SELECT COMMITTEE ON THE CONSTITUTION

THE DRAFT CONSTITUTIONAL TREATY FOR THE EUROPEAN UNION

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NINTH REPORT

By the Select Committee on the Constitution

ORDERED TO REPORT

THE DRAFT CONSTITUTIONAL TREATY FOR THE EUROPEAN UNION

Introduction

1. In June 2003, the Convention on the Future of Europe presented Parts I and II of its work to the European Council at Thessaloniki. Parts III and IV were presented to the Italian Presidency in July. Together, these four parts constitute the draft Constitutional Treaty for the European Union.

2. The draft Treaty was laid before the UK Parliament in August 2003 (Cm 5897). We are aware that many aspects of the draft Treaty have been examined in depth by other committees at Westminster, particularly the House of Commons European Scrutiny Committee and the House of Lords European Union Committee. The European Union Committee has published a large number of reports considering the draft Treaty article by article and is shortly to publish a further, overview report. It is our intention that our report should be read in conjunction with these other reports. We are also conscious that the draft Treaty is only a starting point—the final text has still to be negotiated at the Inter-Governmental Conference which began on 4th October. Any Treaty would then have to be incorporated into UK law by a bill subject to the usual Parliamentary procedures. If such a bill is introduced we will comment further. In view of the wide public interest in the potential implications of the draft Treaty, we considered that we should set out to inform the debate at an early stage, not least to assist those currently negotiating the Treaty on behalf of the UK.

3. The Committee is of the view that the draft Constitutional Treaty will, if implemented in UK law, have a constitutional impact on the United Kingdom. We therefore wrote to the Rt Hon. Peter Hain MP, the Government’s representative to the Convention, to ask him to set out the Government’s view on how the Treaty would affect the constitution of the United Kingdom (see Appendix 2). We received a reply from the Foreign Secretary, the Rt Hon. Jack Straw MP (see Appendix 3).

4. We also issued a Call for Evidence to a number of academic specialists asking for their views (see Appendix 4). In response to this, we received memoranda from Professor Anthony Arnull (University of Birmingham), Professor Rodney Brazier (University of Manchester), Ms Sionaidh Douglas-Scott (King’s College London), Professor John McEldowney (University of Warwick) and Mr Alan Trench (The Constitution Unit, University College London). All the evidence we received is published with this Report. Professor Patrick Birkinshaw also submitted to us a paper that is to be published separately. We are indebted to these individuals for their assistance, from which we have derived both information and insight. We summarise the main constitutional concerns raised by Professor Arnull, Ms Douglas-Scott, Professor McEldowney and Mr Trench below. Professor Brazier’s paper deals solely with a specific question relating to the adoption of the draft European Constitution, namely the place of the advisory referendum in the process of dealing with significant constitutional questions in the United Kingdom. We do not comment on this paper in relation to the draft Treaty. We have nonetheless printed it as it raises a point of constitutional significance to which we may wish to return in a future report.

The scope of the draft Constitutional Treaty

5. We first draw attention to some of the most prominent provisions in the Draft Treaty, although such an outline inevitably passes over very many matters of practical importance.

6. Although the avowed purpose of the draft Treaty is to prepare a Constitution for the European Union, the legal status of the document, if and when it is signed and ratified by the member States of the Union, will remain that of a treaty at international law. It is by means of treaties that the structure, composition aims and objects of all international organisations are determined.

7. One aim of the draft Treaty is to re-organise and present in an accessible form the present provisions which in a most complex way, explained by the history of the European Union, govern the activities of the Union. Furthermore, the framers of the draft Treaty have included many provisions

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which in various ways change the structure of the Union, change the working of the Union organs, and modify the links between the Union and the democracies of Europe.

8. Title I of Part I of the draft Treaty deals with the definition and objectives of the Union. By Article I-5 (relations between the Union and the Member States) the Union shall “respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional” and shall “respect their essential State functions”: the Union and the Member States shall “in full mutual respect, assist each other in carrying out tasks which flow from the Constitution”. Article I-6 confers legal personality upon the Union.

9. In Title II of Part I, Article I-7 requires the Union to recognise the fundamental rights contained in the Charter of Fundamental Rights, which forms Part II of the Constitution. Article I-8 provides that every national of a Member State shall be a citizen of the Union (additional to his or her national citizenship), and sets out the rights which citizens of the Union shall enjoy.

10. In Title III of Part I, Article I-9(1) provides that “the limits of Union competences are governed by the principle of conferral”, and that the use of those competences is governed by the principles of subsidiarity and proportionality. By Article I-9(2), the principle of conferral is explained, namely that the Union shall act within the limits of the powers conferred on it by the Member States: “Competences not conferred upon the Union in the Constitution remain with the Member States”. Provision is made by Article I-9(3) and by the Protocol on the Role of the National Parliaments in the European Union for a procedure informing all national parliaments of the Commission’s legislative proposals and enabling national parliaments to submit their views on whether a legislative proposal complies with the principle of subsidiarity.

11. In Title III of Part I, by Article I-10, “The Constitution, and law adopted by the Union’s institutions in exercising competence conferred on it, shall have primacy over the law of the Member States”. Member States are to take all appropriate measures to ensure fulfilment of obligations flowing from the Constitution.

12. Articles I-11-16 deal with the categories of competence that the Constitution contemplates; these include exclusive competence (as to which only the Union may legislate) in respect of establishing the competition rules necessary for the internal market, monetary policy (for those Member States that have adopted the euro), common commercial policy, customs union and the conservation of marine biological resources under the common fisheries policy. Areas of shared competence are specified in Article I-13, and another category of supporting, coordinating or complementary action is set out in Article I-16. Article I-14 deals with the coordination of economic and employment policies. By Article I-15, the Union’s competence in matters of common foreign and security policy covers all areas of foreign policy and all questions relating to the Union’s security which might lead to a common defence. Article I-17 (Flexibility clause) provides a procedure by which necessary powers additional to those conferred by the Constitution may be obtained by a procedure that requires a unanimous decision by the Council of Ministers.

13. The Union’s Institutional Framework is governed by Title IV, chapter 1 of Part I. That framework comprises the European Parliament, the European Council, the Council of Ministers, the European Commission and the Court of Justice. By Article I-21, the European Council shall by qualified majority elect a President, for a term of two and a half years, renewable once, who may not hold a national mandate and whose office replaces the existing arrangement for a rotating President held for six months. In relation to the European Council and the Council of Ministers, Article I-24(1) provides that voting by qualified majority shall in general require a majority that consists of the majority of Member States, representing at least three fifths of the population of the Union; in certain cases, the required qualified majority shall consist of two thirds of the Member States, representing at least three fifths of the population of the Union. New provision is made for the composition of the European Commission (Articles I-25 and 26), including the new post of Union Minister for Foreign Affairs (Article I-27), who as one of the Vice-Presidents of the Commission would be responsible for handing the Union’s external relations.

14. By title V, chapter 1, there is set out a modified hierarchy of legal instruments of the Union, namely “European laws, European framework laws, European regulations, European decisions, recommendations and opinions”. Of these, a “European law” would replace the existing category of regulations; a “European framework law” would replace the existing category of directive (with some modification); and the category of “European regulations” would be new. Article I-35 provides for a new category of “Delegated regulations”.

15. Title V, chapter 2, makes specific provision for measures implementing the common foreign and security policy (Article I-39), the common security and defence policy (Article I-40), and the area of freedom, security and justice (Article I-41) and also provides for the Union and Member States to
"act jointly in a spirit of solidarity" if a Member State is the victim of terrorist attack or natural or man-made disaster.

16. Title VI (The Democratic Life of the Union) contains a group of Articles dealing with principles of representative and participatory democracy, the social partners and social dialogue, the European Ombudsman, the observance of transparency by Union institutions and the protection of personal data.

17. Title IX (Union Membership) provides procedure for the admission of additional Member States that respect the values referred to in Article I-2. Article I-58 establishes means of suspending a State from Union membership rights, when there is a clear risk of a serious breach of those values. Article I-59 makes provision for voluntary withdrawal from the Union by any Member State.

18. Part II of the draft Treaty contains the Charter of Fundamental Rights of the Union, which is to be observed by all Union institutions, bodies and agencies, and by Member States “when they are implementing Union law” (Article II-51(1)). The Charter “does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task of the Union” (Article II-51(2)). It is intended that rights under the Charter which correspond to rights protected by the European Convention on Human Rights shall be interpreted in an equivalent manner (Article II-52(3)).

19. Part III of the Treaty contains more detailed provisions that give effect to the policies and functioning of the Union (for example, the establishment of the internal market by chapter 1, section 1, and the free movement of persons and services by chapter 1, section 2). In respect of economic and monetary policy, chapter II distinguishes where necessary between Member States that have adopted the euro and those that have not.

20. In Chapter IV of Part III, Article III-158(1) provides for the Union to constitute “an area of freedom, security and justice with respect for fundamental rights, taking into account the different legal traditions and systems of the Member States”. This Chapter deals with important areas of public policy, including policies on border checks, asylum and immigration (Section 2), judicial co-operation in civil matters (Section 3), judicial co-operation in criminal matters (Section 4) and police co-operation (Section 5).

21. Title V of Part III (The Union’s External Action) deals in Chapter II with the Union’s common foreign and security policy and in Chapter IV with co-operation with third countries and humanitarian aid.

22. Title VI of Part III (The Functioning of the Union) contains many provisions that are to govern the composition and working of the Union’s institutions, including the European Parliament (Articles III-232-243), the Commission (Articles III-250-257), and the jurisdiction and procedures of the Court of Justice (Articles III-258-289).

23. Part IV (General and Final Provisions) provides, among other things, for the repeal of earlier European treaties once the Treaty establishing the Constitution has come into force (Article IV-2), for the geographical scope of the Treaty (Article IV-4) and for a procedure by which provisions of the Treaty may be amended: subject to the convening of a special Convention or a conference: any amendments will require to be ratified by all the Member States (Article IV-7). By Article IV-9, the Treaty establishing the Constitution shall be concluded “for an unlimited period”.

Constitutional concerns

24. It is inevitably very difficult in reviewing such a draft document to select matters that will have a particular impact on the operation of the United Kingdom constitution, but the following are among the matters to which the papers submitted to us draw attention. Subject to the work of other Parliamentary Committees, we may give further consideration to these at a later date.

(1) The significance of (a) the express provision for the primacy of the Constitution and of European Union law generally (Article I-10(1));2 (b) the express confirmation that powers not conferred on the Union remain with Member States (Article I-9(2)); and (c) the proposed duty of the Union to respect the national identities of the Member States (Article I-5(1));

(2) The impact and likely effect of the new provision for the division of powers (exclusive competence, shared competence, and supporting, coordinating or complementary action)

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2 This is one of several matters currently under consideration by Sub-Committee E of the House of Lords European Union Committee.
between the Union and Member States; and the limitation on national legislation that would arise where the Union has taken action in an area of shared competence or supporting action (Articles I-12, 13 and 16);

(3) The extent to which the use of European framework laws would be likely to differ from the present directives, with regard both to the exercise of national discretion and the established doctrine of direct effect in European law;

(4) The effect of the new formulae for qualified majority voting on the ability of United Kingdom bodies to influence decisions of the European Union;

(5) The effect upon the authority of United Kingdom institutions of the proposals for extending decision-making by qualified majority voting into new areas;

(6) The effect upon United Kingdom institutions of the proposals for (a) the Presidency of the European Council and the Union Minister for Foreign Affairs, and (b) the modified composition of the Commission;

(7) The effect upon United Kingdom institutions of the new competences of the Union in relation to the common foreign and security policy (Article I-15) and the area of freedom, security and justice, and the provision for qualified majority voting in these areas;

(8) The effect on the United Kingdom Parliament of the proposed ‘early warning decision system’ whereby notice will be given to national parliaments of legislative proposals with a period of six weeks being allowed for views to be submitted by national and devolved parliaments on the principle of subsidiarity (Article I-9(3) and the Protocol on the Application of the Principles of Subsidiarity and Proportionality);

(9) The future status and effects of the Charter of Fundamental Rights;

(10) The impact on the system of criminal justice within the United Kingdom of Chapter III on Justice and Home Affairs, which makes it possible for EU measures in this area to have direct effect (currently not the case) as well as increasing the EU’s powers in the criminal law field;

(11) The impact on the system of criminal justice within the United Kingdom of the proposals for European action in respect of serious crime, including the creation of a European Public Prosecutor (Article III-175) and other measures relating to cross-border crime;

(12) The effect of the designation of the draft Treaty as a constitution, and whether this will (a) have a material effect on the future development of the European Union; (b) necessarily mean that future developments will result in a weakening in the authority of the national constitutions of Member States; and (c) subject the constitution of the United Kingdom, which is essentially unwritten, to greater pressures for change than the constitutional arrangements of other major European states.

(13) The issue of whether the European Communities Act 1972 will continue to be recognised as the legal mechanism by which European Union law has effect within the United Kingdom; and whether continuing development in the European Union will have material effects upon the constitutional doctrine of the sovereignty of Parliament;

(14) The effect of procedures and powers in the draft Treaty upon the devolved organs of government in Scotland, Wales and Northern Ireland; upon the relations of these bodies with the United Kingdom Government; and upon the position of local government in the United Kingdom; and

(15) The proposals for withdrawal by a Member State from the Union (Article I-59), and for amendment of the proposed Treaty (Article IV-7), and whether they materially affect consideration of the impact of the Treaty on the United Kingdom constitution.

25. We draw attention to these aspects of the draft Constitutional Treaty for the European Union as raising issues of principle relating to principal parts of the constitution of the United Kingdom.
APPENDIX 1

Membership

The members of the Constitution Committee are:

Lord Acton
Lord Elton
Lord Fellowes
Baroness Gould of Potternewton
Lord Holme of Cheltenham
Baroness Howells of St Davids
Lord Jauncey of Tullichettle
Lord Lang of Monkton
Lord MacGregor of Pulham Market
Earl of Mar and Kellie
Lord Morgan
Lord Norton of Louth (Chairman)

Declarations of interest

General interests declared by Members of the Committee may be found in the Register of Lords Interests, available on the parliamentary web-site at www.parliament.uk

Members of the Committee declared the following interests in relation to this inquiry:

Lord Fellowes—Member of the Royal Household (retired from active list)
Baroness Gould of Potternewton—Member, Council, UCL Constitution Unit; Council Member, Hansard Society for Parliamentary Government; Member, Independent Commission on PR
Lord Holme of Cheltenham—Chairman, Hansard Society for Parliamentary Government
Lord Morgan—Academic Assessor, Leverhulme research projects on Devolution at the University of Edinburgh and UCL Constitution Unit; Member, Council, UCL Constitution Unit; Member, Institute for Welsh Affairs, Cardiff; Adviser to University of Wales, Bangor, ESRC devolution project
Lord Norton of Louth (Chairman)—Member, Council, UCL Constitution Unit (since October 2002); Member, Advisory Board, ESRC Devolution and Constitutional Change programme; Member, Study of Parliament Group; Chairman, Commission to Strengthen Parliament (1999-2000)
APPENDIX 2

Letter from Lord Norton of Louth, Chairman of the Committee, to the Leader of the House of Commons, Lord Privy Seal and Secretary of State for Wales, the Rt Hon. Peter Hain MP

The Constitution Committee of the House of Lords, which I chair, is charged as part of its terms of reference, “to keep under review the operation of the constitution”.

The Committee is of the view that the draft Treaty which has been drawn up by the Convention on the Future of Europe will have a constitutional impact on the United Kingdom. The scope and extent of this impact has been the subject of much speculation, and it is the Committee’s intention to bring clarity to the issue by reporting on the draft constitution. Such a report would focus not so much on the merits or demerits of particular proposals, but on the ways in which the draft Treaty, if implemented, would affect the United Kingdom constitution.

I would therefore be grateful if you would set out the Government’s views on how the proposed European Constitution would affect the constitution of the United Kingdom. In particular it would be helpful if you would state:

• which of the articles in the draft Treaty have potentially significant constitutional implications for the United Kingdom;
• what the constitutional effect of the implementation of those articles would be;
• how the Government have set about evaluating the effect of any constitutional changes; and
• whether the Government have any plans to seek to amend any of these articles during the forthcoming Inter-Governmental Conference.

