THE FEDERAL TRUST
for education & research
enlightening the debate on good governance

# EU Constitution Project Newsletter

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In line with the Federal Trust's aim to enlighten the debate on good governance, this Newsletter reviews the current reform process of the EU from the standpoint of the work of the Federal Trust's project on Constitutionalism, Federalism and the Reform of the European Union (the 'EU Constitution Project'). The Newsletter looks at current developments in and outside the Convention and also covers the UK debate. Finally, it provides information about relevant events and publications.

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## Editors' note

As this is the last issue of the EU Constitution Project Newsletter, we wanted to produce a slightly different Newsletter. Coinciding with the settling of the last remaining disagreements on the draft Constitutional Treaty on 17-18 June, this last Newsletter is the collective product of a number of contributors. The conclusions reached by the authors are by no means unanimous, but we hope that it will contribute to a serious debate on the future of the EU both in the UK and more widely.

We would like to thank all those who have contributed to previous issues and to the technical and research support provided by The Federal Trust Office. Without either of them, our work would have never prospered.

**The EU Constitution Project**

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# 1. Editorial: The EU Constitution Project – and the EU Constitution

When the project for the Federal Trust EU Constitution research programme was originally conceived (mid-2001), the project for an EU Constitution was still barely a twinkle in the eye of even the most optimistic observers of the EU. There were few who dared imagine that the Declaration on the Future of the Union appended to the Treaty of Nice could lead to a major simplification and clarification exercise in relation to the primary legal texts which form the basis for the existing and composite EU constitutional framework. Now that it is coming to its conclusion, it would seem that the normative case for an EU Constitution has been fully accepted at the elite political level. Whether it will be widely accepted by those responsible for national ratification of EU treaties remains to be seen.

Before coming to some remarks about the set of documents agreed by the Heads of State and Government at the Brussels IGC late on 18 June 2004 (for until the process of legal and linguistic *toilettage* is complete, we must continue to talk of a composite set of documents which together constitute the Treaty establishing a Constitution for Europe), I would first like to comment briefly on the happenstance of directing a project on the EU Constitution, just as the whole idea of an EU Constitution reached the front pages of the newspapers.

The Constitution Project was very much the brainchild of John Pinder, in his role as Chairman of the Federal Trust. Very generous funding has been provided to support the Project over its three years of existence (October 2001-September 2004) from the James Madison Trust. This funding supported not only the research officers based at the Federal Trust in London, but also made it possible for me to be freed up from certain teaching responsibilities at the University of Manchester. I would like to register my personal thanks, in this regard, to a number of key individuals:

- To John Pinder for providing the inspiration and the means without which the project could not have been developed and produced the outputs which it has done;
- To Martyn Bond and Brendan Donnelly, for their support and guidance as successive Directors of the Federal Trust;
- To Anna Vergés Bausili, Erin Delaney and Lars Hoffmann for working as research officers on the project (in many cases beyond the call of duty);
- To other members of the Federal Trust staff who have made possible a number of wild suggestions (e.g. 'let's try to have the definitive website for monitoring the Convention, the IGC and the Constitution');
- To numerous Federal Trust interns who have offered invaluable supporting work particularly on the website and the database; and
- To Tom Gibbons and Andrew Sanders, Heads of the School of Law, University of Manchester, for supporting my involvement in the Constitution Project and with the Federal Trust;
- To UACES for providing funding for a Study Group on the EU Constitution process which ran throughout 2003 and for providing funding for the July 2004 joint Conference of the Federal Trust and UACES.

Finally, on behalf of the whole EU Constitution Project team I would like to register my wholehearted thanks to the many people who have contributed generously to the project by giving papers at Conferences and Study Group meetings, by contributing editorials and other comment pieces to the Newsletter, and by offering analysis and think pieces for the online papers. In many respects, therefore, the project has been a collective and – we hope – very open exercise, and would not have been possible without the generosity of many people. It has, moreover, been very much a cross-border enterprise, as the very international readership of this Newsletter demonstrates very clearly.

We intended from the beginning that the Project should not be completely overwhelmed by the impetus given to the 'constitution debate' by the Laeken Declaration and the establishment of the Convention, which arrived just as we started work. On the contrary, we wanted there to be a focus on some key issues of constitution-building, which have continued to be the focus of much work within the context of the Convention and indeed to some extent the IGC (although the latter has dealt largely with institutional issues, and some remaining questions on how the EU goes about its business). The issues identified for particular focus were:

- the role of different institutions under divided-power systems, including the legislature, the executive, the judiciary, but favouring systems which simultaneously provide for the representation of the states and the representation of interests such as the regions and economic and social interests;
- the separation of powers within a constitutionalised polity, the principle of interinstitutional balance, the principle of limited powers, and the division of powers between the Union and the states, in both the internal and external spheres;
- concepts of citizenship and legitimacy, including the representation of interests, democracy and the protection of citizens' rights and fundamental rights;
- governance under the rule of law, the role of the Court of Justice, and the effects of EU law in relation to national law.

In addition, the major normative premise upon which the Constitution Project was founded was that there has in fact long been an EU Constitution of a composite form, partially treaty-based and partially judicially-formed. This premise – and the mapping and evaluation exercises with which those working within the Constitution Project have been involved – together inevitably affect perceptions of and judgments about 'The EU Constitution', such as it has now been agreed.

These are, of course, from both the normative and the analytical standpoints, distinctively *legal* perceptions of the EU's status quo, especially since they make most use of thin, institutionally focused concepts of constitutions and constitutionalism, and rely much less on the teleological and political elements of constitutionalism, namely its contribution to polity-formation and polity-maintenance. On the other hand, we do remain convinced of the need for the thickening of key concepts such as citizenship to enable the long term health of the EU as a polity.

The previous *status quo* also seemed, in comparison to the present situation of tabloid-driven vitriol aimed at the new Constitution and all who support it, a fairytale scenario in which constitutional elements could be seen being gradually grafted onto the Treaty framework, largely unseen by those who are motivated by unreasoning opposition to the EU and all that it stands for. This did not imply, of course, an unquestioning acceptance of all elements of policy content or approach, or a lack of critical bite regarding arguments such as the case for a more 'Social Europe', or the risk that the EU has signed up too enthusiastically to the neo-liberal constraints of the World Trade Organisation. But what the 'old' EU constitutional framework has undoubtedly provided has been an important laboratory for experimentation, a laboratory which did in large measure inform the work of the Convention in drawing up the draft Treaty establishing a

Constitution for Europe, thanks to various mechanisms by which that body could draw upon the existing *acquis* and try to identify its weaknesses and its strengths. It is as a result of this working method that important and constructive changes such as the creation of a unitary legal structure with a unitary Union legal personality came so easily to be accepted within the Convention and were never considered for subsequent removal by the IGC, in its of its working phases. It can also be seen to have contributed to debates about 'improving' the system of legal instruments, or about the incorporation of the Charter of Rights as a formal constitutional source, albeit ever more hedged around by *caveats* to restrict its application to the municipal legal systems of the EU Member States.

At the Constitution Project, we warmly welcome the agreement reached by the Heads of State and Government in Brussels on 18 June 2004. Others writing in this newsletter will focus on key questions such as institutions (size, composition, functions, etc), decision-making and voting arrangements, national parliaments, and so on. It suffices to state here that it represents an adequate compromise both between the political interests of the various Member States as well as between the collective political pragmatism of 25 Member States and the particular vision for the Convention driven above all by the personality of its President. We do not accept the argument that the adoption of a formal Constitution for the EU is either a distraction of political energies from more important issues such as economic growth or political stability, or a risky interference with the long term delicate balance between the Member States and the EU. It was becoming apparent, that with every passing day the text elaborated by the Convention – already itself quite complex – was being 'fiddled' into states of ever greater complexity and textual obscurity. For that reason, it is good that the 'fiddling' has ended and that the cleaning of the texts prior to signature can now begin. What we will have, once the texts are consolidated into a single document, will be something which is – inevitably – lengthy and complex; but it will contain, in addition to considerable detail (some of it undoubtedly unnecessary), some elements of rhetorical and symbolic importance which should be the baseline for understanding the overall EU project and what it does.

After signature will come ratification, and it is to be hoped that to some extent this can become a 'European' event or set of events, rather than one mired wholly in domestic politics with national electorates maintaining their recent vocation to give sitting governments, and political elites more generally, 'a good kicking'. The UK will have its own distinctive struggle in which the wild exaggerations of much of the domestic press will come up against the apologist defensiveness of those who claim to be in favour of the Constitution. Perhaps a debate about 'what is a Constitution' can be enjoined in that context, and perhaps it may even be possible finally to lay to rest the fallacious idea of a Brussels-based 'superstate' or 'federalist juggernaut', driven by some hidden hand (well, actually, probably the French and the Germans...). The same defensiveness leads political commentators boasting their pro-European credentials to suggest that in fact the EU has recently changed, that Enlargement has made all the difference, and that until recently it was indeed possible to talk of a Franco-German conspiracy leading to a 'superstate'. Enlargement has changed much in the EU, but it has not changed the key checks and balances which have long been expressed through some of the key elements of the EU legal order. In truth the reality of EU-based federalism has always been, and will always remain, a delicate and constantly renegotiated balance between semi-sovereign nation states (themselves in flux and transformation in a world displaying simultaneously tendencies towards globalisation and regionalisation/localisation) and semi-sovereign institutions.

