rights, if made binding in EU law through the Constitution, will have economic effects. It will impose higher costs on businesses by imposing extra EU obligations on top of national ones. It will tend to raise taxes at national level by imposing new EU obligations on national governments. And as with all such measures, however desirable they may be in themselves, they will affect poorer countries more than rich ones, weaker firms more than strong ones, and will thereby impinge adversely on employment and economic growth prospects in poorer and weaker national and regional economies.

14. "HARMONISING " CIVIL AND CRIMINAL LAW AND PROCEDURES ACROSS THE EU … THREAT TO TRIAL BY JURY AND *HABEAS CORPUS* … AN EU PUBLIC PROSECUTOR

The abolition of the "three-pillar" structure of the existing EU, which meant that justice and home affairs, as well as foreign and security matters, were treated as "intergovernmental" rather than supranational and governed by community law like the EU's economic "pillar," brings the Court of Justice and the Commission into these policy areas for the first time. The Constitution gives the EU power to harmonise civil law and procedures (Art. III-170) and criminal law and

procedures (Art.III-171) in the Member States, with a view to bringing about an EU "area of freedom, security and justice." Article III-175 empowers the European Council to establish an EU Public Prosecutor to bring charges against people for serious offences affecting more than one Member State. A dangerous prospect that is opened up by extending the powers of the Court of Justice through its new fundamental rights jurisdiction, and the Commission's role in "approximating" civil and criminal law and procedure, could be moves to limit the right to trial by jury and *habeas corpus,* the requirement that one be brought speedily before a court if one is arrested. This exists in common law legal systems such as those of Britain and Ireland, but not in most continental ones. These articles could also affect rules regarding oral hearings, the use of live witnesses in civil cases, legal aid, the disposition of property under succession law and many other matters of substantive civil and criminal law that are now entirely within the power of national States and where important differences exist between EU Members.

15. A CONSTITUTIONAL COMMITMENT TO JOINING THE EURO AND ABOLISHING NATIONAL CURRENCIES

The EU Constitution entails an implicit commitment to adopting the euro and abolishing their national currencies for those EU Members that have not yet done that or whose peoples have rejected that course in referendums - the UK, Denmark, Sweden and the 10 new EU Members. Article IV-1 provides that *"The currency of the Union shall be the euro."* The Constitution assumes that eurozone membership is the goal for all 13 States that will be EU members from 2004, but have not yet adopted the euro.

Article III-69 (2) provides that a single currency and the pursuit of a single monetary and exchange rate policy shall be one of the "activities" of the Union in pursuit of its constitutional objectives. Article III- 91(1) provides that Member States not in the eurozone will be regarded as "*Member States with a derogation.*" Article III-92 (1) provides that at least every two years the Commission and the European Central Bank shall report to the Council of Ministers on the progress of the non-euro countries, that is, those with a derogation,*"in fulfilling their obligations regarding the achievement of economic and monetary union."* The constitutional commitment and its implications are clear.

Article III-92 (2) provides that the Council of Ministers shall decide which States with a derogation qualify for EMU and shall abrogate their derogation from EMU. This may be done by Qualified Majority Vote. The Article does not state that this decision will only be taken with the consent of the non-eurozone state concerned. It may be taken without their consent. Article III-92 (3) provides that the Council of Ministers and the new Member State adopting the euro shall then decide unanimously on the rate at which the disappearing national currency is exchanged for the euro and other details. The word "shall" implies that abolishing its national currency is a legal obligation on the State concerned. In effect the State that previously had a derogation permitting it to stay outside the eurozone, must fall in line with the eurozone members once the decision referred to in Article III-92 (2) has been taken. For the Governments of those countries whose citizens wish to keep their national currencies, adoption of the EU Constitution may be a way to get around political commitments to hold a referendum on adopting the euro, or to get around rejection of the euro in past referendums by emphasising its new status as an EU constitutional obligation.

16. HOW MANY PROTOCOLS? … EURATOM

There are 123 Protocols attached to the existing EU treaties. The Accession Treaties of the 10 new Member States contain further Protocols. Protocols have the same legal force as the treaties themselves. The Convention Draft says nothing about them. Each Member State will have to decide which of the Protocols relevant to them should effectively be incorporated into the EU Constitution, so that they continue to have legal force.