The Committee plans to produce a report in the autumn. It would therefore be very helpful if you could reply by Monday, 8 September, to enable the Committee to proceed with their deliberations immediately on return from the Summer Recess.

16 June 2003
Thank you for your letter of 16 June to Peter Hain about the Convention’s draft EU Constitutional Treaty. I am replying as Minister with overall responsibility for government policy on the convention and the draft Constitutional Treaty it produced. I apologise for the delay in replying.

You ask, on behalf of your Committee, for the Government’s views on the draft Treaty’s potential impact on constitutional arrangements in the UK. I welcome your Committee’s intention to report on this issue, and am happy to set out the Government’s position. There is a great deal more detail in the White Paper we have just published, and a copy of which I enclose. I would draw your attention in particular to the section on Parliament and International Treaties, on page 23, which explains why the Government believes that for this Treaty, as for those resulting from previous IGCs, such as Maastricht, Amsterdam and Nice, the right procedure is Parliamentary examination and debate, rather than a referendum.

A new Constitutional Treaty, like all the existing Treaties, would be implemented in the UK through an Act of Parliament, in the same way as the UK’s accession to the European Communities was given effect by the European Communities Act 1972. The new Treaty could not enter into force if Parliament did not pass the necessary implementing legislation. So the UK’s constitutional arrangements in terms of Parliamentary approval of the Treaty are not changed. Similarly, any future legislation needed to implement British obligations under the Treaty would, as now, be in the form of primary legislation enacted by Parliament or secondary legislation subject to Parliamentary scrutiny.

It will remain the case that any change to the EU Treaties is a matter for unanimous decision by Member States. Other Member States would also retain their distinct legislative arrangements in terms of the scrutiny, ratification and entry into force of the Treaty and subsequent legislation. The draft Treaty is a constitution for the EU, not for individual Member States although, since EU law has always had primacy over the law of Member States, we have obviously accepted that an EU draft constitution would potentially have significant constitutional implications for some Member States; but we do not for the reasons set out below believe this to be the case here.

The draft Treaty does make some changes to the existing EU Treaties. These are designed to improve the EU’s efficiency and effectiveness. The Treaty proposes making co-decision the normal legislative procedure, thus giving the European Parliament a greater say in decision-making. It also proposes the extension of Qualified Majority Voting (QMV) into some new policy areas. But, overall, the draft text does not change the fundamental relationship between the EU and the Member States. Indeed, in our judgement, both the Single European Act, which opened the way to the completion of the Single Market, and the Maastricht Treaty, which established CFSP, cooperation in justice and home affairs, and the arrangements for the single currency, as well as extending QMV to 30 policy areas, introduced more profound changes to the EU Treaties than are involved in this proposal.

Moreover, the fact that such proposals have been put forward does not mean that they will be agreed. There are 25 states represented around the table. Consensus is required on each amendment to the existing Treaties. As in previous Treaty negotiations, we do not agree with all of the proposed provisions, and will argue our case accordingly. In particular, paragraph 66 of the White Paper sets out some of our main concerns. We shall insist on unanimity remaining for Treaty change, and in other areas of vital national interest such as tax, social security, defence, key areas of criminal and procedural law, and the system of own resources. Unanimity must also remain the general rule for CFSP.

As you will be aware, both the House of Lords European Union Committee and the House of Commons European Scrutiny Committee have done extensive work already on the draft.

16 September 2003
APPENDIX 4

Call for Evidence

The Call for Evidence was sent to a small, targeted number of individuals and institutions.

The Constitution Committee have been appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”.

The Committee have decided to conduct a short inquiry into the proposed constitutional Treaty drawn up by the Convention on the Future of Europe.

The Committee will be pleased to receive written submissions which address the following questions:

1. To what extent will the proposed European Constitution, if implemented, affect the constitution of the United Kingdom;
2. Which of the articles in the draft Treaty have particularly significant constitutional implications for the United Kingdom;
3. What would the constitutional effect of the implementation of those articles be; and
4. What work has been done to evaluate the effect of any constitutional changes.

It is envisaged that this inquiry will be conducted largely on paper, and it is unlikely that those who submit written evidence will be called to present oral evidence.

The proposed Treaty has already been the subject of a number of reports by the European Union Committee of the House of Lords. The Constitution Committee does not intend to duplicate their work, nor to take evidence on the merits of articles in the draft Treaty except insofar as they raise issues of principle affecting a principal part of the constitution of the United Kingdom.
WRITTEN EVIDENCE

Memorandum by Professor Anthony Arnull, University of Birmingham

Summary

In this memorandum, provisions of the draft Constitution are singled out for discussion where they: (a) deal with the relationship between the draft Constitution and UK domestic law; (b) affect EU decision-making, particularly the functioning of institutions in which the UK is directly represented at the political level (namely the European Council and the Council of Ministers) or the overall institutional balance in the EU; (c) affect the UK’s freedom of action, especially in areas touching core aspects of national sovereignty; or (d) affect the role of UK national institutions in the activities of the EU. The main part of the discussion examines the following subjects: primacy; division of powers; the European framework law; infringement proceedings against Member States; decision-making; the Presidency of the European Council and the Union Minister for Foreign Affairs; external action and the solidarity clause; the role of national parliaments; the Charter of Fundamental Rights and Union accession to the European Convention on Human Rights; the amendment procedure. There is then a short section which considers three miscellaneous matters of some constitutional importance, at least for the United Kingdom. The memorandum concludes with an attempt to assess the overall importance of the draft Constitution. The assessment offered is of necessity provisional. The draft Constitution is a long and complex document and its full implications are unlikely to be immediately apparent.

Introduction

1. The Committee has asked me to comment on the constitutional implications for the United Kingdom of the final document issued by the Convention on the Future of Europe on 18 July 2003.3 The full title of that document is “Draft Treaty Establishing a Constitution for Europe.” Although the word “Constitution” in that title has understandably attracted more attention, it is the word “Treaty” which has the greater legal significance.

2. The European Union already has a constitution comprising the Treaties by which it and its constituent parts, the European Community and the European Atomic Energy Community (Euratom), were created.4 These set out the Union’s aims and objectives and how they are to be achieved. But as a constitution the Treaties are deficient. They occupy many pages and have been amended many times. They are the subject of a large body of case law of the Court of Justice, some of it constitutional in character. The result is that a lay reader, if he or she could get through them, would find it almost impossible to understand their effect.

3. A feeling that this was contributing to a decline in the Union’s legitimacy led the Member States at Nice to launch a process of reflection on the future of the Union. One of the issues identified by the Member States as needing to be addressed during that process was “a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning”. The process was taken forward at the European Council meeting in Laeken in December 2001, where, in a Declaration on the Future of the European Union, the question was raised whether “simplification and reorganisation [of the Treaties] might not lead in the long run to the adoption of a constitutional text in the Union.”

4. The Convention on the Future of Europe set up at Laeken to address this and other questions in detail decided to produce a simplified and reorganised text called a constitution which would merge and reorganise the Treaty on European Union (TEU) and the EC Treaty (though not the Euratom Treaty). However, although the Convention method had not been used before to prepare changes to the Treaties,5 the final text will as usual have to be agreed by the Member States in an intergovernmental conference (IGC) and ratified by each of them in accordance with their own constitutional requirements before it can enter into force. So the fact that the new Treaty which eventually emerges might be called a constitution will have no constitutional significance in itself. It

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3 CONV 851/03.
4 See Case 294/83 Les Verts v Parliament [1986] ECR 1339, para 23, where the Court of Justice described the EEC Treaty as the Community’s “basic constitutional charter”.
5 It was used for the first time to draw up the Union’s Charter of Fundamental Rights, which was “solemnly proclaimed” by the European Parliament, the Council and the Commission in December 2000. See [2000] OJ C364/1.
will have the same legal status as all previous Union Treaties. Its constitutional significance will depend entirely on what it actually says.

5. It is not possible within the confines of this memorandum to carry out a comprehensive analysis of all the provisions of the draft Constitution which might affect the constitution of the United Kingdom. In what follows, provisions are singled out for discussion where they:

(a) Deal with the relationship between the draft Constitution and UK domestic law;

(b) Affect EU decision-making, particularly the functioning of institutions in which the UK is directly represented at the political level (namely the European Council and the Council of Ministers) or the overall institutional balance in the EU;

(c) Affect the UK’s freedom of action, especially in areas touching core aspects of national sovereignty; or

(d) Affect the role of UK national institutions in the activities of the EU.

Primacy

6. Article I-10(1) of the draft Constitution 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.” That provision reflects the case law of the Court of Justice on primacy beginning with *Costa v ENEL*, decided as long ago as 1964. The effect of that case law would seem to be preserved by Article IV-3, according to which “The case-law of the Court of Justice of the European Communities shall be maintained as a source of interpretation of Union law.”

7. The doctrine of primacy means that, where there is a conflict in a national court between a national rule and a European rule, precedence must be accorded to the latter. It can only apply where the European rule is sufficiently clear to be suitable for application by a court (a quality known as direct effect). Article I-10 of the draft Constitution may be regarded as defective in not making this clear. More importantly, the existing doctrine of primacy applies only within the context of the European Community: it does not extend to Titles V and VI of the TEU, the so-called second and third pillars, which deal respectively with the Common Foreign and Security Policy (CFSP) and with Police and Judicial Cooperation in Criminal Matters. The merger of the EC Treaty and the TEU which the draft Constitution envisages would abolish the Union’s pillar structure, so the effect of Article I-10(1) would be to make the doctrine of primacy applicable across the entire range of the Union’s activities. Moreover, while matters falling under Title VI would for the most part be brought within the scope of the classic powers of the Court of Justice, most of the provisions concerning the CFSP will remain outside the jurisdiction of the Court. It is therefore unclear whether a national court would be able to ask the Court of Justice for guidance on the effect of Article I-10(1) in nearly all cases concerning the CFSP. If national courts are left to their own devices, there will inevitably be divergence between Member States. The solution to this problem is either: (a) to delete the provision excluding the CFSP from the jurisdiction of the Court, or (b) to exclude the CFSP from Article I-10(1). In a Union which will include the rule of law among the values on which it is based, the former would seem preferable. However, the latter is likely to prove more politically acceptable.

Division of powers

8. The existing Treaties make it hard to establish who is responsible for what: they do not make clear which powers belong to the Union and which powers belong to the Member States. Among the issues identified at Nice as needing to be addressed was therefore “how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity”. These questions are dealt with in Part I, Title III, of the draft Constitution, especially Articles I-12, I-13 and I-16.

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6 *Case 6/64 [1964] ECR 585.*
7 See further below.
8 But see Art III-283.
9 See Art III-282.
10 See Art I-2.
9. Article I-12 lists the areas in which the Union is to have exclusive competence, in other words, where the Member States would have no power to act unless empowered to do so by the Union. The list is remarkably short, comprising only five areas, all of which were understood by the Convention to fall within the exclusive competence of the Union at present.\(^\text{11}\) The wording of one - “…to establish the competition rules necessary for the functioning of the internal market…” - is, however, problematic. The Court of Justice accepted, in a famous case decided in 1969, that “one and the same agreement may, in principle, be the object of two sets of parallel proceedings, one before the Community authorities under...the EEC Treaty, the other before the national authorities under national law.”\(^\text{12}\) That interpretation, the Court said, was confirmed by what is now Article 83(2)(e) EC, which authorises the Council to determine the relationship between national laws and the Community rules on competition. Article 83(2)(e) is in substance reproduced in Article III-52(2)(e) of the draft Constitution. The continued existence of domestic competition rules also underlies the new Council Regulation\(^\text{13}\) on the implementation of the Treaty competition rules. The reference to such rules in Article I-12 should therefore be deleted.\(^\text{14}\) Indeed, it is doubtful whether the subject needs to be mentioned expressly in Title III of Part I since it is an aspect of the internal market, which Article I-13(2) refers to as an area of shared competence. However, the drafting of that provision is not entirely satisfactory, as we shall see.

10. Article I-16 lists five areas in which the Union may take “supporting, coordinating or complementary action.” Such action would not supersede the competence of the Member States to act in the areas concerned and must not entail harmonisation of national laws.

11. Where the draft Constitution gives the Union a competence which is not covered by Articles I-12 or I-16, it is to share that competence with the Member States. This means that both the Union and the Member States will be able to act. The Member States will normally be able to do so only where the Union “has not exercised, or has decided to cease exercising, its competence.”\(^\text{15}\) The main areas in which shared competence applies are listed in Article I-13(2), though the list is not intended to be exhaustive. Not surprisingly, the Convention had some difficulty in deciding which areas of competence should be included.\(^\text{16}\) In some areas (specified in Article I-13(3) and (4)), the exercise by the Union of its competences will not prevent the Member States from exercising their own competences.

12. The idea that the competence of the Member States should be restricted once the Union has acted is well established in the case law of the Court. However, it might be sensible to make it clear that, as in areas of exclusive Union competence, the Member States would not be precluded by Union action from acting themselves if permitted to do so by Union law. It may be noted that the Cambridge draft submitted to the Convention\(^\text{17}\) used a different formula to describe the duties of the Member States when the Union has acted in an area of shared competence, speaking of the Member States respecting “the obligations imposed on them by the relevant Union measures”. However, the precise impact on national competence of Union action will in any event be affected by its legal basis in Part III of the draft Constitution.\(^\text{18}\)

13. Articles I-14 and I-15 deal respectively with the Union’s competence to coordinate the economic policies of the Member States and in matters of common foreign and security policy. The Convention considered this to be justified by the “specific nature” of those areas.\(^\text{19}\) Both are already the subject of provisions in the EC Treaty or the TEU which are developed in Part III of the draft Constitution.

14. Title III of Part I of the draft Constitution is therefore of constitutional importance as it would affect the UK’s freedom of action. Although the task it seeks to perform is a useful one, it may require further attention at the IGC.

\(\text{11}\) See CONV 724/03, p.70.
\(\text{12}\) Case 14/68 Wilhelm v Bundeskartellamt [1969] ECR 1, para 3.
\(\text{15}\) Art I-11(2).
\(\text{16}\) See CONV 724/03, pp.74-75.
\(\text{17}\) See (2003) 28 ELRev 3,17.
\(\text{18}\) See Art I-13; Dougan, above.
\(\text{19}\) See CONV 724/03, p.68.
The European framework law

15. Many of the Community’s existing powers to act involve the use of the directive. According to Article 249 EC, “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” The draft Constitution recasts and rationalises the catalogue of acts available to the Union. The directive is to be replaced by the European framework law, which shall be “binding, as to the result to be achieved, on the Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result” (Article I-32(1)).

16. The difference in wording strongly implies that Member States are intended to enjoy greater leeway in implementing framework laws than they do at present in giving effect to directives. That in turn suggests that framework laws may have to be less prescriptive than many directives now are. A possible result could be that provisions in framework laws that are sufficiently precise to produce direct effect will no longer be permitted. If they are, however, it may follow from Article I-10(1) that such provisions might be invoked in the national courts in proceedings both against the State and its organs (sometimes called vertical direct effect) and against private parties (sometimes called horizontal direct effect). If so, that would represent a significant change from the present position. The Court of Justice has held that, because Article 249 only makes directives binding on the States to which they are addressed, they may not be invoked directly before the national courts in proceedings against private parties. Article I-10(1) says that law adopted by the Union’s institutions has primacy over national law. While that provision should probably be read as applying only to Union law which is sufficiently precise for application by a court, it does not in itself permit a distinction to be drawn according to the status of the defendant. That result might be achieved by treating Article I-32(1) as a special rule which derogates from Article I-10(1), but the position should be clarified, ideally by the insertion of a provision dealing expressly with the concept of direct effect.

Infringement proceedings against Member States

17. If framework laws confer a wider margin of discretion on the Member States than directives, the result may be fewer actions by the Commission against Member States before the Court of Justice for failure to fulfil their obligations. Where such proceedings are brought, the draft Constitution would reinforce the procedure in two ways. Both may be considered of constitutional significance, as they would curtail the rights of respondent Member States to defend themselves.