The next stage of the debate will be an ideal opportunity to make the positive case for a restatement of what the EU is and what it does. The re-articulation that the EU is a polity with limited and constrained competences highlights not only the role of national competences, but the need for responsible political contestation around what the EU should be doing, and what political goals it should be seeking. The base line has to be clear and correct information about the 'state of the EU', especially in terms of the legal framework of powers and institutions, and the extent of and limitations to, the EU's powers and institutions. Key areas of fiscal policy, labour law, employment and growth, energy policy, immigration and asylum, criminal law and procedure are not – *pace* much of the British press – solely of interest to the UK, or solely to be focused upon because they are the sites of the infamous UK 'red lines'. On the contrary, they are all areas in which the extent and focus of EU policy is consistently misrepresented, and where there is a need for clarity and impartiality of analysis. It is to this debate that the EU Constitution Project hopes already to have contributed, and to contribute further in the future.

Professor Jo Shaw
University of Manchester and The Federal Trust

## 2. Tributes to John Pinder

Editors' note: Given John Pinder's signal contribution to federalist studies in the context of the European Union, and his support for the EU Constitution Project, we felt it appropriate to 'sign off' the Newsletter, with two brief tributes to John Pinder.

Gordon Brown recently announced on the radio that there were really no more federalists left in Britain. The falsity of this claim is due above all to John Pinder.

It is John who has taught, organised and inspired generations of young federalists born since the Second World War. His writings on Europe and federalism have illuminated, his work in the European Movement, Federal Trust and Federal Union stimulated and his personal vision exhilarated us.

As foes have mangled the idea of federalism into an unrecognisable caricature of alien centralism worthy of Stalin, friends have fearfully abandoned even the word 'federal', but John has kept it alive and well. He has shown us that it is not the federalists who are unrealistic or utopian but, on the contrary, those with delusions of the adequacy of inter-national co-operation to solve the world's problems.

Many of us were moved and stimulated by the freshness and clarity of federalist thinking in the nineteen seventies and eighties, but we were unprepared for the onslaught of disinformation from our opponents. John showed us that our analysis was well grounded and our movement part of the long history of the struggle for peace. He has transmitted and enhanced a great tradition that the British were in danger of forgetting. He has provided us with the tools, intellectual and organisational, and with the determination to keep on using them when political leadership has failed. Thanks to John, all those who seek to mislead and confuse the public will find that there are indeed federalists left in Britain.

David Grace, *Inside* **Europe**

As John Pinder is about to join our club of octogenarian eurofanatics, I look back with admiration at his contribution to the federal cause in Europe. My primer for understanding the case for British membership of the European Community was his 1959 Report of 'Britain and Europe' published by the Economist Intelligence Unit under his direction, followed by an equally persuasive volume on 'The Commonwealth and Europe'.

I regarded John as my federalist mentor when I joined Britain in Europe and the European Movement in the 1960s. With his help we ensured that the European Movement and its governing bodies were led by federalists and, over many years, its policies were well ahead of governmental thinking. We similarly worked closely together in the Federal Trust of which he has been its inspiring and generous chairman for many years.

With Altiero Spinelli and George Brown John and I promoted the idea of by-passing the French vetoes on British membership of the EEC by creating a parallel European Political Community. The proposal, supported by HMG and several other EEC governments was about to be made public in 1969, when De Gaulle resigned as President of France and the door for British membership opened once again.

Both during the campaign for entry in 1970/1 and the 1975 referendum, John's intellectual input played an important role in devising our campaign strategies.

His two term presidency of the international Union of European Federalists were characterised by the development of practical but far-reaching policies promoted by the Federalists and influenced EC governments to adopt many of them. Now once again he is engaged in persuading opinion formers of the need to endow the European Union with the capacity to play a leading role in global affairs.

Finally the vast number of John's books and publications are the best record of his immense contribution to the federalist cause.

Ernest Wistrich
The Federal Trust

## 3. The Constitutional Treaty 2004 June at the IGC and forthcoming

The process which had started back in 2000 when Heads of State and Government at Nice called for a new round of reform of the Treaties accompanied by a deeper debate on the Future of Europe, was finally concluded at the European Council in Brussels of 17-18 June.

As the endgame played itself out, final agreement was reached on a number of mainly institutional issues. This was appended to the much larger number of ancillary issues, provisionally agreed in the course of the IGC negotiations, and constituting the 'package' of amendments to the Treaties. Nothing is agreed until everything is agreed, and thus the settling of power issues involved in any change to the institutions also meant final approval of a large number of other 'less controversial' issues, among them changes bearing on the governance of the Union division of powers, and the governance of the Union. However, there can be no doubting that the IGC in its final stage was expertly steered and chaired by the Irish Presidency.

Indeed, in a longer term perspective, the final official agreement in Brussels represents a new episode in the constitutional life of the EU, or in other words, in the ongoing shaping and transformation of EU.

The incoming Dutch Presidency (starting on 1 July) will undertake the consolidation of the agreements into a clean and final text, so that official signature of the new Constitution can take place from the end of October 2004. The ceremony of signature is expected to occur in Rome, as seemingly agreed last year under the Italian Presidency.

Provisional consolidated version of the draft Treaty establishing a Constitution for europe, 25 June 2004 [CIG 86/04] and Addedum [CIG 86/04 ADD]

### *Press reactions*

Le Figaro

Le Monde

Le Monde

Sueddeutsche

The Independent

EU Observer

The Economist

La Vanguardia

### *Other Commentary*

'The Treaty establishing a constitution for Europe: An overview', by David Phinnemore

'Light and Shade of a quasi-Constitution', *EPC Issue Paper 14*, by Giovanni Grevi

## Views on the Constitutional Treaty

### *The End of the Constitutional Beginning*

By any standards 18 June was a date of historical importance in the life of the European Union. The Intergovernmental Conference finally agreed a text of the Constitutional Treaty to be submitted to the 25 Member States for ratification. Yet the scenes of celebration in Brussels and beyond were distinctly muted. This was not just because the final agreement had something of the air of a foregone conclusion, it having become increasingly obvious in the weeks and months before the final summit that, under the pragmatic watch of the Irish Presidency, the European leaders had managed to put aside their differences of last December sufficiently to find a compromise solution to the outstanding questions of Council voting, the composition of the Commission, the extensions of areas of competence subject to QMV, the absence of a reference to Christian values in the preamble etc. Neither can we explain the low-key reaction to the constitutional moment solely or mainly by reference to its competing for headlines with other more worrying indicators of the health of political Union, whether the record low turnout at the previous week's European Parliament elections or the continuing acrimony and indecision over the appointment of a new Commission President.

Instead, the sense of flatness, even unease, that has attended the IGC endgame is in large part due to the fact that agreement on the text leaves two crucial questions hanging in the air. First, and most urgently, what are the prospects of ratification – of turning the text into a legally effective constitutional instrument? Secondly, and, even more importantly, what precisely (or even imprecisely) is the long-term 'added value' of the Constitutional Treaty? In the immediate aftermath of last Friday's success, a relieved Bertie Ahern was reported to have said 'you'll get a few generations out of it'. But this merely begs the inverse question, what will this and the next few generations of European citizens get out of the Constitution?

These are both complex issues, and it would be foolhardy to predict their outcome with any confidence. What we can be sure of, however, is that they are closely inter-related. If we expect present and future generations to derive anything

positive from Europe's first supranational constitution, not only does the ratification battle have to be won, it has to be won *in the right way and for the right reasons* – even if this makes an already hard task even more formidable.

And there is no doubt that it will indeed be a hard task to ensure the ratification of the Constitutional Treaty. Tony Blair's late change of heart on the need for a referendum has been criticised as both wrong in principle and strategically inept. Wrong in principle, because such a complex question is not susceptible to an easy Yes/No answer, and indeed threatens to descend into the base exchange of banalities, half-truths and downright lies that has plagued the 'Britain in Europe' debate for so many years. Strategically inept, not only because Blair appears badly compromised by his earlier and sustained insistence that a referendum was unnecessary and inappropriate, but also because, in the views of many other European leaders who watch their domestic opinion polls with trepidation, he has also compromised *them* by setting a precedent they will find it difficult not to follow.

Of course, it is too easy to blame Blair. The whole question of ratification could have been handled better from the outset. Both the Constitutional Convention and the IGC missed opportunities to find a suitable legal device to move beyond the laconically permissive Treaty amendment requirement of ratification in accordance with the (diverse) 'constitutional requirements' of the Member States and to insist upon a Europe-wide referendum. Instead, we are left with the impression of political elites being backed into a corner, in some cases reluctantly moving towards the referendum option, in other cases obstinately holding the line against such a measure, and in any case unable to co-ordinate their actions so as to ensure simultaneous plebiscites (so, incidentally, both forfeiting the mobilizing potential of a pan-European democratic event and courting the risk of defeat in one country setting off a negative chain reaction in others).

