

THE EUROPEAN CONSTITUTIONAL PROCESS: A THEORETICAL VIEW

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Section I: About the Constitutional process - the Convention and the IGC 2002-4

INTRODUCTION

In 1999, my work as a full-time law professor came to a temporary halt. Shortly before this happened, I brought out a book called *Questioning Sovereignty*¹. This attempted to apply my version of the institutional theory of law to certain urgent contemporary questions in the philosophy of law and political philosophy circulating around the ideas and the roles of law, state, and nation in ‘the European Commonwealth’ (as I there called it). Then, partly by chance, I was elected as one of the eight members of the European Parliament representing Scotland. My theoretical questions thus acquired a directly practical edge. All the more so at the end of 2001, for then I was most fortunately elected to take part in the Convention on the Future of Europe set up by the European Council at Laeken in December of that year. I was elected as one of two representatives from the Group of the Greens and European Free Alliance² on the European Parliament’s delegation to the Convention. Naturally, I found this a fascinating and challenging experience³.

1. THE CONVENTION: WHAT AND WHO?

Following the Treaty of Nice, which paved the way for the remarkable and welcome enlargement of the European Union that occurred on 1 May 2004, with

1. Neil MacCormick, *Questioning Sovereignty: Law State and Nation in the European Commonwealth*, (Oxford, 1999, Clarendon Press).

2. As a Scottish National Party MEP, I was automatically a member of the European Free Alliance (EFA), which is a European-level political party bringing together in an alliance of principle national or regionalist parties from ‘stateless nations’ and autonomous regions of Europe, such as Andalusia, the Basque Country, Catalunya, Flanders, Galicia, Scotland, Wales, Friesland, Savoie, Brittany and others. In the European Parliament from 1999 to 2004, EFA and the Greens formed a single Parliamentary Group on the basis of an agreement reached in July 1999.

3. What follows is a highly subjective participant’s account of the Convention process. An objective account can be found in Peter Norman *The Accidental Constitution* (Brussels, Eurocomment, 2003).

further instalments to come, the Union's leaders acknowledged the need for a wide-ranging consultation on its future shape. This would be aimed at re-connecting the Union with its increasingly alienated citizens. What came to be called the 'Constitutional Convention' (strictly, 'the Convention on the Future of Europe') was established by the Laeken Declaration of December 2001, following on the European Summit meeting. It was created with a remit to lead an open and far-reaching public debate on the future constitutional and institutional structures of the EU. The process involved parliamentarians as well as governments for the first time in relation to a full-scale revision of the Treaties prior to an Inter-Governmental Conference ('IGC'). It was modelled on the highly successful Convention that drafted the Charter of Fundamental Rights of the EU, adopted at Nice in December 2000, though only as a 'political declaration'.

Chaired by former French President Valéry Giscard d'Estaing with two Vice Chairmen, former Belgian Prime Minister Jean Luc Dehaene, and former Italian Prime Minister, Giuliano Amato, the Convention began its work on 28 February 2002, and finished on 10 July 2003.

The Convention comprised

- governmental representatives of all Member States, acceding states and candidate states — twenty-eight in all, each with an alternate.
- representatives from the national parliaments of all Member States, acceding states and candidate states — fifty-six in all, each with an alternate.
- sixteen MEPs, each with an alternate, and two representatives from the European Commission, Antonio Vitorino and Michel Barnier.
- observers including the European Ombudsman, and representatives from the Economic and Social Committee and the Committee of the Regions.
- a Secretary-General, Sir John Kerr, former head of the UK Foreign Office, assisted by an extremely able and industrious secretariat drawn from the civil service of the Council, the Parliament, and the Commission.

Given the number of full and alternate members, at Convention sessions there could be up to two hundred and five persons in the room actively engaged in the debate, with a further thirteen observers entitled to speak. Then there were assistants, advisers to ministers, diplomats, press persons and Convention Staff. The remarkable thing was the extent to which Convention Members attended to their task and both contributed to, and listened to others in, the debates. When the Convention was sitting there was always a considerable buzz in and around the large Committee Room (PHS 0C50) in the European Parliament building in Brussels, and in the adjacent public space and Hemicycle Bar. This may not be a perfect way to try to write a constitution, but it certainly had the merit of drawing the arguments out into open air and subjecting them to genuinely critical debate that led to modification of positions by all or most participants.

Openness of deliberation was also fostered by publication on the Convention website of all its official documents, all Contributions by Members, all Amendments

proposed by them, and the verbatim record of proceedings⁴. This connected also to the Forum website, where citizens at large and non-governmental organisations (NGOs) could state and explain their opinions. It was disappointing that during a long period the print and broadcast media in Europe, and (as usual) particularly those of the United Kingdom, made but few comments and published few reports of what was going on. At the conclusion of the Convention's deliberations, newspapers in the UK, and some elsewhere, represented the output of the Convention as a sudden and unexpected bombshell that had been cooked up in some kind of secret conclave. This was very far from the truth. There has never been a more open and public constitution-drafting process in the history of humankind.

2. THE WORK OF THE CONVENTION

The Convention's work was divided into phases. The first was that of 'listening', with wide-ranging consultations across Europe. Then came a phase of 'analysis', with a dozen working groups examining such major issues as subsidiarity; the place of the Charter of Fundamental Rights in the EU Constitution; the EU's legal personality and how to simplify the Treaties; the role of national parliaments; and so on. Reports of the Working Groups were debated in plenary sittings of the Convention during the autumn of 2002 and through to early winter 2003.

Last was the 'writing phase'. Following on the publication and initial discussion of a Preliminary Draft, a framework document presented to the Convention in October 2002, there commenced in early winter of 2003 the serious job of fleshing out the skeleton table of constitutional contents with draft Articles. This was overseen by the Praesidium, which comprised the President and Vice-Presidents, two European parliamentarians, two national parliamentarians, two Commissioners, two national government representatives, and Mr Peterle from Slovenia to watch for the interests and concerns of acceding states. Already the Convention was determined that these must be articles of a draft constitution, not just a revised treaty.

As each *tranche* of first draft articles was delivered, a torrent of amendments flowed in from the pens of the Members and Alternate Members of the Convention. In May and June, the Praesidium of the Convention responded to amendments and debates about the Articles by re-drafting and re-drafting again. The end-game in June and early July of 2003 was exceedingly hectic. The final text was hammered out by such consensus as could be achieved in each of the sub-sets of the whole Convention, and in the political groups that participated in it. The President presented the Convention's final conclusions comprising Parts I and II of the Draft Constitution-text to the governments of Member States at the European Council in Thessaloniki on 20 June 2003. On 18 July, after final adjustments concluded

4. Still available at <http://european-convention.eu.int>

on 10 July, the text of Parts III and IV (the latter of which had received minimal discussion at the Convention) was delivered to Prime Minister Berlusconi in Rome at the beginning of his period as President-in-Office of the European Council.