18. Where the Commission’s complaint is that “the State concerned has failed to fulfil its obligations to notify measures transposing a European framework law”, it may, in the course of the same proceedings, ask the Court to impose on the State concerned a financial penalty (Article III-267(3)). At present, such a request may only be made in the course of a fresh application to the Court where the State concerned has not taken the steps necessary to comply with the Court’s original judgment. This is in principle a welcome reform of a cumbersome procedure. However, the reference to failure to notify the national implementing measures must be a mistake. It would catch States who have in fact implemented but merely failed to notify where required to do so. Clearly no penalty would be justified in such a case. If there is to be a special rule for European framework laws, failure to transpose is surely the real mischief it should tackle.

19. In other cases, the Commission will not be able to ask the Court to impose a financial penalty in its initial application to the Court. As at present, the Commission will only be able to do so if the State concerned fails to take the steps necessary to comply with the Court’s judgment. The draft Constitution envisages that, in such a case, the administrative procedure will be streamlined. The Commission is to have the power to bring the State directly before the Court after it has been given the opportunity to submit its observations (Article III-267(2)). The requirement, currently laid down in Article 228(2) EC, that the Commission should issue a reasoned opinion before applying to the Court will go. This is a rather half-hearted reform. It is not clear why the Commission should not be given a general right to ask the Court in its initial application to impose a financial penalty.

Decision-making

20. The draft Constitution contains important provisions on decision-making. They are of constitutional significance because they will affect the capacity of individual Member States to
influence the outcome of deliberations, particularly in the Council of Ministers, and the balance between the Council and the European Parliament.

21. Article I-22(3) changes the default rule for decision-making in the Council from simple to qualified majority.\(^{20}\) In theory, this works in favour of the larger Member States like the United Kingdom. In practice, the existing default rule rarely applies.

22. Article I-24(1) says that, when the Council of Ministers (or the European Council) takes decisions by qualified majority, “such a majority shall consist of the majority of Member States, representing at least three-fifths of the population of the Union”.\(^{21}\) This would represent a radical departure from the existing system, under which Member States are accorded varying numbers of votes according to the size of their populations. A simple dual majority system of the type set out in Article I-24(1) was advocated by the Commission and by several delegations at Nice, but ultimately rejected in favour of the traditional system of weighted votes, although the process of agreeing on the reweightings applicable in an enlarged Union proved acrimonious.

23. The beauty of the simple dual majority formula lies in its clarity, objectivity and durability: it would not need to be adjusted each time a new Member State joined the Union, although the populations of the Member States would need to be reviewed regularly. It is also consistent with the idea of the Union as a polity of both States and peoples.\(^{22}\) However, the voting element of the formula would give Malta the same weight as the UK, while the population element would mean that the UK had considerably less weight than Germany, a State with which it currently enjoys parity.\(^{23}\) This might cause presentational problems and undermine the legitimacy of decisions taken by qualified majority vote.

24. Perhaps mindful of problems such as these and of the fact that a simple reweighting of Council votes in the enlarged Union had been envisaged at Nice,\(^ {24}\) the draft Constitution provides that the simple dual majority formula will take effect only on 1 November 2009, after the European Parliament elections scheduled for that year have taken place. Until then, the vote weightings set out in Article 2 of a “Protocol on the Representation of Citizens in the European Parliament and the Weighting of Votes in the European Council and the Council of Ministers” will apply (assuming the Union remains at 25 Member States).\(^ {25}\) Article 2 of the Protocol corresponds to the scale which will apply with effect from 1 November 2004 by virtue of Article 12 of the Act concerning the accession of the candidate countries.

25. Much number-crunching will be needed to establish how these systems compare with the present system (although enlargement may well alter the dynamics of decision-making). The following table, based on some provisional calculations, compares the present position with the system which is intended to apply from 1 November 2004.\(^ {26}\)

<table>
<thead>
<tr>
<th></th>
<th>Total votes</th>
<th>Qualified majority</th>
<th>Blocking minority</th>
<th>UK votes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Now (EU-15)</td>
<td>87</td>
<td>62 (71.26%)</td>
<td>26 (29.89%)</td>
<td>10 (11.49%)</td>
</tr>
<tr>
<td>1 November 2004 (EU-25)</td>
<td>321</td>
<td>232 (72.27%) (subject to population test: see below)</td>
<td>90 (28.04%)</td>
<td>29 (9.03%)</td>
</tr>
</tbody>
</table>

\(^{20}\) Cf. Art 205(1) EC.

\(^{21}\) Two thirds of the Member States representing at least three fifths of the population of the Union where the Council is not acting on the basis of a proposal from the Commission or the initiative of the Union Minister for Foreign Affairs (see below): Art I-24(2).

\(^{22}\) Cf. Art I-1(1).

\(^{23}\) For a more detailed discussion of the advantages and disadvantages of the simple dual majority system, see Galloway, *The Treaty of Nice and Beyond* (2001), pp.71-72.

\(^{24}\) See the Declaration on the Enlargement of the Union.

\(^{25}\) A declaration attached to the Protocol deals with the consequences of Romanian and Bulgarian accession.

\(^{26}\) It is less easy to compare that system with the one which is intended to apply from 1 November 2009. This and the following table are based on information contained in Galloway, above, p.66 and chap. 4.
The following table shows the evolution of the QMV threshold in terms of the percentage of votes required.

<table>
<thead>
<tr>
<th>EU-6</th>
<th>EU-9</th>
<th>EU-10</th>
<th>EU-12</th>
<th>EU-15</th>
<th>EU-25</th>
</tr>
</thead>
<tbody>
<tr>
<td>70.59%</td>
<td>70.69%</td>
<td>71.43%</td>
<td>71.05%</td>
<td>71.26%</td>
<td>72.27%</td>
</tr>
</tbody>
</table>

26. It will be seen that the vote weighting of the United Kingdom will fall after enlargement in percentage terms and that a qualified majority will become more difficult than ever to achieve. That difficulty will be compounded by the new population test, which was a feature of the Nice agreement and appears in the Act of Accession and the Protocol annexed to the draft Constitution. That test will enable any Member State to ask for a check to be made to ensure that States comprising a qualified majority represent at least 62% of the Union’s total population. If they do not, their decision will not take effect. The population test has the effect of enhancing the capacity of the larger Member States (particularly Germany, but including the United Kingdom) to block qualified majority decisions to which they are opposed. This needs to be borne in mind when considering the further extension in the use of qualified majority voting contemplated by the draft Constitution.

27. One important reason for that extension is the elevation of the so-called co-decision procedure, currently described in Article 251 EC, into the Union’s “ordinary legislative procedure”. This means that the Union’s legislative acts (European laws and European framework laws, corresponding essential to regulations and directives under the current system) will normally be adopted jointly by the European Parliament and the Council of Ministers. The ordinary legislative procedure is set out in Article III-302. The text has been simplified, but the substance remains essentially unchanged from Article 251 EC. The Council will act by qualified majority throughout except in one situation. Where the Council acts unanimously if it wishes to approve amendments proposed by the European Parliament at second reading on which the Commission has delivered a negative opinion.

28. Like the co-decision procedure, the ordinary legislative procedure will normally be launched by the submission of a proposal by the Commission. However, Article I-33(1) envisages the adoption of legislative acts at the initiative of a group of Member States. The circumstances in which this will be permitted are set out in Article III-165, which refers to Section 4 (“Judicial Cooperation in Criminal Matters”) and Section 5 (“Police Cooperation”) of Chapter IV (“Area of Freedom, Security and Justice”) of Part III. This incursion into the Commission’s right of initiative is intended to balance the use of the ordinary legislative procedure in this field. A corresponding provision has been inserted into Article III-302 to take account of cases where the ordinary legislative procedure is not triggered by a Commission proposal.

29. One provision to which the ordinary legislative procedure would apply under the draft Constitution is Article III-21, which concerns measures in the field of social security which are necessary to bring about freedom of movement for workers and the self-employed. Article III-21 corresponds to Article 42 EC. Although the co-decision procedure applies under the latter provision, it is expressly provided that the Council is to act unanimously throughout that procedure. That derogation has not been repeated in the draft Constitution, which may not be acceptable to the United Kingdom. It should, however, be noted that the scope of Article III-21 is limited. It is not concerned with the substantive content of national social security legislation, but only with ensuring the aggregation of periods taken into account under the different national laws and the payment of benefits to people resident in other Member States.

30. Other provisions of the draft Constitution which contemplate action by the Union in the social security field would require the Council of Ministers to act unanimously.

27 See Art I-33.
28 See Art III-302(9).
29 See CONV 727/03, p. 29. Cf. the temporary incursion, due to expire on 1 May 2004, contained in Article 67(1) EC.
30 See Art III-302(15).
31 Art 42 EC does not refer to the self-employed, but legislation adopted under that article has been extended to the self-employed on the basis of Art 308 EC.
33 See e.g. Art III-9(2), Art III-104(1)(c), (3) and (5).
31. Another area where the United Kingdom has traditionally resisted QMV is tax. Article III-62(1) of the draft Constitution would, like Article 93 EC, require the Council to act unanimously when seeking to harmonise national rules on turnover taxes, excise duties and other forms of indirect taxation. Article III-62(2), which has no counterpart in the present Treaty, would allow the Council to act by qualified majority where a measure referred to in Article III-62(1) relates “to administrative cooperation or to combating tax fraud and tax evasion”, but only where the Council has unanimously found that to be the case. There is a similar provision concerning company taxation in Article III-63. The draft Constitution retains the exclusion of fiscal provisions from those which may be approximated by co-decision/ordinary legislative procedure in order to facilitate the establishment and functioning of the common market. Other provisions of the draft Constitution relating to tax involve no or only minimal interference with the freedom of action of Member States.

The Presidency of the European Council and the Union Minister for Foreign Affairs

32. Provision is made in the draft Constitution for the European Council to elect its President by qualified majority for a term of two and a half years, renewable once. The function of the President, who would not be permitted to hold a national mandate, would be to facilitate the work of the European Council and to “ensure the external representation of the Union on issues concerning its common foreign and security policy”. Article I-24(5) makes it clear that neither the President nor the President of the Commission would vote where the European Council acts by qualified majority. The reason seems to be that no votes are attributed to them under the QMV formula. What is perhaps less clear is whether the same rule is intended to apply where the European Council acts by unanimity. If it is, the result would be that either President could block a decision taken by consensus (that is, without recourse to a vote) under the default rule laid down in Article I-20(4), but not one taken by unanimity (which implies the taking of a vote). The extreme subtlety of that distinction suggests that Article I-24(5) should be regarded as confined to QMV, which would mean that the President of the European Council, as well as the President of the Commission, would have a vote when the draft Constitution requires the European Council to act unanimously. This needs to be clarified.

33. The provisions concerning the President of the European Council, together with the new arrangements for determining the Presidency of the Council of Ministers, are designed to avoid the disruption caused by the present system, under which the presidency of the Council of Ministers rotates every six months and the European Council meets under the chairmanship of the Member State holding the presidency of the Council of Ministers. Moreover, in a Union of 25 Member States, the present system would mean that each State held the presidency only once every 12½ years. The creation of the post of President of the European Council has encountered opposition from some smaller Member States as well as the Commission. Concern has also been expressed about the limited democratic legitimacy the President would enjoy.

34. The draft Constitution would in addition endow the Union with a Minister for Foreign Affairs. Appointed by qualified majority vote of the European Council with the agreement of the President of the Commission, the person chosen would be one of the Vice-Presidents of the Commission. He or she would also chair the Foreign Affairs Council (one of the formations of the Council of Ministers) and “take part” in the work (without being a member) of the European Council. The Minister would be assisted by a European External Action Service working in cooperation with the diplomatic services of the Member States. The Minister would represent the Union in matters relating to the CFSP, “conduct political dialogue on the Union’s behalf and…express the Union’s position in international organisations and at international conferences.” He or she would have the right to “refer

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34 See Art III-65(2). Cf. Art 95(2) EC.
35 See Arts III-47, III-130, III-146, III-180.
36 See Art I-21.
37 Art I-24(5) is a free-standing paragraph in a provision headed “Qualified majority”.
38 See Werts, The European Council (1992), pp.130-132. The terms “consensus” and “unanimity” would both permit decisions to be blocked by a single Member State.
39 See Art I-23(4).
40 See Art I-27(1).
41 Art I-23(2).
42 Art I-20(2).
43 On which there is a declaration attached to the draft Constitution.
44 Art III-197(2).
to the Council of Ministers any question relating to the common foreign and security policy” and to submit proposals to it.\textsuperscript{45}

35. These arrangements, and the responsibilities of the President of the European Council in relation to the CFSP, are designed to alleviate some of the problems caused by the present division of functions between the Secretary-General of the Council of Ministers, who also exercises the function of High Representative for the CFSP, and the Commissioner for External Relations. Whether they are likely to prove durable may be questionable, but the role of both the President of the European Council and the Minister for Foreign Affairs is potentially influential. However, the precise nature of the relationship between the two is not easy to discern and there are concerns about the accountability of the Minister for Foreign Affairs, whose democratic legitimacy (such as it is) is only indirect.\textsuperscript{46}

**External action and the solidarity clause**

36. Article I-6 provides: “The Union shall have legal personality.” That provision complements the abolition of the pillar structure and contributes to the simplification of the Treaties. It probably does not change the existing position: Article 281 EC expressly confers legal personality on the Community and it is strongly arguable that the Union already possesses implied legal personality as a matter of public international law.\textsuperscript{47} Moreover, the question of legal personality is separate from the question of competences and that of the procedure for entering into international agreements. This was made clear in the final report of Working Group III, where it is noted:\textsuperscript{48} “Explicit conferral of a single legal personality on the Union does not\textit{ per se} entail any amendment, either to the current allocation of competences between the Union and the Member States or to the allocation of competences between the current Union and Community. Nor does it involve any amendments to the respective procedures and powers of the institutions regarding in particular the opening, negotiation and conclusion of international agreements.”

37. The external competence of the Union is dealt with in Articles III-225 and III-226. In addition, Article I-12(2) provides: “The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable it to exercise its internal competence, or affects an internal Union act.” That provision seems intended to give effect to the case law of the Court of Justice, but there is concern that it does not do so accurately\textsuperscript{49} and it may need to be revisited at the IGC. Following a recommendation by Working Group III, the draft Constitution contains a general provision dealing with the procedure for negotiating and concluding international agreements.\textsuperscript{50}

38. The provisions of the draft Constitution on external action with the greatest constitutional significance for the UK are probably those dealing with the CFSP. The provisions in question fall into three main groups. In ascending order of detail, they are: (a) Article I-15; (b) Articles I-39 to I-40; (c) Chapter II of Title V of Part III (Articles III-195 to III-215). Of those provisions, only Article I-15\textsuperscript{51} and Article III-209 would fall within the jurisdiction of the Court of Justice.

39. Article I-15 provides as follows:

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

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

40. The power of the Court of Justice to review compliance by Member States with the second subparagraph of that provision is particularly significant. It may lead the Court to be called upon to consider whether action by a Member State complies with an act adopted by the Union in this area or is contrary to the Union’s interests or likely to impair its effectiveness. The Court would be likely to regard at least some of these issues as justiciable.

41. Article III-209, first subparagraph, provides: “The implementation of the common foreign and security policy shall not affect the competences listed in Articles I-12 to I-14 [exclusive competence, shared competence, coordination of economic and employment policies] and I-16 [supporting, coordinating or complementary action]. Likewise, the implementation of the policies listed in those articles shall not affect the competence referred to in Article I-15.” That provision is a refinement of Article 47 TEU, according to which the Treaty on European Union shall not affect the Community Treaties and which the Court of Justice has jurisdiction to apply. It did so in the “Airport Transit Visas” case, where it said it was responsible for ensuring that “acts which, according to the Council, fall within the scope of the...Treaty on European Union, do not encroach upon the powers conferred by the EC Treaty on the Community.” Article III-209 prevents the provisions on the CFSP from being used to interfere with other competences enjoyed by the Union under the draft Constitution and (significantly) vice versa. Its purpose is to stop a power or a process applicable in one field from being used to take steps which ought properly to be regarded as falling within a different field. It is an application of the principle of conferral, according to which “the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution.” The fundamental nature of that principle explains the grant to the Court of jurisdiction to apply Article III-209.