But all of this is now water under the bridge. If European political elites have been dragged kicking and screaming towards a more inclusive debate on the adoption of the constitution, then they must quickly resolve to make a virtue out of necessity and convince themselves that late is better than never. For although referendums, – or, indeed any broadly consultative political debate short of a referendum that address polyvalent questions in binary terms – may indeed be crude devices to address some types of complex political problem, they seem indispensable to the very purpose of the current constitutional initiative. So pervasive has been the 'constitutionalisation' of all the big questions of institutional design, competences and fundamental rights in the post-Laeken period that it is easy to forget that the whole constitutional exercise should be less about substance than process. That is not to say that the major substantive changes introduced by the constitutional text, and in particular its attempts both to streamline the decision-making process and to introduce more visible and responsive sites of accountability and responsibility for such decision-making, have been unimportant. Indeed, to repeat the conventional wisdom of the last decade, they have arguably been indispensable to the prospect of an effective and reasonably legitimate post-Enlargement Europe. Yet the fact remains that all of these changes could have been brought about under the old IGC method. The 'C' word need never have been uttered. The fact that it was, and then pursued with such intensity, speaks to a broader concern to provide a fuller endorsement of the European Union as a self-standing political community with a claim to a form of internal and external legitimacy which is not merely delegated from the Member States, nor simply a consequence of the material benefits the EU brings or of the expertise of its functionaries, but which is at least to some extent in response to the aspiration for 'constitutional self-government' of its citizens. Unless the Constitution can actually boast some measure of direct popular endorsement, then it simply fails in this broader purpose, and adds to rather than addresses the legitimacy deficit of a European Union big on democratic symbolism but small on democratic achievement.

Which brings me to the nature of the debate on ratification, and the importance of the 'yes' campaign striking the right note. The radical Eurosceptics have dug their trenches deep and early, and their lines have undoubtedly been reinforced by the results of the European elections and the rise of new anti-European parties in countries such as Britain, Sweden, the Netherlands, Austria and Poland. The danger is that these implacably anti-European forces, aided by other more introverted nationalist parties, seek to frame the constitutional debate in all-or-nothing terms –neither in or out of Europe – and the temptation is that advocates of the new constitutional settlement *allow* the debate to be so framed in the hope that the opposition trenches collapse under the weight of their own negativism. Yet, in my view, that would be a great mistake. In the first place, allowing the debate to be dominated by the politics of fear may play into the hands of those who wish to present withdrawal from the European Union as a simple and easily digestible political option, and who have a ready arsenal of scare-quotes with which to parody the integrationist alternative. Secondly, we should be careful what we wish for. If the debate were to be conducted in these starkly dichotomous terms, it might be difficult – illegitimate even – to avoid the conclusion that a 'no' vote *should* indeed lead to withdrawal. Thirdly, and most importantly, for the 'yes' side to collude in the politics of distortion would be a denial of the very democratic purpose of a constitutional founding. The more positive and honest case for the Constitution rests on the argument that while the European Union has over half a century produced a significant dividend in terms of peace and prosperity, in order for these public goods to be sustained and extended the time is ripe – and the Constitution is the right instrument – for the fuller popular endorsement of the political and administrative infrastructure which has produced them. Both legally and politically, the more acceptable and more broadly accepted alternative to this view is *not* withdrawal from the Union, but merely a candid recognition that Europe, while not wishing to throw away its current achievements, does not yet (and perhaps will not ever) consider itself ready to constitute a community of political attachment sufficient to put certain matters directly in common under a system of constitutional self-government. That alternative might be difficult for some integrationists to swallow, but it is both more palatable and more in line with the political sensibilities of the European peoples than the more extreme option of withdrawal and possible dissolution of the Union as we know it. For victory to be worthwhile and for the implications of defeat not to become unthinkable, therefore, those who want to see the Constitution ratified and implemented must try to present their case in a way that

demonstrates their readiness to contemplate honourable failure.

Professor Neil Walker
European University Institute, Florence

### *A Constitution for a House without Windows*

Napoleon once said that constitutions should be short and obscure. The Constitution of the United States satisfies one of these criteria in that it is short: the European constitution satisfies the other in that it is obscure. It is certainly not short – indeed, at over 300 pages, it is longer than the Treaty of Rome which it proposes to replace. It therefore fails in one of the most basic tests of a constitution, that it should be available to the ordinary person to read and understand. 'Giscard said that he wanted to produce a text which schoolchildren could understand. But one would have to be a very sophisticated and determined schoolchild to read through the 300 pages of this constitution and grasp what it was about. 'Take away that pudding', Winston Churchill once said, 'it has no theme'. The European constitution is equally indigestible, favoured only by those in the charmed circle of the political class.

The constitution does nothing to answer the two main questions which Europe's citizens are asking. The first is – what purpose does the European Union have in a world in which the Cold War has ended; the second is – how can the institutions of the Union be made more accountable and more voter-friendly. Instead, the constitution broadly ratifies a highly unsatisfactory status quo. Peter Hain exaggerated when he said that it was just a 'tidying-up exercise', but his exaggeration was a comparatively mild one. Europe deserves better.

The constitution does little to advance the aims supported by the Federal Trust. It tends to shift power away from the Commission to the Heads of Government, thus strengthening the intergovernmental elements in the European Union. Indeed, the Commission is now becoming what the French Gaullists always wanted it to become – a secretariat rather than a policy-making body. The constitution is in fact a Eurosceptic constitution, entrenching the status quo, though the Eurosceptics seem too short-sighted to have noticed it.

A more accountable and voter–friendly Europe could have been secured if the Commission had been made responsible to the European Parliament, as proposed by the German Foreign Minister, Joschka Fischer. This reform could in fact be achieved without amending the Treaties, by activating Article 158. At present, however, the will to do this seems absent, both amongst Heads of Government and in the European Parliament itself.

Were the Commission to become responsible to the European Parliament, this would rejuvenate European elections. Voters would be asked to choose who ought to form the Commission, and they would be helping to set the broad direction of European Union policy. Moreover, the Commission itself would come to enjoy greater legitimacy and it would be able to resume the role which the founding fathers wanted it to have.

It is a grave error to preserve in the constitution the institutional structure of the European Union as it is today, since this structure belongs to a deferential past in which the leaders led and the followers followed. The problem for Europe's leaders today, however, is that the followers will no longer follow, but must be persuaded. European institutions, therefore, must be made subject to greater popular control. Unfortunately, Europe's leaders do not understand this because they live in hermetically sealed dwellings, houses without windows, isolated from the people.

The new constitution, therefore, is a missed opportunity. Even if it is ratified, it will have to be amended within a few years if Europe is to develop that accountable and transparent structure called for in the Laeken Declaration. Nevertheless, I remain an optimist about Europe. I believe that the constitution will be rejected, and not only by Britain.

Professor Vernon Bogdanor
Oxford University

### *The Constitutional Treaty: how federal?*

The six major preceding Treaties have taken the EU by a series of steps quite far towards a structure that is federal in the proper sense of the word: with democratic government and the rule of law for the common affairs of Member States, which retain their own democratic government and rule of law for their own affairs.

The primacy of Union law, which has long since been accepted in matters of Union competence, is explicitly entrenched in the Constitutional Treaty.

The Constitution also enhances the democratic character of the Union's legislature. The States' representatives in the Council are to legislate in public, enabling the States' parliaments better to hold to them account. Qualified majority voting is extended to apply to most decisions and the procedure is somewhat simpler and easier for citizens to understand. But important exceptions remain where unanimity is to prevail, notably in the fields of tax, foreign policy and defence.

Codecision is to give the citizens' representatives in the European Parliament power equal to that of the Council for all legislation where the Council is to vote by majority, as well as for the whole of the budget. The Parliament retains the right to dismiss the Commission; and the right to approve the European Council's nomination for its President has been dignified by the word 'elect', with the European Council enjoined to take account of the elections to the European Parliament and conduct 'appropriate consultations'.

Thus the institutions are to become significantly more democratic; and citizens' rights are protected by the Charter. But it is doubtful whether the executive function, split as it is between Commission and Council, will become more effective. Within the Commission, the President's position will be strengthened by the power to reshuffle or dismiss Commissioners. But the new arrangements for Presidency of the Council do not seem likely to alter the ambiguous relationship between the Commission and the Council with respect to the executive function; and the full-time Presidency of the European Council for periods of two-and-a-half to five years may well weaken the Commission without, given the difficulty of coaxing coherent policies out of ministers from twenty-five self-willed states, providing an adequate substitute.

In its powers, the Union has already moved far in a federal direction, with the customs union, the single market and the single currency, together with competences regarding the environment and cross-frontier aspects of internal security. These are major fields of policy that are properly allocated to the Union not the States, which should retain those more closely related to national cultural and social patterns and less to their interdependence. It is in macroeconomic policy required to support the monetary union and in foreign and security policy that the Constitution falls far short of an optimal division of powers.

The Union's Foreign Minister will face great difficulty in persuading the States'

representatives to pursue effective common foreign, security and defence policies. But as a Vice-President of the Commission, the Foreign Minister will also have responsibilities for important fields of external policy as a whole. More probably, however, without stronger "federal"elements in its relevant institutions, the Union will remain unable to conduct an adequate common foreign and security policy.

The British insistence on veto in foreign policy, together with the opt-out from the Euro, strengthened the resolve of others to ensure that the Constitution provides for groups of States to go farther with enhanced co-operation, including the use of qualified majority voting among themselves; and this suggests the potential for a federal core within the Union, such as Joschka Fischer envisaged in his speech at the Humboldt University in May 2000.