In October 2003, the Inter-Governmental Conference assembled to discuss whether to adopt the Draft Constitution through an appropriate Constitutional Treaty, with or without amendment of the Convention's text. Member States each submitted points on which they requested or required further revision before they could sign a Treaty embodying the Constitution. After an abortive summit in Brussels in December 2003, the Irish Presidency made better progress during 2004, and set a course for conclusion of a Constitution-Treaty in June 2004. This was actually achieved at a Meeting on 17th and 18th June 2004 in Brussels, and the text as finally perfected in all languages⁵ was signed in Rome on 29 October 2004, under the title 'TREATY ESTABLISHING A CONSTITUTION FOR EUROPE':

After stating the bare formal facts of the Convention's existence, composition, and performance, it is incumbent on me to say a few words about the experience of participation in it. What was that like?

3. THE CHARACTER OF THE CONVENTION

The point about the Convention was its essentially open, public and parliamentary, perhaps I should say 'parliamentarian', character. The predominant number of its members were representatives from Parliaments at Member State or All-Union level, and were members of one or other parliament. But they had no direct electoral mandate from their electors, and the degree to which parliamentary delegations fairly reflected all shades of opinion in the States was a matter of conjecture.

A big question was to what extent the Presidium would run the Convention, to what extent the Convention would take on a life of its own. Would the democrats prevail over the bureaucrats? On the whole, democracy won, though not without a lot of sabre-rattling from the back-benches. The President made more than a few bold, and occasionally contested, assertions about the consensus of the Convention as he perceived it, and undertook a series of private meetings with various Prime Ministers and Presidents, and committed himself to some controversial positions in public speeches here and there. At the end of the day, we had to produce a constitution that would be acceptable to the Member States. Since it was therefore important to draw citizens' attention to the momentous ideas that were taking shape, I was less outraged by Giscard's tactics than were some of my colleagues. Convention members and alternates (hereinafter, 'conventioners') depended on our

5. There are twenty one languages covering the twenty five states, viz, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovenian, Spanish and Swedish.

particular emissaries to the Praesidium (for the European Parliament, these were Iñigo Mendez de Vigo and Klaus Hänsch) to rectify any gross mis-ascription of consensus by the President. Thus, for example, was suppressed the President's pet brainchild, an annual 'Congress of Europe' comprising the European Parliament in session together with representatives of every national parliament.

Gisela Stuart MP was one of two representatives⁶ of the UK Parliament at the Convention. She served on the Praesidium as a representative of the National Parliamentarians. The UK Members from the two parliaments and from the Government held regular forty-five minute meetings together with staff from the UK Permanent Representation immediately before each of the Plenary Sessions, and Gisela kindly briefed us about ongoing business in the Praesidium. From herself and from other sources one learned a little of the hectic and sometimes chaotic conduct of business at the Praesidium, with documents arriving late in the day. The same certainly applied to non-Praesidium Members, but this was in a context in which, at great speed, documents were being prepared for discussion in many languages, usually starting with the French-language version. It came as something of a surprise and a disappointment when in December 2003, in a Fabian Society pamphlet, Gisela gave a very damaging account of the proceedings at the Praesidium, especially as it worked in the closing weeks of the Convention, when the final text of the Constitution was being hammered out⁷. It is a matter for regret that this was not stated much more openly at that very time when others might have supported a demand for a different way of proceeding.

However that may be, Members of the Convention did occasionally demand, and secure that we had, votes on significant issues concerning the conduct of the Convention, for example, on whether to demand a Working Group on 'Social Europe'. But the method of consensus prevailed over the method of voting. This was both right and inevitable, since we were not a parliament elected to our task, but what I called earlier a 'parliamentarian' assembly. Towards the end, as I mentioned, the process of settling points of controversy relied particularly on the emergence of acceptable common positions through the various fractions of the Convention. That is to say, among the political families represented, and among the different subsets of the Convention —national parliaments, the European Parliament, the governments and the Commission.

On this, however, Gisela Stuart's December pamphlet is highly critical. The consensus, she implies, was only agreement among an inner group who had the essential say. On one point, though, I would take leave to correct her. She correctly notes that the Constitution's text changed at a late moment on a significant point: 'The provision making it explicit that the President of the Commission could not hold the post of President of Council was removed in the last days. Valéry Giscard d'Estaing explained this as being an 'unnecessary statement, as both jobs were

6. The other was David Heathcoat-Amory MP (Conservative) and the alternates to these two were Lord Tomlinson (Labour) and Lord MacLennan of Rogart (Liberal Democrat).

7. G. Stuart MP, *The Making of Europe's Constitution* (London: The Fabian Society, 2003).

so demanding, that one person simply could not combine them.’ That may indeed have been Giscard’s view, but it was not only the reason for the change.

At a late meeting of the European Parliament Delegation, visited by Jean-Luc Dehaene for the purpose of trying to establish where consensus lay, concern was being expressed about the potential difficulties of a two-headed Europe with a Commission President and a Council President potentially pulling in opposite directions. I intervened to point out that it was only necessary to delete the then current text’s prohibition on the Council President holding another mandate at EU level. If that were done, it would become open to the Council, if it so chose, to elect the Commission President to its chair. But of course this would require the agreement of the Council, which would be forthcoming only if the separation of the posts had become or had proved to be seriously problematic. This intervention, visibly supported by most MEPs present, led or contributed to the necessary deletions being made in the final draft, and indeed the final text. It is such an obvious point that probably quite a few people separately thought of it, and for all I know put it forward for consideration at other similar fractional discussions in the closing stages of the Convention.

In other ways, there was certainly a lot of openness, and a lot of listening to whoever wanted to speak to us, both collectively and as individuals. Vice-President Dehaene was responsible for the organised consultation of ‘European Civil Society’, and a formidable two-day session took place on 24-25 June 2002, with a European Youth Convention sitting in Brussels 10-11 July and reporting to the full Convention on 12 July. The degree to which such gatherings are truly representative is, of course, always open to challenge, and sceptics like Danish MEP and Conventioneer Jens-Peter Bonde drew attention to the substantially Europhile character of most of the organisations that did take part. I had my own reasons to be somewhat unimpressed with the way the Youth Parliament was put together, which effectively overrode my right to nominate a representative from EFA.