42. Article I-39 provides that the CFSP shall be “based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States’ actions.” The necessary European decisions are to be adopted by the European Council and the Council of Ministers acting unanimously, except in the cases referred to in Part III. The European Council and the Council of Ministers will act on a proposal from a Member State or from the Union Minister for Foreign Affairs, acting alone or with the Commission’s support. Recourse to European laws and European framework laws is specifically ruled out in this context. The European Council may unanimously decide that the Council of Ministers should act by qualified majority in cases other than those referred to in Part III.

43. Article I-40 states that the common security and defence policy (CSDP) shall be an integral part of the CFSP. The CSDP is to include the progressive framing of a common Union defence policy. In language stronger than that of Article I-15(1), the first subparagraph of Article I-40(2) says that this “will lead to a common defence” (emphasis added), but only when the European Council, acting unanimously, so decides. Moreover, the decision of the European Council will have to be recommended to the Member States for adoption in accordance with their respective constitutional requirements.

44. This particularly heavy variant of the decision-making process, involving what amounts to national ratification of a Union act, represents an acknowledgment of the momentous character such a decision would have. The EU Committee noted of a previous version of Article I-40(2) that a decision of this type “would not only have profound implications for the role of NATO, but also appears to be wholly unrealistic in the foreseeable future. The Committee can see a case for such an aspirational provision against the possibility that NATO might become ineffective and that the Member States might accordingly need an alternative mechanism. We assert our view that we would not wish any developments in European Union defence to weaken the role of NATO. We also believe that it is wholly unlikely that ‘the progressive framing of a common defence policy...will lead to a common

53 Art I-9(2).
54 Art I-39(1).
55 A European decision is “a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them”: Art I-32(1).
56 See Art I-32(1).
It may be noted that draft Constitution would continue to make it clear that the CSDP must not prejudice the specific character of the security and defence policy of non-aligned Member States and Member States who see their collective defence as assured principally through NATO and must be compatible with the common security and defence policy established within that framework.

Detailed rules on decision-making under the CFSP are set out in Article III-201. The first subparagraph is essentially the same as Article 23(1) TEU. It provides that the Council of Ministers is to act unanimously and that abstentions will not prevent it from doing so. Like Article 23(1) TEU, Article III-201 also includes a mechanism for so-called constructive abstention. Under that mechanism, a Member State which qualifies an abstention is not obliged to apply the decision taken but must accept that it commits the Union and refrain from any action likely to undermine it. If the number of Council members qualifying their abstentions in this way exceeds a certain threshold, the decision cannot be adopted. The second subparagraph of Article III-201 alters the current threshold to “one third of the Member States representing at least one third of the population of the Union”.

Article III-201(2) sets out the cases in which, by derogation from Article III-201(1), the Council of Ministers may act by qualified majority. Three of the cases mentioned correspond essentially to those in which the Council of Ministers is currently permitted to act by qualified majority within the framework of the CFSP by Article 23(2) TEU. A new fourth case would allow the Council of Ministers to act by qualified majority “when adopting a decision on a Union action or position, on a proposal which the Minister [for Foreign Affairs] has put to it following a specific request to him or her from the European Council made on its own initiative or that of the Minister”.

This represents a potentially significant extension in the use of qualified majority voting in relation to the CFSP. However, in an important change from earlier drafts, QMV is now only envisaged where the Minister has made his or her proposal at the request of the European Council, which would act by consensus. Moreover, as with Article 23(2) TEU, an “emergency brake” is available to any member of the Council which is opposed to the adoption of a decision by qualified majority vote. Thus, Article III-201(2) provides:

“If a member of the Council of Ministers declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a European decision to be adopted by qualified majority, a vote shall not be taken. The Union Minister for Foreign Affairs will, in close consultation with the Member State involved, search for a solution acceptable to it. If he or she does not succeed, the Council of Ministers may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity” (emphasis added).

It is arguable that the draft Constitution would make the emergency brake slightly more difficult to apply in this context, for the word “vital” in the opening sentence (italicised above) has replaced the word “important” in Article 23(2) TEU.

Article III-201(4) preserves the current exclusion of qualified majority voting in the case of “decisions having military or defence implications”. Such decisions are also excluded from the European Council’s power, reiterated in Article III-201(3), to decide unanimously that the Council of Ministers should act by qualified majority in cases other than those referred to in Article III-201(2). Partial compensation for those exclusions may be found in provisions on new forms of enhanced cooperation in the context of the CSDP. Enhanced cooperation in relation to matters having military or defence implications is currently ruled out by Article 27b TEU, but there was a feeling in the Convention that enhanced cooperation might be useful in security and defence matters because of differences between the Member States as regards their capabilities and willingness to commit themselves. Enhanced cooperation under the CFSP in matters which do not have military or defence

59 See the second subparagraph of Art I-40(2), reproducing the second subparagraph of Art 17(1) TEU.
60 Art III-201(2)(b).
61 The draft Constitution does not specify how the European Council is to act in this instance, so the default rule in Art I-20(4) would apply.
62 See Art 23(2) TEU, last sentence.
63 See Arts I-40(6) and (7), III-213 and III-214. See also Arts I-40(5) and III-211.
64 See the final report of Working Group VIII on defence, CONV 461/02, p.19.
implications, currently the subject of provisions introduced at Nice, is dealt with in Articles III-325 and III-326.

49. In the Working Group on defence, there was broad support for a new provision spelling out the principle of solidarity between Member States. The provision was not envisaged as “a clause on collective defence entailing an obligation to provide military assistance”, but as applying to threats from non-State entities. The provision contemplated appears in the draft Constitution as Article I-42, which is headed “Solidarity clause”. It provides:

“1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the victim of terrorist attack or natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) – prevent the terrorist threat in the territory of the Member States;
– protect democratic institutions and the civilian population from any terrorist attack;
– assist a Member State in its territory at the request of its political authorities in the event of a terrorist attack;

(b) – assist a Member State in its territory at the request of its political authorities in the event of a disaster.

2. The detailed arrangements for implementing this provision are at Article III-231.”

Article III-231(1) gives the Council of Ministers the task, acting on a joint proposal by the Commission and the Union Minister for Foreign Affairs, of adopting a European decision laying down the arrangements for implementing the solidarity clause. The European Parliament merely has to be “informed”. The Council of Ministers would act by qualified majority under the default rule contained in Article I-22(3). By virtue of Article III-231(2), “Should a Member State fall victim to a terrorist attack or a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities.”

50. The EU Committee said of an earlier version of the solidarity clause that it was “a fundamental and constitutional provision” which represented “an extension of existing provisions. While the aspirations of this Clause may be valuable for political reasons, the defence implications should not be overlooked.”

51. Finally, it should be noted that the Council of Ministers, acting by qualified majority, will be required to adopt a European decision defining the statute, seat and operational rules of the European Armaments, Research and Military Capabilities Agency referred to in the second subparagraph of Article I-40(3). The Agency is to be “open to all Member States wishing to be part of it.”

The role of national parliaments

52. Because it elevates the European Parliament to the position of co-legislator alongside the Council of Ministers, greater use of what the draft Constitution calls the ordinary legislative procedure would contribute to increasing the democratic legitimacy of the Union and its institutions, an objective identified at both Nice and Laeken. In the same vein, the draft Constitution seeks to involve the national parliaments more closely in the Union’s activities. A Protocol on the Role of National Parliaments in the European Union strengthens the Amsterdam Protocol on the same subject, notably by requiring the Commission to send all legislative proposals and consultation documents directly to Member States’ national parliaments. An accompanying Protocol on the Application of the Principles of Subsidiarity and Proportionality would introduce an “early warning system” or “yellow card”

65 Arts 27a to 27e TEU.
66 See CONV 461/02, p.20.
67 Technically the solidarity clause would fall outside the scope of the CFSP.
69 Provisions other than those mentioned in the text which recognise a role for national parliaments include Arts I-17, I-24(4), I-41(2), I-57, III-160, III-161, III-162, III-174(2), III-177(2) and IV-7.
70 For the background to the Protocol, see the final report of Working Group IV on the role of national parliaments, CONV 353/02.
mechanism where a national parliament has concerns as to whether a Commission proposal complies with the principle of subsidiarity. It provides that a national parliament “may, within six weeks from the date of transmission of the Commission’s legislative proposal, send to the Presidents of the European Parliament, the Council of Ministers and the Commission a reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity.” If the number of such reasoned opinions exceeded a certain threshold, the Commission would be required to review its proposal.

53. That mechanism was introduced following a recommendation by Working Group I on the principle of subsidiarity. 71 The Working Group went on to suggest that a national parliament which issues a “yellow card” should have the right to issue a “red card” by referring the matter to the Court of Justice if its concerns over subsidiarity were not met. That is the background to paragraph 7 of the proposed new Protocol, the first subparagraph of which provides:

“The Court of Justice shall have jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article III-270 of the Constitution [the action for annulment or judicial review] by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.”

54. That subparagraph is clearly inadequate to give effect to the “red card” mechanism envisaged by the Working Group I. In fact, it makes no change to the present position, since there is nothing to prevent a Member State from bringing an action for the annulment of a Community act at the request of its national parliament on the ground that the principle of subsidiarity has been violated. 72 That would remain the case under the corresponding provisions of the draft Constitution. There is no point in including in the Constitution provisions which have no effect. The subparagraph should therefore be deleted or amended to give effect to the recommendation of Working Group I. 73 If national parliaments are permitted to bring annulment proceedings for infringement of the principle of subsidiarity, consideration might also be given to allowing them to bring such proceedings, this time for infringement of an essential procedural requirement, where the Protocol on the Role of National Parliaments is infringed in the process leading to the adoption of a Union act. Giving national parliaments any form of independent right to bring proceedings in the Court of Justice would clearly be of constitutional significance.

The Charter of Fundamental Rights and Union accession to the European Convention on Human Rights

55. The provisions of the draft Constitution on the Charter of Fundamental Rights and Union accession to the European Convention on Human Rights are undoubtedly of constitutional significance, though it is more limited than is sometimes supposed. This is large subject, but I shall deal with it briefly because it was recently the subject of a characteristically authoritative report by the EU Committee. 74

56. Article I-7 provides as follows:

“1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II of the Constitution.

2. The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”

Four points are worth making here.

71 See its final report, CONV 286/02.
72 This has been pointed out by the EU Committee: see “The future of Europe: national parliaments and subsidiarity - the proposed protocols” (Session 2002-03, 11th Report, HL Paper 70), pp.15-16.
73 Art III-270 would also need to be amended.
74 “The future status of the EU Charter of Fundamental Rights” (Session 2002-03, 6th Report, HL Paper 48).
57. First, the Charter is addressed principally to the institutions, bodies and agencies of the Union. It applies to the Member States only when they are implementing Union law: Article II-51(1). Its effect on the Member States is therefore more limited than that of the general principle of respect for fundamental rights which the Court of Justice has applied for many years. That general principle applies to the Member States not only when they are implementing Community law but also when they are acting under a derogation for which Community law provides. The right of the Court to continue to apply the general principle would not be affected by the draft Constitution, as Article I-7(3) confirms.

58. Secondly, the Charter “does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution”: Article II-51(2).

59. Thirdly, although the Convention did not reopen the substantive provisions of the Charter, it revised the so-called horizontal provisions, which deal with its interpretation and application. Particularly worthy of note is the new Article II-52(5), which provides: “The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.” In other words, Charter provisions containing principles as opposed to rights may only be invoked before a court where the interpretation or validity of an act intended to give effect to them is in issue.75

60. Finally, notwithstanding the apparently imperative wording of Article I-7(2), the opening of negotiations and the conclusion of an agreement for Union accession to the European Convention on Human Rights would require authorisation by the Council of Ministers, acting unanimously: Article III-227(2) and (9). Accession would also require the consent of the European Parliament: Article III-227(7)(b).

The amendment procedure

61. The procedure for amending the Constitution set out in Article IV-7 would involve convening a Convention unless the European Council decided, by simple majority but with the consent of the European Parliament, that the extent of the proposed amendments did not justify that step. The amendment procedure does not distinguish between different Parts of the draft Constitution. It could not therefore be used to support an argument that some Parts have higher status than others. It would remain the case that any amendments would have to be agreed by all the Member States and ratified by them in accordance with their respective constitutional requirements.

62. The likely difficulty of securing agreement on amendments to the proposed Constitution in a Union of 25 or more Member States has led to the inclusion in the draft of provisions, some already mentioned, allowing the European Council, acting unanimously, to (a) decide that certain decisions that may only be taken by the Council of Ministers acting unanimously may henceforward be taken by QMV,76 and (b) extend the use of the ordinary legislative procedure.77 These provisions will enable national governments to avoid seeking the approval of their parliaments for changes which would otherwise require such approval. A compromise arrangement might be to require decisions extending the use of QMV or the ordinary legislative procedure to be submitted to the Member States for ratification under their own constitutional requirements.78

75 There may of course be argument over whether a particular provision lays down a right or a principle. An updated version of the “explanations” of the text of the Charter, originally prepared at the instigation of the Praesidium (steering group) of the Convention which drafted the Charter, gives as examples of principles recognised in the Charter Arts II-25, II-26 (although those articles use the language of rights) and II-37. According to the updated “explanations”, the following provisions contain elements of both rights and principles: Arts II-23, II-33 and II-34. See CONV 828/03, p.51. The courts of both the Union and the Member States are to pay “due regard to the explanations” when interpreting the Charter (see its preamble), although they do not purport to be legally binding.

76 See Arts I-24(4), second subparagraph, I-39(8), III-201(3).

77 See Art I-24(4), first subparagraph. See also Arts III-104(3), III-130(2), III-170(3).

78 Cf. Art I-40(2) on a common defence, discussed above.
Miscellaneous matters

63. There are three miscellaneous matters of some constitutional importance, at least for the United Kingdom, which should be mentioned briefly in the interests of completeness.

64. With effect from 1 November 2009, the Commission would comprise its President, the Union Minister for Foreign Affairs and 13 European Commissioners along with 10 non-voting Commissioners. The introduction of non-voting Commissioners would be an innovation. The two categories of Commissioner are to be selected on the basis of a system of equal rotation between the Member States. There are of course currently two British Commissioners. However, the relevant provisions of the draft Constitution represent a partial retreat from the position agreed at Nice, where it was accepted that the Commission would in due course comprise fewer Commissioners than Member States. Under the draft Constitution, each Member State would be guaranteed either a voting European Commissioner or a non-voting Commissioner.

65. Article III-175 provides for the establishment of a European Public Prosecutor’s Office to help combat serious crime having a cross-border dimension as well as crimes affecting the interests of the Union. The European Public Prosecutor’s Office would be responsible for “investigating, prosecuting and bringing to judgment... the perpetrators of and accomplices in serious crime affecting more than one Member State and of offences against the Union’s financial interests...” It is to “exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.” The European Public Prosecutor’s Office may be set up by the Council acting unanimously and with the consent of the European Parliament. A decision to establish such an office would clearly have constitutional implications. Whether the same can be said of the inclusion in the draft Constitution of a mere power to do so with the consent of all the Member States as well as the European Parliament seems more doubtful. This is another area, however, where a requirement of national ratification might be appropriate.

66. Article I-59 contains a procedure for Member States to withdraw from the Union. It represents a considerable break with tradition, no such provision having been included in the Treaties so far, and underlines the voluntary nature of membership and the continuing sovereignty of the Member States.

An appraisal

67. Every Community or Union Treaty which the United Kingdom has signed since its accession has had constitutional implications. If endorsed by the Member States at the next IGC, the draft treaty establishing a Constitution for Europe would be no exception. However, whether its effect on the constitution of the United Kingdom would be any greater than that of its predecessors, particularly the Single European Act and the Treaty on European Union, seems doubtful.

68. It is true that the draft Constitution would extend further the use of qualified majority voting, but so did the two Treaties just mentioned as well as the Treaties of Amsterdam and Nice. In a number of important areas, the draft Constitution would continue to require the Council of Ministers to act unanimously (much to the dismay of the Commission). This is especially true of the CFSP. Although the draft Constitution makes a limited attempt to extend the use of QMV in this context, what is striking about the provisions on CFSP is how firmly it remains the preserve of the Member States, with only a limited role for the European Parliament, the Commission (as distinct from the Minister for Foreign Affairs) and the Court of Justice.