John Pinder
The Federal Trust

*Constitutionalising the European Union: The Power of Language*

Language matters. One can think of few better examples to demonstrate that than the process of constitutionalisation in the EU. If the Treaty adopted in June 2004 marks a major step in this process, it does so mainly because of its *language* rather than the *substance* of its provisions. Substantively it is merely another round of treaty reform, more ambitious than the previous one, but less ambitious or ground-breaking than other rounds of treaty reform we have witnessed in the past. Institutional provisions are essentially tinkering with existing procedures, and much of it is the codification of existing practice or case law of the European Court of Justice. The incorporation of the Charter of Fundamental Rights is significant, but again here we have the modification to an existing feature of the EU's legal system.

What *is* revolutionary, however, is the language of this particular round of treaty reform. Starting with Fischer's talk about the Union's *finalité politique*, the launch of the post-Nice process on the 'Future of Europe' and the Laeken declarations reference to a 'constitution for the citizens of Europe', a powerful constitutional discourse has taken hold. The wave of this discourse has swept much of the subsequent treaty reform before it. The Convention has come to be known as the constitutional convention, and the treaty it drafted is commonly referred to as the''new European Constitution'. Crucially, much of the debate about this round of treaty reform is about the case for and against a European constitution, and it is to be expected that referenda campaigns will also be fought on this issue, rather than on the substance of the treaty that is actually being voted on.

There are two conclusions to be drawn from this observation. First, the power of discourse in general, and of this constitutional discourse in particular. Once key actors and the media were talking about a European constitution, it quickly became impossible for other players to do anything else but contribute, and thus reinforce, this discourse. Like snowball into avalanche, the language of constitutionalism has come down on the unsuspecting European citizens who now have to make their own contribution to this discourse. This is the second point to be made: as with many other aspects of European integration in the past, it has been an elite discourse that has brought the idea of the European constitution into the limelight. Now that the citizens have to express their views in the context of ratification referenda, it remains to be seen whether their reaction to the discourse will be positive or negative.

That uncertain public reaction is one reason why the politics of language that have engulfed the work of the Convention and the subsequent IGC are a double-edged sword. On the one hand a discourse of constitutionalism is to be welcomed, given that it finally brings into the open what experts and insiders have known for a long time: that European integration has turned the EU into more than an intergovernmental organisation, that in fact this is a process of polity-building which has direct consequences for citizens, and thus requires their consent. In this sense the EU has been constitutionalised for decades, be it through agreements among member states (inside and outside of IGCs) or through the jurisprudence of the ECJ. A public discourse recognising this, and promising further impetus in this process is overdue and desirable.

On the other hand, there is something unfortunate about the way in which the constitutional discourse has embraced a round of treaty reform that is the end rather limited, one that – as we noted at the outset – does not deliver a constitution in the commonly understand meaning of the concept. The promise of a 'new European Constitution' that is now expected by the public is not going to appear and, as many might expect, radically change the face of EU politics overnight. The manner in which the new Commission President was chosen – déjà vu of the appointment of Jacques Santer 10 years ago – has demonstrated that, for the time being, it is business as usual.

Indeed, there are two problems here: for supporters of further integration, those who welcome and campaign for a constitutionalised Europe, the actual text of this 'constitution' is bound to be a disappointment. Many have already complained that in some ways this treaty is a step backwards that strengthens the intergovernmental over the supranational elements in the EU. Among the wider public, there may be consternation coming with the realisation that the promised constitution is little more than ordinary treaty reform, that the glamour associated with a 'constitution' has been used in vain. This might not only damage the success of this particular round of treaty reform, but also engender scepticism in the constitutional project in the future.

The second problem is more real and apparent. Euro-sceptics will campaign vigorously against this treaty on the basis of – not its content – but the constitutional idea and language it has adopted. It facilitates the long-standing, if unfounded, claim that the EU is heading towards becoming a 'super-state'. This was untrue yesterday, is untrue today and will remain untrue even after the ratification of the constitutional treaty. But the language of constitutionalism, and the linguistic choices in the treaty (President of the European Council, Union Foreign Minister) appear to confirm the suspicions of Euro-sceptics, and provide potentially very damaging ammunition for those who seek to combine their opposition to further integration with tirades against a European super-state. For the better or worse (and according to many predictions one must fear for the worse), a great risk has been taken: EU reforms are now hostage of a constitutional discourse that implies, in some member states and for many individual citizens, that the EU is moving towards a more centralised, statist model of governance. Many citizens will also appreciate and support this linguistic choice, but in the end it would be regrettable if a treaty that actually continues the successful formula of gradual steps towards European union was rejected by

the public only because of the linguistic choices made by its drafters. But that is the power – and the danger – of the language of constitutionalism.

Dr. Thomas Christiansen
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### *If You Want an EU Constitution, then Let's Vote (and Vote No)*

The generally poor turn out in the EU elections (Britain excepted) and the comparatively strong showing of Euro-sceptical parties, have led many pro-Europeans to argue against the need for a Europe-wide referendum on the new constitution. The standard reason for this stance is that EU referenda, like the elections, tend to be motivated by domestic concerns, and in particular criticism of the incumbent party. Such arguments are doubly flawed. First, if the constitution is to mark a qualitative move beyond the treaty process, as its strongest advocates desire, then it must have the backing of the European people as the *pouvoir constituente*. Without that endorsement, it remains an intergovernmental agreement. Attempts to make it more than a treaty would actually delegitimise the EU: the reverse of what its supporters claim to desire from the new settlement. Yet, calling it a constitution raises the expectation, not least within the ECJ, that it does indeed have greater standing than previous treaties and it will certainly be harder to revise and renegotiate. Second, and more importantly though, the criticism that EU politics should be unsullied by domestic considerations is wrong headed. EU politics is domestic politics, and one of the biggest mistakes of many pro-Europeans has been to ignore or avoid this fact. Citizens support the EU to the extent that it secures prosperity and various forms of security – economic and environmental as well as against crime and other conventional threats – better than any national state could. Moreover, they rightly wish to complain if the EU fails to work as optimally as it should within its designated spheres. National politicians are responsible both for the extent of the EU's reach and oversee many of its policies. MEPs are still largely identified by membership of a national political grouping. Citizens still see themselves in national terms first, EU terms second. There is nothing intrinsically wrong with this, people rightly want policies to be responsive to their concerns and interests, not least the impact on where they live. To stultify debate of the EU at national level, therefore, is to deepen its democratic deficit.

In fact, the major lacuna in the constitution is the weakness of adequate mechanisms to make EU policy more responsive to domestic concerns. As a result, the EU has become once more an all or nothing matter – pro or anti, in or out. What we need is the possibility of nuanced debate about Europe. If governments and MEPs were truly accountable to citizens for their decisions, then EU policy would be the better for it. The CAP, common fisheries and the sluggish economic growth within the Euro-zone are not good adverts for elite, technocratic governance and pro-Europeans ill-serve their cause by pretending otherwise. The Eurosceptic argument will only be put to rest when citizens can talk about whether particular policies could be accepted, rejected or improved and structures partially altered, scrapped or adapted and sensibly instruct their politicians on these issues. However, the draft constitution fails to address this problem. Indeed, if the prime role of any constitution is to provide rules of the democratic game in order to enhance the efficiency, equity and accountability of political decision-making, then this constitution must be deemed a dreadful failure. The limited moves in this direction, such as the citizens initiative, are gimmicks. Instead, what we have is the attempt by different groups either to draw their various 'red lines' of what is and is not an EU matter, or to entrench the elite and distant EU political process even further. The result is that there is a constitutionalising of many of the issues that should actually be matters of day to day politics and debate, and the further empowering of an elite and unresponsive system. A pan-European referendum that rejected this mess is being treated as a rejection of the EU. That is an error. Rather, forcing a genuine domestic dialogue over the EU's purpose and structure should be seen as the start of genuine EU democratic politics.

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### *As the dust settles: legitimacy and democracy*

In the third week of June 2004 the EU boasts an agreed Constitutional text and a new Parliament-in-waiting. But is the Union more legitimate and democratic? Should citizens care? Well, pieties aside, perhaps not all that much about legitimacy. The hunt for legitimacy is the sport of princes: when it is lost, rivals compete for the spoils; when it is had, it eases rulers' room for manoeuvre. From a citizen's perspective, the more that governing elites worry about legitimacy, the better. It gives them that democratically essential *frisson* of insecurity and keeps them on their toes. On the other hand, citizens should care very much about whether the Constitution democratises the Union.

The verdict? As far as citizens are directly concerned, the Constitution does little to affect either legitimacy or democracy much – partly because marginal gains on the swings are likely to be offset by marginal losses on the roundabouts, but principally because the legitimacy and democracy problems the Constitution addresses are not those between citizen and ruler but those of inter-elite relations. It probably has succeeded in striking inter-state and inter-institutional balances that the relevant elites will find sufficiently tolerable to sustain. The legitimacy of the Convention method, though, has certainly been boosted by the outcome of the last few weeks –the Convention's draft could have had no more resounding vindication than to pass through the intergovernmental wrangling relatively unscathed.

Democracy depends on perceptions quite as much as legitimacy, but here citizens' perceptions count more. Citizenship itself is barely touched by the Constitution. The original provision for a citizens' initiative was watered down, though it will be fun to see citizens submitting proposals to the Commission. Of more consequence in the long run will be the establishment of the ordinary legislative procedure as default and the expansion of areas subject to it, though it is going to be hard to craft a discourse persuading ordinary punters that seemingly arcane institutional fixes can produce benefits directly meaningful to them. To be fair, that gap in understanding is not altogether the EU's fault. Those sections of the electorate whose grasp of politics is simplistic at the best of times may find the demands of 21st century political organization in general increasingly incomprehensible. UK citizens are additionally handicapped by a press much of whose reporting of EU affairs is meretricious almost beyond belief.