Quite apart from that sort of mass consultation, I, like other Conventioneers, embarked on a vigorous programme of consultation within my own constituency of Scotland⁸. As a representative of the European Free Alliance, I consulted with sister parties in Galicia, Andalucia, Euskadi, Catalunya, Flanders, Poland, Friesland, Latvia, Savoie, Brittany, and Moravia. At home I held meetings and consultations all round Scotland, and I spent two delightful days with Plaid Cymru at Llandudno in Wales during September 2002. It was my great good fortune that I was able to participate at all in the Convention. My position as an Alternate Member in the

8. Gisela Stuart writes that at the Convention ‘MEPs spoke for the institution of the European Parliament, not for the people who elected them’ (*op. cit.*, p. 18). This is very far from the truth, though indeed the case any of us wanted to make for our constituents was strengthened to the extent that the European Parliament Delegation was aligned with it. But all my interventions at the Convention were based on what I considered an appropriate constitutional structure for Europe in the light of the proper and legitimate interests of Scotland (my constituency) and of the other stateless nations whose representatives as an EFA member I represented at the Convention.

European Parliament delegation depended on a close-run election in my Parliamentary Group, that of the Greens and European Free Alliance. In fact, alternate members were able to take a large part in the deliberations, partly by sensible co-ordination with full members (my principal was the Austrian Green MEP Johannes Voggenhuber) and partly by the good will of the Presidency and Secretariat. There were also procedural devices that helped— in particular the ‘blue card’ which facilitated a brief (one minute) debating intervention during plenary sessions and thus permitted almost instantaneous response to points made by other speakers.

My favourite personal example of this was when President Giscard introduced the debate on the first draft of the Articles declaring values and objectives of the Union. There was in the draft a call for recognition of Europe’s ‘cultural diversity’. Various members, myself included, lodged amendments adding the words ‘and linguistic’. This was important, since hitherto the Commission has resisted attempts by Parliament to authorise financial support for regional and minority languages of the Union, since the Commission regards such support as lacking a legal base in the current Treaties. Adding ‘and linguistic’ would therefore fill a real gap in the law to the advantage of minority national and regional languages within the Union. In his introductory remarks, the President was very dismissive. ‘Of course we do not want to encourage more and more languages in Europe,’ said he. Up went my blue card, and when I was called a little while later, I pointed out, to applause, that we were not seeking to multiply languages but to get fair recognition of the existing languages and existing linguistic diversity of Europe. I think that may well have been a moment when a point was won.

Alternates could also take a full part in the Working Groups, as I did in that on the Charter of Rights and that on Simplifying the Instruments of the Union. There was a particularly useful role to be played in relation to the Charter, on which the UK Government was very reluctant to move beyond political acknowledgement of the Charter Rights, and devices had to be agreed with a view to assuaging doubts. In the Simplification Group, Giuliano Amato gave a brilliant lead and we settled for the proposal to abolish ‘Regulations’ and ‘Directives’, and to introduce in their place the idea of ‘European laws’ and ‘European framework laws’⁹. This then appropriately reserves use of the concept of ‘regulation’ for delegated acts of commission or other bodies, Parliament and (where appropriate) Council retaining a right of prior approval or subsequent recall over all such regulatory acts¹⁰. Given the degree to which citizens currently find the work of the Union unintelligible, simplification is certainly called for. It remains to be seen whether enough has been achieved in this line.

Anyway, enough has been said to describe the work and the character of the Convention. It did succeed in producing a Draft Constitution, and that Draft, with

9. See Articles I-32 and following of the Draft Constitution.

10. See now Article I-36 (2) of the Draft Constitution. Regulations may be made subject to ex post revocation, or to ex ante approval by Parliament and/or Council.

amendments on a small number of important and contentious points, is the main substance of the Constitution adopted by the IGC for ratification by the states. It is time to consider its content, in outline at least.

4. THE PROPOSED CONSTITUTION

The Proposed Constitution is divided into four parts:

Part I is the core of the Constitution, covering in 60 Articles the essentials of the European Union as a polity of a unique kind. It formally establishes the EU ‘on which the Member States confer competences to attain objectives they have in common’. It then sets out the values, the objectives and the governing principles of the Union. It declares the Union’s commitment to Fundamental Rights and non-discrimination, and it confirms the common citizenship of the Union as supervening on citizenship of any Member State, Union citizenship being in addition to, not in substitution for, that of one’s own Member State. It defines the principles on which the Union may exercise its competences: the limiting principle is that of conferral —no power except what is conferred by the constitution. As to manner of exercise, the principles of subsidiarity and proportionality apply —do only what requires all-Union action for the sake of effectiveness, and do only as much as is necessary to achieve the objective set¹¹.

In that light it lists the competences conferred on the EU, being either matters of exclusive legislative competence, or of shared legislative competence, or of complementary competence not involving legislative power exercised at all-Union level. Within these restrictions, the primacy of Union law over Member State law (as long established in the Community ‘*acquis*’) is continued. Provision is made for a Common Foreign and Security Policy (especially engaging the European Council and a new Union Foreign Minister who is also to be a Vice President of the Commission). Also envisaged is the possibility of ‘Enhanced Co-operation’ in the way of greater integration for specific purposes of sub-sets of all the member States.

The main institutions of the Union are defined:

11. The terms of Article I-11 so far as material are:

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution.”

- the Parliament, representing the citizens of Europe directly in law-making and in scrutiny of the Executive.
- The European Council (heads of state or of government) with a new arrangement for a two-and-a-half year presidency, giving the overall impetus and guidance to Union activities but having no legislative power
- The Council of Ministers (one per Member State) exercising legislative power on equal terms with the Parliament and also having delegated executive functions.
- The European Commission, which has the main executive power on behalf of the EU, which supervises the upholding of the Constitution¹² and the law throughout the Union, and which exercises the principal right of legislative initiative under the guidance of the European Council and subject to the final legislative decisions of Parliament and Council.
- The Court of Justice of the European Union, with jurisdiction over issues between Member States and Institutions, and Institutions *inter se*, on questions concerning the validity of Union acts and the enforcement of Union obligations, and with power to determine issues of Union law on reference from Member States' Courts, but otherwise with relatively narrow jurisdiction concerning citizens' complaints.
- The European Central Bank, responsible for the euro, the Court of Auditors, responsible for oversight of financial propriety and prudence, and as advisory bodies the Committee of the Regions and the Economic and Social Committee, continuing much as before. But the Committee of the Regions acquires a new power to act on behalf of the Regions in challenging legislation considered to be in breach of the principle of subsidiarity.

