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**Supranationalism, the rule of law and constitutionalism in the Draft Union Constitution**

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**Abstract**

No concept in legal discourse is more contested than the Rule of Law. The Rule of Law is a component of constitutionalism and both feature as legitimating pillars of the new European Union Constitution. In this article, the author examines these concepts and their utilisation and expression in a supranational constitution that has drawn on the inspiration of national constitutionalism.

*'A constitution is indeed a corset for those who seek power. (...) But constitutional principles are not corsets for the political discourse of a free society; they are the necessary condition for having any discourse at all about how purposes are to be fulfilled in that society.'*  
(N.Johnson. *In Search of the Constitution*. pp. 147-48.)

**The Rule of Law and Constitutionalism**

My theme was partly prompted by my colleague Professor La Torre, and partly by my own interests. My paper seeks to examine the rule of law and constitutionalism within the draft constitution of the European Union (EUC). The effort to produce a draft constitution was driven by the imperatives of constitutionalism, and constitutionalism together with the rule of law, are seen as essential values of the draft constitution in Art I-2. The context is a supranational one – one that operates above, as well as within, nation states. It is also set in a global context, as the drafters of the Constitution, and those who entrusted them with their task, were well aware. Art III-193(2)(b) of the EUC on external action speaks of common policies to 'consolidate and support democracy, the rule of law, human rights and international law.' We need to attempt some definitions, or at least clarifications.

*i) The Rule of Law*

The European Court of Justice has stated that the Community is one based on the rule of law and one, which is subject to judicial supervision.<sup>1</sup> That court's efforts to promote individual protection under the law and to facilitate individual access to the protection of the court have been viewed as the most famous chapter in the court's development of a 'new legal order'.<sup>2</sup> The institutions of the Union and Member States are subject to the

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<sup>1</sup> *'Les Verts' v Parliament* [1986] ECR 1339; *European Parliament v Council* [1990] ECR I - 2041; *Zwartveld* [1990] ECR I- 3365.

<sup>2</sup> But not as regards access by individuals under Art 230 EC; see below.

Treaty and Union/Community law when fulfilling Union objectives. The draft Union constitution itself spells out that the Union is subject to the powers conferred on it – it is a limited entity and one bounded by law. As I shall comment below, this may be seen as a very narrow version of the rule of law and one which concentrates on formalities and not substance: for the rule of law is an idea that is subject to the widest of interpretations. These range from purely formalistic accounts of legality on one part to accounts which see the rule of law as synonymous with a just and fair organisation of social and political relationships on the other. I have had the privilege of giving lectures in the former Soviet Academy of Sciences where the rule of law assumed vastly different significance among the audience: something they should aspire to, or something that was simply an apologia for capitalism and social and economic exploitation. Hayek's famous invocation of the rule of law has been correctly seen as a legitimator of market relationships, economic individualism and capitalism. To Hayek, the rule of law was only co-extensive with economic individualism.<sup>3</sup> Furthermore, the rule of law is often used where 'Law and Order' is meant. The two are not the same. The latter means imposing order and social control where order is lacking. George Bush senior's 'big idea' in 1991 envisaged 'peace and security, freedom and the Rule of Law'. What was in his mind? The Commission may see the need to impose law, but within the Union it is up to national systems to impose order.<sup>4</sup>

An American and English lawyer may take different constitutional significance from the expression 'rule of law'. Likewise *l'état de droit* and *Rechtsstaatlichkeit* may mean different things to French and German lawyers. Central to continental traditions is the primacy of consent for the exercise of power and the insistence on a written constitution and legislative codes as the basis of all legal action. These systems have difficulty with a judge based common law approach to the identification of norms of behaviour in precedents, although *droit administratif* is judicially developed. Indeed, the emphasis on judge-made law in the English tradition was the reason why the English needed no written constitution: our constitution came from the law and judicial decisions enforcing the rights of individuals under the law.<sup>5</sup>

The general irreducible minimum content of the rule of law would include the setting of limits to power's all intrusive claims – the supremacy of law and legal process over arbitrary action. This connotes publication of law, control of discretion and power according to published law as interpreted by independent judicial organs, and non-retroactivity of legal effect as a generally desirable thing. It would include the equality of all before the law. Law is blind, or should be blind, to social, political, class, gender, racial, national or other differences. The maintenance of the rule of law is a 'basic principle' of 'any system of law'<sup>6</sup>; in the UK, 'Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.'<sup>7</sup> That government can do what law does not prohibit was seen as consistent with the rule of law<sup>8</sup>; more recently, the courts in England, in a similar fashion to the ECJ, have said that Government must seek support

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<sup>3</sup> F.Hayek *The Road to Serfdom* (1944).

<sup>4</sup> See 'Solidarity' for instance, Art I-42 of the EUC/T.

<sup>5</sup> A.V.Dicey *Introduction to the Study of the Law of the Constitution* 10<sup>th</sup> ed (1961).

<sup>6</sup> Lord Bridge in *R v Horseferry Road Magistrates' Court ex p Bennett* [1994] AC 42.

<sup>7</sup> Lord Steyn in *ex p Pierson* [1997] 3 All ER 577.

<sup>8</sup> *Malone v Metropolitan Police Commissioner No2* [1979] 2 All ER 620.

of *positive* law for its actions.<sup>9</sup> Government's actions cannot be presumed lawful simply because its actions are not specifically prohibited. The principle of 'legality' requires legal authorisation for governmental action.

The emphasis on publication of laws has given additional support for 'transparency' in the operation and activities of government as a component of the rule of law. 'Transparency' has indeed become a focal point of contemporary governmental practice and much is said in the EUC about openness, access and transparency. The Convention spoke of making the basis of law making and allocation of competencies between Union and Member States more explicit and clear. Simplification would assist the citizen and the Member States (MSs). The rule of law in this sense is primarily focused upon individual protection and legal authority for intrusion into an individual's space or affairs. Its primary objective is promoting and maintaining legal validity and certainty in the relationship between individuals and state or supra state structures. For some, as we have seen, the rule of law carries substantive significance; it promises the good life. Substantive fairness means not simply treating abstract individuals equally; it involves making people more equal in a material sense. *Equality* it is argued means just that, and necessitates intervention in market and social relationships, which have produced disparate and very unequal individuals and groups. To others, over-burdening the rule of law with notions of substantive justice and social engineering to achieve the good life is to abuse the narrow essence of what the rule of law signifies – procedural rectitude, legal certainty and judicial independence. 'We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph' argues Raz.<sup>10</sup> For Raz, the rule of law in a narrow conceptual sense has an independent force, which is not confused with a particular political philosophy. Confusion of wider elements of social justice as a necessary component of the rule of law will merely produce a state, which is a hell on earth and not a heaven, Hayek believed.<sup>11</sup>

While some authors were at pains to point out that the rule of law promoted procedural aspects of justice and not substantive aspects which involve questions of: What is *really* fair? What is ethical and just? What is good – and so on. The substantive contents of even a purely formal version of the rule of law must be accepted. Promotion of individual security and individual rights among abstract individuals *is* a substantive objective. Lon Fuller wrote of the irreducible moral content of the rule of law – the 'general procedural purposes' of a legal system that are necessary for such a system to be operable – as a counter to legal positivism and purely abstract accounts of the rule of law. These were procedural necessities upon which a legal system had to be based. They included desiderata such as law should be general, prospective, published, non-contradictory and clear.<sup>12</sup> Without them there would be no system, no coherence. 'Only by regular and explicit reference to these general procedural purposes, and to the corresponding facts, can we judge the degree to which the system as a whole fulfils the requirements of the rule of law.'<sup>13</sup> Furthermore, as Fuller saw it, only by faithful

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<sup>9</sup> *R v Somerset CC ex p Fewings* [1995] 3 All ER 20 CA and see especially Laws J. at [1995] 1 All ER 513.