So much for the Constitution. What of the European parliamentary elections? Turnout for them is usually assumed to be an indicator of EU legitimacy (though quite why remains mysterious). The UK had its highest turnout ever at 39 per cent, which just shows what can be achieved when the election is – well, political. Elsewhere the decline in turnout continued, reportedly down to 45.5 per cent overall. Still, let's not rush to gloomy conclusions about public apathy, disengagement, or rejection. As we all know, these are second-order elections, the Parliament doesn't form or throw out a government, and EU citizens typically report being ignorant of EP party organisation and legislative activities as well as finding the EU generally mind-boggling and remote. In that case, almost half the adult population of Europe takes the trouble to vote every five years for something they don't understand for reasons they don't understand either but in the confident (if false) expectation it will make little real difference to anything in their daily lives. Given all that, the real puzzle is why turnout remains as high as it does. Perhaps we are all just better EU citizens than we think.

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## *Making it our own: A Proposal for the Democratic 'Interpretation' of the EU Constitution*

The European Constitution is born. Hurrah!? Well, many of us are greeting this moment with a mix of relief, frustration and foreboding. Relief since after so much energy and hope invested in this Constitutional process, our Heads of State have finally managed to agree on something. Failing to do so would have made a mockery of any new pronouncement on vision and ambition for the EU in the foreseeable future. Frustration because we feel that there has been a lost opportunity here. Contrary to what some of the cynics say, many groups and individuals in civil society, academia and in the broader political world have taken a key interest in this process of Constitutional drafting by commenting, suggesting, amending. Clearly not all proposals from the Convention floor could be taken into account let alone from outside. But our political elites have no doubt failed to create a 'constitutional moment' in Europe, to engage with their publics on the future of a united Europe and use this Convention process to foster the progressive emergence of a trans-European public sphere.[1] This matters because this failure to engage will make it all the more difficult to ratify the Constitution in the year or two to come.

Hence, finally, the sense of foreboding. How likely is it that this Constitution will be ratified in 25 countries? Not much, especially as the number of referenda to be held is rising by the day. It is really too bad that there never was a group of people charged with reading and amending the Constitution with an eye to making it a user-friendly and even an inspiring text –a text in other words that we would all feel proud to defend, enthusiastically, unreservedly. Two centuries later, the US Constitution is still so. Where were the poets? The philosophers? The pamphleteers? The Constitution could have benefited from a second round of drafting: there were stylistic points, but also substantive points, where simply value was left on the table, and where more balanced compromises could have been reached that would have won the adherence of a greater number of citizens. This is the point that a group of 100 academics from across the EU sought to make in the document *Making it our Own* which has been posted and amended on several websites, including that of the Federal Trust, since last October 2003.[2] So is the game over, is it too late for 'making it our own'? Not entirely.

I would like to suggest that all important texts are living documents, whose meaning is always elucidated through on-going *interpretation,* usually by wise and authorized bodies, be it of judges reading Constitutions or of rabbis writing and re-writing the Talmud (at least until the 13th century). In this sense, this Constitution like others before it is just an empty shell. It will be what we make of it. Indeed, it can be read and is already read across Europe in very different ways. Some see it as one more step towards their dream of a 'federal Europe' – itself subject to many meanings. Others as, at last, the formal containment of an ever deepening Europe. Others still as a building block for the emergence of the EU as a power that matters on the world stage (although we have to admit that this is a very introverted Constitution). It can also be seen as a very imperfect expression of the essence of the EU as neither a supranational democracy nor a simply union of democracies but instead an evolving demoi-cracy.[3]

Why not then open-up the interpretative process, alongside the all too necessary formal function of the ECJ as well as formal political bodies? In the era of the internet and 'participatory democracy' (sic) shouldn't interpretation also be democratised in some way? Why not engineer on the web a transnational multi-voice democratic process of continuous interpretation?

On the basis of a constitutional text posted on the Web, the Federal Trust could issue a call for interpretative contributions, subject to the following conditions: that interpretations be signed by at least two authors from at least two different countries, that they do not exceed (200?) words, that they be connected to a specific article of the Constitution. And let the fun begin!

Dr. Kalypso Nicolaïdis
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## *Best on offer*

Nothing's perfect. Even I will admit that the Convention's text had defects. And many will think they have grown, in size and number, in the IGC. We seem to be stuck with Commissioners being chosen from Member States in strictly equal rotation, forgetting that the Commission is not meant to be representative of Member States but of the common interests of EU citizens. The 'Team Presidency' for Councils other than the Foreign Affairs Council and the European Council has been overspecified. And an inevitably complex text has been made a bit more complex. One could go on..

But the time for all that has passed. Now the point is that the text is much better than the status quo. Much better than Nice. Most people seem to think that the Convention did a reasonable consultative job. The Irish Presidency have certainly done an excellent diplomatic job. Now it's up to us. All who believe in the need for a European Union should get behind this text, and sell it. Most people arent interested in the trees about which we debate: they want to hear about the shape

1) For a discussion see Nicolaïdis and Weatherill, *Whose Europe* ? Oxford: 2003.
2) See proposals in *'Making it Our Own: A Trans-European proposal on Amending the draft Constitutional Treaty for the European Union'.* (http://www.fedtrust.co.uk/making_it_our_own)
3) See Federal Trust Online Paper, December 2003, as well as Nicolaïdis, 'We, the Peoples of Europe' in Paul Hilder, ed, *The Democratic Papers: Talking about Democracy in Europe and Beyond,* British Council, May 2004.

of the wood. We must not let the particular imperfections we see muddle the general message. The European Parliament election results and turnout tell us that we now need to stand together, explaining why the EU matters, and that with this Treaty it will work a bit better.

There Is No Alternative. The IGC is over, and this is the text on offer. Those who would have wished for something more far-reaching, perhaps a real 1787 founding Constitution rather than another Treaty among sovereign states, need to beware of letting the best become the enemy of the good. The IGC proved that even the Convention's text went a little further than all Member states are prepared to go. And Treaty form means that the slowest ship sets the convoy's pace. That's life.

But equally the Convention showed that there is no wish to turn the convoy round. The UK Conservatives put forward their prescription for an *à la carte* EU with individual countries free to denounce policies, and withdraw from structures, they dislike :they got an attentive hearing, and their ideas were reflected in a minority 'Eurosceptic' report. But not one of the 28 Governments represented in the Convention gave them any support whatsoever. Not one. The 'renegotiation' the Tories seek would last 10 minutes. What would they then do? After the rebuff, how would their position differ from that of the UKIP?

The Continental press believes Mr Blair won in Brussels. But the stress on 'red lines' may prove to have been better as IGC tactics in Brussels than as referendum strategy back home. The heavy emphasis on keeping the Treaty free from particular features deemed objectionable has so far left little energy for describing its general contours, and their merits .It now needs to be actively sold, on the basis not of what isn't in it, but of what is.

The message should be simple, wood not trees. Perhaps it could be along the following lines.

> 'Why do we need an EU? Because European states, on their own, cannot combat threats that have already reduced 'sovereignty', weakening control of safety, jobs, savings, health. Supra-national threats like terrorism, currency speculation, money-laundering, drugs, AIDS..
>
> 'On its own, even the EU cannot defeat all such threats. We need to work with the US. But the US is a super-power. To work with it is difficult unless we too have clout. Only by working together in Europe can we aspire to equality, and pull our full weight.
>
> 'Working together in Europe means using what the EU offers : rules, procedures and institutions that our governments have jointly devised. They safeguard national independence ,and permit joint action where national action is not enough. The system has been built piecemeal over more than 50 years. We want it to work better. So Governments have now codified and clarified it in the Constitutional Treaty.
>
> 'For good or ill, this is not the Constitution of a super-state. Or any state. It is an agreement between states. Many of its provisions already apply under the existing Treaties. But it drops their aspiration to 'ever closer union', and it includes a procedure for leaving the Union if any state so wishes.
>
> 'The EU was founded to make war between its members impossible. That aim has long been achieved. But Governments also wished to pool their economic and political weight to advance, at home and abroad, the values they share. They are now joined by those in Eastern Europe, where such values were for so long suppressed. It is a mark of the EU's success that so many have wanted to join it, now that they can.
>
> 'Our challenge was to adapt a system first devised by 6 States to suit the needs of 25. We wanted to make the EU more efficient, more democratic, and both clearer and closer to our citizens. With the new Constitutional Treaty, it will be. That is good for all of us, and for the effective defence of national interests against the threats of today's world .'

I am no fan of Referendums: I prefer Burke's view, as in the Address to the Bristol Electors. But it seems we have to have a Referendum on the Treaty. So, accepting that it is the best Treaty on offer, it's not too soon to start speaking up for it.'

Lord Kerr
Ex-secretary general of the Convention

## *The Constitutional Treaty from a 'Regional' Perspective*[4].

The regional dimension to the Constitutional Treaty has generally been ignored in most of the national and EU-wide debates during the run-up to the June summit. Of course, this is unsurprising in that those elements of the Treaty appertaining to the EU's 'regions' or sub-national governments were not considered to be especially controversial, at least not in the minds of national delegations. But the comparative silence on this regional aspect to the Treaty should not be taken as indicating nothing of substance has been agreed. In fact, quite the reverse is true. Indeed, not only does the new Treaty enhance the role of regions within the framework of EU governance directly (and arguably closing to a degree one element in the EU's democratic deficit), it provides an opportunity for regions to exert greater influence on EU governance indirectly – that is, through the vehicle of the nation state. Here I briefly address three aspects to the regional dimension of the new Treaty: first the subsidiarity issue; second the role of national (and sub-national) parliaments in the subsidiarity process as presented in the new Treaty; and finally the role of the Committee of the Regions.