The balance between the Institutions is adjusted so that legislative and budgetary power are ordinarily to be exercised on a bicameral basis between Council and Parliament, and always to be exercised by open debate and public voting. This defines the 'democratic life of the Union'¹³ along with the confirmation of the office of the European Ombudsman and rights to data protection, to democratic equality, representative and, in part, participatory democracy, and guarantees of the special rights of churches and religious groupings as well as similar secular associations to consultation in legislative processes. Part I also determines that the European Union will have legal personality (previously, this was enjoyed only by the European Community as an internal 'pillar' of the Union established at Maastricht¹⁴ in 1992) allowing it for the first time to sign treaties in its own

12. Previously, the 'guardian of the Treaties'.

13. See Articles I -45 -52, grouped together under the 'democratic life' heading.

14. Hitherto, under the bizarre arrangements agreed at Maastricht in 1992, the European Community has had international legal personality and is a party to treaties, such as the World Trade Organization Treaties (WTO), which deal with matters over which member States have transferred competence to the Community. The Union, which has two other 'pillars' apart from the Community pillar, concerning Defence and Foreign Affairs and Justice and Home Affairs respectively, does not. This is among the oddities the present Constitutional proposal seeks to consign to the dustbin of history.

right, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, “the European Human Rights Convention”), and to sit on international bodies. Part I concludes with an ‘exit clause’ (Article I-60) providing for Member States which so decide to leave the Union, with suitable arrangements for continuing relationships after departure.

Part II consists of the Charter of Fundamental Rights which will be binding as a matter of law (previously adopted at Nice in 2000, it initially only had the force of a political declaration. It binds all EU institutions, but binds the governing authorities of the Member States only when they are implemented in EU law. Otherwise this will not impinge on domestic human rights legislation in Member States, and the text of the Charter (which mirrors closely the European Human Rights Convention) is calculated to facilitate avoiding conflict with the Human Rights Court at Strasbourg and its established case-law¹⁵. It will cease to be possible for Member States to transfer decision-making to the Union level in a way that deprives citizens of rights constitutionally protected in domestic law.

Part III clarifies in greater detail the policies and each of the domains of competence of the Union. This part derives almost entirely from the existing Treaty on European Union and European Community Treaty as most recently amended by the Nice treaty of 2000. It adjusts the provisions of these to fit the new constitutional framework, and sets them out in a more logical and intelligible order. (They match the layout of the central constitutional elements in Part I.) It also contains important further provisions detailing the Institutions’ mode of action, in expansion of Part I

Part IV deals with how the Constitution will come into force and makes provision concerning future amendment, either by use of a fresh Convention process for major amendments, or by simpler procedures involving unanimity at Council and consent of Member State Parliaments for less far-reaching changes.

Essentially, this Constitution represents evolution rather than revolution. It takes the existing treaties and institutions, and consolidates the treaties into one, with the essentially constitutional Part I differentiated from the rest, and the Charter of Rights also given a special place as Part II. It greatly simplifies the instruments through which the Union can act¹⁶. Above all, it markedly enhances the democratic character of the law-making activities of the Union, by recognising an ‘ordinary legislative process’ with co-equal roles for Parliament (representing the citizens directly) and Council (representing the citizens in their several states), in response to Commission proposals. It also provides for more effective answerability of the executive at Union level (Commission accountable to Parliament) and in the states

15. See Article II-112 (3) ‘Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of these rights shall be the same as those laid down by the said Convention.’

16. These will be six in number: a European Law (ex-‘regulation’); a European Framework Law (ex-‘directive’); a delegated regulation within restricted powers conferred on the executive and subject to recall, a binding decision, an opinion and a recommendation. See Articles I-33 - I-39.

(better possibilities for parliamentary control of Ministers at Council). It builds in a requirement of openness and publicity in all legislative and most executive acts. It gives far better recognition than before to the internal diversity of Member States and the need for subsidiarity to entail respecting the smaller scale democracy of the regions (some of them 'stateless nations fully comparable in size and economic clout with the smaller Member States) and the local authorities.

The Constitution takes what is already there—and which has worked to the common benefit of Europeans for half a century—and improves the framework to let it work better. It acknowledges continuity of the *acquis communautaire* in the Preamble to the Constitution. Its authors have acted in the spirit of what F. A. Hayek¹⁷ and others call 'critical rationalism. They have relied not on an abstract blueprint but on an 'immanent critique' of a relatively satisfactory régime which could, indeed can, be improved by adjusting less satisfactory elements in accordance with the animating principles of the more satisfactory.

5. OPEN LAW-MAKING AND LIMITED GOVERNMENT

If the Constitution comes into force as planned, law-making in the Union will step out of the shadows of the diplomatic-type negotiations that have characterised COREPER¹⁸ and Council working groups, and that have determined the agenda and even the output of the Council of Ministers. Instead, for all ordinary legislative work, the Union will genuinely have a two-chamber legislature, comprising the directly elected European Parliament and the indirectly elected Council of Ministers. All legislative deliberation and decision-making will take place in the full light of publicity¹⁹. New arrangements in favour of the Member State Parliaments will put them in the position to act as more democratically effective monitors of the legislative activity of ministers at the Council. There is to be an arrangement whereby Parliaments will directly receive each legislative proposal by the Commission. The purpose of this is in particular to give them a new standing as guardians of the principle of subsidiarity. However, it will equally improve their capability to secure answerability back home of Ministers going to or returning from meetings of the Council. For the ministers will no longer be deliberating and deciding in private there when they are making laws.

The principal right of legislative initiative will remain in the hands of the Commission, as the Union's primary executive branch. It will place proposals before the legislative institutions, and they will decide, only making laws to the extent that, after however many amendments they think necessary, the two cham-

17. See F. A. Hayek, *Law, Legislation and Liberty*, vol. I, *Rules and Order* (London, Routledge and Kegan Paul, 1976) 5-9, 14-17, 29-34.

18. The Committee of Permanent Representatives of the Member States; this is charged with preparing all the work for Council meetings.

19. See Article 49 on 'Transparency of the Proceedings of the Union's Institutions'.

bers reach final agreement, through a conciliation procedure if necessary. In turn, the democratic legitimacy of the Commission will be improved, for the President will be elected following the European Parliamentary Election every five years, and will reflect the weight of political opinion expressed in the election. (The proposal envisages the Council making a nomination to Parliament, but, if there were a clear majority position in Parliament, the Council would be no more able to ignore this than can the monarch in the UK ignore an election result when inviting a new Prime Minister to take office). The President, once elected, has a crucial role in selecting the Commission from among the nominees of the States. The President will also have power of dismissal over Commissioners, hence will have considerable democratic legitimacy and constitutional authority.