<sup>10</sup> (1977) 93 LQR 195, at 195-96. See also P.Craig (1997) *Public Law* 467 and T.Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001).

<sup>11</sup> Hayek op cit p.18.

<sup>12</sup> Lon Fuller *The Morality of Law* (1964).

<sup>13</sup> R.Summers *Lon Fuller* p.29 (1984).

adherence to the ‘general procedural purposes’ or the internal morality of law, was it more likely that the right questions would be asked and the right answers be given. In other words, like Johnson’s constitution outlined at the beginning of this essay, the rule of law does not determine an outcome: it provides the framework within which the best outcome is more likely to emerge. For others, questions of substance are very much at the centre of understanding what are individual rights, or what is the law, in difficult cases.<sup>14</sup> ‘Fundamental principles’ protecting fundamental rights said Lord Steyn ‘must be upheld. The Rule of Law requires it.’<sup>15</sup>

The poverty of legal validity as an *exclusive* basis for exercise of power has long been recognised and the invocation of the rule of law as a means of establishing the legitimacy of state power has been advocated as a means of providing a fuller and deeper expression of substantive legality.<sup>16</sup> I spoke earlier of the principle of legality. Is there such a thing as the ‘spirit of legality’ and if so, what does it mean?

For Lewis and Harden, the rule of law as a concept takes different shape in different epochs and is context specific and sensitive. The rule of law requires that we establish what are the ruling legitimating doctrines or principles associated with the exercise of power by government over individuals. Once the governing principles are established, the question is asked of governors ‘to what extent are you being true to these principles?’ And ‘how do we know that you are being true?’ In the liberal democratic tradition, essential to its legitimating principles are accountability and democracy. Transparency is central to any notion of accountability and transparency entails provision of official information behind government decisions and actions or failures to act. Democracy has moved from simple representative models with ever increasing franchises to more fully developed participatory and inclusive models. Equality means that promises to equal treatment must be fulfilled by provision of the means to achieve equality. Access to justice means that individuals or groups must be supported in their claims before the courts by the provision of legal aid at state expense. It clearly advocates through this method a far more substantive version of the rule of law.<sup>17</sup> Since Harden and Lewis wrote, Habermas has written of the central role of the rule of law in re-invigorating a richer democracy and principles of justice and in providing a public space for meaningful participation by citizens.<sup>18</sup> The EUC has itself unfolded in this denouement as I shall explain.

## *ii) Constitutionalism*

There is, then, no more hotly or widely contested political or legal doctrine than that of the rule of law. Constitutionalism is broader in its spread and indeed includes the rule of law. Like the rule of law, constitutionalism is beset by various competing conceptions – from conservative liberal to radical social democratic and even post modern humanistic. I shall explain some of the contents of constitutionalism below but central to its contemporary existence is a belief that power has to be balanced,

<sup>14</sup> R.Dworkin *Taking Rights Seriously* (1977).

<sup>15</sup> *R (Anufrijeva) v Secretary of State for the Home Department* [2003] 3 All ER 827 at para 36.

<sup>16</sup> For versions of a broad meaning: the Declaration International Commission of Jurists at Delhi (1959); W.Friedmann *Rule of Law in a Mixed Economy* (1971); Harden and Lewis *The Noble Lie: The British Constitution and the Rule of Law* (1986).

<sup>17</sup> Harden and Lewis *The Noble Lie* (1986).

<sup>18</sup> J.Habermas (1992) 12 *Praxis International* 1; *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996); (1996) 9 *Ratio Juris* 125 and *The Postnational Constellation* (2001).

accountable, rational, humane and exercised not simply with the consent, but with the active involvement of those subject to power's rule.

Constitutionalism is increasingly, although not universally, viewed as the form of power that is seen as the best form of governance in the European Union.<sup>19</sup> But it is constitutionalism that is supranational: it may have been influenced by national conceptions but it addresses different multi level organisation and governance. Constitutionalism has been described as a 'normative theory' comprising a set of processes and rules that allocate, discipline and govern power.<sup>20</sup> It does so by maximising 'the ideals of freedom and full participation and representation.'<sup>21</sup> Constitutionalism embraces an aspect of established and limited government; accountable government; balanced government; regularised government; individual protection; removal of unjustifiable discrimination; responsive government; and democratic government. They relate more to pragmatic rationalism and contextual sensitivity about the best way to temper public power in a situation in which people find themselves. The values and principles of constitutionalism are not universally true in any one interpretation or instantiation. They have to be applied and developed in widely differing social contexts – local, regional, national and supranational and in differing forms of governance. Constitutionalism and the rule of law do not only embody the values of a pre-existing society; they produce values which transcend historical and social contingencies and which shape political development and which in turn are shaped by that development.

It has long been realised that public power is not the exclusive form of power, a point that has been used to undermine both the claims for, and achievements of, constitutionalism. In other words, significant forms of power operate outside government to such an extent that they pose a serious threat to the rule of law and constitutionalism.<sup>22</sup> The last thirty years have been rich in their illustration of the injustice that is produced by market forces untrammelled in their pursuit of wealth maximisation. Hence the preoccupation with Globalisation and the disequilibrium brought about by trans-national and non-governmental organisations operating outside the constraints of constitutionalism.

We all carry this baggage with us as a feature of rational liberal democratic governance. We know what constitutionalism and the rule of law entail and that the devil is in the detail. We also know that promises of good governance are not fulfilled; that law in the books and law in action are two very different things; that the outcome of many legal disputes is very uncertain and that many exercises of power are not controlled by rules known beforehand and that regulation by law gives way to administration, self regulation, negotiation and compromise. Discretion is pervasive. As has been widely commented, the power distortion that brought about a quest for constitutional context only becomes more acutely perceived the further that quest progresses and fails. We know why paradoxes dictate the necessity of constitutionalism. These include the paradox of a polity and non inclusion of some of those affected by

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<sup>19</sup> See N.Walker *The Idea of Constitutional Pluralism* EUI Working Paper Law No 2002/1; see also M.Poiars Maduro 'Europe and the Constitution: what if this is as good as it gets?' in J.Weiler and M.Wind eds *Rethinking European Constitutionalism* forthcoming. On national constitutional traditions, see J.Schwarze ed. *The Birth of a European Constitutional Order* Verlags Gesellschaft (2000).