69. There was considerable demand in the Convention for QMV to be embraced more enthusiastically, particularly in view of the probable difficulty of achieving unanimity in a Union of 25 or more Member States. Opponents of greater recourse to QMV sometimes forget that no Member State opposes everything. Enlargement increases the likelihood that measures supported by a majority of Member States, sometimes, perhaps often, including the United Kingdom, will find the process blocked by a small number of dissidents. Even where the draft Constitution envisages that QMV will apply, it will itself be more difficult to muster than at present, at least until 1 November 1999 when the radical change to the present system of working out when a qualified majority has been reached is intended to take effect.

80 See its press release of 13 June 2003 (IP/03/836).
70. Some will also find disappointing the failure of the draft Constitution to address principles of a constitutional nature which have been laid down by the Court of Justice in its case law. It is true that there is a provision (albeit unsatisfactory) on primacy, but there is no mention of the related concepts of direct effect or State liability in damages.\[^{81}\] Moreover, no attempt has been made to reflect in Article III-274, which concerns the preliminary rulings procedure, the limits on the power of national courts to pronounce on the validity of Union acts laid down in the Foto-Frost case.\[^{82}\] These omissions seem hard to defend in a document which describes itself as a Constitution and is intended to add clarity.

71. Others may be reassured by the prospective demise of the (in)famous reference to “an ever closer union among the peoples of Europe”, which appears in the preambles to both the EC Treaty and the TEU as well as Article 1 of the latter. It is replaced in the preamble to the draft Constitution by a less provocative reference to the peoples of Europe as “united ever more closely”.\[^{83}\] The draft Constitution makes it clear that the powers enjoyed by the Union are conferred on it by the Member States, who therefore remain its collective masters. It states explicitly that “Powers not conferred upon the Union in the Constitution remain with the Member States”.\[^{84}\] This was seen by Working Group V as an aspect of the principle of conferral and as necessary to establish a presumption in favour of national competence.\[^{85}\] The expanded provision on the Union’s obligation to respect the national identities of the Member States\[^{86}\] underlines further the role and importance of the Member States in the proposed new constitutional dispensation.\[^{87}\]

72. The draft Constitution has been described, from opposite ends of the spectrum, as a “blueprint for tyranny”\[^{88}\] and a “tidying up exercise”.\[^{89}\] Both descriptions are caricatures, but the latter does not have quite as distant a relationship with the truth as the former. Be that as it may, the IGC ought not to take too seriously the repeated pleas of the President of the Convention for the text of the draft Constitution to be left as it stands.\[^{90}\]

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3 September 2003

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\[^{81}\] See e.g. Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357.
\[^{82}\] Case 314/85 [1987] ECR 4199.
\[^{83}\] The preamble to the Charter of Fundamental Rights, which appears at the beginning of Part II of the draft Constitution, retains its existing reference to “an ever closer union” among the peoples of Europe. That seems to be an oversight, since there is no corresponding reference in the preamble to the draft Constitution itself.
\[^{84}\] Art I-9(2).
\[^{85}\] CONV 375/1/02 REV 1, p.10.
\[^{86}\] Art I-5(1). Cf. Art 6(3) TEU.
\[^{87}\] See CONV 375/1/02 REV 1, pp.10-12.
\[^{88}\] Daily Mail, 8 May 2003.
\[^{89}\] Rt Hon Peter Hain MP, reported in The Guardian on 14 May 2003.
\[^{90}\] See e.g. his “Rome declaration” of 18 July 2003.
Memorandum by Sionaidh Douglas Scott, King’s College London

Summary

The draft EU constitution, while not containing proposed changes to the EU order of very great magnitude, does include some measures capable of having a significant impact on UK constitutional law.

- Part I plays an important role in clarifying the powers of the EU and fundamental principles of EU law. Its provisions on subsidiarity and primacy of EU law appear to make little change to the exiting situation. The list of EU competences is welcome, although there may be a problem demarcating shared and supportive competences. The new ‘delegated regulations’ and ‘implementing acts’ have probably not been defined and delineated with sufficient clarity.

- The Convention incorporates the Charter of Fundamental Rights in Part II. However there are still problems with its ‘horizontal provisions’ and thus questions as to its impact on national law. The distinction between ‘rights’ and ‘principles’ may need some clarifying.

- Chapter III on Justice and Home Affairs contains some noteworthy provisions affecting national criminal law, an area until recently largely untouched by the EU. The Constitution makes it possible for EU measures in this area to have direct effect (currently not the case) as well as increasing the EU’s powers in the criminal law field, giving it new competences in criminal procedure, substantive law and a basis for the European Public Prosecutor. These provisions merit careful scrutiny.

- The provisions on the Common Foreign and Security Policy are probably less far-reaching than those in JHA. There is no provision for the direct effect of EU measures in this area and the draft Constitution does little to add opportunities for QMV. The proposed EU foreign minister, despite their proposed formal right of initiative, will may be unlikely to have a significant impact on member states’ foreign policy.

1. Introduction

To what extent will the proposed European Constitution, if implemented, affect the constitution of the United Kingdom?

On a very general level there is the issue of the extent to which further European integration per se has implications for the UK constitution. Of course, the extent to which integration affects the UK depends on what that integration involves (discussed below). However, regardless of particular features, with a ‘European Constitution’ the EU might itself begin to look more like a state, or ‘super-state’, even if contentious terms, such as ‘federal’ were left out of the final draft. Arguably, the EU has had a Constitution for some while, if not an express one, but a written formal document makes more evident the nature of its legal order, with EU legal personality, a Charter of Fundamental Rights, a President, and a Foreign Minister, even if it can act only on the basis of conferred competences (Article I-9). Such a Constitution might seem to refurbish, or even create, a new identity for the EU, perhaps bringing this home to European citizens, even eventually reaching their hearts and minds?

Article I-5 of the draft Constitution requires the Union to ‘respect the national identities of its Member States’, as well as stating that the EU ‘shall respect their essential State functions . . .’ and the term ‘respect’ has been used in previous treaties (e.g. A 6(3) EU). However, it is not entirely clear what the term ‘respect’ means in this context. Certainly, neither Article I-5, nor the draft Constitution as a whole, contains a clear statement that the Member States are sovereign and independent. At the very least this situation reinforces the perception held by some (e.g. Neil McCormick) that the European legal space is not one of discrete separate legal orders, nor one of hierarchy between the EU and its member states, but rather a plurality of overlapping legal orders, rather more fluid than we had imagined it, with interesting questions for constitutional allegiances.

Which articles in the draft Treaty have particularly significant constitutional implications for the United Kingdom?

What would the constitutional effect of the implementation of those articles be?

2. ‘Constitutional implications’

One initial issue – what is meant by ‘constitutional implications’ for the UK? What sense of the UK constitution are we using here? Constitutions are notoriously slippery concepts, particularly that of the UK, largely unwritten, in which it is not so very easy to distinguish (even principal) constitutional laws from ordinary laws. Most constitutional law textbooks include the following as constitutional law: general principles of constitutional law (such as parliamentary supremacy, separation of powers, responsible and accountable government); the institutions of government (including basic structures – parliament, the executive, the judiciary, executive agencies, as well as key powers such as foreign policy and defence, expenditure and tax); and the relations between the individual and the state (including human rights, state security, emergency powers and terrorism). Article I-5 of the Draft Constitution, cited above, seems to follow this view, and, stated in full reads as follows:

1. The Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security.

But ‘Constitution’ may have a wider sense too. The EU draft constitution is a ‘thick’ constitution to the extent that it includes much detail which goes beyond the basic formulation set out above. It includes in Part III detailed rules on areas such as agriculture and competition, as well as various policies in which the EU by no means has exclusive competence. If one perceives ‘constitution’ in this ‘thick’ EU sense, then arguably, everything in the EU draft has a capacity to affect the UK constitution.

I will not assume ‘constitution’ has this sense in my response. In the context of this paper, I take ‘constitution’ to imply the term for the law that establishes and regulates the main organs of government and their powers, as well as foundational constitutional principles, such as the rule of law, sovereignty of Parliament, separation of powers, and the relations between the individual and the state. The question then becomes – how much in the draft European Constitution is new, with a potential impact?

The UK has been put under pressure by both pro-Europeans and eurosceptics to hold a referendum. During the Convention the Government resisted this pressure, arguing that the changes were not of sufficient constitutional importance. This position perhaps reflected the UK Government’s fear of its ability to win a referendum, rather than a genuine view that the draft Constitutional Treaty really represents a mere ‘tidying up’ exercise. A more general view now seems to be that the draft Constitution goes beyond consolidation, involving extensions of the previous EU legal order which have implications for the UK’s sovereignty and parliamentary democracy. The rest of this paper details what these might be.


Article I-9 Fundamental Principles: Subsidiarity

Article I-9 (3): This provision deals with the principle of Subsidiarity. The wording is similar to that in A 5 EC. However, a new Protocol on the Application of the Principles of Subsidiarity and Proportionality has been annexed to the draft Constitution, by which all Commission propositions will be sent to national parliaments for review. If 1/3 of parliaments object then the Commission will have to review the proposal. This new early warning system to give national parliaments a clear role in monitoring subsidiarity is another important, democratic step. The key result of this reform may be to make it clear to domestic media and national publics that their national parliament has full information and a role to play at the start of the process. If the system works, it will also encourage communication across national parliaments. This is surely a constitutional feature, if hardly a negative one.

However, the Protocol is unclear on certain matters – what would be the effect if national parliaments objected to some matter other than subsidiarity – i.e. human rights, or the substance of the measure. The Protocol also apparently provides no possibility for parliaments to raise fresh objections after a
measure has been amended by the Council or European Parliament. Therefore this would still leave gaps as to national parliaments’ ability to function re subsidiarity.

4. **Article I-10 - Primacy of Union Law**: This is a new article, which enshrines the supremacy of EU law for the first time into a treaty. Several comments can be made:
   a) Article 10 aims, I imagine, to set out the situation that has existed in EC law following from the ECJ’s caselaw, starting with *Costa v Enel*. This caselaw has generally been accepted by the English courts. However, even if Article I–10 were to be implemented there would still be, in UK law, no clarity as to what would happen were Parliament to pass a statute going expressly contrary to EU law. UK courts would be bound either to follow Parliament’s express wish, or to go against that wish and the authority of Parliament, and follow EU law. Article I-10 does not settle this quandary.
   b) Article I-10(1) refers to the primacy of the EU only ‘in exercising competences conferred on it’. Article I-10(1) therefore does not settle the issue of who is to determine the boundaries of EU competences (the so-called ‘Kompetenz – Kompetenz’ issue). This issue may still raise key issues notwithstanding the delineation of competences in the new EU draft Constitution (see below).

5. **Articles I-11-16: Categories of Competence**:
   a) For the first time, a list of EU competences has been set out. However, there may still be problems likely to affect UK constitutional law. I see the problem lying in the dividing line between Article I-13 (shared competences) and Article I-16 (co-coordinating/supporting competences). For example, health is likely to be contentious. Article I-13 refers to ‘common safety concerns in public health matters’ as a shared competence and Article I-16 ‘protection and improvement of human health’ as a supporting competence. There is likely to be some overlap. The difference between the two types of competences lies in the capacity of a shared competence to have a pre-emptive effect on member state action. Once the EU has exercised competence in a shared area the Member states may not act. This is likely to be contentious in areas such as health, which even if not directly constitutional, are still thought of as preserves of national sovereignty, as well as large spending areas in which different national economic, social and tax policies will make a difference.
   b) Article I-14: ‘The coordination of economic and employment policies’ also bears further scrutiny. What is the status of this article? It would seem to be a shared competence, although it doesn’t fall under the list in Article I-13. It is a new clause, although to some extent reflects previous practice and case law. However, its implied status as a shared competence would imply pre-emption of state action, once the EU has acted – controversial particularly with regard to economic policy in Article 14(1), and again, with possible constitutional implications.
   c) Article I-17: Flexibility clause:
      This is an amended version of Article 308 EC – the ‘implied powers’ clause which allowed the EC to take actions on certain matters, even if there were no express provisions enabling it do so in the treaty. Notably, in its amended form it applies to areas covered by all 3 pillars, i.e. to JHA (Justice and Home Affairs) and CFSP (Common Foreign and Security Policy) as well as EC matters, i.e. its subject matter is no longer restricted to the Internal Market. In theory it might provide a new base for actions in controversial areas, extending the EU’s competence. However, there are probably enough safeguards written into it – the Council must act unanimously under it, and the national monitoring procedure for subsidiarity under Article 9(3) applies.

6. **Legal Acts of the Union**
   a) **New capacity for direct effect**: Notably, the new category of European law and Framework law (Article I-32) now covers the EU’s 3rd Pillar – the PJCC (Police and Judicial Co-operation in Criminal Matters) (see Article I-41 (1) and Part III draft Constitution). Nowhere does the draft Constitution imply that in this context, these measures will have different characteristics than elsewhere. So they could have direct effect and the ECJ’s caselaw from *Van Duyn* and *Marleasing* and *Unilever Italia* will apply to police and judicial criminal matters if taken by the new European law or framework law. This goes some way toward building a directly effective EU criminal law, thus creating a relationship between the individual and the state in this area.
b) Non-legislative acts: Articles I-35 and 36.

Article I-35 introduces ‘delegated regulations’ – an entirely new clause as such acts are not currently provided for. The implementing acts covered by Article I-36 (2) are based on Article 202 EC. But the distinction between the two does not seem to be very clear. Nor is there any great clarity as to what is and is not a legislative rather than a delegating or implementing act. This has an impact for legislative procedures, comitology and parliamentary scrutiny of measures.

7. The Charter of Fundamental Rights

Now incorporated into Part II draft Constitution.

a) Problems still remain concerning the ‘horizontal provisions’. When will the Charter apply to the member states? The question is still what is meant by Member states ‘implementing’ EU law. This matters because once a Charter provision falls within member state purview then national courts may have to adjudicate the matter. They will have to adjudicate a Charter which contains a much broader range of rights than those existing under the Human Rights Act. The Charter contains socio-economic rights for example, still a contentious matter. There is a difficulty about making social rights justiciable, where the strict enforcement of such rights would transfer some key decisions on social policy, and even spending, from the legislature to the Courts. The Convention attempted to address this difficulty by making a distinction between principles and rights in Article 51 (1) of the Charter. Additionally, Article 52(5) provides that Charter provisions containing principles will be justiciable only in the interpretation of Member State legislative measures to give effect to such principles.

But there are still problems in the rights/principles distinction in the Charter. Principles are supposed to be aspirational only, rather than directly effective justiciable rights. But it is still conceivable that the ECJ might take its own approach, transforming some principles into directly effective rights.

b) National judges will also be able to declare UK law invalid if it violates a Charter right, a situation which goes beyond there powers under the Human Rights Act, where they can only issue a declaration of incompatibility. So the scope of the Charter is a crucial matter.

8. Chapter III - Justice and Home Affairs

This is an ambitious chapter, which makes some important changes to the existing situation which have an impact on UK constitutional law. The subject matter of Justice and Home Affairs (JHA) - in particular the present EU 3rd Pillar (PJCC), criminal law and criminal justice, and relations between individual and the state - are areas close to the heart of national sovereignty, as well as being subject to very different traditions in Member States (in spite of initiatives like Corpus Justice which works towards a European Criminal code). Although, since the Maastricht Treaty, the EU has had some competence in JHA (and prior to that intergovernmental co-operation existed, e.g. through the Trevi group) progress was not as swift as it could be until September 11, after which the EU adopted a substantial amount of legislation aimed at promoting security. Although Article III-163 states that ‘This Chapter shall not affect the exercise of the responsibilities incumbent upon Member States with regard to maintaining law and order and safeguarding internal security’ there is nonetheless, in the process of being created, a substantial constitutional criminal law of the EU. I have restricted my comments to those concerning PJCC (3rd Pillar) as I think these are most likely to have a constitutional impact in the UK.

9. There are striking changes to decision making in this area.

In the field of criminal law and policing the majority of legislation will be taken by QMV, excluding only the creation of a European Public Prosecutor, cross border actions by the police and operational police measures. (Art II 171 – 176).