But there will also be a new full-time (two-and-a-half years renewable) Presidency of the European Council. Will such a Presidency not overshadow the role of the Commission President? Is this no more than a recipe for confusing citizens and outsiders alike? Who speaks for the Union? There is a real matter of concern here, but it is worth noticing that the Draft Constitution gives the Council Presidency very restricted functions, and nothing like the authority the Commission President has. The chairing of the European Council is an important task, and so is that of securing a continuity of the agenda and monitoring the follow-up of its successive meetings. There may in addition be a figurehead role to play in external relations²⁰. But it remains the case that the President of the European Council will be a figure who does not hold, or no longer holds, any national mandate, but is elected to the Chair by the votes of those who do.

Chairing a body all of whose members hold continuing office as head of government or executive head of state, this President will hold a position far short of *primus inter pares*. Indeed, as I have remarked elsewhere ‘less than *par inter primos*’ seems a more appropriate description²¹. There is a real contrast with the substantial constitutional authority vested in the President of the Commission. It may turn out on occasion that the Council invites the President of the Commission to take its chair, and this could even some day grow into a convention of the Constitution. That would, at any rate, be one way to avoid the risk of conflicting authorities, or their puzzling appearance from the citizen’s point of view.

In strategic terms, and especially in relation to Foreign and Security policy, the European Council has a vital role. The proposed Foreign Minister of the Union, who will also hold office as a Vice President of the Commission, will play a key part in maintaining coherence between Council and Commission. Through the European Council, and also in relation to the Council of Ministers, a balance will

20. See Article I-22 (2). The task of ‘assuring the external representation of the Union’ (but without prejudice to the functions of the Union Minister for Foreign Affairs) gives the figurehead element to this function, but the rest of the Article simply underlines that the President’s functions are co-ordinating and chairing, not exercising executive authority. Contrast Article I-27 dealing with the Commission Presidency.

21. European Parliament, debate on the Greek Presidency, 19 June 2003.

be maintained with the Member States and their Parliaments, whose monitoring role will have been strengthened in the way noted above. The extension of the ordinary legislative process (formerly ‘co-decision’) to the great majority of the legislative functions of the Union likewise strengthens the role of the European Parliament.

It is important to stress, however, that the governance of the Union is to be limited government. There are checks and balances between the Institutions. There are the principles of conferral, and of subsidiarity and proportionality. Most important of all, Part II of the Constitution comprises the Union’s Charter of Fundamental Rights as devised by the previous Convention of 2000, approved as a political declaration by the European Council at Nice, but now given full binding force. The Charter has been adjusted in certain minor details to fit its new context and to meet certain apprehensions about its potential scope.²² It binds only the institutions of the Union, and the Member States when they are implementing union law. It has to be interpreted in a way that secures continuing compatibility with the European Human Rights Convention (‘ECHR’) and the jurisprudence of the Strasbourg Court. The commitment that the Union shall in future itself accede to the ECHR is an attempted further guarantee that there will not develop a damaging human rights dualism between the Union and the Council of Europe. Of course, like the States themselves, the Union is free to afford more extensive protection of rights than that achieved by the ECHR and the Human Rights Court.

Whatever else, the scheme of government envisaged in this Constitution is, beyond doubt, limited government. The limitations, albeit elaborate, seem fully intelligible and quite workable.

6. CONTINENTAL-SCALE DEMOCRACY?

Is all this going to ensure a really democratic form of government for the Union? And will it work? Surely, it will make a difference when the light of open debate shines where previously there was the darkness of bureaucratic-cum-diplomatic preparation of Council business, followed by ministerial voting in private. Greater openness at the pre-legislative stage, and during legislative debates, cannot but bolster the answerability of Ministers to domestic Parliaments. But will parliamentarians successfully rise to this challenge, and really take a line on European as well as domestic legislation, given the great interaction there now is between the two? Again, what about the European Parliament? Do the votes cast by this Parliament amount to real democratic legitimation, given the perennially low

22. Under the anxious prompting of the United Kingdom government, the provisions on the ‘scope and interpretation of rights and principles’ in Article II-52 were spelt out yet more carefully. In addition, the Preamble to the Charter of Rights authorizes Courts interpreting the Charter to take into account the explanatory notes on the Charter originally produced by the President of the Charter Convention, updated in the light of the work of the Constitutional Convention.

(45.7% over the whole Union in 2004) level of turnout at elections? Will it help if the electing of the Commission President comes to be seen as one immediate upshot of a European election?

All this remains to be seen. Current proposals for better law-making procedures aim *inter alia* to reduce the time-lag between introduction of legislative proposals and their ultimately coming into force, then being effectively transposed into the laws of the Member States and being made fully operative there. But there is an inevitable delay built in to any properly deliberative, interactive, and reflective legislative process. It is in these circumstances difficult for citizens to be aware of whom they should blame, and of how to hold appropriate persons to account, in case of measures that arouse their ire. Most MEPs, in my experience, do seek conscientiously to represent their constituents and to give effect to reasonable representations about current legislative business. But the super-leviathan of Europe, a mighty super-tanker, responds only slowly to changes of course determined by those on the bridge. It can be difficult to notice, far less be grateful for, MEPs' best efforts at responsive representation of their electors.

The time-lag argument might, however, have another, more encouraging, application. Even if a new constitution can create the instruments of a genuinely enhanced democratic accountability of the political institutions of the EU, this is unlikely to become at once obvious to any save a minority of enthusiasts for the Union project. Low electoral energy levels developed over past decades will not at once rally in response to the new situation. But if real change does come about, it will not for ever be possible for even the most neglectful of media to conceal this from citizens. A starting point for change could and should be the process of adopting the changes. A process of submitting the ratification of a new Constitution to debate and decision in each of the States will mark, if the response is positive, a new resolve of Europeans to exercise ownership of the institutions erected in their name and carrying on business by their presumed will and consent. If the response is negative, the Constitution should not be wished on them despite such a verdict.

If it is negative, it is difficult to see what different process could be devised to produce a more acceptable result. Not merely was the Convention process a very open and public one, so was the IGC that followed. Far more was made open and public during the intergovernmental negotiations over the adjustment of the draft than ever before. In that sense, the Convention process can be claimed to have brought about a better and more open IGC process.