<sup>20</sup> M. Poiars Maduro, 'From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance' 2003, paper at 'Globalisation' conference, University of Sheffield May 2003.

<sup>21</sup> Maduro, note 20 op cit.

<sup>22</sup> R.Unger *Law in Modern Society* (1976).

that polity – and what constitutes a polity, whose voice in the polity can be heard and on what subjects may the polity be heard and how effectively? The paradox of the fear of the many and the fear of the few – the dilemma of populism and majoritarianism, and dictatorship, and tyranny through these over the many and over the few. Lastly ‘who decides who decides’ in the ultimate quest of balancing opposing forces – who may be entrusted with the power to make final decisions and on what subjects? <sup>23</sup> Constitutionalism provokes a quest that can never be satisfied but which nonetheless must not be avoided.

The EU is a response to globalisation and international regionalism, a response emphasised by the establishment and deliberations of the d’Estaing Convention. One of the points put by the Laeken summit in establishing the Convention was ‘how to develop the Union into a stabilising factor and a model in the new world order.’<sup>24</sup> What has the convention provided in its vision of the rule of law and constitutionalism within the new constitution that may contribute to that role?

### **Globalisation, Europeanisation and Supranationalism**

Globalisation, it has been claimed, changes the nature of both the rule of law and constitutionalism. So too has European governance or Europeanisation. They become more cosmopolitan, more pluralist. They are no longer nationally directed. Furthermore, the development of Globalisation and international regionalism, including the most successful of the latter, European governance, change the form of national constitutionalism as national actors may seek to operate in supranational arenas, sometimes to compensate for loss of opportunities in domestic arenas.

The developments which globalisation have produced are, and here I lean on Maduro:

- 1) Increasing judicialisation, and even municipalisation, of international law: this includes the ‘Community way’ developed by the European Court of Justice, the proliferation of international trade dispute bodies, as well as the international criminal court; the *Pinochet* judgments<sup>25</sup> involving the jurisdiction of national courts over former heads of a foreign state who were claiming immunity from the national jurisdiction;
- 2) An increase and growing dependency on supra-national policy making;
- 3) ‘Privatisation’ or individualisation of international law: the creation of individual rights of which *Van Gend En Loos* and *Costa v ENEL* are leading examples in a ‘new legal order’;
- 4) Economic liberalisation;
- 5) Empowerment of executives vis-à-vis national legislatures because of transfer of power and the consequential impact on national structures and constitutions; the protocols on the role of national parliaments and on subsidiarity etc in the draft constitution seek to address some of these problems in terms of formal processes but an enhanced executive vis-à-vis national parliaments increases opportunities for more effective lobbying by preferred groups;
- 6) Disempowerment of some national groups because of internationalism;

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<sup>23</sup> Maduro note 20.

<sup>24</sup> Preface to the Draft Constitution CONV 850/03 18 July 2003, p.1.

<sup>25</sup> *R v Bow Street Stipendiary Magistrate and others ex p Pinochet Ugarte (No3)* [2000] AC 147 which did retreat from the breadth of the first judgment: cf. *Democratic Republic of Congo v Belgium ‘Yerodia’* [http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgement/icobe\\_ijudgement\\_toc.htm](http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgement/icobe_ijudgement_toc.htm)

- 7) Empowerment of some groups through internationalism: the emergence of Transnational Corporations, Inter Governmental Organisations, NGOs;
- 8) ‘New forms of regional and global governance claim normative authority independent from the states.’ In some cases this is backed up by claims of legal and constitutional supremacy. Legal supremacy is certainly stipulated with the draft EUC and constitutionalises what the ECJ had long ago decided. The position on ultimate constitutional supremacy may be less clear (below);
- 9) Constitutional pluralism – and the question then to be addressed: to what extent can national and supranational constitutionalism and their interrelationship make up for deficiencies in each version of constitutionalism? How can such a pluralism make up for the deficiencies and barriers to democratic involvement, inclusion and promotion of human dignity in national and supranational constitutions? And what are the limits to its possibilities?

‘Once we understand the paradoxical character of constitutionalism’ says Maduro, ‘we can free ourselves from the boundaries of national constitutionalism. There is nothing in constitutionalism that makes of national polities the natural jurisdiction for full representation and participation.’<sup>26</sup> Constitutionalism is therefore not only possible but also necessary beyond the state. What kind of constitutionalism and with what content?

### **The Community and its Constitution<sup>27</sup>**

The Community was an expression of supranationalism without a constitution and with no real sense of constitutionalism, or perhaps only a minimal sense of constitutionalism. There was until 1979 no elected body and then one with severely limited powers. The Treaty provided no role for individuals in judicial enforcement. There were opaque forms of enforcement via the Commission against Member States. Judicial review was via preferred actors, not individuals. There was no effective accountability for the Commission and individual Commissioners. Secrecy was *de rigueur*. It was a clear example of minimal constitutionalism exemplified by so many global/regional orders, which allow the pursuit and protection of economic rights and more stable forms of dispute settlement but nothing possessing greater constitutional stability. To that extent, the EEC represented limited government and fear of the organised political process. Article 4 Treaty of Rome stated that the institutions shall operate within their powers – a concentration upon legal validity and not legitimacy.

Constitutionalism was developed in the Maastricht and Amsterdam treaties, which are referred to as ‘constitutions’. Art F TEU and particularly its development in Art 6 TEU at Amsterdam provides: ‘The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.’ One should also refer to Art 7 TEU (suspension of rights) and Art 49 TEU (application for membership) involving non-adherence, and a requirement of adherence, to human rights.

The ‘Rule of Law’ first appeared expressly in the Preamble to the Maastricht Treaty (and see Art 11(1) TEU on CFSP and Art 177(2) EC on development

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<sup>26</sup> Maduro note 20 op cit.

<sup>27</sup> N.MacCormick *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (1999); N.Walker ed. *Sovereignty in Transition* (2003).

cooperation).<sup>28</sup> The ECJ, as seen above, referred to the Community being built on the rule of law and judicial supervision. Maastricht and Amsterdam saw a growing concentration upon the deliberative processes and human rights' protection at the Union level. Greater rights of access to information were produced. Wider forms of participation were exhorted by eg. the Commission in its white paper and response on European Governance.<sup>29</sup> Citizenship of the Union was introduced to attempt to provide much needed legitimacy to a polity (the Peoples of Europe) without a *volksgeist*. The Union produced its own Charter on human rights, 'solemnly proclaimed' at Nice and which now forms the second part of the draft EUC.