The Treaty Establishing the Constitution for Europe does propose to attach eight Protocols to it, one of which links the provisions of the European Atomic Energy Treaty to the Union Constitution, with various amendments that allow the institutional and financial provisions of the new Union to apply to the European Atomic Energy Community, of which the EU States are members. The Euratom Treaty obliges the EU Member States *"to create the conditions necessary for the speedy establishment and growth of nuclear industries"* and *"to facilitate investment to develop nuclear energy."* Member States contribute to the financing of Euratom through the EU budget, for whose administration in atomic energy matters the EU Commission is responsible. In recent years some EU States, for example Sweden and Germany, have started to phase out nuclear power, and public opinion is pressing to get rid of it in others. The expansion of the EU from 15 to 25 Member States will bring the East European nuclear-using States into both the EU and Euratom. This could well shift the political balance of forces in the EU in favour of nuclear power and lead to pressure for more money for Euratom. Should the Euratom Treaty, which was drawn up in 1957 when citizens' views on nuclear energy were very different from today, be transposed in this way into the *"Treaty Establishing a Constitution for Europe."*

17. THE DEMOCRATIC GLOSS ON THE EU CONSTITUTION

Article I-46 sets out what is calls "*the principle of participatory democracy*," as follows: *"The Union Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views on all areas of Union action."* Brussels is already peopled by numerous self-appointed citizens' organisations, many of them subsidised by the EU Commission, whose purpose is to lobby for EU funds or to be nominally consulted by the EU institutions. Eurofederalists like to refer to these as representing "civil society" and putting forward the views of "citizens." They provide the facade rather than the reality of democracy however. The Union's key decisions are taken elsewhere, with minimal popular control and democratic involvement. The same Article lays down that that a European law shall provide for a citizens' initiative under which a petition signed by over a million citizens coming from *"a significant number"* of Member States may invite the Commission to submit an *"appropriate proposal"* for action to implement the EU Constitution. However, the Commission may respond to or ignore such a petition as it sees fit.

A *"Protocol on the role of national parliaments"* is attached to the Draft Constitution. It provides that national parliaments shall be informed of proposals for EU laws at the same time as the Council of Ministers and the European Parliament. At present this information is readily available among journalists and followers of the EU scene in Brussels. A further *Protocol on Subsidiarity* states that a national Parliament may complain that a Commission proposal for EU legislation breaches the principle of subsidiarity within six weeks of learning about it. If one-

third of the national Parliaments then object, *"the Commission may decide to maintain, amend or withdraw its proposal."* It is not required to do this. This is a derisory gesture towards involving national parliaments in EU law-making. In practice it would leave them with little influence and no control on Commission proposals.

18. VOLUNTARILY LEAVING THE EU

Article I-59 allows for a Member State to withdraw voluntarily from the Union and for the EU to negotiate and conclude an agreement setting out the arrangements for its withdrawal and its future relationship with the Union. This is an impovement on the existing EC/EU treaties, which make no provision for a State to leave the EU, but it recognises the political reality that the EU cannot prevent such a withdrawal unless it is willing to use force, and it does not yet have that capacity. The Constitution shall cease to apply to a State wishing to withdraw after the entry into force of the withdrawal agreement or, failing the successful negotiation of that, two years after the notification of its intent to withdraw. If a State were unhappy with the terms of its withdrawal agreement, the suspension of its rights under the Constitution in this way could be used to put it under pressure to agree to measures that were not in its interests. Far better for States not to put themselves under an EU Constitution in the first place by refusing to adopt it. That would put a State or States not wishing to be bound by this Constitution in a powerful position to negotiate an arrangement with the EU that suited its best interests as a condition for permitting those that wanted a Constitution to proceed.

19. RATIFYING AND AMENDING THE EU CONSTITUTION … SOME FRANCO-GERMAN THREATS

Article IV-2 repeals all the existing EC/EU treaties. It reads: *"The Treaty establishing the European Community, the Treaty on European Union and the acts and treaties which have supplemented or amended them and are listed in the Protocol annexed to the Treaty establishing the Constitution shall be repealed as from the date of entry into force of the Treaty establishing the Constitution."* Article IV-9 provides that "*The Treaty establishing the Constitution is concluded for an unlimited period."* Article IV-7 permits amendments to be made to the Constitution by the same "Convention method" that led to it in the first place - a majority decision by the Heads of State and Government on possible amendments, a nominated Convention to consider these, an Intergovernmental Conference to draft a treaty, which then has to be ratified by all Member States.

Article IV-8 provides that the treaty embodying the EU Constitution must be ratified by all the EU Member States *"in accordance with their respective constitutional requirements"* in order to enter into force. That means that the 25 Member States of the enlarged EU must ratify it. This is normal with all EU treaties. A Declaration - which is a political statement that is not legally part of a treaty - is attached to the Constitution saying that if, two years after the signature of the treaty containing it, four fifths of the Member States have ratified it and one or more States *"have encountered difficulties in proceeding with ratification,"* the matter will be referred to the Presidents and Prime Ministers. If some States do not ratify, however, there is nothing legally that the Presidents and Prime Ministers of the other States can do to make them change their minds. All EU treaties are treaties between States that are constitutionally and

legally equal, which is why they must be ratified unanimously. In theory the States that wanted the Constitution could go off and found a different and separate EU among themselves, with a different euro-currency and a different Commission, Council, Parliament etc., leaving the non-ratifying States with the present EU, and all its resources, institutions, including the existing euro, and its network of international treaties; but that is not a realistic option. There is no mechanism for expelling a State or States from the EU because they are reluctant to re-found it on the quite new legal basis of this proposed Constitution and give the EU Constitution primacy over their own Constitutions and laws. Any attempt to do or threaten this by the Big States who desire to push through an EU Constitution, is so much bluff and hot air.