At the end of it all, the final version of the Constitution in all twenty one languages of the Union was established over the summer and early autumn of 2004. The Constitution Treaty was signed in Rome on 29 October on behalf of all the Member States, with provision that it would come into force after ratification by all Member States, ratification to be completed within two years. Since then, the debate has been remitted back to the member States and to European public opinion generally for decision whether to ratify or not. Will the European Union acquire this new constitution or not? It remains to be seen.

Section II: The Constitution and Legal Theory

INTRODUCTION

The process that produced the ‘Treaty Establishing a Constitution of Europe’ was fascinating both from a participant’s and from an observer’s standpoint. The whole process both poses questions for constitutional theorists and challenges them to engage in the debate using their own expertise in terms sufficiently intelligible to make a contribution to the public decision-making process. This, it will be recalled, has reverted to the hands of the citizens of Europe, deciding state-by-state, with a requirement for ratification by every state. Some will decide by votes in Parliaments alone, on the basis of the principle of representative democracy. Others will defer to direct democracy and decide by referendum, either alone or in combination with ratification legislation in the event of a ‘Yes’ vote in the referendum.

There are four questions I want to ask. The first is ‘Treaty or Constitution?’, the second is about the legitimacy of the constitution-making process I have just described, the third raises the issue of continuity and evolution in constitution-making, and the fourth concerns the possibility of ‘constitutional patriotism’ on the European level.

1. TREATY OR CONSTITUTION?

There was an ambiguity built into the very idea of the Convention process. Were we preparing the ground for a new treaty, or for a new constitution? The answer was ‘both’, since the existing Union was and is constituted by Treaties that can be replaced only through a new Treaty. On the other hand the existing Treaties have over the years been transformed through judicial action into a kind of ‘functional constitution’²³ or ‘constitutional charter’²⁴.

The Convention, in calling its output a Draft Constitution, hoped to show one way whereby the Union could transform itself from a Treaty-based collectivity of

23. See N. MacCormick, ‘On the Very Idea of a European Constitution: Jurisprudential Reflections from the European Parliament’, *Juridisk Tidskrift* (2001-02) 529-541. I differentiate a ‘functional constitution’ comprising norms of whatever origin that establish a frame of government and empower organs of government for some polity or organisation from a ‘formal constitution’, which does the same thing, but does it explicitly and is adopted by a deliberate act of constitution-making. Richard Bellamy, in a paper to the CIDEL Conference in London, 12-13 November 2004 distinguishes (in effect) between a ‘régime constitution’ and a ‘polity constitution’. My functional constitution is his constitution for a régime.

24. Compare S. Douglas-Scott, *Constitutional Law of the European Union* (London, Longman, 2002) at pp 255-258.

states into a formally constitutionalised legal entity having personality in international law. The accumulation of treaties up to and including Nice (2000), the puzzling juxtaposition of the Union and the Community, the so-called ‘pillar’ structure, the diplomacy masquerading as legality, all these unsatisfactory characteristics were ready to be swept away. In place of a messy implicit or functional constitution secreted within the treaties and the surrounding case-law, the Convention offered and the IGC completed a clear text for an explicit formal Constitution.

The European Union remains a polity of its own kind, *‘sui generis’*. It is clearly not a state itself. For it has no monopoly of legitimate force over the Union’s territory, nor has it independent tax raising powers. Nor may it run a budget deficit (indeed, its ceiling of allowable expenditure is set at 1.28% of the GDP of the Union, in contrast to the USA which spends about 20% at the Federal level). It can co-ordinate the defence of the Union but cannot raise a defence force of its own. Some key parts of its arrangements do not apply throughout the territories belonging to the Union—for example, the eurozone is not co-extensive with EU, even though the euro is the official currency of the Union (Article I-8)²⁵. In future, moreover, in areas that may include defence, states will be able to engage under the constitution in projects for enhanced co-operation, proceeding with further integration more rapidly than can be achieved by unanimity. The Union co-exists with its Member States in a condition of ‘constitutional pluralism’²⁶ under which each state retains its own constitutional independence, including the right of ‘exit’. On the other hand the constitutional character of the Union has already been developed autonomously by judicial interpretation, in a manner that will probably not be undercut by the terms of Article I-1 and the ‘principle of conferral’. For that is the twin of the ‘principle of primacy of Union law’, which derives from the early constitutionalising decisions of the Court of Justice²⁷.

It is reasonable to conclude that the Union is a hybrid polity, having some elements of the federal and some of an international organisation of a particularly intimate kind, aspiring to effective democratic self-government at several levels guided by the principle of subsidiarity. The ‘suigenericity’ of the union should be welcomed and cherished. If ‘confederation’ is not too shop-soiled a term, it perhaps fits the union better than any alternative. Once the Treaty Establishing a Constitution for Europe is ratified and is in force (if it ever is), the text thus adopted

25. THE SYMBOLS OF THE UNION

The flag of the Union shall be a circle of twelve golden stars on a blue background.

The anthem of the Union shall be based on the “Ode to Joy” from the Ninth Symphony by Ludwig van Beethoven.

The motto of the Union shall be: “United in diversity”.

The currency of the Union shall be the euro.

Europe day shall be celebrated on 9 May throughout the Union.

26. See MacCormick, *Questioning Sovereignty*, pp. 117-121; Douglas-Scott, *Constitutional Law of the EU*, pp. 523-530.

27. See J. H. H. Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press 1999) pp. 16-39.

will become ‘the Constitution’ *simpliciter* in terms of the working of the Union, and by virtue of the way it refers to itself internally in the text. Its amendment will be regulated by itself (under Part IV), in a way that reflects the confederal or sui generis character of the Union, still requiring large-scale consensus, but giving special significance to any amendments adopted by at least four fifths of the states. The quality of the constitution should be judged by its contents, not by the legal act, of Treaty-making, that brought it into being as a project for ratification.

2. WAS THE PROCESS LEGITIMATE?

My second question, closely linked to the first, concerns the legitimacy of the process of determining the content of the constitution. As has been noted, though the IGC made important adjustments, the Constitution is substantially that which the European Convention completed as a draft in July 2003. Someone might then ask whether that Convention was legitimately composed for the purpose of constitution-making. Certainly, as I stated in section I .3 above, on the character of the Convention, it was decidedly a representative, a ‘parliamentarian’ assembly called to the task of constitutional deliberation. It did not, however, comprise individuals elected to the very purpose of making a constitution. All its elected members had been elected to other tasks, either in the European Parliament, or in a Member State parliament, or in a Member State government, or by indirect election as European Commissioner, or by nomination of the European Council in the case of Messrs Giscard D’Estaing, Amato and Dehaene. The institution to which they had been elected then deputed them, by elective or other processes, to act in a representative capacity at the Convention. Whoever may be thought to have legitimately the *pouvoir constituant*, the power of constitution-making, of the European Union, the Conventioneers could not (nor did they) claim to be the ones that have it²⁸.