First, the Treaty contains new statements on subsidiarity. These are to be found in Article I-9, and in a new Protocol on the Application of the Principles of Subsidiarity and Proportionality. The former explicitly requires that the Commission take into account the regional and local dimension of any proposed action in the pre-legislative phase of its activities. In effect, this is the first occasion in which the EU Treaty recognises the stake-holding of the 'third' level of sub-national government in the subsidiarity dialogue within the EU policy process, a dialogue that hitherto implicated only national governments. The subsidiarity Protocol, along with the Protocol on the role of National Parliaments, both reinforces and extends previous treaty recitations on subsidiarity. The requirement that the Commission must demonstrate why the objective of a prospective EU measure cannot be achieved by Member States acting individually is strengthened, and the implications for regional legislation is included for the first time.

Second, taken together both the Protocol on subsidiarity and the new Protocol on the role of National Parliaments in the European Union implicate the EU's regions to a greater degree than presently in EU governance, albeit via national parliaments rather than directly. This is achieved principally by the invitation that national parliaments might 'consult, where

4) This comment is drawn from the Subrosa Discussion Paper 'Subsidiarity and the Draft Treaty' by Noreen Burrows, Caitríona Carter and Andrew Scott, 25 May 2004.

appropriate, regional parliaments with legislative powers' in undertaking the subsidiarity test. The degree to which the influence of sub-national parliaments in EU governance will in practice increase as a consequence of these new provisions will depend on a host of factors – not least of which is the national arrangements that are introduced to facilitate this engagement. One particular issue is that the time-frame for national parliaments to respond is merely 6 weeks; little time for national and sub-national parliamentary 'subsidiarity scrutiny' of EU proposals to be undertaken and coordinated. Nonetheless, this belated recognition that EU legislation impacts on sub-national as well as national competencies in 'devolved' or 'federal' national polities provides potentially considerable leverage to sub-national parliaments and governments to shape national positions with respect to some aspects of EU policy.

Finally, the new Treaty does provide for the Committee of the Regions (CoR) to express its opinion on the subsidiarity dimension to EU legislative proposals, a prerogative that is now protected by the Treaty. While this in itself offers little scope for any greater role for that Committee to play in the EU legislative process, there is scope for the CoR to act as a coordinator between regions which do have legislative competences and which may well be more closely involved in EU governance via the Treaties' subsidiarity provisions as set out above. This is a role which also could be played by the informal RegLeg grouping - the regions with legislative powers.

In conclusion, the Constitutional Treaty provides opportunities for an enhanced role to be played by sub-national parliaments and governments in the EU policy process. These opportunities are indirect, and derive almost entirely from the new provisions on subsidiarity and the related role of national parliaments in the EU policy process. The extent to which they are exploited will depend principally on the extent to which domestic procedures are created – where these are not already in existence – to permit the voice of sub-national authorities to be 'heard' in national capitals. Although perhaps a modest change on the face of it, is it one that could well develop into one of substance.

Professor Andrew Scott
University of Edinburgh

*A 'flexible' Constitutional Treaty?*

Flexibility is a privileged vantage point for assessing the merits of the new Constitutional Treaty, and the sustainability of the EU institutional framework. The notion of flexibility that I adopt here is very broad, with a common denominator in the provision of sufficient scope for the adaptation of decision-making to new political requirements. Flexibility can be measured across different policy areas, as well as over time, looking at the question of treaty revision. Stretching the concept even further, flexibility is also about majority voting vs. unanimity.

In a Union of 25, unanimous decision-making is simply an inadequate procedure for achieving policy results: it will inevitably lead the Union to gridlock wherever it is applied. It is highly disappointing, for example, that unanimity has been re-introduced by the Inter-Governmental Conference (IGC) for decisions on the multi-annual financial framework, as well as for practically all relevant decisions on the own resources of the Union. So much for future financial solidarity across the enlarged Union. Unanimity is still required under Article I-17 as well, to attain one of the objectives set by the Constitutional Treaty, when the Constitutional Treaty does not provide for the necessary powers. Such strict application of the principle of conferral risks imposing a suffocating straitjacket on the larger Union.

Most worrying of all, the *passerelle* mechanism, whereby majority voting in Part III of the Constitutional Treaty can be introduced without a formal treaty amendment, is subject to unanimity, and the opposition of a national parliament is sufficient to prevent its use. Furthermore, any revision of the Constitutional Treaty requires unanimous agreement *and* unanimous ratification, although the convocation of an IGC is not necessary to introduce amendments to Title III of Part III of the Constitutional Treaty. The Constitutional Treaty is therefore very hard to amend: flexibility over time is minimal.

New provisions including 'emergency brakes' make decision-making in sensitive areas, such as criminal justice cooperation and social security of migrant workers, more cumbersome. One country can interrupt the legislative procedure and ask that a draft measure be referred for decision to the European Council. Within four months, the European Council can either request a new Commission's proposal, or refer the matter back to the Council. Under Justice and Home Affairs provisions, however, an interesting opportunity is now opened to move to enhanced cooperation in case of no decision by the European Council.

This points to the potentially more important role that closer cooperation mechanisms will play in promoting flexible integration across policy areas. Treaty based enhanced cooperation applies now to Common Foreign and Security Policy (CFSP), although unanimity will be required to establish it. The important *passerelle* provision of Article III-328, which was initially removed by the IGC, will apply to the countries that are part of an enhanced cooperation, thereby facilitating decision-making. In one specific domain Monetary Union – the powers of the Euro-Ecofin are enhanced by reserving a range of important decisions to the countries which adopted the euro. In another key policy-area – security and defence – a new mechanism for 'permanent structured cooperation' will apply, whereby countries fulfilling precise criteria can undertake more demanding military tasks. This provision paves the way for a third area of so-called pre-determined closer cooperation, together with EMU and Schengen.

All in all, following this very short, and non-comprehensive – overview of the new provisions related to flexibility, it is hard to see the Constitutional Treaty lasting for 50 years. The Constitutional Treaty is too rigid and political requirements ahead will call for substantial amendment in 10 years at most. The text agreed in Brussels on 18 June is about as much as 25 national leaders could agree upon after a year of shallow political debate and diplomatic wrangling, but it falls short of what is required to guarantee the functioning of the Union in the long term.

That being said, the Constitutional Treaty is a considerable improvement on the current Treaty of Nice and, more specifically, includes some elements of innovation with a view to enabling flexible integration. That is why it would be a huge mistake to imperil the future of European integration by rejecting the Constitutional Treaty in national referenda. The consequence would be the outright division of the Union, as opposed to a sensible use of existing provisions that allow for differentiated integration.

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*The Significance of the Convention on the Future of Europe*

Last year, many members of the European Convention expressed embarrassment at the inclusion, in the draft Preamble of the Constitutional Treaty, of a sentence congratulating the Convention on its work. On 18 June 2004, the *Taoiseach* (Irish Prime Minister), Bertie Ahern, as President of the European Council, put on the record exactly such a statement of gratitude to Valéry Giscard d'Estaing and the participants in the Convention for producing the framework on which the eventual success of the IGC was built. These positive sentiments were well merited.

The representative nature of the Convention was of particular significance. Twenty-eight national governments and parliaments, the European Parliament, the Commission, social partners and sectoral bodies sent their delegates to this unique body, meeting under the austere and focused chairmanship of the former French President. A real strength was the presence of MPs from government and opposition parties. The developing interaction of the various components was a source of dynamism and ideas.

The working method of the Convention was, in general, inclusive and thorough. It permitted broad policy debate and, through its Working Groups, serious analysis of key issues. The European political 'families' proved capable of constructive compromise on important and sensitive issues, ranging from subsidiarity and the role of the national parliaments to the complexities of the internal and external security of the Union. The fundamental balances – between Member States and institutions – which represent the great legacy of Monnet and Schuman were respected by all sides.

Perhaps the greatest achievement of the Convention was the preparation of the Preliminary draft Constitutional Treaty – the 'skeleton' on which the final text was constructed. It was in the form of a single text, with the effect of merging the existing Treaties based on the concept of a single legal personality. It provided for a logical progression from definition of the Union itself to articulation of its values and objectives and its competences and then to description of the Union's institutions, legal instruments and procedures, and of the details of the policies carried out in common.

Central to the Convention's work was the search for simplification – of decision-making and instruments – and for greater transparency and efficiency. Simplifying instruments and procedures was described by Giuliano Amato as the most complex political task he had ever undertaken! Nonetheless, the outcome was the clear, logical text of Parts I and II of the Constitutional Treaty.

The Convention succeeded in producing a draft text which addressed key issues of public concern. Its definition of the nature of the Union on which the Member States confer competences to attain common objectives gives the lie to misleading assertions about a coming 'federal superstate'. It positions the European Union as a community of values and places fundamental human and civil rights at the heart of that Union. It provides a basis for the development of a competitive, modern economy capable of delivering social progress. It reflects the many challenges facing the Union in a rapidly changing world.