The EU Constitution has been insisted on by the Big States, in particular France and Germany, to give them leadership of a 25-Member EU with fundamentally changed decision-taking rules that serve Big State interests. France and Germany have no intention of treating the 25 members of an enlarged EU on the same plane of legal equality as themselves. President Jacques Chirac showed how he really regards the newcomers when he told them that they *"missed a good opportunity to shut up"* when they dissented from France's position on the Iraq war in spring 2003. The key proposals in the Constitution that express the Franco-German drive to dominate the new EU are (a) the new voting arrangements that allow 13 States to outvote 12 as long as they have 60% of the EU population; (b) the permanent political President appointed by majority vote of the Presidents and Prime Ministers; (c) the "structured cooperation" scheme whereby an inner group around France/Germany can use EU resources and institutions for military interventions with which some other Member States disagree; (d) the abolition of the national veto and its replacement by majority voting for making EU laws in some 27 areas, and in particular the "escalator" clause that allows policy areas to be moved from unanimity to majority voting at the behest of the Presidents and Prime Ministers, without need for new treaties or the approval of national parliaments or peoples.

These are in addition to the important provision of the Treaty of Nice (Art. 214 TEC) that lay down that in future the Presidents and Prime Ministers will appoint the President of the Commission and the individual Commissioners by majority vote - graced by the formality of approval/"election" of their nominees by the European Parliament. The Commission President will then be able to shuffle and reshuffle the portfolios of Commissioners and obtain their resignations if required, just as in any government or cabinet. Putting that provision of the Nice Treaty together with those of the Draft Constitution, it should be clear that Fance, Germany and the Big States are proposing changes to the rules of the constitutionally new EU that greatly increase their power both over it and within it. Giscard d'Estaing, whom France's President Chirac insisted on foisting as president of the Convention at Nice, has indeed given his patron the kind of Constitution for an EU superstate enshrining Franco-German hegemony that he wanted

Unsurprisingly, France and Germany want minimum changes to the Convention text. If they do not get their way in the IGC, their fall-back position to retain their hegemony in a 25-State EU is to threaten a two-tier, two class, two circle EU, with themselves leading an inner group and using the EU institutions to present the others with continual political and economic *faits-accomplis.* They want decision-taking by population size, which benefits them, to be substituted for the weighted voting scheme agreed for a 27-Member EU in the Nice Treaty, on the basis of which the 10 new Members have joined the Union. "*An enlarged Union based on Nice is not in the interest of any Member State. This is not a threat, This is a messenger*

delivering news," threatened German Foreign Minister Joschka Fischer. (*Irish Times*, 14 November 2003*) "The draft Constitution is a tremendous step forward. If it is blocked, history will not wait. Things will move forward. We'll have different goals. Some member states will be in at all costs,"* he repeated three days later. (*Financial Times,* 17 November). There has been widespread discussion of a European "inner core" in the French and German press. French Commissioner Pascal Lamy said, *"We are not sure that Europe is going to continue to converge, and a Franco-German alliance would be a good antidote." (Le Monde,* 13 November). French Foreign Minister Dominique de Villepin said a Franco-German Union or Confederation was *"the only historic gamble that we cannot possibly lose."* (*Euobserver,* 21 November) *"If the Europe of 25 fails, what is left for France"? The Franco-German rapprochement initiative,"* said French Prime Minister Jean-Pierre Raffarin. *(Agence Europe, 21 November)* This Franco-German muscle-flexing over the leadership of an enlarged EU shows the reality of inter-State politics behind the rhetoric of EU partnership. It represents the will to power of the French and German national elites that has been the political motive force of European integration for decades.

20. **CONCLUSION**

To sum up, the attempt to foist a Constitution on the European Union and give it legal personality separate from and superior to its Member States is a further huge step towards turning the EU into a highly centralised Federal-type State, with its own citizenship, money, economic policy, military arm, foreign policy, and legislative, executive and judicial arms of government. Such an EU Constitution would override national Constitutions in any case of conflict. Yet there is no EU community or people, no European *"demos,"* to give such a union democratic legitimacy. The Constitution proposes to merge the intergovernmental and supranational areas of the Treaties in a single institutional structure, to strengthen Union powers and competences over its national Member States in new and important ways and to increase the influence of the bigger EU States in making EU laws. It represents a further stage in the assault on the Nation States of Europe and the national democracy that underpins them, by the powerful political, economic, bureaucratic and ideological elites that for decades have been pushing the EU integration project.