Before we proceed some problems should be identified. Larger conglomerations of societies may remove some of the barriers and obstacles preventing full participation and self development in a national structure; but, and devolution emphasises the point, smallness also has its advantages because transaction and information costs are lower nationally and regionally, participation is more viable and more intense and probably more effective; there are greater possibilities of cooperation within confined parameters. Will enhanced information actually only serve to strengthen the hand of combined interests at the expense of disorganised groups and individuals at the supranational level? – the Commission is extraordinarily net-worked by privileged groupings. Power is closer to the people at a national and regional level – the Commission has stubbornly resisted advances on access to information in the ECJ and CFI and the Council has been notoriously opaque in its defence of diplomatic and national sensitivities in an international context.<sup>30</sup> Conversely, exclusion may be more complete at national traditional levels where age-old social hierarchies may dominate and where social stratification is more rigid. Why should – or should – democratic processes at a supranational level overrule national democratic processes?

To what extent can national and European constitutionalism mutually interact on questions like human rights on which there is no overall international consensus? Is national mediation necessary to avoid supranational hegemony? Can supranational constitutionalism be of assistance precisely because of the role it plays in improving and legitimating national constitutionalism?

The EUC is an attempt to replicate at supranational level the constitutionalism established most completely at national levels. For this reason it has been criticised for conceptual confusion – that constitutions can only exist at a national level.<sup>31</sup> Is it fair to say however, that the Union model is a further expression of constitutionalism and that its great contribution will be seen in its reaction with, and development alongside, national constitutionalism.

### **The European Union Constitution**

The eastward expansion of the Union brought a felt necessity to bring together the four treaties – in reality one Treaty the Treaty on European Union (TEU) – into a more simple and straightforward statement of constitutional fundamentals. The TEU is a

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<sup>28</sup> A. Arnall in *Accountability and Legitimacy in the European Union* A. Arnall and D. Wincott eds (2002) OUP pp239-258. See Lord Mackenzie Stewart *The European Communities and the Rule of Law* (1977); K. Alter *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (2001).

<sup>29</sup> *European Governance; A White Paper* COM(2001) 428, 25 July 2001; for the follow up papers see: [http://www.europa.eu.int/comm/governance/suivi\\_lb\\_en.htm](http://www.europa.eu.int/comm/governance/suivi_lb_en.htm)

<sup>30</sup> Case T 194/94 *Carvel v The EU Council* [1995] ECR II 2765

<sup>31</sup> J. Weiler *The Constitution of Europe* (1999).

constitution for the Union including the Community. But the TEU it is a cumbersome, complex arabesque. Many of the Union's leading constitutional principles have been formulated by the ECJ in its efforts to provide momentum for the 'Community way' such as direct effect and sovereignty, doctrines which find no official sanction in the present Treaty. Sovereignty, or the preferred primacy, is now expressed in the draft constitution but not without some ambivalence (see below). The EUC has as its primary objective the simplification of the structures of the Union, and setting out where power lies and how it is conferred and who makes what laws in clearer terms. The legislature including a permanent body of legislators for the Council will sit in public. Law-making powers, it hopes, will be more clearly distinguished from executive powers. This is an act of greater transparency to 'let the citizen know'.

#### *i) Allocation and Exercise of Competences*

The Convention constitution presented to the EU summit on 20 June 2003 at Thessaloniki, and finalised on 18 July 2003, can be seen in one sense as a statement seeking to reinforce a narrow conception of the rule of law by introducing greater legal certainty, transparency in law making, clearer relationships between the centre and MSs and a clearer division of powers/competences. To conclude there would be a mistake. Not only does the Union operate within powers conferred by the MSs, but those powers are exercised according to principles of subsidiarity and proportionality the details of which are spelt out in protocols, now in the draft EUC.<sup>32</sup> These principles will entail questions of substance and merits as to means and appropriate level of action including local and regional levels; they are not mere formalities. Action taken by the Union institutions will be challengeable before the ECJ on the basis of these protocols.

Art I-9 on fundamental principles attempts to make it clear that competences come from MSs via the constitution and not from the constitution itself. This is the doctrine of conferral and it accompanies subsidiarity and proportionality. Powers not expressly conferred remain with the Member States. Where powers are shared, subsidiary applies. Conferral seeks to assuage those nations that fear the emergence of Frankenstein's monster or a *deus ex machina* more powerful than, and somehow disengaged from, the collective will of the MSs. The Convention seeks to confirm that the constitution is the child of the MSs and not vice versa. To that extent it may be seen to encapsulate legal certainty in that limits are set to the competence of the Union. However, what in years to come may the ECJ make of 'The constitution ... shall have primacy over the law of the MSs'?<sup>33</sup> Could 'law' include national constitutions? Could the EUC be taken as an expression of Union constitutional supremacy over national constitutional supremacy? That is not intended – Giscard d'Estaing spoke of the provision re-establishing the status quo. But is the status quo that clear of doubt? And from whose perspective is it assessed?

Other fundamental principles of the Union include subsidiarity and proportionality. Two protocols cover subsidiarity and proportionality, as we have seen, as well as the role of national parliaments (NPs) in the legislative process of the Union. The protocols seek amongst other things to protect the role of NPs so that legislative proposals and consultation papers of the Commission have to be notified to NPs and set periods are provided before a common position may be adopted.<sup>34</sup> This has been a

<sup>32</sup> Art I-9(1). And Protocols on *The Role of National Parliaments in the European Union and Application of the Principles of Subsidiarity and Proportionality*.

<sup>33</sup> Art I-10(1).

<sup>34</sup> Special provisions apply to action by the European Council under Art I-24(4).

particularly sensitive issue in the UK where governments have and still frequently fail to abide by the letter and spirit of Standing Orders requiring notification of European measures before a common position is adopted. In relation to compliance with subsidiarity, a NP may express its opinion that subsidiarity has not been complied with – measures have to be supported by reasons and items of evidence by the Commission. Where one third of NPs make such a challenge, the Commission must review the proposal. It is not bound by any view of the NPs but they are entitled (along with regional governments who have been consulted) to make a challenge before the ECJ under existing Art 230 EC.

### *ii) Law-making*

The Convention sought to simplify both the law-making and budgetary procedures. Arts I-33-38 contain the detail on law making. Basically, a distinction is made between legislative acts (European laws and framework laws - replacing regulations and directives respectively) and non-legislative acts (European regulations and decisions) which will be used for measures covering ‘non-essential’ items delegated to the Commission<sup>35</sup> by legislative measures and for implementation of ‘Union acts’ where uniformity is required. For legislative acts, co-decision and QMV will be the norm although the latter will not apply in tax, social affairs and environmental concerns. Other procedures may be used. Procedural safeguards for publication, reasons and so on are laid out and the Institutions will choose the ‘appropriate measure’ in accordance with proportionality. It is hoped that this will assist both a clearer separation of powers and a hierarchy of norms.