Member states will also lose their right of initiative in this field from 1 May 2004 (already planned prior to the draft Constitution), so the Commission will thenceforward have the sole right of initiative. As already stated above criminal and policy legislation will take the form of EU laws capable of direct effect rather than framework decisions, decisions and Conventions as at present. Judicial control has
been expanded so the ECJ’s ordinary jurisdiction will apply to JHA with the exception of validity and proportionality of policing (Art 283).

10. The competences of the EU also change in these areas.

The EU’s criminal law powers will be more clearly defined in 3 areas:

a) Cross-border co-operation (Art III 171(1)) – would include areas such as mutual recognition of all forms of judgements and other judicial decisions – i.e. freezing of assets and so on. This has an impact on national criminal law, as actions already taken by the EU illustrate. The European Arrest Warrant (EAW) has already been adopted in June 2002, partly as a reaction to September 11. It effectively abolishes extradition in the EU, requiring instead member states to recognise and enforce arrest warrants issued in other member states. The EAW was passed unanimously under the PJCC as a framework decision, but under the draft treaty measures could generally be taken under QMV. There was much disquiet at the time the EAW was passed – partly because reasons for refusing to recognise them are extremely limited, and do not include comprehensive human rights grounds. The EAW is basically premised on mutual trust in the respective criminal law and justice systems of the member states – as are the draft treaty’s provisions on cross border co-operation. This trust is perhaps not so evident all the time – for example, the English High Court refused to extradite the Paris metro bomber suspect to France quite recently (in the Ramda case) on the basis that they felt that the evidence against him had been obtained from a co-accused under oppression.

b) Criminal procedure (Art III 171(2)). This covers areas such as admissibility of evidence, the rights of individuals in criminal proceedings, victims’ rights. Under the draft Constitution, European framework laws may establish minimum rules in areas having a cross-border dimension. This could be quite intrusive. ‘Cross border dimension’ is not defined but could be quite wide in scope, in which case, the EU could have a considerable jurisdiction. Although some legislation might be welcome to counteract the rather repressive effects of measures such as the EAW and European definition of terrorism, the problem is that criminal procedure differs widely from state to state. Although accusatorial and inquisitorial systems did begin to converge as early as the 18th century, there has not been very much convergence, There is still mutual criticism - e.g. criticism of plea bargaining, and the greater resources of prosecutors in Anglo-Saxon jurisdictions by continental systems, criticisms of the retention of Juge d’instruction on the continent by Anglo-Saxons.

Although organisations like the European Convention on Human Rights illustrate a successful transnational criminal law concerning individual rights, the ECHR operates at a very minimal level, and what the EU aspires to do could go much further. Contemporary attempts to set up transnational criminal procedure suffer from the lack of assimilation. The US was not the only country to have critical reservations about the ICC. France too, had reservations based on its procedures. Recently, the first defendant to appear before the ICTY (International Criminal Tribunal for the former Yugoslavia) challenged the limits on the defence ability to cross-examine prosecution witnesses. In that context, there was a problem resulting from the struggle of the parties and judges to adapt a mix of doctrines to a hybrid situation. Different legal and political cultures give rise to different expressions of criminal justice. To attempt legal convergence results in what Gunther Teubner calls ‘legal transplants as irritants’ - or an interference like that on the TV screen when the picture is blocked.

Therefore, there may be no justice where common action is taken, because there is no substantive notion capable of underpinning it shared by Member States, like a host of computer programmes that will not speak to each other. This area demonstrates a real need for subsidiarity, which after all is another structural attempt to promote freedom and justice – the two other key components of the EU’s ‘Area of Freedom, Security and Justice’ to which its JHA policy aspires.

c) Substantive criminal law (Art III 172). It is proposed that the EU have substantive powers over 10 specific crimes, including terrorism, trafficking in human beings, drug trafficking, and money laundering. This list can also be extended by the Council acting unanimously with the consent of the European Parliament.

A substantive conception of criminal justice to underpin any common EU criminal law is a most formidable challenge. Criminal law and justice are so closely related to national culture and national sovereignty. The EU managed to adopt its common definition of terrorism in the aftermath of September 11 (only 6 member states actually had a crime of terrorism on their books at that time) but it may not be easy to reach agreement in the future.
11. European Public Prosecutor. The draft Constitution also includes Article III 175 – the base to establish a European Public Prosecutor. The provisions concerning the establishment and powers of the Prosecutor are very vague but this wholly new power should enable the Council of Ministers to establish such a prosecutor with a broad jurisdiction to investigate and prosecute all serious crimes affecting more than one member state (Although prosecutions would have to be brought in the courts of a member state). Unanimity is required to set up a European Prosecutor and disquiet about this office has been expressed in some Member states. It might be the case that a Prosecutor would be established, but with powers only in those member states which had consented to its jurisdiction. This would then create all sorts of problems regarding the Prosecutor’s relations with those states which had not consented (creating a situation like that regarding the US and the International Criminal Court).

Existing bodies, Eurojust and Europol, would also gain an increase in powers. Article III-174(2)(a) will allow Eurojust to initiate criminal prosecutions (although formally they will be conducted by ‘competent national authorities’) as well as its current mission of co-ordinating co-operation between national authorities in relation to serious crime. According to Article III 177 Europol’s competence and remit would be increased to cover all serious crimes with a cross border element. Art III 177(3) does however specify that any ‘coercive action’ ‘shall be the exclusive responsibility of the competent national authorities’. So Europol has not yet been given its own right of initiative as such.

12. In conclusion, the effect of these amendments (and even existing measures, which have not always been noted for what they are) is that much criminal law and procedure, as well as policing measures, are being taken out of the hands of national parliaments. Additionally, this has not been accompanied by accountability elsewhere. Control over Agencies such as Eurojust and Europol is still weak. There is insufficient scrutiny.

In its conclusions, Convention Working Group X stated that: ‘it is important that citizens feel that a proper sense of “European Public Order” has taken shape and is actually visible today in their daily lives. In this respect the principles of democracy and transparency are of the utmost importance.’ The EU has been active in its AFSJ (Area of Freedom, Security and Justice) since September 11 taking steps against terrorism to promote public security. But too often this actions has been at expense of democracy, transparency and civil liberties, not to mention the sovereignty of national parliaments in these areas.

13. Common Foreign And Security Policy (CFSP)

Will the increase in powers of the EU in this area threaten national sovereignty?

a) Article I-39(7) specifies that measures taken under the CFSP are to take the form of European decisions and that European law and framework laws are excluded. Therefore CFSP acts will not be capable of direct or indirect effect.

b) Article I-39 also states that decisions are to be adopted unanimously ‘except in the cases referred to in Part III’. The Convention extensively debated qualified majority voting (QMV) in the CFSP and a large number of Convention members argued for its widespread use. France and Germany proposed using QMV in their joint institutional paper, although after the Iraq crisis, France seemed to have abandoned the idea. The UK in particular was strongly opposed to any QMV in CFSP, even to any minor extensions in implementation. Some scope for QMV in the CFSP exists in the draft Constitution (Article III-201 (2) and (3) – however, most of these already existed, with the exception of Article III-201(3) by which the European Council has the power (by unanimous decision) to extend QMV (although this does not apply to defence – Article III 201 (4)).

c) Nevertheless, the possibility for enhanced cooperation in CFSP has been strengthened. In an important move forward (Article III-213) some forms of enhanced cooperation are now to be allowed in security and defence policy. Crisis management tasks may be attributed to a group of countries, so-called ‘structured cooperation’ may be established concerning capabilities and the possibility for closer cooperation on mutual defence is also proposed. This is, however, a controversial area and will be discussed again at the IGC. The UK in particular is nervous about ‘structured cooperation’ in defence and any possible competition with NATO, and strongly opposes a mutual defence clause.
14. New EU Foreign Minister

The main change in the draft Constitution on CFSP is the double-hatting of the new EU foreign minister (Article I-27), responsible to the Council for CFSP, and at the same time, occupying the role of Vice-President of the Commission and coordinating external action policies. Would this role threaten the autonomy of the UK’s foreign policy?

Under the draft Constitution, the EU foreign minister has a formal right of initiative (Article I-27(2) and Article III-200) which means that they will have a fair amount of weight in designing a common policy, providing that the division of tasks between the foreign minister and the permanent president of the European Council are sufficiently defined.

However, during the Iraq crisis Javier Solana, the EU’s current High Representative for the CFSP, had no role. Even the then Greek presidency’s efforts in calling for an emergency summit were to little avail. It is doubtful whether a more permanent president of the European Council and an EU foreign minister would have been in any stronger position to mandate an ‘EU position’ over Iraq. Indeed, the splits over Iraq call into question the value of having an EU minister for Foreign Affairs. It seems unlikely that this new post will remove the reluctance of the member states, especially the larger ones, to cede national sovereignty on foreign policy issues and thus create a genuine, substantive foreign policy for the foreign minister and president to implement.

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Introduction

1.1 The purpose of this paper is to address the affects of the proposed European Constitution on the constitution of the United Kingdom. Specific attention is drawn to those articles of the draft Treaty that might have particular significance to the constitutional arrangements for the United Kingdom.

1.2 Consideration is given to how institutions of the United Kingdom may have to adapt to give effect to the Constitutional Treaty were it to be implemented. Special consideration is given to identifying the main characteristics of the United Kingdom’s current constitutional arrangements that are distinctive from other Member States. Given its history, tradition and culture, the United Kingdom may find the proposed European Constitution more complex and difficult to assimilate than other Member States. This reflects the asymmetrical nature of our existing constitution involving devolution and regional assemblies. Account has also to be taken of the strong tradition of local government within a non-federal system. The primacy of United Kingdom legislation and the technical detail, complexity and variety of United Kingdom statute law needs to be taken into account when assessing the draft Constitutional Treaty.

1.3 The paper begins with consideration of the United Kingdom’s constitutional arrangements at present and proceeds to examine the affects of the proposals in terms of the likely impact on the constitution. In the interests of space only the major Articles that are most likely to have a constitutional impact are considered. It is clear that there are some significant proposals that emerge from the European Constitution that have the potential to impact on the structure and working of the United Kingdom’s constitution. Assessing how that impact may be quantified or described, however, is difficult. In some cases there will require substantial change to the law in other instances changes will be less fundamental and require gradual assimilation rather than any fundamental re-think. Striking the balance between the different levels of change will be difficult to judge. There are four parts to the Draft Constitution. In terms of constitutional implications this paper will focus on Part I that addresses the definition and objectives of the European Union. The most obvious area where there will be fundamental change in terms of substantial re-alignment will come from Part II which incorporates the Nice, European Charter of Fundamental Rights (December, 2000). This is outside the discussion of this paper. Part III and IV address general policies of the European Union. Most of Part III is excluded from consideration in this paper and it is generally understood, at the time of writing, that Part III is under discussion and is to be revised. Part IV contains general and final provisions; of specific interest are those that explain how the Treaty would come into force and powers of amendment. These are not considered in this paper.

The United Kingdom’s constitutional arrangements.

2.1 The essential characteristics of the United Kingdom’s constitutional arrangements require some elucidation, partly because in the absence of a formal written constitution there are difficulties in clearly defining the powers of the executive and the role of the legislature and judiciary. Compared to most other Member States there are some intrinsic qualities ascribed to the absence of a formal written constitution that are worth considering. There is an increasing tendency towards uniformity within the European Union that may challenge the essence of the United Kingdom’s system of law, government and administration if not directly then indirectly. The latter may occur as an incipient change to the constitution without the appropriate consideration and time for reflection. Thoughtful reflection is certainly appropriate when considering the implications of the proposed European constitution. It is also a timely moment, given the recent proposals within the United Kingdom, for constitutional modernisation, in particular the office of Lord Chancellor and the possibility of a new Supreme Court. This is the culmination of fundamental constitutional reforms introduced since 1997 ranging from an independent Bank of England, Lords reform, the creation of an administrative court, the Human Rights Act 1998, changes to local government and the introduction of a variety of types of devolved regional government. Changes to the electoral system have also replaced the first past the post system for regional devolved assemblies and European elections with a plethora of different electoral systems - save for the retention of first past the post for Parliamentary elections. Such changes are unprecedented both in terms of the speed of their introduction and also their potential impact on the way constitutional government operates in the United Kingdom. At the same time there remains a

formidable part of the constitution that has retained its historic identity even if located in a different formulation of political and legal powers in the midst of modernisation and change. Continuity is seen as one of the self-perpetuating features of the constitution. Change, even of a fundamental nature may be introduced but continuity helps maintain and preserve past traditions. The ebb and flow of reform and renewal is accommodated within the flexibility of the constitution.

2.2 Describing such a system of constitutional government and the constitution itself is problematic especially when asked to consider how the draft European Constitution may have implications. The difficult task of describing and defining the essential qualities of the United Kingdom constitution is an important starting point. The United Kingdom’s constitution may be described as unwritten or uncodified, as opposed to written or codified; flexible, as opposed to rigid; unitary, rather than federal; and institutional and practical, as opposed to theoretical and doctrinal. The contemporary monarchy maintains a largely symbolic role and continuity of tradition. Bagehot aptly described the monarch’s formal powers as “the right to be consulted, the right to encourage, the right to warn”93. The monarch retains the power to grant a dissolution of Parliament on the advice of the government. There is also the power to invite the leader of the political party with the majority of seats (the Prime Minister elect) to form an administration. In the case of a hung parliament this might be not just symbolic but decisive in the choice of the party to form the government.

2.3 The absence of a single codified or written constitution leaves the working out of the practicalities of the constitution to the system of laws, conventions and customs that are the hallmark of the medieval inheritance. A notable feature is the use of conventions — essential norms of political behaviour, difficult to categorize in any strictly legal or constitutional sense, that comprise the common practices and workings of government that link the modern with the ancient, medieval constitution. Dicey’s influence since the nineteenth century has led constitutional lawyers to believe that conventions serve the purpose of examining past practices to determine future conduct. Unlike rules or laws such as statute law, conventions are not enforceable by the courts but often help explain the political workings of the constitution.

2.4 Conventions have grown historically as unwritten rules, and may adapt to the changing methods of modern government. That is their enduring quality. They are not the product of either judicial or legislative intervention, but rather of custom, usage, habit, and common practice. The most formative period for their development was probably in the eighteenth and towards the end of the nineteenth century. Conventions have the shortcoming that they reflect the values of mid-Victorian Government and, perhaps, fail to take account of modern party-political realities. The increasing complexity of the machinery of government may make accountability through conventions more of a myth than a reality. Many important practices are part of the internal working of government, and it is difficult to give internal working practices special value or elevation to the status of a convention. In essence, conventions are “the morality of the constitution”. They may be relied on to alter with the political circumstances of the time.

2.5 The essentials of the United Kingdom’s constitution are the sovereignty of parliament and the rule of law. With Britain’s membership of the European Union, and the Human Rights Act 1998, both these traditional aspects of constitutional law have recently come under debate and scrutiny as part of the process of fundamental reform. Another unique feature of the constitution that has been questioned is the absence of a formal or rigid doctrine of the separation of powers. This remains a gap in the United Kingdom’s constitutional arrangements which is difficult to fill. Montesquieu’s philosophy of the separation of powers has influenced the creation of a constitutional doctrine or principle that is commonly found in most written constitutions, notably that of the USA. However, the idea of separation of the three functions — the legislature, the executive and the judiciary — is hard to conceive of as applying to the United Kingdom. For example, up until the recent announcements proposing reform, the Lord Chancellor was head of the Lord Chancellor’s Department, Speaker of the House of Lords, and head of the judiciary. Defining separation may mean that one organ of government should not exercise the functions of another; or that no one element of the three should dominate the other; or that the same person should not occupy a position in all three organs of government — which the Office of Lord Chancellor opposed. While the separation of powers is fine in principle, it is hard to operate in practice. The need for a distinction between the three functions is at the heart of the doctrine. Lord Templeman, in the House of Lords in M v Home Office,94 considered the question of the courts’ contempt powers when the Home Secretary appeared to be in breach of his


undertaking not to deport a citizen of Zaire. The fundamental principle was that the Home Secretary should obey the law like any other citizen. As Lord Templeman noted, “Parliament makes the law, the executive carry the law into effect and the judiciary enforce the law.” It might be concluded that there is no formal separation of powers in the United Kingdom and that the formalities of such a doctrine are unlikely to be observed until there is a written constitution. However, the doctrine is important, and has influenced the United Kingdom. The separation of powers doctrine seeks to observe checks and balances in the way powers are exercised, and may have guided the way the three organs of government have developed. The rule of law, which Dicey defined in terms of preventing “arbitrary decision making”, rests on the wisdom of convention and relies on good sense and judgement to prevail. The sovereignty of Parliament could on a whim curtail the rule of law, but Parliament has, with certain exceptions, limited its own powers to interfere with it, and thus ensured its survival.

