

THE EUROPEAN CONSTITUTION: WHAT IT REALLY SAYS

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6 April 2005

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INTRODUCTION

The Constitution was launched in 2001 by the 'Laeken Declaration' of heads of government. This questioned how to prevent "a creeping expansion of the competence of the Union" and stated that the EU "... must be brought closer to its citizens, instead of intervening, in every detail, in matters best left to Member States ...". It went on to say "Many feel that deals are too often cut out of their sight and they want better democratic scrutiny..."

On the crucial issue of power-sharing, the Declaration was reformist. "The important thing is to clarify the division of competence between the Union and the Member States. This can lead both to restoring tasks to the Member States and to assigning new missions to the Union...Should we not make it clear that any powers not assigned to the Union fall within the exclusive competence of the Member States?"

Judged by these ambitions, the Constitution has not succeeded:-

- There is a substantial proposed transfer of authority¹ to the EU, with no compensating return of powers to Member States
- The boundaries between the powers of the EU and the Member States are not clearly drawn
- There is no discernible progress towards democratic accountability
- The social and economic aims of the Constitution are statist and interventionist, of the sort discarded by the UK in the 1980s.

"The Constitution is the embryo of a European economic government"

French Finance Minister Nicolas Sarkozy

What the EU needs is not more bureaucratic powers to add to the 97,000 pages of the *acquis communautaire*, but modernisation. Although much of the text reads more like a political manifesto than a constitution, it does not address unemployment (over 10% in France and Germany, sustained by unreformed markets and the rigidities of EMU); over-regulation (now affecting every aspect of national life); or corruption, which is out of control². The Constitution would institutionalise, rather than cure, the underlying causes of these problems.

As for foreign and security policy, the text is informed by the ultimately unsustainable French concept of "multipolarity", whereby the EU is seen more as a rival than as a partner of the USA.

¹ Some 60 areas previously subject to national vetoes will in future be decided by majority voting (with certain UK opt-outs): other areas are brought under EU jurisdiction for the first time or more unambiguously than before. It is, however, an inexact field of science.

² Evidenced by the resignation of the Commission in 1999 and the refusal of the Court of Auditors to give the Community's accounts a clean audit for 10 consecutive years.

The way to initiate radical reform in the EU - recognised as essential by progressive voices throughout Europe - is to reject the Constitution.

KEY CLAUSES

The Constitution comprises 268 pages of small print. Few have read it or know what it contains. This opens the way for unsubstantiated and mutually contradictory assertions. On the Left, Continental supporters hail it as a triumph for the social market: opponents denounce it as conceding too much ground to Anglo-Saxon ideas of free enterprise. In the UK, the government alternately trivialises it as “a tidying up exercise” and claims that it “reflects British aims” and “strengthens the role of national parliaments”. Everywhere except in Britain, the Constitution is acknowledged as a significant milestone in the political evolution of the EU.

The necessarily selective passages in italics quoted in this synopsis are taken directly from the text, to help readers make up their own minds.

Framework for a federal Europe

Art. 1 – 1 *Reflecting the will of the citizens of Europe to build a common future, this Constitution establishes the European Union.....*

Comment The present EU gains its authority from the Member States, by treaties between them. The new Union’s power will derive directly from the Constitution - the mark of a federal state. The existing treaties will be repealed and terminated.

Art. 1 – 6 *The Constitution and law of the Union shall have primacy over the law of the Member States.*

Comment Britain and other Member States currently enjoy the right to ultimate jurisdiction if EU law conflicts with their own constitutional law. The Constitution purports to remove this right. During the negotiations the UK government attempted to delete the primacy clause: later, it abandoned the attempt, and now claims that the clause reflects the existing state of British law.

“The Constitution is the birth certificate of the United States of Europe”

Hans Martin Bury, German Minister for Europe

Art. 1 – 7 *The Union shall have legal personality.*

Comment This would enable the EU to make treaties in its own right, a power hitherto reserved to the Member States.

Art. 1 – 8 *The currency of the Union shall be the euro.*

Comment Other symbols of statehood introduced by Art. 1 – 8 are the flag, the anthem, the motto and the public holiday (Europe day).