### *iii) Democracy and Human Rights*

The Draft constitution also seeks to further substantive visions of constitutionality by enhancing openness, access to justice, democracy and participation and protection of fundamental human rights including those going well beyond the ECHR and UN Charter of Human Rights. A central feature of the rule of law – a wider version but now widely accepted – has become the protection of fundamental rights including equality and non-discrimination. The EU Charter on Fundamental Rights now placed within Part II of the draft constitution (but for how long given the UK’s Government’s opposition to it being in the main corpus of the Constitution) is a remarkably broad statement of human rights protection – far broader than that accepted within the UK for instance. It includes social and economic rights, rights to good administration and a right to access to official information. It includes provisions on representative and participatory democracy.

A preoccupation with formal equality has given way to a more embracing protection by the Union with substantive equality so that if we take the text of the EUC, eradication of poverty as well as solidarity and mutual respect among peoples are governing principles and the Union will combat social exclusion [and discrimination] (Art I-3).

In an effort to enhance democracy, there was also to be – as announced in the preliminary draft constitution – a Congress of the Peoples of Europe comprising members of the European Parliament and NPs. In the draft of 11 June, however, the

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<sup>35</sup> Which raises the question of Comitology committees: see Commission proposal 15878/02 amending Decision 1999/468/EC. See Commission documents note 29 above. Non legislative acts may be taken by the Council, Commission or European Central Bank. Control mechanisms are set out in Arts I-35 and 36.

Congress did not make an appearance. Very late in the day a provision was added to Art I-46 [(4)] whereby a citizens' initiative involving no less than a million citizens of the Union may invite the Commission to submit proposals for measures implementing the Constitution. Lip service is paid to the principles of representative democracy and participatory democracy but without any hard detail apart from mandating Union institutions (sic) 'by appropriate means' to give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.' 'Open, transparent and regular dialogue' by the Union institutions with representative associations and civil society shall take place. The Praesidium behind the Convention described such practices as 'already largely in place', which seems over-self-congratulatory.<sup>36</sup> Broad consultations by the Commission to ensure transparency and coherence in the Union's actions shall be undertaken.<sup>37</sup>

Art III-304 provides that in carrying out their tasks the institutions agencies and bodies of the Union shall have the support of an open, efficient and independent European Public service. The importance of transparency in their work shall be recognised by the institutions etc, of the Union.<sup>38</sup> We have noted how the EP and Council as legislator shall sit in public and also ensure publication of the relevant documents. Details of the sorts of documents that might be published, e.g. 'results, explanations of voting, minutes and any statements entered in them', were removed from the draft of 13 June 2003.

*iv) One legal identity*

The central structural feature is a collapsing of the three pillars into one edifice and the conferral of legal personality on the Union. This has the most profound of implications. The intergovernmental nature of the second and third pillars will succumb to the Community way with the ordinary legislative method involving the European Parliament and Council and QMV becoming the norm in the area of freedom, security and justice.<sup>39</sup>

*v) The Common Foreign and Security Policy*

Although decision-making by unanimity will remain the norm, a far greater (and expanding) role for QMV will be seen in the common foreign and security policy, 'all areas' of which are now within the Union's competence. Guidelines will be set by the European Council. All questions of Union security, including the framing of a common defence policy, possibly leading to a 'common defence' are likewise within Union competence. Even though the governing instruments in CFSP will not be European laws or framework laws but European decisions (ED), the implications for international relations and foreign policy, and therefore for international order, are enormous. So enormous that it will be seen as an encroachment upon a central feature of the UK's, and other national perceptions of sovereignty. International relations and diplomacy are seen in many states as matters that are subject to no forms of judicial control, other than those agreed upon through treaties or subject to customary international law. Art I-3(4) states that there will be 'strict observance and development of international law,

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<sup>36</sup> CONV 650/03 2 April 2003 p.2.

<sup>37</sup> Art I-46. See the white paper etc note 29 above.

<sup>38</sup> Art III-301 and see Part I.

<sup>39</sup> There may also be legislation by 'special legislative procedures'.

including respect for the principles of the UN Charter.’<sup>40</sup> The CFSP, the EUC proclaims, will be unreservedly supported by a spirit of loyalty and mutual solidarity and MSs shall comply with acts adopted by the Union in this area.<sup>41</sup> They must refrain from action contrary to the Union’s interests or likely to impair its effectiveness. Art I-39 says that there will be a development of mutual political solidarity among MSs for the CFSP and an ‘ever increasing degree of convergence of MSs interests.’ A flexibility clause allows a MS to abstain from a vote on a European decision (ED) within CFSP declaring that they are not bound by such a decision. But they must refrain from acting in a manner, which will undermine the decision. A sufficient number of such abstentions shall prevent a decision being adopted.<sup>42</sup> Furthermore, where a ED may be taken by QMV under Art III-201(2), a MS may oppose adoption of a ED on grounds of national policy on ‘vital and stated reasons’. A vote shall not be taken in such circumstances.<sup>43</sup> This compromise was necessary to assuage the concerns of states particularly the UK into accepting the CFSP provisions. It reminds us that the rule of law is often in reality a balance between flexibility, or political power, and certainty.

The creation of a European Foreign Minister combining the roles of High Representative and External Relations Commissioner was seen as a means of emphasising the importance of foreign policy within the Union. Very late in the Convention’s life the possibility of a single department to support a Foreign Minister of the Union was proposed and found its way into the Constitution.<sup>44</sup> Not only were the two officers with responsibility for foreign policy split; their staffs and physical locations were also divided. It was reported by the *Financial Times* that the suggestion of a single department was championed by German Foreign Minister Joschka Fischer, who was interested in the position himself.<sup>45</sup>

The respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights are described in Art 1 as ‘the common values in a society of pluralism, tolerance, justice, solidarity and non-discrimination.’ Respect for these values and for international law is cemented by the principle of ‘loyal cooperation’, which means that MSs shall ‘refrain from any measure which could jeopardise the attainment of the objectives set out in the constitution.’<sup>46</sup>

#### vi) *Freedom Security and Justice*

A crucial factor in traditional concerns concerning the rule of law has been control over police powers and discretion. These fall within the area of Freedom, Security and Justice (FSJ). The establishment of a European Public Prosecutor (EPP Art III-175) has met with some fervent opposition within the UK who see this as an assault on the traditional sanctuary of habeas corpus – that guarantee of freedom for freeborn

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<sup>40</sup> Accession of the Union to international treaties will be simplified.

<sup>41</sup> Art I-15(2). In the July 2003 draft, this provision is within the jurisdiction of the ECJ, below.

<sup>42</sup> Art III-201(1). At least one third of MS representatives representing at least one third of the Union population.