2.6 In summary the main features of the United Kingdom’s Constitutional arrangements that require careful consideration in the light of the proposed European constitution are:

- the primacy of the House of Commons in its political and legislative roles;
- the importance of a civil service that is permanent, neutral and appointed on merit;
- the dualism approach of the United Kingdom to international law and obligations requiring domestic United Kingdom legislation to give effect to international obligations;
- the absence of a tradition involving a codified or written constitution;
- the absence of entrenched law and the lack of any technical classification distinguishing constitutional law from ordinary law;
- a tradition of relatively few restraints on the House of Commons to enact legislation on the basis of the political sovereignty of the electorate;
- the principles of cabinet and ministerial responsibility to the House of Commons and the functions of the various select committees of Parliament to take evidence and hold government to account.

The effects of the proposed European Constitution

3.1 The most important constitutional question to be addressed is how easily will proposals for a written European constitution established by Treaty for Member States fit within the historical tradition of the uncodified constitution in the United Kingdom? Given the significance attached to the primacy of the House of Commons and the role of politicians in terms of policy making through legislation the answer is that the proposed Constitution is likely to impact significantly on areas of policy and law. Thus the traditional United Kingdom constitutional approach to legislation and law making may change. However, there is likely to be a division of opinion among commentators over the interpretation to be given to certain aspects of the draft Constitution. The constitutional significance of the draft needs to be assessed in terms of how the traditions of the United Kingdom’s Constitution are likely to be affected - this includes the culture of law and politics including Parliamentary debate and accountability.

3.2 The task of assessing the impact of the draft Constitution is made more difficult by the degree of ambiguity about the nature of the European Constitution itself. Its draft (likely finally to be in excess of 200 pages) is unlike any other style of written constitution. Its scope is unclear. Commentators disagree over the ambit of the constitution. Some see it as a consolidation or “tidying up” of the existing treaty arrangements in line with a need for general simplification. This is used as an explanation to deflect criticism that the constitution may alter the United Kingdom’s current constitutional arrangements. Others see the draft as having significance in terms of altering the constitutional order of Europe and thereby causing re-consideration of the United Kingdom’s sovereignty.

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95 At p. 437.
97 There is an excellent discussion to be found in: House of Commons Research Paper 03/60 and Research Paper 03/58 covering the main parts of the draft Constitution.
3.3 On the question of United Kingdom sovereignty it might be possible to envisage two distinct approaches. The first is a narrow approach that argues that strictly speaking the proposed Constitution changes nothing fundamental. Here the emphasis is on the European Communities Act 1972 that remains intact and consequently remains the basis for the relationship between the United Kingdom and the European Union. On this view the legal sovereignty of the House of Commons is constant in terms of the authority of Commons to revise or amend the 1972 Act, thus permitting the continuity of sovereignty.

3.4 The second approach is broader. It is possible to consider that many of the attributes granted to the European Union under the proposed Constitution are analogous to a wholly sovereign state but explicitly stop short of creating a sovereign state. Such attributes include: conferment of legal personality; the notion of citizenship of the European Union; the development of a Charter of Fundamental Rights for citizens of the Union; changes in the way decisions may be made without the national vote; the creation of a President; a Foreign Minister; and through the proposed document itself a written constitution is adopted rather than a collection of individual Treaties. While the Constitution may constitute the sum total of the existing Treaties, revised and refined, it is also endowed with a status of a Constitution - even though this status is not well defined or explained. Inevitably the status of a Constitution invites interpretation by the courts and this adds an additional dimension of how judges might interpret the terms of the Constitution. There is plenty of room for interpretation, particularly as there is such unnecessary vagueness.

3.5 The question of how sovereignty is defined is considered in Article 1-10 of the draft Constitution. This article asserts that 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. This broadly defines the powers, that have been interpreted by the European Court of Justice in successive case law and accepted by the courts of Member States. This includes also under Article 1-10 that Member States should take “all appropriate measures, general or particular” to ensure that the obligations flowing from the Constitution are fulfilled. The formulation of Article 1-10 gives the Constitution legal authority and primacy. This reinforces the argument that interpreting the draft Constitution will be a matter of law- with the subsequent notion that the courts will make every attempt to give primacy to that law and by its nature will seek to uphold the Constitution when there are doubts and uncertainties. This gives rise to the possibility of the development of various Constitutional presumptions as a means of interpreting the European Constitution.

3.6 Constitutional interpretation by judges has a long history distinguishing it from ordinary statutory interpretation. Generally a more dynamic or flexible approach is adopted, most likely employing other jurisprudence from other countries and systems. This may give rise to a degree of judicial incremental law making commensurate with the organic growth of the constitution itself that has the potential for developing constitutional rights, immunities and powers beyond the literal meaning of the words adopted. The potential for a possible jump in judicial interpretation towards a more purposive approach to legal rights under the constitution should not be under-estimated.

3.7 The powers granted under the draft Constitution are vague and ambiguous. There is no explicit statement positively defining the remit of powers resting on the constitution or on the European Union. According to Article 1-9 of the draft constitution the Union has power to act only within “the competences conferred upon it by the Member States”. Conversely there is no explicit recognition in the Constitution of the national sovereignty of Member States. Article 1-5 addresses the question of the national identities and the respect such state functions including the territorial integrity of the state and “... for maintaining law and order and safeguarding internal security” should be given by the European Union. It is difficult to know whether there is any legal protection afforded to state functions were it agreed by the Union to proceed to govern member states in those areas, most notably defence and foreign affairs.

3.8 This is at the hub of the problem of interpretation. There appears to be different modes of protection afforded to national states. The first is Article 1-5 based on “respect” for national identities. The second is Article 1-9 which defines the limits of Union competences by the “principle of

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100 See in the Northern Ireland context under the Government of Ireland Act 1920, Belfast Corporation v OD. Cars [1960] N.I. 60
conferral”. This is a complex and ill defined concept. It has a number of strands to it. The first is that “the Union shall act within the limits of the competences conferred upon it by the Member States”. This is broadly in line with past practice that over time the Union will be defined by the mutual assent of the Member States. This includes the principle of subsidiarity and over time the various Treaties have built up a series of competences that are largely accommodated within the Member States through consent. However, for the first time this is defined as a fundamental constitutional principle and the principle of conferral may give rise to an organic shape to the Constitution as well as the European Union. There is considerable scope for believing that cumulatively and over time the European Union is likely to grow and develop. The draft Constitution permits this to happen but the disadvantage is that precisely where the boundaries of that development are appear not from the Constitution but from the Member States. This might prove re-assuring to some as a sign of a flexible and pragmatic approach to constitution writing. Equally it might mean that the Constitution sets a blue-print for developing a broader political and policy-making role that has the potential to effectively change the nature of the competences enjoyed by the Member States. The proportion of organic growth through the proposed Constitution may directly affect the proportion of authority within the Member State. In a country such as the United Kingdom care is needed to ensure that the traditions of the constitution-conventions and so on are capable of holding their influence against the tide of incremental change possible under the European Constitution.

3.9 The second strand is that “… [c]ompetences not conferred upon the Union in the Constitution remain with the Member States”. One interpretation might be that this provides a doctrine of mutual assent. The Union may only grow through competences granted to it by the Member States. However, equally valid might be an interpretation that assumes that the Union’s powers are inevitably going to grow. This has the potential danger of creating an asymmetrical form of constitutional devolution to the Union, if it is presumed that the growth in activities is to be lead by the European Union rather than at the level of Member States. In that sense it might be the residual power that resides with Member States even though, paradoxically, the constitution makes it clear that the Union derives its powers (Article 1-9) from the Member States. This ambiguity is difficult to resolve until it is made clear to what extent the Union is likely to increase its competences. Article 1-1 makes clear that the aspirational part of the Union in building a common future is to be found through the Union’s role to … coordinate the policies by which the Member States aim to achieve these objectives and shall exercise in the Community way the competences they confer on it….”

3.10 In considering how to assess the constitutional implications of the draft Constitution, it is difficult to reconcile the narrow approach and the broader approach to interpreting the proposed constitution. One way might be to argue that the new European Constitution would require primary legislation (reinforcing the 1972 Act) and by analogy with the Human Rights Act 1998 the opportunity to strike some compromise that preserves some degree of constitutional primacy to the House of Commons, and the long standing tradition of the sovereignty of Parliament in the United Kingdom’s system. The use of a referendum might help underpin any change. Indeed, it might be argued that the organic quality of any changes undertaken through the draft Constitution requires some flexible mechanisms to ensure that the traditions of the United Kingdom’s constitutional system are preserved. Some mechanisms are required to keep under review the traditional United Kingdom Constitution when faced with unpredictable changes that may occur in an unforeseen way. The principle should be adopted that constitutional change should come about only after debate and discussion rather than by stealth.

3.11 Article 1-3 provides broadly defined objectives for the European Union. While couched in rhetorical and optimistic language the objectives touch on many matters that also fall within the United Kingdom’s parliamentary traditions. It is these that may need most consideration as the organic nature of the draft Constitution may incrementally impinge on the value and importance of United Kingdom Parliamentary traditions including ministerial responsibility, the role of the House of Commons, the separation of powers doctrine and conventions of the constitution.

Conclusions

4.1 The draft European Constitution should not be seen as a document that is in response to a single event in history and so sets up a rigid set of “rules” to determine future actions and open to interpretation by the courts. Nor does the proposed constitution provide a clear set of rules on how...
power is to be exercised. The proposed Constitution has a more organic nature to it than a traditional approach to writing constitutions. The Constitution initiates a process and thus predicting its impact or assessing its significance is made more difficult. As a process the constitution addresses a wide variety of issues ranging from how policy is to be developed to the relationship between the Union and Member States. As outlined above two approaches may be taken: a narrow approach that is focused on the European Communities Act 1972 as the main basis for the Treaties and therefore the Constitution itself; a broader approach that considers the Constitution to be given primacy under European Union law that initiates a process that may affect the main institutions of government and more deeply the legal culture and traditions of the United Kingdom. Irrespective of whether a broad or narrow approach is adopted, it is clear that the United Kingdom needs to find mechanisms to monitor how to adapt and react to the many constitutional innovations and changes that will result from the draft Constitution. The draft constitution should be read as an aspirational document that leaves unclear and uncertain how the future constitutional arrangements of the European Union will work. As a template the draft Constitution should be seen as initiating a process and if the broad approach is adopted it will cause us to re-think many of the ways our traditional United Kingdom Constitution is working.

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Memorandum by Alan Trench

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1. The purpose of this memorandum is to draw the Committee’s attention to the implications of the draft European Constitution prepared by the Convention on the Future of Europe, chaired by Valéry Giscard d’Estaing, for devolution in the UK and the UK’s devolved institutions: the Scottish Parliament and Executive, the National Assembly for Wales and (when not suspended) the Northern Ireland Assembly and Executive.102

2. Relations between the United Kingdom’s devolved institutions and the EU, and the role of the UK Government in those, were discussed in the Committee’s report on Devolution: Inter-institutional relations in the United Kingdom published in January 2003.103 At that time the Committee found that relations were generally good and that the arrangements for liaison, consultation and communication in relation to EU business had worked well. The Committee noted the work of the Convention on the Future of the Europe, and the role of meetings of the Joint Ministerial Committee in its EU format as part of the process by which the UK Government shared information and consulted the devolved administrations about the work of the Convention. However, these issues are not raised by the House’s Select Committee on the European Union in its recent identification of key issues for consideration by the House.104

3. Sub-national authorities have made a number of efforts to express their views about the Constitution. A group of various European regions was formed in 2001, and the Scottish Executive and later the National Assembly for Wales have participated in this. The name of that grouping has changed several times, from ‘constitutional regions’ to ‘Regions with Legislative Power’ (REGLEG). Likewise the composition of the group has grown, from seven initial members in May 2001 to 40 in November 2002. The group has produced three principal statements of its position regarding the Convention; the ‘Flanders declaration’ of 28 May 2001, the ‘Liege resolution’ of 15 November 2001 and the ‘Florence resolution’ of 15 November 2002.105 Of these, the most useful document is the ‘Florence resolution’, which states most clearly and fully the views of REGLEG on the outcome of the Convention. The UK Government’s views on these issues (formed in consultation with the Scottish Executive and Welsh Assembly Government) was set out in a undated paper by Peter Hain entitled ‘Europe and the Regions’.106

4. The key issue for the REGLEG regions has been the safeguarding of their constitutional position. They sought to achieve this by securing a number of changes to existing arrangements:

   (a) a more precise definition of EU competences
   (b) more express recognition of the importance of regional governments and their functions throughout the Constitution
   (c) a strengthened institutional position for the Committee of the Regions, and better representation for REGLEG regions on it
   (d) making the principles of subsidiarity and proportionality legally binding, and ensuring that they are considered in the legislative process
   (e) access for sub-national authorities to the European Court of Justice to protect sub-national authorities’ interests
   (f) securing an express right to attend Council of Ministers’ meetings where the matter under consideration is the responsibility of sub-national authorities
   (g) special status for REGLEG, with preferential rights of consultation on legislative proposals107

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102 References to the draft Constitution are to its final draft, document number CONV 850/03, submitted to the President of the European Council on 18 July 2003.
105 All available on the internet at http://www.scotland.gov.uk/about/FCSD/ExtRe1l/00014768/page598851166.aspx
107 See Florence Resolution, p. 3-5.
In general terms, the goals set out by the UK Government on these matters have been realised in the draft Constitution. This embraces most of those sought by REGLEG (notable omissions were b), c) and g) above). However, this has been accomplished by strengthening the position of regions as part of member states, and by increasing the onus on member states to protect the interests of their regions. The Constitution emphatically does not alter the fundamental nature of the European Union as a set of European institutions which relate to member states.

5. It is easiest to understand most of the changes made by the draft Constitution in the context of the principle of subsidiarity. The Constitution increases the effectiveness of this both substantively and procedurally. So far as substantive protection of sub-national authorities is concerned, subsidiarity is linked to national constitutions and concerns. Thus Article 5, para. 1 requires the Union to “respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government” (emphasis added). Article 9 provides that the use of Union competences is governed by the principles of subsidiarity and proportionality, and spells out what subsidiarity means:

“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 intended action cannot be sufficiently achieved by the Member State, either at central level or regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.” (emphasis added)

6. This marks a significant change from the position at present. When subsidiarity was first introduced into EU law by the Maastricht Treaty, it was initially unclear whether (and how) it related to functions discharged by sub-national governments. A short-lived political and academic debate was ended in October 1992 by a declaration adopted at the Birmingham European Council meeting which inter alia made it clear that subsidiarity related only to the question of whether the Union or the member states should act, and had no applicability to internal issues such as whether legislation should affect sub-national authorities and their functions, or to how member states should deal with such authorities.

7. The new subsidiarity clause does not alter the principle that the allocation of functions between member states and sub-national authorities is a matter for the member state concerned. However, it incorporates the involvement of the sub-national level in the determination of whether a function should be the subject of legislation by the EU or the member states; when a function is the responsibility of a sub-national authority (and therefore not of either level directly involved in EU business), it remains subject to subsidiarity. To make this work, there are various procedural safeguards that are to be incorporated into the EU’s legislative procedures.