That is why citizens in every European country, whether on the political Centre, Left or Right of politics, are opposed to this EU State Constitution scheme on democratic and internationalist grounds. The more they learn of what is in it, the more opposed they become. The vast majority of people on our continent desire a Europe of cooperating independent democratic Nation States that work together to deal with the problems they have in common - problems that are shared by many States beyond Europe's borders. Ordinary citizens do not want an EU State, the nightmare Europe of the centralisers, the superpower-builders, the power-hungry and their ideological acolytes, whose contempt for democracy is so evident in their construction to date, and is demonstrated daily in the way they are seeking to thrust this EU Constitution upon their unaware or ignorant fellow citizens.

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Appendix 1: **PROVISIONAL LIST OF NEW POLICY AREAS THE EU CONSTITUTION MOVE FROM NATIONAL PARLIAMENTS TO MAJORITY VOTING ON THE COUNCIL OF MINISTERS**

1. Delegated legislation to the EU Commission providing for regulations on "non-essential elements" of European laws and framework laws (Article I- 35 (1); former Article 202)

2. Arrangements for own resources, in part (Article 1-53 (4), former Article 269)

3. Services of general interest (Article III-6; former Article 16)

4. Diplomatic and consular protection (Article I-8 and III-11; former Article 20)

5. Free movement of workers (Article III-21; former Article 42)

6. Administrative cooperation and measures to combat tax fraud, following a unanimous decision by the Council (Article III-63 (2))

7. Intellectual property, except language arrangements, and other centralised procedures (Article III-68 (1))

8. New tasks for the European Central Bank (Article III-77 (6);former Article 105(6))

9. Structural and Cohesion Funds, from 2007 (Article III-119; former Article 161)

10. Administrative cooperation on justice and internal affairs (Article III-164; former Article 66)

11. Border controls (Article III-166; former Article 67)

12. Asylum and immigration (Article III-167 and 168; former Article 67)

13. Judicial cooperation in civil matters apart from family law (Article III-170(2); former Articles 65 and 67)

14. Judicial cooperation in criminal matters (Article III-171; former Article 31 EU)

15. Harmonisation of legislation on criminal proceedings, sanctions and offences (Article III-172 (1); former Article 31 (EU))

16. Eurojust (Article III-174; former Article 31(2) EU)

17. Police cooperation, except operational cooperation (par.2) (Article III-176 (1); former Article 30(1) EU)

18. Europol (Article III-177; former Article 30(2) EU

19. Culture (Article III-181 (5); former Article 151 (5))

20. Civil protection (Article III-184)

21. Initiatives by the Minister for Foreign Affairs at the request of the European Council (Article III-201 (2))

22. Statute and seat of the Armaments, Research and Military Capabilities Agency (Article III-212 (2))

23. Commercial policy (Article III-217 (2) and III-227; former Articles 133 and 300)

24. Urgent financial aid to non-member States (Article III-222)

25. Establishment of specialised courts (Article III-264; former Article 225A)

26. Giving the Court of Justice jurisdiction with regard to intellectual property rights (Article III-269; former Article 229A)

27. Amendment of the Statute of the European Court of Justice (Article III-289; former Article 245)

Appendix 2**: WHY THE CHARTER OF FUNDAMENTAL RIGHTS SHOULD NOT BE IN AN EU CONSTITUTION**

by "Analyst"

THE CHARTER OF FUNDAMENTAL RIGHTS

Uniformity v Pluralism

The incorporation of the EU Charter of Fundamental Rights into the Draft Constitution, giving a full human rights jurisdiction to the European Court of Justice, is one of the most significant changes proposed by the Convention. It is also one of the most problematic from the perspective of fundamental rights, democracy and rationality. The following discussion argues that the protection of fundamental rights is the proper preserve of the Member States and that the EU policy should be directed to the management of a healthy pluralism on this issue rather than the imposition of an unworkable and inherently substandard uniformity.

Why incorporate the Charter?

Why would the EU seek to arrogate to itself the task of protecting the fundamental rights of the citizens of the Member States?

If the laws and constitutions of member states, or the 1950 European Convention on Human Rights, were somehow inadequate for the task, the proposal might bear consideration on that account. Yet Article I-7 (2) of the Draft Constitution proposes that the EU "seek accession" to the ECHR[1] and Article I-7 (3) looks to the fundamental rights in the ECHR and the constitutions of the member states as "general principles of the Union's Law". The Preamble to the Charter reaffirms these sources and Title VII is at pains to affirm that nothing in the Charter is intended either to extend the scope of EU Law or to conflict with the interpretation of equivalent rights recognised by the ECHR or in the constitutional traditions common to the Member States. Clearly, therefore, the proposal is not based on an assessment that there is a substantial deficiency in the existing legal protection of human rights or that these sources are inadequate for the purposes of Union Law.