<sup>43</sup> After intervention by the Union Minister for Foreign Affairs, the matter may be referred to the European Council by the Council of Ministers on QMV – The European Council to decide by unanimity. See also Art III-201(4).

<sup>44</sup> Art III-197(3) – a European External Action Service working in cooperation with diplomatic services of Member States.

<sup>45</sup> *Financial Times* 21 June 2003.

<sup>46</sup> Art I-5(2).

Englishman in the absence of legal justification for detention, which had to be argued before an independent court of law. To Dicey habeas corpus summed up the essence of the rule of law. Of greater concern was the failure to respond to attempts to beef up the role of the European Parliament in relation to FSJ and ‘mutual evaluation’ of the measures implementing FSJ because the EP is a legislative body and the Praesidium believed FSJ covered ‘administrative arrangements’ for an evaluation conducted by MSs and the Commission (Art III-161). The EP and national parliaments would be kept informed. The legislative/administrative division is an old canard and this looks evasive on the part of the Praesidium. Art III-176 deals with police cooperation and the provision of a European law on exchange of information. Europol and Eurojust will have arrangements respectively for evaluation and scrutiny by the EP and NPs laid down in a European Law but their shadowy existence and extensive remit have caused understandable concern. A European Law will also establish the scope of judicial review of procedural measures taken by the EPP in the performance of its functions (Art III-175(3)).

*vii) Part II of the EUC and Human Rights*

Of immeasurable significance are the provisions on the Fundamental Human Rights FHRs referred to in Art I-7 and in the Charter of Fundamental Rights (CFR) which is part II of the Constitution – and not as a protocol as the British government wished, presumably in the belief that a protocol would allow for optionality. The Convention has gone further than the Working Group and has now placed a duty (and not merely a power) upon the Union to seek accession to the Convention on Human Rights (ECHR) but not so as to affect the Union’s competences. The Court of Human Rights will only have an impact on the international obligations of the Union’s institutions including the ECJ and its decisions will not affect national laws, at least the Working Group believed.<sup>47</sup> Fundamental human rights, which derive from the ECHR, together with the constitutional traditions common to the MSs, ‘shall constitute general principles of the Union’s law’.<sup>48</sup>

The horizontal clauses of the Charter in Arts II-51-54 seek, amongst other things to contain the legal impact of the Charter so that more exhortatory provisions known as ‘principles’ will only be recognised and not made into binding provisions creating individual rights by the Union courts unless implemented by ‘acts’. The Charter is ‘only’ binding on Member States when ‘implementing Union Law’.<sup>49</sup> In spite of the considerable legal difficulties that will be faced by national and Union courts in interpreting these provisions and their effect, it is my belief that the Convention is to be congratulated for placing the Charter at the centre of the constitution. It sends a message to the Union and the wider world that protection of human rights, including access to information, fair and responsive administration, equality and solidarity and effective remedies before impartial tribunals are at the centre of the Union’s mission. Already the Charter has been invoked by national courts in the UK as an inspiration, but not as a legal duty, for legal development.<sup>50</sup> Such developments doubtless fuel the UK

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<sup>47</sup> CONV 354/02 WG II 16, 22 October 2002.

<sup>48</sup> I-7(3) and see II-52(3) and (4).

<sup>49</sup> By virtue of Art I-7(3), the ECJ retains its jurisdiction over ‘fundamental rights’ as guaranteed by the ECHR and ‘constitutional traditions common to the Member States’: see eg *ERT* [1991] ECR I-2925; *Familiapress* [1997] ECR I-3689; see, however, F.Jacobs (2001) 26 ELRev 331.

<sup>50</sup> See House of Lords Select Committee on the European Union *Sixth Report* HL 48 (2002-03) para.33.

and other governments' fears that the Charter is a Trojan Horse that will undermine the delicate separation or balancing of powers within domestic orders and between those orders and supranational orders and that they will have a direct impact outside the areas of Union competence.

*viii) A Closer look at the contents of the Charter*

The Preamble to the Charter states that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and *solidarity*; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and creating an area of Freedom, Security and Justice.' To strengthen the rights it is necessary, the Charter continues, to make them 'more visible'.

The following make it obvious why the Constitution and Charter amount to a substantive version of rule of law and how the rule of law now has to encompass protection of human rights. As well as the traditional civil and political rights, Equality (Art II-20) non-discrimination (Art II-21) and equality between men and women are made constitutional and fundamental rights; under Title IV 'solidarity', meaning collective and individual employment and social security rights, is protected. The whole notion of legal protection for 'solidarity' is difficult for any British government. For example, it includes promotion of health care, access to public services (on which the UK government staked its reputation in the 2001 election but on which it has gone fairly quiet) and environmental and consumer protection to constitutional measures. This is a constitutionalism based upon collectivism covering economic and social rights and third generation rights. The UK government might argue that by making everything constitutional, nothing is constitutional. Similarly, by giving an expansive interpretation to the rule of law, the concept loses its certainty.

Under Title V 'Citizen's rights' I have already referred to the right to good administration and access to documents. Further provisions cover rights to a hearing before any adverse decisions, giving of reasons and rights to have made good 'any damage' caused by Union institutions or servants on legal principles common to the MSs. Title VI embraces 'Justice' which includes an 'effective remedy'. Art I-50 and II-8 give protection to personal data. Once again by virtue of the CFR and this provision, data protection, like access to documents, is elevated to a fundamental human and constitutional right. The danger some might see in making such subjects fundamental and constitutional is that that status is likely to lead to a greater influence in judicial decision-making and that they will overspill into areas not covered by Union competence.

The general provisions in Title VII of the Charter relate to the fact that the Charter and constitution, and the version of the rule of law and constitutionalism they espouse, exist in an international environment. It has to make allowance for a pluralism of legal systems and traditions in which there is all too much scope for conflict and divergence, or for hegemony. Art II-51 therefore spells out the scope of Union law – it is not extended by the fundamental rights provisions. Art 52-4 says that 'insofar as the Charter recognises fundamental rights as they result from the constitutional traditions common to the MSs, those rights shall be interpreted in harmony with those traditions. Consistency in interpretation is aimed at. Art II-52(3) basically provides that rights under the Charter corresponding with Convention rights shall be consistent with Convention rights and one might add judgments of the Court of Human Rights, although nothing prevents an interpretation giving more extensive individual protection under Union law. Disparities in approaches by the ECJ and CHR to the same

provisions have long been apparent. Finally, ‘nothing restricts or adversely affects international law protection of human rights or human rights recognised by MS constitutions.’