8. These safeguards are mainly set out in the Protocol on the Application of the Principles of Subsidiarity and Proportionality (the ‘Subsidiarity Protocol’ for short), annexed to the draft Constitution. The first is a requirement for wide consultation, which is to include consultation on the regional and local dimensions of proposes action. The second is the requirement for the reasons for legislation to be set out in the legislative proposal. In effect, there will be a ‘subsidiarity impact assessment’ in all Commission proposals for EU legislation. (The Commission retains the sole right of initiative for most areas of shared competence.) This assessment will need to take account of the impact of the Commission’s proposal on regional legislation where that will be necessary to implement the proposal. It will need to support its view that action should be taken at EU level in qualitative and if possible quantitative terms, and take account of financial and administrative burdens imposed as a result.

9. Much of this is an administrative matter for the Commission, which will not concern any level of government in the UK. However, the need for the ‘subsidiarity impact assessment’ to consider the implications of the proposal for regional legislation is somewhat more complicated. This is intended to address problems that have notably arisen in Belgium where the Federal government has negotiated Community legislation regarding matters which are exclusively the function of the Regions or Communities, which the Federal order has no power to implement but for which it has been held accountable before the European Court of Justice. It is unlikely to be legally problematic in the UK, where powers remain at UK level to implement EU obligations in default

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108 One notable early case of this concerned the failure of the Walloon regional government to implement one of the drinking water directives. Case C-42/89 Commission v. Belgium [1990] ECR I-2821. Belgium has now established a number of complicated procedures to ensure that the interests of the Regions or Communities are considered when EU policy is made, which include arrangements for Regional or Community Ministers to attend the Council of Ministers to represent Belgium.
of implementation by the devolved institutions. However, the Commission will need to take account of the powers transferred to the Scottish Parliament and Executive and National Assembly for Wales in framing legislation as a result, and no doubt the UK Government will consequently wish to ensure that the Commission is fully aware of the nature of devolution in the UK.

10. A third protection for devolved administrations is the institutional position of the Committee of the Regions. This becomes an advisory body to the Union as a whole, advising the Council of Ministers, European Commission and European Parliament equally, and able to issue opinions on its own initiative too. However, the suggestions in Peter Hain’s paper that it might have full institutional status or that its name be changed to reflect its status has not been realised. There is provision for the composition of the Committee to be reviewed by the Council of Ministers (at present it is fixed in the EC Treaty).

11. The main change affecting the Committee relates to the obligation that it be consulted. The draft Constitution adds an express formal requirement that the Committee be consulted on most legal measures in areas affecting sub-national authorities. At present the Committee has no formal right to complain to the Court if its interests are over-ridden (in particular, if it is not consulted about a matter where consultation is required). It now gets the right to bring an action before the Court where it has not been consulted over legislation where that consultation is required by the draft Constitution. This does not quite go as far as sought by REGLEG, although it is hard to see what substantive difference there is between seeking protection for all the Committee’s prerogatives (without stating what they are) and protecting those rights that directly and expressly arise under the Constitution.

12. A fourth area, which raises more questions, is the role that national Parliaments will come to assume in relation to subsidiarity. The Subsidiarity Protocol will require all Commission proposals (and opinions on those) to be communicated to national Parliaments at the same time as they are forwarded to the Council and Parliament. National Parliaments (and chambers of them) have six weeks to produce and send to the Commission, Council and Parliament a “reasoned opinion” if they consider a proposal does not comply with the principle of subsidiarity. This is part of the broader trend within the draft Constitution to find ways of involving national Parliaments more closely in EU matters. However, as far as sub-national authorities are concerned national Parliaments assume a broader role, as they are also made responsible for consulting “regional Parliaments with legislative powers”.

13. This raises a number of questions, to which there are no obvious answers. The first is that of principle: why should a national Parliament safeguard the prerogatives of other legislatures, which may have acquired their powers at its expense? This may be problematic in other EU member states. It is perhaps a less difficult issue for the UK given the generally good nature of relations between the UK level and the devolved institutions. However, it does give practical point to the concerns expressed in the Committee’s report on Devolution: Inter-institutional affairs in the United Kingdom about the very limited relations between the legislatures and assemblies within the UK. If the devolved institutions come to consider that the UK level does not take their concerns seriously, and act to help them protect or advance their interests, those relations may start to deteriorate. It is therefore important that in practice the UK is effective in helping the devolved institutions to look after their interests. The draft Constitution means that is no longer solely an issue for the executives involved, but one that concerns the legislatures as well.

14. This leads to a number of practical issues. Which chamber of Parliament at Westminster, and whom within that chamber, will take on the responsibility of communicating with the Scottish Parliament, Northern Ireland Assembly and (in some cases) the National Assembly for Wales? An obvious candidate would be the House of Lords Select Committee on the European Union, which is highly respected for its work on EU legislation. That would need to be agreed with the Commons, however, and with the Constitution Committee (given the Constitution Committee’s interest in devolution matters). It would require changes in the European Committee’s ways of working, as the principle of ‘scrutiny reserve’ cannot apply where the deadline is so tight as is proposed. Whichever body at Westminster takes on that responsibility, it will need to ensure that communication takes place quickly, given the tight six-week deadline for a response and the need...

109 See Article 32 and Articles III-292-294.
110 Subsidiarity Protocol, para. 7.
111 Session 2002-03 2nd Report, HL Paper 28, chapter 4 and Appendix 5, paper 1 ‘Inter-Parliamentary Relations in a Devolved UK: an initial overview’.
for internal deliberations in those bodies. It will also need to put in place effective procedures for identifying proposals that require consultation with the devolved legislatures and assemblies, and those will need to work quickly.

15. The proposals will also pose challenges for the devolved assemblies and legislatures. The devolved assemblies and legislatures will need, for their part, to ensure that the relevant committee or organ responsible for such matters is identified and deals with such issues quickly. In practice it is likely to have no more than two or three weeks to consider a proposal, formulate a view and communicate it to Westminster. That is little time by any standards, and is unlikely to be compatible with usual cycles for committee meetings. A special committee able to meet urgently, and with access to considerable resources to support it, will be needed. That is not straightforward, especially if (as is likely) the volume of proposals is not great. The machinery needed may not be called on to work often, but it must work quickly and smoothly when the time comes.

16. It may be that one way to resolve some of these difficulties would be for Westminster to consult the devolved legislatures and assemblies on all legislative proposals, or all those on which the Committee of the Regions has also been consulted. That would greatly simplify the task of identifying relevant proposals and ensure that machinery was developed and kept in regular use, as well as enabling Westminster to benefit from the contributions of the devolved bodies.

17. One area where REGLEG has not been successful is in securing access for its members to the European Court of Justice. REGLEG sought something like the right of access to the Court that member states and EU institutions have, for competence disputes with the Union and its institutions. They did not secure such privileged status. Two options will be open to sub-national authorities if their interests are infringed: to persuade their member state to bring an action, or to persuade the Committee of the Regions to do so (provided, of course, the Committee’s own rights have been infringed). The latter is unlikely to prove an effective remedy in practice, so the willingness of a member state to take action to defend the interests of its sub-national authorities will become important for it to have good relations with those sub-national authorities.

18. It is also worth noting the position under the draft Constitution regarding attendance at and participation in meetings of the Council of Ministers by ministers from sub-national authorities. This was first conferred by the Maastricht Treaty and has been used by the UK devolved administrations on a number of occasions. This is not altered by the Constitution; those attending Council will still have to be “a representative of each Member State at ministerial level” who will be the only person able to commit the Member State or vote for it. Ministers from the devolved administrations will therefore continue to able to attend Council meetings and vote, but in doing so must continue to represent the UK Government and not the administration of which they are members.

19. The draft Constitution does not dramatically transform the position of devolved administrations in the United Kingdom regarding the European Union. They may be more significant for sub-national authorities in member states such as Spain or Germany, where access to EU institutions is either restricted by the member state or operates in a very formalised manner. These safeguards may mean more to the sub-national authorities than they do in the UK.

20. The draft Constitution makes modest changes that affect the position of the UK’s devolved institutions. The new provisions regarding subsidiarity alter the position of the Scottish Parliament and National Assembly, and will require greater co-operation between those bodies and the United Kingdom Parliament when EU legislation affecting devolved functions is proposed. The draft also slightly strengthens the position of the Committee of the Regions and will enable the devolved institutions to exercise some influence through that channel as well.

21. However, the UK Government remains overwhelmingly the most important formal link between the devolved institutions and the EU. The issues raised by the Committee in its report on Devolution: Inter-institutional relations in the United Kingdom therefore remain current. The concerns expressed by the Committee about the working of intergovernmental relations in the absence of political consensus between devolved administrations and UK Government, or if the present level of consensus were to decline, are therefore highly pertinent in the context of the draft Constitution. As regards devolution in the UK, this means that UK Government will need to

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112 Session 2002-03, 2nd Report, Devolution: Inter-institutional Relations in the United Kingdom, para. 175.
113 Article 22, para. 2.
exercise its powers with great care in future, if its dominant position in relation to EU matters is not to be come a source of tension with the devolved administrations.

22. As regards the draft Constitution, it would be unrealistic to expect major changes at this stage to accommodate what, in the overall context, are relatively minor concerns that are specific to the United Kingdom. The draft does not, however, amount to a fundamental change in the relationship between sub-national authorities and the EU. The draft Constitution creates a changed framework for relations, and the issue is so much not one of what is included in the draft Constitution, or of how that Constitution comes to be implemented in the UK, but rather of the practices that are followed and conventions developed subsequently.

8 September 2003
Memorandum by Professor Rodney Brazier, University of Manchester

1. This memorandum is limited to one issue only. It arises from the first of the four questions posed by the Constitution Committee in its Call for Evidence. It is the extent to which the adoption of the proposed Constitution of the European Union illustrates the need for new rules to govern whether particular constitutional questions should be subject to an advisory referendum. I appreciate that that question may not be uppermost in the Committee's mind in this present inquiry, and in addressing it I may resemble students who answer exam questions that they wish to see rather than those which are actually set. But I feel strongly that the adoption of the proposed European Constitution provides a compelling example of a fundamental defect in the United Kingdom constitution.

2. The Constitution Committee has already said that the circumstances in which referendums should be held and what conditions should attach to them deserve a full inquiry.114 I hope that one result of the Committee's present investigation will be that it will conduct such a full inquiry as soon as circumstances permit.

3. I expressed my concern to the Committee in an earlier inquiry about the absence of rules in the United Kingdom which might govern the process of constitutional change.115 In essence, there is no formal, legal mechanism in the United Kingdom constitution which prescribes how changes may be made to the constitution. No special majorities, or compulsory referendums, or other formal procedures are required, merely legislation passed in the ordinary way. So if a Government can get its legislation through Parliament, that is all that is needed in order to make constitutional changes, regardless of how important they may be. It is entirely for the Government of the day to decide whether to obtain any independent evaluation of possible constitutional reforms, whether and how to consult about them, and whether to hold a referendum. This freedom of manoeuvre has produced odd results. Under the present Government, House of Lords reform was preceded by a Royal Commission; possible change to the Westminster voting system was considered by an independent commission; and the public was comprehensively consulted on both issues. By contrast, there was no pre-legislative inquiry nor, therefore, any systematic consultation before the Human Rights Bill was introduced. Moreover, referendums were held on possible devolution to Scotland, Wales, Northern Ireland, London, and on whether local electors wanted an elected mayor, but not (for instance) on Lords reform, or on the incorporation of the European Convention on Human Rights. Is that complete freedom of action defensible in constitutional terms?

4. My view remains that all major constitutional changes - what the Committee would call "principal" changes - should be preceded by the maximum consultation, by independent analysis, and where possible by cross-party agreement about them. And before being implemented the most important constitutional changes should be put to a national advisory referendum. (Indeed, approval at a referendum would be the next best thing to cross-party agreement if a Government were unable to achieve political consensus.)

5. The Political Parties, Elections and Referendums Act 2000, Part VII, sets out a detailed legal framework to ensure that referendums above local level are conducted fairly. But it is of course notorious that the Act is silent on the circumstances which would trigger a referendum. Any national referendum must be authorised by fresh primary legislation passed for the purpose. The only time that a Government has thus far caused such legislation to be passed was for the 1975 referendum on whether the United Kingdom should remain in the European Community. Such legislation is also required for sub-national referendums, of which there have been several (including the devolution polls in 1979 and 1998), and of which there will be more (on possible English Regional Assemblies).

6. Historically, resistance to national referendums in this country was based in part on the abuse of such polls in the 1930s by the dictators, and in part by parliamentarians' desire to maintain parliamentary supremacy and the representative function of MPs. But now that referendums have been held for a national purpose and for devolution purposes - even down to the level of whether local government electors wanted an elected mayor - that historical resistance must, I think, be taken to have reduced, although plainly the constitutional position of Parliament and of MPs remain significant factors in the future of possible referendums at national level. Indeed, the present Government is committed to further national referendums, of its own choosing, on the adoption of the euro, and on any possible change to the Westminster voting system.


115 Ibid, pp 50-52
7. Currently, a debate is going on about whether there should be a referendum about the proposed European Constitution. The Government opposes one on the grounds that it is an insufficiently important question, given the nature of the document itself, given that the main issue about the United Kingdom’s relationship with the then European Community was settled in 1975, and given the promise of a future referendum on the single currency issue. Others argue for a referendum, on grounds which include the importance of the treaty as a fresh statement of the fundamental rules for the European Union, and the nature of the changes which would be made by it. That these arguments can be made on either side demonstrate the inadequacy of the present ad hoc situation concerning referendums. The drawbacks of that situation include the following.

(i) Political - sometimes, as currently, party-political - arguments can break out about whether a particular constitutional question should or should not be put to a referendum. While political debate is to be encouraged, it should not have to rage around the working rules of the constitution in particular cases.

(ii) The traditional, ad hoc, approach to referendums enhances the control of the Government of the day over constitutional development. Ministers have the final say about whether there will be a referendum: the Government decides purely at its own discretion whether a poll should take place. Constitutional arrangements, in the main, should ideally not be at the disposal of the Government of the day, and should not allow it to pick and choose which method should be used for a particular change.

(iii) A Government which is free to decide whether to hold a referendum may be tempted to do so for what, in purely constitutional terms, is an illegitimate reason. The 1975 referendum was designed as much to hold the then Government together as to get an answer to a constitutional question - although a referendum at some stage (and ideally before entry to the then EC) was, in my opinion, constitutionally desirable. And a Government may be tempted to resist a referendum on an equally illegitimate - though entirely understandable - ground, namely, that it might produce the "wrong" result for Ministers. It has been claimed that worry about the outcome is a crucial part of the present Government’s current resistance to a referendum on the European Constitution. Standing rules could largely remove the Government from the decision whether to hold a referendum on a given issue.

(iv) The ad hoc approach produces inconsistent decisions about whether to hold a referendum. Examples were given above in paragraph 3. If there are to be any referendums at all, matters that are broadly similar in constitutional importance should be subject to broadly the same mechanism for resolution: questions of broadly similar importance above a certain threshold should be subject to a referendum. How that threshold should be defined could be decided by new rules, or possibly could be left to the judgement of a body independent of government.

(v) The ad hoc approach to referendums, requiring an ordinary statute to authorise a particular referendum, contributes to the view that constitutional change is qualitatively the same as change in any other area of public policy. It is not: the rules under which a state is governed are (or should be) of a different quality to the rules that are produced to implement particular areas of public policy. Constitutional rules are (or should be) different from other rules, and they should be established in ways which underline that difference. In other words, constitutional rules should be established and changed in ways which are unique to them, including for the most important by the use of a referendum.

8. Those drawbacks would be reduced if agreement could be reached about what should trigger a national referendum. Rules could be incorporated into legislation which would provide standing authority for any future national referendums. I do not say here what those rules might be. There are several approaches to writing them. The rules might require a national advisory referendum before existing and listed constitutional legislation was amended or repealed. Or the rules might require a referendum if a proposed change would affect specified areas of the constitution, such as the monarchy, or the composition or powers of either House of Parliament, and so on. Or the rules might require a specified body, perhaps using criteria listed in the rules, to judge whether a constitutional referendum should be held. The Constitution Committee itself could be one candidate for such a role. What I am clear about is that the current debate about whether, and if so how, the United Kingdom should ratify the proposed European Constitution will intensify rather than abate. It is, I believe, a perfect illustration of why more work should be done on the place of national referendums in the United Kingdom constitution.

29 August 2003