The overt rationale for a legally binding Charter in the Constitution is that it would provide redress for a citizen against possible breaches of human rights in the course of the operation of Union law. The Charter is to be *"judicially cognisable only in the interpretation of [legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law] and in the ruling on their legality"* - Article II-52 (5). If the fundamental rights guaranteed in the ECHR, and resulting from the constitutions and jurisprudence of the member states, are *general principles of EU Law*[2], are not the Court of the ECHR and the Supreme Courts of the Member States the best qualified bodies to adjudicate (within their respective jurisdictions) on any breaches of those rights in the operation of that law? What then would a legally enforceable Charter add to the protection of these rights?

Would it improve the protection of human rights?

The Draft Constitution envisages a new treaty basis[3] for the human rights jurisdiction already assumed by the European Court of Justice. It does not in general propose a higher standard of protection, a greater accessibility, or an added legal certainty - on all of these criteria the opposite is arguably the case. The competences of the Union are not affected by the incorporation of the Charter or by the suggested accession to the ECHR.[4]

The Charter is not a "made to measure" suit, tailored to the specific needs of the Union. It is more in the nature of a "shop window" for goods that are on sale elsewhere. The shelves of the Charter "shop" are practically bare. Rights declared in the Charter which are already developed in the jurisprudence of the ECHR or in the constitutions of the Member States are to be given the same meaning and scope and to be interpreted *"in harmony with those traditions"*.[5] Article I-8 (2) of the Draft Constitution sets out the few rights specific to Union citizens (which are clearly not "fundamental"). These rights are further elaborated in the Charter (now as "fundamental rights") but to no avail, because Article II-52 (2) of the Charter states that they are to have no greater effect than is already provided for in Article I-8 (2) of the Draft Constitution. Other rights in the Charter (which contain "principles") are not judicially cognisable unless the Union decides to legislate for them and others again have no legal effect because they do not bear on matters within Union competence - e.g. Article II-9 (right to marry and found a family), Article II-14 (right to education).

The only plausible conclusion, therefore, is that the Charter is not intended to add anything of substance to the protection of fundamental rights as such, but to greatly enhance the jurisdiction of the European Court of Justice [6] at the expense of the courts of the Member States. The ECJ may well choose to continue the expansion of its empire into areas mentioned in the Charter but which are supposedly neutralised by Articles II-51 to 54. The existing Treaties have proved ineffective as a restraint on its expansionist inclinations. It has become quite literally a law unto itself.

The evolving role of the European Court of Justice

The historical evolution and judicial activism of the ECJ are well documented. It long ago realised that its assertion of the supremacy of EU law over national law would put it in conflict with the protection of citizens by national courts against breaches of human rights arising from the operation of EU law. On the other hand, if it permitted the constitutional courts of the Member States to declare that a particular EU law was void in that State because it gave rise to a breach of human rights, the uniformity of EU law and thus the "level playing field" for commercial activities would be jeopardised.

A jurisprudence that gave priority to Community policy and commercial expediency over a true understanding of human rights and democratic principles led to the conclusion that the protection of human rights by national constitutions must yield to Community law. The ECJ recognised, however, that some powerful Member States (notably Germany) would not acquiesce in a situation in which the fundamental rights of the citizen, as guaranteed by the national basic law, were unprotected in Community matters. It therefore decided, as long ago as 1969[7] and without any obvious legal basis in the Treaties, that it should take on the role of developing on a case-by-case basis a uniform standard of human rights, effectively supplanting the role of the national courts in this fundamental area.

To reassure the national courts, the ECJ purported to have recourse to "the constitutional traditions common to the Member States", while ignoring the fact that there are substantive differences among the Member States in important areas of human rights. It came to rely on the ECHR as a primary source[8]. It has proceeded gradually but steadily along this course for well over thirty years, relying on the fact that, as the sole interpreter of the Treaties, it can over-rule any claim that it lacks the competence to extend its own jurisdiction in this manner. This has been perhaps the ultimate example of judicial activism in the modern world.

The final endorsement of supremacy

The Draft Constitution now proposes to legitimise and to bring to its logical conclusion this empire-building by the European Court of Justice. Article I-10 expressly affirms for the first time in a Treaty the supremacy of all EU laws over all national laws. National courts, currently obliged to refer certain cases to the ECJ for its opinion, would in future be obliged to provide a new *right of appeal* to Union courts from all their decisions on Union law matters[9]. The ECJ would in effect become the Supreme Court of the Union.

Carte blanche

The extraordinary vagueness as to the cognisable sources for the "recycled" fundamental rights in Union law would inevitably entrench the *carte blanche* already enjoyed by the European Court of Justice to devise whatever result best suits its policies in a particular case. The rights declared by the Court would continue to be divorced from any specific social or political context or value system. They would reflect the personal values of the judges of the Court and the elites of the EU autocracy, rather than the values of the societies they serve. While this may be true to some extent of many national courts, in the case of the ECJ there would be no practical possibility of any democratic control or reversal of its decisions.