Article II-52 (5) is a confusing provision, which seeks, it seems, to assuage some MSs, notably the UK:

*‘The provisions of the Charter which contain principles may be implemented by legislative and executive acts taken by the institutions and bodies<sup>51</sup> and by acts of the MSs when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts [sic] and in the ruling on their legality.’*

‘Principles’ means broader statements, which are not justiciable at the suit of individuals per se. What is meant by ‘acts’ in relation to MSs? Does it include non-legislative measures such as decisions by the executive but which are given in English law no formal legal status as such? They are recognised by the law but do not constitute a legal provision. Probably not – it will only cover delegated legislative and administrative measures such as statutory instruments and orders. What is the position of a decision by an official within Union competence that is not implemented by such an ‘act’? What of spillover into purely domestic law? Full account shall be taken of national laws and practices as specified in this Charter.<sup>52</sup>

#### *ix) Union Institutions*

In terms of Union institutions the elevation of the European Council to a formal institution of the Union is to be applauded. It is given formal constitutional status commensurate with its importance and is no longer the shadowy informal body that simply ‘grewed’. In addition, its inclusion as one of the institutions of the Union, along with ‘other bodies and agencies’ means that it will be covered by the provisions on access to information unlike the present position.<sup>53</sup> I have spoken above about the Council of Ministers as a legislator possessing a permanent standing committee of members, and in the legislative process the EP was described as a big winner with co-decision now extending from 37 to about 80 areas and with an enhanced role in the budgetary process.<sup>54</sup> The President of the European Council is to hold office for two and a half years and voting weights in the Council of Ministers and a new composition for the Commission to give a fairer reflection of size of national population will only take effect after 1 November 2009 to appease those who would lose out from concessions won at Nice. It is another example of legal formalism (a narrow form of the rule of law) giving way to flexibility in what are still diplomatic relations.

#### *x) The ECJ and judicial remedies*

From a legal perspective the court merits special attention. Effective remedies are essential to the rule of law. A right without a remedy is a self-contradiction. Here, the EUC is disappointing. The ECJ (and High Court – CFI – and specialised courts) is

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<sup>51</sup> Agencies are not included, quare Art II-51(1) where there is a reference to ‘agencies’.

<sup>52</sup> Art II-52(6).

<sup>53</sup> Arts I-49(3) and III-305.

<sup>54</sup> *Oral Report Presented to the European Council in Thessaloniki by V.Giscard d’Estaing* 20 June 2003.

under a duty by virtue of Art I-28 to ensure respect for the law in the interpretation and application of the Union constitution and Union law, a feature built on existing provisions, which have inspired the ECJ to some remarkable jurisprudence.<sup>55</sup> Arnall for instance has concentrated upon the role of the ECJ in promoting direct effect, supremacy and liability as the prime examples of the existence of the rule of law in the Community.<sup>56</sup> The provision could also be seen as a reminder to the court that it too must operate within its allotted jurisdiction and within the rule of law which the ECJ has been accused of not following through its amendment of existing legal doctrine without full or any sufficient argument on the point.<sup>57</sup>

The recommendation of the Discussion Group that an assessment panel be set up to give advisory opinions on the suitability of candidates for judicial office and Advocates General in the ECJ and CFI/HC was taken on board.<sup>58</sup> The panel will only comprise judges and lawyers who give an opinion. It raises the question of who decides who decides in terms of adjudication. The ultimate decider here on who will be judges will be governments, for judges are to be elected ‘by a common accord of the governments of the MSs’. If I may raise national concerns, English and Welsh judges are for the first time to be appointed after involvement of an independent Judicial Appointments Commission and not simply through an inscrutable executive process although the Commission is likely to be recommendatory in putting a panel of names to the Secretary of State.<sup>59</sup>

The provisions on procedural ‘access to justice’ if you will – the *locus standi* provisions – are disappointing. The narrow and confined approach of the ECJ to standing for non preferred applicants seeking judicial review is well known and in spite of developments which might have introduced a more relaxed approach, the ECJ left no doubt that any significant development had to be introduced by treaty amendment.<sup>60</sup> In relation to individuals, Art III-270 (4) provides ‘any natural or legal person may ... institute proceedings against an act addressed to that person or which is of direct and individual concern to him.’ So far nothing has changed and this reflects the view of the discussion group or circle and is to that extent a disappointment in that it does not facilitate access to justice by individuals to challenge Union measures which may affect them adversely but not directly *and* individually. The Article continues that an individual may institute proceedings against a ‘regulatory act’, which is of *direct* concern to him and which does not entail implementing measures. In other words, in relation to regulatory acts (which means that European laws and Framework laws are not included – see Art I-26) there is no requirement of *individual* concern.<sup>61</sup>

No special procedure for constitutional review in relation to fundamental rights was conferred in spite of their presence in other national systems. The working group on the Charter did not recommend this pointing instead to the benefits that ‘possible incorporation of the CFR into the Union architecture would have thereby making the

<sup>55</sup> Art 220 EC and Cases C-6 & 9/90 *Francovich and Bonifaci v Italy* [1991] I-5357.

<sup>56</sup> A. Arnall ‘The Rule of Law in the European Union’ in A. Arnall and D. Wincott eds *Accountability and Legitimacy in the European Union* (2002) OUP at pp. 239-258.

<sup>57</sup> Arnall op cit refers to the case of C 352/98 P *Bergaderm* [2000] ECR I-5291.

<sup>58</sup> Art III-262.

<sup>59</sup> *Constitutional Reform: A New Way of Appointing Judges* DCA (2003). An ombudsman is also to be created to deal with complaints from frustrated candidates.

<sup>60</sup> Case C 50/00 P *UPA v Council* [2002] 3 CMLR 1.

<sup>61</sup> CERCLE I WD 08, 10/3/03.

Union's present system of remedies available.<sup>62</sup> Individuals will largely have to rely upon national courts/tribunals referring questions of fundamental rights relating to Community measures and competences to the ECJ/HC or adjudicating themselves on provisions relating to the Charter and national provisions within Union competence. The CFI has observed that national procedural difficulties may create barriers in relation to access.<sup>63</sup> This presumably is why a provision is now included in Art I-28 that 'MSs shall provide rights of appeal (originally 'review') sufficient to ensure effective legal protection in the field of Union law'<sup>64</sup> although it is hard to see how appeal can cover a 'preliminary ruling' now in Art III-278. The precise scope of this provision is not clear.