Does that constitute an objection? No, because the task of Convention was to examine the problem of alienation of the Union from its citizens, to analyse, to propose, and, if agreement could be reached, to draft. Drafting proved possible, and was achieved by very wide consensus in the Convention. *Pouvoir constituant* rests with the states, and, since they are democracies, rests with them only as trustees for their citizens. The states being democratic states as a condition of their membership of the Union, they must act either through or in response to referendums, or through representative parliaments as embodiments of the general will according to their own constitutional tradition and practice.

28. On *pouvoir constituant/pouvoir constitué*, compare Douglas-Scott, *Constitutional Law of the EU*, pp. 535-536, and see N. Walker, ‘Late Sovereignty in the European Union’ in Walker (ed.), *Sovereignty in Transition* (Oxford, Hart Publishing 2003), pp. 3-32 at 1-20, discussing M. Foucault; also H. Lindahl, ‘Sovereignty and Representation in the European Union’, Walker *op. cit.*, pp. 87-114 esp. at 89-90, J. Ziller, ‘Sovereignty in France’, Walker *op. cit.*, pp. 261-277 at p. 270.

Even as trustees, some will object, the states cannot have a constituent power, as distinct from treaty making power under international law. If the European Union is to be or is to become a polity in its own right, not simply by a judicial sleight of hand, some will consider that only the citizens themselves can bring this about, acting collectively and by some appropriate majority²⁹. To say this, however, is to confront the well-known paradox of constituent and constituted power. The citizens are not citizens of this polity till it has a constitution, so how can they be *ex ante* the ‘we’ with the power to make a constitution for ‘us citizens’.

In relation to these points of doubt, Article 1 of Constitution has a certain studied ambiguity:

I-1 (1.) Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall co-ordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it.

The will reflected in the act of establishment purports to be that of citizens and States ‘of Europe’. But the text then stipulates that its powers derive from the act of conferral by the Member States on the Union of competences towards attaining common objectives of the States.

There are two things to say here: first, the Constitution recognises here that its citizenship in a sense already exists —citizenship of the (‘Mark I’) European Union was established by the Treaty of Maastricht in 1992³⁰. But secondly, for constituent purposes, citizens act state by state (the same was the case in the United States of America for the adoption of the Constitution of 1787, and continues, in part, as to its subsequent amendments). This duality of citizen-will and state-will can be said simply to reflect or re-present this Union’s sui generis, confederal character Union, for which I have already argued.

There could be a counter-argument that the constitutional traditions of all or some of the member states have no place for such a hybrid constituent will³¹. But the answer to that is that the member states are, exactly, states, and the Union is not a state. What makes sense in respect of constituting a state will not automatically make sense in respect of constituting something that is not a state, and very obviously designed not to be one —one day, it could become a state, no doubt; but the exciting thought is that it need not. Europeans now have a choice.

29. Compare Bert Van Roermund ‘Sovereignty, Popular and Unpopular’ in Walker *op. cit.*, pp. 33-54.

30. For a devastating comment on Maastricht citizenship, see Weiler, *Constitution of Europe*, pp. 324-335.

31. See generally Walker, *Sovereignty in Transition*, chapters 11 - 18, and in particular Ziller, *cit. sup.* n. 28.

Among them has developed, partly by design and partly by the normal operation of unintended consequences, a polity of a new kind, not a state or a super-state, but not a mere international organisation of a purely or mainly intergovernmental kind. It is a confederation of its own kind, of a new kind, the first ever democratic confederation of democratic sovereign (or, perhaps, post-sovereign) states.

3. THE SIGNIFICANCE OF CONSTITUTIONAL CONTINUITY

My third point concerns again the issue of continuity and of evolution. The Constitution Treaty contains in its preamble words that the Convention did not include in its Draft, which amounted to a serious omission from it. These are as follow:

DETERMINED to continue the work accomplished within the framework of the Treaties establishing the European Communities and the Treaty on European Union, by ensuring the continuity of the Community *acquis*...

This is absolutely vital. The Constitution does not invent the Union out of nothing. It reconstitutes a going concern, which already has a functional constitution³². Immodestly, I must say I moved a partly unsuccessful amendment in the Convention to make a similar point.³³ The above noted and always present paradox of constitution making is that only those who are already constituted in some kind of a polity can adopt a constitution, but persons only become members of a polity by having that character bestowed upon them by a constitution. A Constitution makes you a citizen, but you have to be one to adopt a constitution. The dialectic of *pouvoir constituant* and *pouvoir constitué* is indeed puzzling, until one reflects

32. Joseph Weiler's *Constitution of Europe* in its totality, taken indeed with much other work of his, is eloquent on the constitutional evolution of Europe, and also on the unique kind of polity the European Union is.

33. My proposal was aimed at ensuring that the citizens were seen to be acting within or alongside the states, and to acknowledge that it was as already-citizens that we Europeans could now proceed to improve our constitution and give it the full character of a constitution for a new kind of polity. Here is the text of amendment and explanation as lodged with the Convention.

"Mindful that, after more than fifty years of endeavour in peace and in mutual solidarity, the States and Peoples within a great part of the European Continent have successfully established a Union of a unique kind among themselves, and endowed it with a common citizenship, we the citizens of this European Union and our several States hereby adopt the following Constitution in order the better to regulate our common affairs, to declare the values and objectives of our Union, and to establish in an effective and democratic way the competences of the several Institutions of this Union.

"Explanation: *The Union already exists, and has proven its durability as a polity of a unique kind. The task is therefore to establish a proper constitution for this Union, and it should be clear that those who establish it are those who are already its citizens, acting through the member States whose citizens they also are. Whether and to what extent the Constitution endows the Union with a federal character is a consequence of its contents, not a condition to be stated in the opening Article.*"

on the always-present element of custom and tradition in real-life constitutional processes³⁴.