Respect for the Rule of Law in a society is grounded on an effective relationship between the citizens and the legal system, mediated through the democratic process. Where there is already a glaring "democratic deficit", as in the EU, the supplanting of national legal systems with a "foreign" code is calculated to undermine respect for law and to increase the alienation of the citizen from the institutions of the State.

People before politics or profits

Accepting the formal subjugation of national courts to Union courts in matters of fundamental rights would also imply a subversion of the priorities on which democratic societies are founded. The Rule of Law protects the interests of the weak against unjust claims of the strong. It protects the interests of the individual against unjust claims of the community. It puts people before politics or profits.

The priorities implicit in the Draft Constitution are otherwise. This is subtly and perhaps unconsciously reflected in the drafting of the Charter. The catalogue of fundamental rights is set out in very brief, unqualified, statements (e.g. Article II-2 (1): *"Everyone has the right to life"*). However, *all* of these rights are subject to Article I-52 (1), which states: *"Subject to the principle of proportionality, limitations* [on these rights] *may be made only if they are necessary and genuinely*

meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

Should all fundamental rights be subject to limitation by law, to meet *"objectives of general interest"*? Clearly not. Whatever the underlying philosophy of a constitution or charter, the existence of exceptionless norms is widely accepted as a basic tenet of a sound human rights jurisprudence. There are some actions which it is *never* just to perform against an innocent person, no matter what State objective or other "good" end might be served in so doing. What national constitution, for example, would ever legislate to allow some of its citizens to be unjustly mutilated, poisoned or killed (e.g. by medical experimentation or research), even to assist or protect others? Equally, there are no circumstances in which a just law could permit someone to be violated or tortured, even in the interests of national security. To allow anyone to be abused in this way for the benefit of others would be a denial of his radical equality as a human being, the basis of all human rights.

The proposed Charter, however, countenances such limitations when they are deemed "proportionate" and "necessary", provided they *"genuinely meet objectives of general interest recognised by the Union"*. It thereby formally subordinates the rights of the individual to the collective, of the person to the State, of the weak to the strong. That is the very antithesis of a sound human rights philosophy.

A practical example

A very clear illustration of the practical implications of this approach may be seen in the recent controversy over the massive funding by the EU of research on human embryos[10]. Such research is opposed by several EU countries and is illegal in some (including Germany, Austria and Denmark). An EU Commission Report[11] described the ethical issue as follows: *"Human embryonic stem cell research raises complex ethical questions. It confronts scientific progress with ethical concerns and it has triggered an intense public debate on its guiding ethical principles and limitations. The question whether it is ethically defensible to do research on embryonic stem cells can be described as a conflict between different values, between different actors' rights and obligations, or between the short- and long-term interests of different groups. … Opinions on the legitimacy of experiments using human embryos are divided according to the different ethical, philosophical, and religious traditions in which they are rooted. EU Member States have taken very different positions regarding the regulation of human embryonic stem cell research. This confirms that different views exist throughout the European Union concerning what is and what is not ethically defensible".*

Following the adoption of the Draft Constitution, a uniformity in such ethical issues would gradually be imposed by decisions of the ECJ, trampling on the diversity of views in the Member States. The priorities that would inform the ECJ in its formulation of EU ethical policies on these life-and-death matters may be gauged from the objective currently being pursued by the Council Decision in its funding of this research: *"The strategic objective of this line* [of funding of research on human embryos] *is to foster the competitiveness of Europe's biotechnology industry by exploiting the wealth of biological data produced by genomics and advances in biotechnology."* [12]

Effective recourse to a final determination of disputes

The Draft Constitution also demonstrates a disregard for the vital role of justiciable human rights in the relationship between the citizen and the State. In arrogating to the ECJ the ultimate authority to decide on issues of fundamental rights, it would deprive the ordinary citizen of an effective recourse to a final determination in a dispute in such matters.

It is precisely to protect individuals, families, smaller groups and communities from the (albeit well-intentioned) machinations of State authorities that easier recourse to the Courts for the protection of human rights has developed in modern societies. If national courts cannot effectively guarantee many of these rights or if appeals lie to Union courts (because an impugned government action is mandated by EU law), it will be cold comfort indeed to the hapless citizen to offer him or her the "right" to follow his complaint to an EU Court, there to risk what may be left of the family fortune in the enterprise of seeking a long delayed and very expensive redress.

A pluralist alternative

Little consideration appears to have been given to the obvious democratic alternative. If the EU wanted to develop a credible protection of human rights, it could have accepted and welcomed decisions by the constitutional courts of Member States which pointed out human rights defects in an EU law. That would have provided the ECJ with a genuine "constitutional tradition common to the Member States" with which to guide the development of EU law in ways compatible with human rights. Where differences in the national understanding of human rights might arise, the ECJ - in the interests of a genuine pluralism - should allow a discretion to each Member State to act on the understanding proper to its own culture and jurisprudence. The ECJ would have the task of regulating the consequences of any disparities that might arise, but that would be less objectionable than enforcing a uniform standard of human rights, of its own devising, for the sake of political or commercial expediency.