The work of the Convention was not without significant faults. The failure to ensure an effective debate on the institutional dimension of the draft Treaty may be seen as the cause of the initial failure of the IGC. The fundamental issue of Qualified Majority Voting in Council had been signalled as a problem for Spain and Poland but was largely ignored in the face of the general determination to reach consensus. The definition of consensus requires consideration before a future Convention gets down to work.

Overall, the European Convention proved to be a new and welcome approach to treaty revision. It was broadly representative, involving politicians from across the spectrum. It met in public and its documentation was readily available. It was open and accessible to civil society. Above all, it fulfilled its mandate by providing a sound basis for the achievement of a transparent and accountable European Union.

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*A new division of power in the EU?*

Despite the standing ovation for *Taoiseach* Bertie Ahern from the EU's leaders when a deal was finally done at the European summit on the EU constitution on 17-18 June, the atmosphere at the summit was fractious with some describing the first night's dinner as 'icy'. Britain and France in particular managed to fall out over the question of how much the UK was blocking substantive steps forward (answer less than both countries pretend for different reasons). And British officials went on to brief (unfairly) against Germany as well as France for making a deal difficult so much for the outburst of trilateralist *bonhomie* in February. Meanwhile, the Poles hung in to the last stretch of the summit for a new 'Ioannina'-style compromise on the voting deal, and the coalition of smaller countries familiar from the Convention burst back into life led by Finland, Austria and the Czechs to demand a better deal for the 'smalls' too on voting.

These summit tensions may tell us quite a lot about the likely future dynamics of the enlarged EU, not least where the UK is attempting to position itself (in a schizophrenic position switching as ever between wanting to be one of the big 3 leaders, to leading a counterweight power bloc (with uncertain and varying allies) against apparent Franco-German 'domination' the latter seems to be the UK's preferred stance). But taking a step back from these political fractures, still strongly informed by the Iraq splits, while the constitution deal is more complex on voting than the initial Convention deal, a balance has been maintained between larger and smaller countries, and between integrationist and intergovernmental positions.

The deal done on double-majority voting illustrates in particular, the new balances being struck in the EU of 25. The new system requires at least 55 per cent of countries (and not less than 15) and 65 per cent of population. It adds the constraint that at least 4 countries must be present to form a blocking minority. And in a deal done for the Poles, if 3/4 of the blocking minority of either countries or population is reached, the issue can be referred to the European Council.

This looks and is messy but the basic deal of 55 per cent, 65 per cent is still decidedly clearer than the Nice weighting system. The fight back by the smalls in the face of a new system that transfers considerably more weight to the largest countries is also welcome the relatively weak new requirement of at least 4 countries for a blocking minority, makes the point that 2 or 3 countries should not think they determine all decisions. And the insistence on 55 per cent and 15 countries, also rebalances a small amount further

towards the smaller countries (while the new Ioaninna deal will hopefully remain obscure and unutilised).

Despite UK 'red lines', there has been a substantial increase in majority voting, and some of the UK red lines became rather fuzzy majority voting being agreed on aspects of social security (albeit with an emergency brake) and on criminal justice (with an interesting new brake-accelerator). Combined with greater ease of enhanced cooperation, the stage is set for more integration if there is political interest in moving further forward, whether at 25 or in a smaller group.

With a surprise but welcome deal to limit the size of the Commission to a maximum of 2/3 of Member States from 2014, and with the limited but potentially still significant 'election' of the Commission President, together with the various constraints on the remit of the new European Council President, both the balance between the institutions, and between larger and smaller countries has not shifted decisively as many feared and as the UK now proclaims to larger countries and to national Governments.

The Community method has been streamlined, strengthened and to some extent democratised. But the political future will depend on whether national and European politicians are ready to transform the way they promote debate about the EU: genuine, honest, open and substantial debate is needed not only to ratify the constitution but to create a more democratic European politics on the basis of the constitution.

Dr. Kirsty Hughes
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### *Modelling the Constitution: MEPs and citizens*

Federal union and directly electing the European Parliament have gone hand in hand since the inception of the EEC. Anxious lest such elections create a direct link between voters and MEPs, erode national sovereignty by embodying it in an elected supranational 'assembly', governments warned that such elections would denude the state of the loyalty of their people. Electing the EP by universal suffrage would create a pre-eminent political right signifying the creation of supranational citizenship to rival that of the state.

Opponents of integration and federalism duly opposed direct elections. National MPs appointed to the EP argued that even an elected EP would not have such ambition but would seek to enhance the EC's democratic legitimacy, credentials and practices at supranational level. The more audacious foresaw creeping bicameralism (now known as co-decision). Few doubted that an elected EP would be a political force for change. Within months of the first direct elections in 1979, governments and MEPs embarked on constitution-building steps: from the Genscher-Colombo initiative to the Spinelli initiatives, Single European Act and the Convention on the Future of Europe. In 1984 and 1989, the more audacious even contemplated holding referendums on EU reform simultaneously with direct elections.

The first ever direct elections in the EU25 were as historic as the first. The issue of democracy remained paramount. MEPs again had transformed the face of the EU's polity: the EP was the parliament, a genuine legislature in an EU due to entrench a new constitution. Since 1960 MEPs have striven to realise supranational parliamentary democracy – from the early Dehousse reports in 1960 to the Spinelli and Crocodile initiatives of 1984, the Catherwood reports on non-Europe, those inter alia of MEPs Brok, Herman, and of David Martin in the 1990s and the Corbett in 2003. All showed the EP a motor for constitutional change accomplishing fundamental institutional reform by gradual yet bold steps that would establish a genuine bicameral legislature, and increasingly make the EU's institutions themselves directly responsive and accountable to the people in the member states.

The EP has achieved much yet for much of the time, its role in reforming the EU has gone unacknowledged. In 1984 Spinelli pronounced parliaments as king-makers; they had a special and particular role to play vis-à-vis executives. The EP has moved from being a weak, consultative assembly to being one of the movers and shakers of European integration. Whether it can continue to shape and sustain democratic practices remains to be seen.

Even though the parties and EP have always been criticised, MEPs have rendered decisionmaking and the legislative processes open, just, democratic, accountable, efficient and effective. The new EP's parties must continue to improve this. UKIP's professed goal – 'wrecking the EP' – brings into the EP the parliamentary equivalent of football hooliganism.

The EP needs to become the EU's grand forum. It needs to show the people that it is worthy of their confidence; can hold executives accountable; can influence the shape of policy inputs and outputs, the distribution of resources and the strategic vision of the EU across policy domains. It must convincingly prove that it is relevant to refining and sustaining democratic practice, respect for the rule of law, tolerance and acceptance of diversity. MEPs must do this consistently, visibly, coherently and in a way that is meaningful to the people. This is not simply a question of financial resources given to the regions, or of MEPs becoming 'closer' to the voters whether in person or via the tools of e-democracy. It is a question of MEPs delivering democratic accountability, and securing democratic responsiveness on the part of the other institutions. That is why it is vital that the Commission and Council's blatant disregard of the EP's objections regarding the disproportionality of the agreement to the transfer of passenger name data to the US is challenged legally (by reference for annulment to the ECJ) and politically on every occasion when the EP has the power to call member governments to account. That is one of the reasons why the question of the next Commission President throws the EP's powers into sharp relief.

MEPs must mobilise themselves and crucially governments (with the help of national MPs) to begin where the Convention left off: all must communicate with the people, and build trust in governance. If they fail, democracy and legitimacy will wither. This is a tall order but securing the Constitution gives them all a golden opportunity to demonstrate their respect for democratic political processes and values and to seal the Constitution as a model of transnational democracy 20 years after the EP adopted its Draft Treaty establishing the European Union.

Professor Juliet Lodge
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### *More bark. More bite? The CFSP and CESDP provisions in the constitutional treaty*

The foreign policy and defence provisions have proved some of the more eye-catching aspects of the media coverage of the

Constitutional Treaty. The creation of a Foreign Minister for the Union is one of the more readily explained dimensions of the Treaty and has facilitated some of the more lurid commentary on the elimination of national power by opponents of the Treaty.

The reality is that the CFSP provisions of the Treaty do not represent a radical departure from past practice in this policy area but rather largely an evolution of previously agreed developments. It is for this reason that the CFSP did not feature significantly in the end-game of the intergovernmental conference. This has been in contrast to foreign policy disagreements between the Member States outside the confines of this debate.

One key innovation from the Convention carried through into the text of the Treaty is the grouping together of all strands of the EU's foreign policy (CFSP, foreign economic policy) under the label 'external action'. This drawing together of the EU's foreign policy is now personified in the position of the Union Minister for Foreign Affairs (UMFA) who is to be simultaneously a Vice President of the Commission and sits within the Council. This 'double-hatted' appointment will be made by the European Council acting by a qualified majority and in agreement with the President of the Commission. This is a sensible drawing together of the differing strands of the EU's external action but the UMFA will have to adroitly balance their responsibilities to the Council whilst simultaneously seeking to work collegially with the other members of the Commission. The UMFA can be dismissed both by the Council and would also be subject to the same obligation to resign as other members of the Commission (if the latter are subject to a vote of censure). In addition the UMFA will share a role in representing the EU with the new position of President of the European Council. Consequently the position of UMFA is likely to prove a high-wire balancing act. A new Foreign Affairs Council is to be spun-off from the General Affairs Council and will be permanently chaired by the UMFA who will also take-over the former responsibilities of the rotating Presidency in the foreign policy area. The UMFA will, however, be supported by the creation of a new European External Action Service to comprise officials drawn from the diplomatic services of the member states, the Commission and the General Secretariat of the Council. The proposition of such a service was not universally welcomed by all member states but work on the creation of the service will commence once the Treaty is signed and prior to ratification.