If the European Coal and Steel Community and the European Economic Community and Euratom had never existed nothing that is happening now would have happened in just this way. But these organisations, with an interestingly novel institutional structure including one ‘Court of Justice of the European Communities’, were set up five decades ago by Treaties among the original six (Belgium, France, Germany, Italy, the Netherlands, and Luxembourg). In due course, the Court decided that the EC Treaty in particular, by necessary implication, had to be interpreted as binding and directly applicable law throughout the Community, overriding national law. The same went for legislation made in exercise of competence conferred by the Treaty. Otherwise, it held, the member states’ aim to establish a common market without internal barriers to trade would be unachievable. The cases on the supremacy and direct effect of Community law have been widely recognised as having brought about, in a juridical if not an overtly political sense, the ‘constitutionalisation of the treaties’³⁵.

Over many years, which saw the accession through five enlargements of a total of nineteen other Member States, each under a freshly agreed treaty of accession, and which saw major treaty revisions (the Single European Act of 1986, the Maastricht Treaty of 1992, that of Amsterdam in 1997, and finally that of Nice in 2000) these judicial decisions stood unamended. What might initially have been set aside, or formally repealed as a kind of judicial *coup d’état* (or *coup de communauté*?) has become a received part of the legal order of the Community and Union. When the ‘European Union’ was inaugurated in 1992, it was carefully set up outside the Community, which was acknowledged as one of its ‘pillars’ alongside two strictly intergovernmental ‘pillars’ that embraced Foreign and Security Policy, and Justice and Home Affairs. Nevertheless, in the very act of trying thus to encompass and constrain the judicially developed ‘constitutional charter’ of the Community, the Treaty on European Union announced the inauguration of citizenship of the Union³⁶. This was, as still it will be under the new Constitution, possessed by citizens of all the states as an addition to, not a substitution for, their national citizenship. So now there was a functional but not yet formal constitution, and there was a common citizenship. Union citizenship was still somewhat shadowy, but the devising of a common EU form for passports that remain national passports was an early symbol of the change, and the Court of Justice began to reflect on the implications of this new citizenship.

34. This point is argued out in my *Questioning Sovereignty*, at pp. 91-93.

35. See Weiler on the ‘transformation of Europe’, in *Constitution of Europe* pp. 10-101; compare P. Craig and G. De Burca, *EU Law, Text, Cases and Materials* (Oxford, Oxford University Press, second edn. 1998) pp. 255-264, Douglas-Scott, *Constitutional Law of the EU* pp. 255-281.

36. Compare Weiler, *Constitution of Europe*, pp. 230-233.

The ‘basic norm’ of the European Union, as of other legal orders, is no mere juristic hypothesis³⁷. The body of custom and usage that has surrounded acceptance of the Community and Union Treaties, and acknowledgement of the functionally constitutional character consequent on the leading ECJ decisions, amounts to a common acknowledgement of the Treaties’ normative status for the Member States and their citizens. Those who now have the opportunity actively to embrace that citizenship by an act of political will in adopting a new Constitution are already citizens (and will remain so if they decline to adopt it). They are so by virtue of the *acquis communautaire* whose continuity the preamble now expressly acknowledges.

4. EUROPEAN CONSTITUTIONAL PATRIOTISM

My final point is brief, but has a certain saliency in a Conference also addressed by my greatly and affectionately respected colleague Jürgen Habermas³⁸. It has been a long-running question whether the European Union can achieve a truly democratic character on a continental scale in a polity that already has twenty one official languages and could soon acquire three more, to say nothing of a multiplicity of ‘regional and minority languages’ which the Constitution declares worthy of respect. One expression of this is the saying that you cannot have democracy —the rule of a *demos*, a people —where you have no single *demos* or people³⁹. Other expressions of much the same idea concern the absence of any substantial European political class with a single ongoing political discourse, or set of overlapping discourses⁴⁰. This absence is reflected in, and partly caused by, the absence of any all-Europe media of communication and of any real European political parties other than loose confederations (some looser than others, of course) of nationally or regionally based parties.

One answer to this, proposed vigorously by Habermas, concerns the possibility of ‘constitutional patriotism’⁴¹. Human polities need not be grounded simply in the bonds of mutual sympathy, arising from a real or imagined common ethnicity or common language. People who share a constitution and are satisfied to take part in the political community it defines can be drawn together precisely by their

37. MacCormick *Questioning Sovereignty*, at pp. 91-93, again.

38. See J Habermas, ‘Die postnationale Konstellation und die Zukunft der Demokratie’ in *Die Postnationale Konstellation, Politische Essays* (Frankfurt, Suhrkamp, 1998) pp. 91-167.

39. Compare Weiler, *Constitution of Europe*, pp. 336-348.

40. See L. Siedentop, *Democracy in Europe* (Harmondsworth, Middlesex, Allen Lane, the Penguin Press: 2000), pp. 122-150; compare also Philip Allott, *The Health of Nations* (Cambridge, Cambridge University Press, 2002), pp. 182-228 on the ‘crisis of European Constitutionalism’. There being no European society, there can be no all-Europe democracy.

41. ‘Citizenship and National Identity: some Reflections on the Future of Europe’ 12 *Praxis International* (1992) 1.

common loyalty to the constitution —or, rather, the constitutional and legal order that unfolds in accordance with it.

This could be all the more so when the constitutional order in its evolved and currently not very satisfactory shape is used as the launch-pad for a new, more intelligible and democratic constitution to be adopted only if enough of the already-citizens vote to embrace it. They could thus acquire a newly and more substantially defined citizenship (Charter of Rights, etc.) defined by this new constitution that critical discourse has distilled out of the current one.

If they do so, they will endorse a legislative process that has proper democratic legitimation in the Parliament and in the Council under scrutiny of national parliaments, with a more fully accountable Executive than hitherto. Given the formula for Qualified Majority voting in the Council (55% of states, representing 65% of all citizens, but no blocking minority to comprise fewer than four states) and the need for an absolute majority of votes in the Parliament, checks and balances abound. If subsidiarity and proportionality are adequately policed under the definitions given of them, the little democracies of the locality, the city, the region, the stateless nation will be left to do the things that are best done with local commitment and local knowledge. The Member States as contexts of very strong democratic identification will not suffer undue intrusion from the European legislature of unwanted and unnecessary legislation that intrudes in unnecessary detail into domestic law.

In these circumstances, Europeans who reflect on the imperatives for common and continuing peace in decent prosperity in this continent, for achievement of a satisfactory and sustainable environment both continentally and globally, and for a fair contribution to the prosperity of developing countries, may not see the European Union as a looming and threatening super-state, a ‘country called Europe.’ If so, this Union will then be able to call forth patriotism around a sui generis constitution for a democratic confederation unparalleled in the World’s history to date.