It is no answer to this approach to say that it would lead to fragmentation of the Union. Those in favour of the present course cannot have it both ways.

If there is in fact is a real consensus (as the ECJ approach implies) as regards important human rights, nothing would be lost and no major difficulties would arise by allowing national constitutional courts to adjudicate (within their own jurisdictions) on the compatibility of Union law with human rights. This approach would in time lead to a real and natural convergence of legal norms and values, as each State learned from the experience and practice of the others.

If, on the other hand, there *are* in fact serious differences between the Member States in these areas (as the stem-cell issue demonstrates), it is no solution at all to impose an entirely undemocratic uniformity in such sensitive matters on all the Member States, for the sake of some political or economic objective. The current debate over the legally insubstantial but nevertheless symbolic issues in the Preamble, such as the exclusion of any reference to God or Christianity and the highly partisan prominence given to the values of "humanism", are further reminders that there are in fact deep divisions in the Member States over many fundamental values.

The legal protection of human rights must of necessity reflect the values held in common in a society and it is inevitable that in a political conglomerate such as the EU there will continue to be

a wide divergence on many important values for the foreseeable future. That being the case, a pluralist solution to the protection of human rights is the only viable option and the attention of the framers of the Constitution should therefore be turned to the provisions that might required to facilitate this in practice.

The Union cannot hope and does not deserve to prosper unless it demonstrates a real respect for the practical and ethical requirements of its motto - *"united in diversity"*. [13]

Notes:

1. Accession is reserved to the Member States of the Council of Europe - cf. Article 59.1, *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Accession by the EU as such would require amendments to the Convention and may very well be refused. The Charter is in effect a competing instrument and if adopted in an EU Constitution it would *prima facie* place the EU Member States in breach of their obligations under Convention Article 55. That Article prohibits *"other means of dispute settlement"* - *"The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention."*

2. Article I-7 (3) of the Draft Constitution.

3. The 1992 Maastricht Treaty was the first Community Treaty to incorporate specific human rights provisions within the body of the treaty - cf. Article 6.
4. Articles I-7(2) and II-51(2) of the Draft Constitution.
5. Article II-52(4) of the Draft Constitution.
6. Article I-10(1): *"The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States."*
7. Stauder v Stadt Ulm [1969] ECR 419
8. cf. the long series of cases beginning with *Nold v Commission* [1974] ECR 491.
9. Article I-28(1) *"Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law."*
10. Council Decision 2002/834/EC - The amount for "advanced geonomic'"research is -E 1.1 billion, in a research budget of E 12.9 billion.
11. SEC(2003) 441 - "Report On Human Embryonic Stem Cell Research"
12. Council Decision 2002/834/EC - Official Journal of the European Communities, L 294/10.
13. Fifth Recital of the Preamble, Draft Constitution; Article IV-1

Appendix 3**: PROPOSALS FOR AN ALTERNATIVE EU FROM EIGHT MEMBERS OF THE CONVENTION THAT DRAFTED THE EU CONSTITUTION**

Alternative Report

THE EUROPE OF DEMOCRACIES

LAEKEN'S LOST MISSIONS

As members of the Convention, we cannot endorse the draft European Constitution. It does not meet the requirements of the Laeken Declaration of December 2001.

Laeken says, **"the Union must be brought closer to its citizens."**

The transfer of more decision-making from Member States to the Union, concerning criminal justice matters and new areas of domstic policy, will make the Union more remote.

Laeken adds that "**the division of competences be made more transparent."**
But the new category of "shared competences" gives no assurance about how power is to be shared, particularly as Member States will be forbidden to legislate in these areas if the Union decides to act.
The EU Court in Luxembourg will decide on any doubt.

Laeken describes the Union as **"behaving too bureaucratically**."
The draft Constitution fails to address the 97,000 accumulated pages of the *acquis communautaire,* and proposes a new legal instrument, the "non-legislative act," whereby the non-elected Commission can pass binding laws.

Laeken calls for **"the European institutions to be less unwieldy and rigid."**
But the Constitution gives more power to all the existing EU institutions and creates a Europe of Presidents, with more jobs for politicians and less influence for the people.

Laeken highlights the importance of national parliaments, and the Nice Treaty "**stressed the need to examine their role in European integration."**
National Parliaments lose influence relative to the Commission, the European Parliament and the European Council. Their proposed new role in "ensuring" compliance with the subsidarity principle is in reality no more than a request which the Commission can ignore. Not one competence will be returned to Member States.

Laeken calls for **"more transparency and efficiency"** in the Union.

The Constitution concetrates more executive and budgetary power in the very EU institutions which have been the subject of repeated and continuing scandals over mismanagement, waste and fraud.