The arrangements agreed under the Treaty on European Union in 1993, where the CFSP functioned as a separate intergovernmental 'second pillar' alongside community activity, are eliminated. The old distinction between pillars is also ended with the granting of legal personality to the EU. This now allows the Union to sign international agreements in its own right rather than these being limited to Community (pillar 1) activity in the past. However, the CFSP remains a policy area in which 'normal rules' do not fully apply. The jurisdiction of the European Court of Justice does not apply to most aspects of the CFSP and no areas of the CESDP. Unanimity in decision-making remains the norm in the CFSP (except in aspects of implementation as in the existing TEU and with a brake-clause provision for 'vital' national policy), likewise in the CESDP and in the other important strand of external action the common commercial policy there has not been a significant extension of voting to that which has existed previously but some narrowing of interpretation. A move towards generalised majority voting in the CFSP is provided for but only under unanimous agreement in the European Council. The CFSP provisions covering enhanced cooperation are widened beyond the implementation of a joint action or a common position. Participating states in enhanced cooperation may also decide to act by qualified majority if unanimous approval is forthcoming from the Council. The European Parliament gains no additional powers of oversight for the CFSP or the CESDP.

The provisions covering the CESDP represent interesting developments. The policy area remains focused on the Petersberg tasks (which can only be expanded by unanimity) with the UMFA playing a central role in implementation. There is, however, the introduction of a new solidarity clause (I-42) in the event of a terrorist attack or man-made or natural disasters. Collective defence still remains the preserve of NATO and the WEU.

The CESDP does see the introduction of a number of new provisions that have been anticipated by activity alongside the intergovernmental conference and which is now codified in the Treaties. There are provisions covering a European Armaments, Research and Military Capabilities Agency for which arrangements are already in-hand. Petersberg tasks remain the focus of the CESDP. Likewise the collaboration between the 'big three' on defence is provided for with the provisions on 'permanent structured cooperation' among a limited group of member states. This is a 'capabilities' driven arrangement with states having to fulfil criteria to qualify for participation. A decision to permit such a grouping is to be made by qualified majority of the full Council. But states that subsequently wish to join the group have to be approved by a qualified majority of the already participating states. The same provisions apply for removing a state from participation. These sit alongside provisions on enhanced cooperation and the overall impression is that the CESDP is an area in which differentiated integration will be the pattern in the future.

Professor Richard Whitman
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*And now for the really difficult bit ... ratification.*

The text of the Constitutional Treaty may have been agreed, but few can be unaware of the challenges that ratification faces. Celebrations at the European Council were clearly tempered by the knowledge that everybody present still has to gain approval of the agreement. For some, a positive vote in the national parliament will suffice. For others, it will be the people that decide.

The plan is for ratification to be completed by the end of 2006. This gives the EU's leaders just over two years to explain, debate and sell the Constitutional Treaty. Some will face few if any problems in obtaining the required support. Others can be less certain. And this has already been recognised. If two years after the Constitutional Treaty has been signed one or more Member States 'have encountered difficulties in proceeding with ratification', and assuming twenty Member States have completed the process, the matter will be discussed by the European Council.

It is by no means clear what the European Council will or could decide. Precedent suggests that affected states will be encouraged to keep trying. This may be possible where smaller states are concerned. But is it conceivable that a large Member State whose people rejected the Constitutional Treaty would be invited to try again? Presumably not. If so the European Council could equally be the

occasion when the more integrationist Member States break with the rest and launch themselves as an *avant garde* within the EU.

This would obviously only be likely and indeed possible with France and Germany. Both seem likely to complete ratification even if President Chirac does call a referendum. Recent opinion polls in France suggest that 66 per cent of the electorate support the Constitutional Treaty. Yet, the Maastricht experience cannot be forgotten.

This is obviously also true for Denmark, where once again, the people will decide. The same goes for Ireland, even if constitutionally a referendum may not be required. And for the first time, other Member States will be referring the decision to their electorates. Referenda are likely in Belgium, Luxembourg, the Netherlands, Portugal and Spain. Few others have ruled a referendum out. The Czech and Polish Governments, in particular, appear to be favouring a popular vote.

And then, of course, there is the United Kingdom where the Blair Government has already announced a referendum. This is likely to be held in 2006. The concessions granted to the UK Government should allow it to mount an effective campaign in favour of the Constitutional Treaty. Whether it does or not will depend on the commitment it has to mobilising support and delivering a 'yes' vote. Enthusiasm has to be sustained for two years, through an election campaign and against a hostile media.

It is not only in the United Kingdom, however, that the odds on a 'no' vote are shorter than the Government would like. The possibility of rejection is equally as high in Denmark and Poland. Each has sizeable and vocal eurosceptic movements and parties with popular support for the Constitutional Treaty estimated to be well below 50 per cent. In such circumstances ratification is far from being a foregone conclusion. And the situation in Poland is compounded by the government's insistence to retain the allocation of votes agreed at Nice and to obtain a reference to 'God' in the Preamble.

While over the next two years much attention may be focused on the progress of ratification in the United Kingdom, it would be foolhardy to assume that the UK Government alone faces an uphill challenge in obtaining domestic approval for the Constitutional Treaty. Many governments are faced with the prospect of battling for approval. In retrospect, reaching agreement at the Brussels European Council on 18-19 June may well prove, for some at least, to have been a much less demanding experience.

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### *After the European Council, a referendum to win*

Now that the European Constitution has been adopted by the European Council, the coming weeks and months will see a glut of meetings, articles and initiatives designed to consider how best to win the promised British referendum on the Constitution. It seems increasingly clear that the referendum itself will not take place until 2006, but the Constitution's supporters know that they have a lot of ground to make up. There is a widespread (and justified) view that the political and economic case for British membership of the euro could and should have been better put by its advocates over the past five years. If the referendum on the Constitution is to be won, those running the 'Yes' campaign will need to think and plan better and harder than did their predecessors in the non-campaign for the euro. Four considerations should be central to this planning.

First, if the Constitution is to be sold effectively, it has to be sold positively, as making the Union more efficient, more democratic and more accessible. Simply to recommend the Constitution as 'not being a superstate' sounds timid and defensive. The Constitution's opponents have a robust and apparently self-confident message. Its advocates must be equally aggressive.

Second, while the phrase 'tidying-up exercise' should be avoided, the campaign for the Constitution should stress that this new document is very largely a codification of the existing position. To reject it would be to reject most of the existing rights and obligations of membership in the European Union. The 'Yes' campaign will be on strong ground in any claims it makes that a 'No' vote in the referendum on the Constitution is tantamount to a vote for leaving the European Union.

Third, the referendum should not take place in the United Kingdom until at least most other countries have ratified the Constitution. This will reinforce the potentially powerful argument that a negative vote from the United Kingdom will simply exclude us from a process going ahead anyway. The time gained in this way, however, should be put to good use in preparing the political and intellectual ground. It should not be used as a pretext for postponing discussion, the cardinal sin of what aspired to be the pro-euro campaign.

Finally, there will be occasions when it is appropriate and useful to point out (as an argumentative shield rather than sword) that the Constitution is not a recipe for a European 'superstate.' But it is less wise to add the epithet 'federal' to the term 'superstate'. The Constitution cannot sensibly be described as an end to 'federalism' in the European Union. The Constitution preserves all the existing federal elements of the European Union, and indeed builds on some of them, for instance by reinforcing the power of the European Parliament, extending qualified majority voting and stressing the supremacy of Union law over the national law where the two conflict. It is of course true that the word 'federalism' is used in this country as a vague term of abuse, roughly equivalent to 'centralising.' But frequent, or even occasional use of the lazy term 'federal superstate' will create an insoluble problem for the 'Yes' campaign. Throughout the rest of Europe, politicians and commentators will be speaking over the next two years uninhibitedly of the 'federal' elements in the new Constitution. 'These comments will inevitably receive wide publicity in this country, not least from critics seeking to prove the dishonesty and incoherence of the 'Yes' campaign. It would be perverse for the 'Yes' campaign to create this problem for itself, when the use of the anyway more accurate terms 'European superstate' or 'centralising superstate' is almost always adequate to convey the speaker's meaning and preempts later political difficulties.

All the preceding exhortations are easier to formulate than to apply. Nor will their application guarantee success. What can be said with certainty, however, is that it is very difficult to envisage winning a referendum campaign without taking account of the factors mentioned above. A timid and negative campaign, underprepared and obsessed with the bogeyman of the 'federal superstate' supposedly precluded by the European Constitution, will have little chance of striking a chord with the electorate.

Brendan Donnelly
The Federal Trust

## 4. News from the EU Constitution Project

After the Summer a new editorial team will take over the EU Constitution Newsletter and it will possibly expand its remit to cover developments other than the final phase of ratification of the Constitutional Treaty. Please watch the Federal Trust website for new periodicals. http://www.fedtrust.co.uk

On other fronts, our website and the collection of online papers will remain accessible as reference material. The Jean Monnet Centre at Manchester University will take over the production of a Database of documentary material on the EU Constitution.

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