Subsidiarity and the role of national Parliaments

Art. 1 – 11 *Under the principle of subsidiarity the Union shall act only if and insofar as the objectives can be better achieved at Union level.*

Protocol 1 *National Parliaments may, within six weeks [of receiving a draft*
Art. 3 *EU law] send a reasoned opinion on whether it complies with the principle of subsidiarity.*

“We are creating a political union”

Belgian Prime Minister Guy Verholstadt

Protocol 2 *Where reasoned opinions of an act’s non-compliance with the*
Art. 7 *principle of subsidiarity represent at least one third of the national Parliaments the draft must be reviewed.... After such review, the Commission may decide to maintain, amend or withdraw the draft.*

Protocol 2 *The Court of Justice shall have jurisdiction in actions on grounds*
Art. 8 *of infringement of the principle of subsidiarity...*

Comment These are the provisions said by the UK government to give “enhanced powers” to national parliaments.

Scope of the Union’s Powers

Art. 1-12.2 *When the Constitution confers on the Union a competence shared with the Member States ... the Member States shall exercise their competence [only] to the extent that the Union has not exercised, or has decided to cease exercising, its competence.*

Art. 1 – 14 This article lists the areas of *shared competence* - notably *the internal (single) market* (i.e. all the legislation affecting commerce and industry, including health and safety), *social policy*, *“economic cohesion”*, *agriculture and fisheries*, *the environment*, *transport*, *energy and freedom*, *security and justice*” (i.e. asylum, immigration and legal harmonisation).

Art. 1 – 13 This Article lists the areas of *exclusive EU competence*, notably *customs union* (tariffs and trade), *competition* and *monetary*

policy (for the eurozone). Most international agreements are also stated here to be subject to exclusive competence.

Art. 1 – 12.3 *The Member States shall co-ordinate their economic and employment policies within arrangements which the Union shall have competence to decide.*

Art. 1 – 12.4 *The Union shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.*

Art. 1 – 18 *If action by the Union should prove necessary to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously, shall adopt the appropriate measure.*

Comment The latter Article is among eight (six of them new) freeing the EU from the limitation of the national veto, the most important being Art. 4 – 444, permitting the European Council, by unanimity and provided no national parliament objects, to introduce majority voting in any policy sphere other than the military.

Foreign and security policy

Art. 1 - 16.1 *The Union's competence shall cover all areas of foreign policy and all questions relating to the Union's security.*

Art. 1 - 41.2 *The common security and defence policy shall include the progressive framing of a common Union defence policy. This will [in the existing treaties "might"] lead to a common defence, when the European Council, acting unanimously, so decides.*

"The EU should have its own army...."

Former Commission President Romano Prodi

Art. 1 - 41.3 *An Agency in the field of defence capabilities development and armaments (European Defence Agency) shall be established ... to strengthen the industrial and technological base of the defence sector.*

Art. 1 – 41.6 *Member States which have made more binding [military] commitments to one another ... shall establish permanent structured co-operation within the Union framework.*

Comment "Permanent structured co-operation" (elaborated in Art. 3 – 312 and Protocol 23) means co-operation under Council authority and subject to majority voting. Protocol 23 deals with combat

readiness, logistical support, defence expenditure and procurement. Together these clauses are often said to constitute an embryonic European rival to NATO.

Art. 1 - 41. 7 *Commitments in this area shall be consistent with commitments under NATO, which, for those States which are members of it, remains the foundation of their collective defence ...*

Art. 1 - 16. 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 Union's action in this area. They shall refrain from action contrary to the Union's interests or likely to impair its effectiveness*

Comment These Articles should be read with Art. 3-296, creating a *European External Action Service* (i.e. a diplomatic service), and Arts. 1-28 and 1-40, creating a *Union Minister of Foreign Affairs* who will “*put into effect*” the common policies.

The Constitution would make it increasingly difficult for a Member State to support the USA whenever a significant bloc of other European countries opposes US policy.

Judicial independence

Art. 1 – 19. 2 [The institutions of the Union] *shall practise mutual sincere cooperation...*

Comment Possibly restricting the independence of the Court of Justice.

Presidency of the EU

Art. 1 – 22 *The European Council shall elect its President for a term of two and a half years, renewable once ...*

Comment The European Council is the summit meeting of heads of Member State governments. The new role of indirectly elected President (who may not hold national elective office) will replace the current system whereby the Presidency rotates between Member States every six months.