Laeken suggests the possibility of a Constitution: **"The question ultinately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text of the Union."**

The suggestion that the existing intergovernmental Treaties be transformed into a new European Constitution was rapidly seized upon, but without any study of either the alternatives on offer or the long-term consequences of such an act.

Lastly, Laeken's overriding aim was a **Democratic Europe.**

The draft Constitution creates a new centralised European State, more powerful, more remote, with more politicians, more bureaucracy, and a wider gap between the rulers and the ruled.

The EURATOM Treaty was brought into the Constitution at the last moment without any working group having the time to revise it.

The draft EU Constitution was never drafted through normal democratic methods.

- The applicant countries were treated as observers in the Praesidium and had no real say; Only three political families were represented in the powerful Praesidium which drafted the tunnel vision text;
- The members were refused the right to have their amendments translated, distributed, discussed and voted upon;
- The Convention had no members for that half of the population which rejected the Maastricht Treaty in France or the Nice Treaty in Ireland;
- Not one single Eurosceptic or Eurorealist person was allowed to observe or participate in the work of the Praesidium, or any of its assisting secretariats.

Giscard did not allow democracy and normal voting in the Convention. The draft Constitution runs counter to all democratic principles. We want a new draft from a much more representative Convention, democratic in content and democratic in procedures.

We hereby submit the following 15 points for the consideration of our Prime Ministers and their fellow citizens:

1. A EUROPE OF DEMOCRACIES: The European Union (EU) should not have a Constitution. Instead, Europe should be organised on an interparliamentary basis by means of a Treaty on European Cooperation. This will create a Europe of Democracies (ED) in place of the existing EU. If the EU should have a new name, it should be a Europe of Democracies.

2. A SLIMLINE TREATY: The present 97,000 pages of the *acquis communautaire* covering the EU and EEA must be radically simplified. Instead, focus should be placed on cross-frontier issues where national parliaments cannot effectively act by themselves. Decisions on subsidiarity should be resolved by the national parliaments.

3. OPEN TO ALL DEMOCRACIES: Membership of the Europe of Democracies should be open to any democratic European state which is a signatory of, and respects fully, the European Convention on Human Rights.

4. SIMPLIFIED DECISION-MAKING: The present 30 different ways of making decisions in the EU should be reduced to two: laws and recommendations. Where qualified majority voting applies, the proposal in question should require 75% of the votes to be cast in favour, unless otherwise stated.

5. A VETO ON VITAL ISSUES: Laws should be valid only if they have been passed by national parliaments. A national parliament shall have a veto on an issue it deems important.

6. THE COMMON CORE ISSUES: Laws should deal with the rules for the Common Market and certain common minimum standards to protect employees, consumers, health, safety and the environment. In other areas the Europe of Democracies should have the power to issue recommendations to Member States, which are always free to adopt higher standards.

7. FLEXIBLE COOPERATION: The Europe of Democracies may unanimously approve flexible cooperation for those nations that want to take part in closer cooperation. The Europe of Democracies should also recognise and support other pan-European organisations, such as the Council of Europe.

8. OPENNESS AND TRANSPARENCY: The decision-making process and relevant documents should be open and accessible, unless a reasonable cause for exception is confirmed by qualified majority.

9. STRAIGHTFORWARD COUNCIL VOTING: A simplified voting system should operate in the Council, which may comprise each Member State possessing one vote in the Europe of Democracies Council. A decision by qualified majority should require the support of countries with more than half the total Europe of Democracies population.

10. NATIONAL PARLIAMENTS SHOULD ELECT THE COMMISSION: Every national parliament should elect its own member of the Commission. The Commissioner should attend the European Scrutiny Committees of the national parliament concerned. National parliaments should have the power to dismiss their Commissioner. The President of the Commission should be elected by the national parliaments. National parliaments should decide on the annual legislative programme and the Commission should correspondingly act as a secretariat for the Council and the national parliaments.

11. NO LEGISLATION BY THE COURT: Legal activism by the European Court of Justice in Luxembourg should be curbed, and the Court should respect the European Convention on Human Rights.

12. PARTNERSHIP AGREEMENTS: The Member States and the Europe of Democracies may enter into partnership agreements of mutual interest with states or groups of states. The Europe of Democracies shall respect the parliamentary democracy of its partners and may assist poorer ones with financial aid, while fostering free trade agreements.

13. BETTER SCRUTINY: The European Ombudsman, the Court of Auditors and the Budget Control Committees of the European and national parliaments should have access to all documents and all financial accounts.

14. EQUALITY OF LANGUAGES: When legislating, all official Europe of Democracies languages should be treated equally.

15. UNITED NATIONS: The Europe of Democracies shall not have its own army. Peacekeeping and peacemaking should be mandated by the United Nations and the Organisation for Security and Cooperation in Europe. Member States shall decide themselves whether they opt for a common defence through NATO, independent defence, or follow a neutrality policy.

Signed by convention members:

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