CHARTER OF FUNDAMENTAL RIGHTS (PART 2 OF THE CONSTITUTION)

Comment The “Charter of Fundamental Rights” would set in stone some politically charged rights and some vaguely worded rights extending the scope of EU law into new areas of national life, including employment law. The UK government unsuccessfully opposed the incorporation of the Charter into the Constitution. Business has expressed concern at its anti-competitive tone and

its potential for generating regulation. It will be interpreted by the Court of Justice (Art. 3 – 369) on social market economic principles (Art. 1 – 3.3).

Business-related clauses

- Art. 2 –83 *Equality between women and men must be ensured in all areas, including employment, work and pay.*
- Art. 2 – 87 *Workers or their representatives must be guaranteed consultation in good time ... under the conditions provided for by Union law.*
- Art. 2 – 88 *Workers have the right to conclude collective agreements ... and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.*
- Art. 2 – 91 *Every worker has the right to limitation of working hours.*
- Comment The Articles cited above should be read in the context of Art. 1-48, in which *the Union recognises and promotes the role of the social partners* (i.e. trade unions and employer bodies).
- Art. 2 – 93 *.... Everyone shall have the right to paid maternity leave and to parental leave following the birth or adoption of a child.*

Social clauses

- Art. 2 – 62. 1 *Everyone has the right to life.*
- Comment Anti-abortion groups may seek to rely on this clause.
- Art. 2 – 79 *No one may be extradited to a State where there is a serious risk that he or she would be subjected to the death penalty or other degrading treatment or punishment.*
- Comment Terrorists could not be extradited to the USA and rarely expelled to their country of origin. (This is the current UK legal position, but the Constitution would put it beyond the possibility of review).
- Art. 2 – 94 *Everyone residing and moving legally within the EU is entitled to social security benefits in accordance with Union law.*
- Art. 2 – 94. 3 *...to combat social exclusion the Union recognises the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources ...*
- Art. 2 – 95 *Everyone has the right to preventive health care*

THE FUNCTIONING OF THE UNION (PARTS 3 AND 4 OF THE CONSTITUTION)

These parts of the Constitution, which are essentially procedural and jurisdictional, together with the Annexes and Protocols that follow, flesh out the principles enunciated in the first part. They contain, *inter alia*, the transfers of decision-making from unanimity to majority voting.

Arts. 3 – 130 to 3 – 256 deal with the workings of the single market, the CAP and other areas, mainly reproducing matters covered by the existing treaties, but with three notable additions - *fisheries policy* is brought within the CAP (Art. 3 – 225); *space policy* makes its debut (Art. 3 – 254); and “*security of energy supply*” (Art. 3 – 256) becomes a function of the single market.

“...the most important treaty since the formation of the EEC ... the decisive task of our time”

German Foreign Minister Joschka Fischer

Arts. 3 – 257 to 3 – 277 deal with “*Freedom, security and justice*” – i.e. the law. Originally reserved for national decision, successive treaties have progressively brought this area within the EU’s jurisdiction, initially with the safeguard of the national veto, later subject to majority voting. The main majority voting areas either newly created or no longer to be subject to veto are *border controls* (Art. 3 – 265); *asylum* (Art. 3 – 266); *immigration* (Art. 3 – 267); *approximation and enforcement of civil laws* (Art. 3 – 269) and (subject to a national let-out clause) *criminal laws* (Art. 3 – 270); *definition of criminal offences and sanctions* (Art. 3 – 271); *initiation by Eurojust of criminal prosecutions* (Art. 3 – 273); and a new *European Public Prosecutor’s office* (Art. 3 – 274).

“... a legal revolution without precedent”

Spanish Foreign Minister Ana Palacio

Art. 3 – 369 gives the Court of Justice jurisdiction, without appeal, over the interpretation of the Constitution, in accordance with the principle, recited in the Preamble, of ever closer union and the maintenance of the “*acquis*”.

The full text, with an index and a detailed analysis by British Management Data Foundation, is available from bmdfstroud@aol.com

A comprehensive legal website is at www.euconstitution-legal.org