Art III-270(1) brings the agencies and bodies within the court's remit under the constitution where their acts have legal effect vis-à-vis a third person. This will remove what is an inconsistent and unsatisfactory position where the acts establishing agencies made varying arrangements.<sup>65</sup> Art III-270(5) does however, provide that acts setting up agencies may lay down specific provisions and arrangements concerning 'actions' brought by natural or legal persons against acts of such agencies or bodies intended to produce legal effects. Such agencies were in an early draft of the Constitution<sup>66</sup> also subject to an Article 177 reference in relation to their statutes – although this provision disappeared from the version of 13 June 2003. On 177 references, a new provision relates to a person in custody.<sup>67</sup> The EUC contains no specific provision for agencies to make implementing regulations, a power that was suggested by the Working Group on Simplification.<sup>68</sup>

The ECJ has no jurisdiction over CFSP matters in relation to Arts I-39,40 and Ch. II of Title V, Part Three.<sup>69</sup> This encapsulates the continuing sensitivity of national governments to any form of judicial oversight in this area. But it appears to have jurisdiction over Art I-15 which states that Member States shall actively and unreservedly support the Union's CFSP in a spirit of loyalty and mutual solidarity. Will this prove to be justiciable? They have both to comply with Union acts in this area and refrain from action contrary to the Union's interests or likely to impair its effectiveness. The ECJ shall have jurisdiction to rule on proceedings reviewing the legality of restrictive measures against natural or legal persons, adopted by the Council on the basis of Art III-224 and brought under III-270(4). The ECJ will also have jurisdiction under Art III-209. By virtue of Art I-39 EUC/T, European laws and framework laws are excluded from the former Second Pillar.

There will be a significant extension of the jurisdiction of the ECJ into the area of Freedom, Security and Justice where European laws are likely to become the norm. Under Sections 3 and 4 of Chapter IV of Title III, the ECJ shall have no jurisdiction

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<sup>62</sup> CONV 354/02 WG II 16 p.15, 22 October 2002.

<sup>63</sup> Case T 177/01 *Jego-Quere et Cie SA v Commission* [2003] 2 WLR 783 ; Case C 50/00 P *UPA v Council* [2003] 2 WLR 795.

<sup>64</sup> Art I-20(1).

<sup>65</sup> CERCLE op cit para. 24.

<sup>66</sup> CONV 725/03 p.149.

<sup>67</sup> Art III-274 fourth para.

<sup>68</sup> CONV 424/02 WG IX 13, p.12.

<sup>69</sup> Art III-282.

where such action concerning law and order and internal security 'is a matter of national law.'<sup>70</sup>

Where a MS is suspended from Union rights etc under III-276, the ECJ may only review the 'procedures'. These procedures were augmented by the Treaty of Nice. A new provision allows for the voluntary withdrawal from the Union of a MS. The treaty may not therefore be everlasting for that member. A state cannot be 'imprisoned' against its will. But, and obviously, a MS cannot become a party to the new constitution unless it agrees to its terms. A failure to agree will open up the spectre of special opt-outs.

Art III-267 amends Art 228 EC dealing with enforcement of Community law which the Discussion Group found to be 'not efficient enough' as a means of enforcement.<sup>71</sup> The requirement that the Commission issue a reasoned opinion specifying points of non compliance with the ECJ's judgment by a MS has been removed. In this the Convention followed the proposal of the group, although the suggestion that a stage of formal notice to the State by the Commission be removed was not accepted.<sup>72</sup> A new provision is added in Art III-267(3) whereby a state that has failed to notify measures transposing a framework law may face financial penalty by virtue of proceedings under the existing Art 266 EC. This also followed the suggestions of the Discussion group.

Under Art III-170(2)(e) on judicial cooperation in civil justice, framework laws will seek to ensure 'a high level of access to justice' and under (2)(g) the development of alternative dispute resolution. Courts may be remote and distant mechanisms for aggrieved citizens. The important role of the EU Ombudsman, and national and regional ombudsmen, as a form of alternative dispute resolution and access to justice should not be forgotten. Their services are free. In his report for 2001, he dryly commented on how the Charter on Fundamental rights, so solemnly proclaimed at Nice by the institutions of the Union, was frequently breached by those institutions. It is a reminder that proclaiming the rule of law and acting according to its precepts are often not synonymous. The remit of the EUO now formally covers 'agencies' as well as Union institutions and bodies – a position which the EUO himself had arrived at independently.

#### *xi) Citizenship*

The provisions in TEU on citizenship have been amongst the most criticised of those, which sought to enhance legitimacy in the eyes of European individuals. They offer a very thin version of citizenship, which was modelled on national concepts. It made no real allowance for the European dimension of citizenship. Even so, the treaty was careful not to infringe on national prerogatives in this area. An early provision of the draft preliminary constitution stating that all citizens, male and female, are equal before the law has gone because of a possible inconsistency with the CFR's guarantee of equality for all persons.<sup>73</sup> The provisions on citizenship in the treaty have been repeated in Art I-8 of the EUC adding nothing new. Title VI of Part I covers Principles of Democratic Equality. Art I-44 says that 'in all its activities, the Union shall observe the principle of equality of citizens.' This means citizens of the Union. A controversial

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<sup>70</sup> Art III-283.

<sup>71</sup> Note 61 above para 27.

<sup>72</sup> On direct referral by the Commission see Art 298 EC.

<sup>73</sup> See now Art I-8.

recommendation in the preliminary draft constitution for ‘dual citizenship’ soon disappeared. The principle of representative democracy and the right to participate in the democratic life of the union are proclaimed and decisions shall be taken as openly as possible and as closely as possible to the citizen as we have seen above. It has been seen how Art I-46 covers the principle of participatory democracy.

The political right in the UK criticised this latter provision because it would simply fall into the corporatist (anti rule of law) embrace that characterises the work of the Commission and favoured groups who are well networked. It also ties in with publications of policy papers by the Commission on *European Governance* in which an enhanced role for rule making and fuller participation with interest groups in such rule making and policy formulation.<sup>74</sup>

### *xii) External Action*

In relation to EU’s external Action it is proclaimed that the Union’s action on the international scene is designed to advance ... the principles which have inspired its own creation and development: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, equality and solidarity and for international law in accordance with the principles of the UN Charter. Its aim is to promote ‘international cooperation’ and ‘good global governance.’<sup>75</sup> Specific powers are given for development cooperation for inter-alia the eradication of poverty<sup>76</sup> and humanitarian aid<sup>77</sup> ‘in accordance with international humanitarian law’. Previously, powers under Art 308 EC were invoked a practice, which prompted criticism of use of that article for over broad purposes.<sup>78</sup> A power is given for the Union to conclude treaties and there will be consultation with the EP before conclusion.<sup>79</sup> EC can presently make treaties as can the EU in certain circumstances.

### **Conclusion**

The draft constitution is a bold and necessary development in the progress of Europe. By mid June 2003, the UK Foreign Secretary was hailing the Convention and its progeny as a great success: it had placed nations at the heart of the modern Europe where the Union would respect national identities of Member States and essential state functions. The EUC had clearly and properly allocated powers between the Union and the nations. Power in the Union had been conferred solely by the nations. This was seen as a vindication of the rule of law. The Union/Member State relationship is built on ‘loyal cooperation’ as well as ‘mutual respect’ according to Art I-5. The same draft document was seen by tabloids and some broadsheets in the UK as ‘destroying one thousand years of history’ and uprooting our ancient constitution. It undermined the rule of law and British constitutionalism, they believed. Furthermore, in seeking

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<sup>74</sup> See note 29 above.

<sup>75</sup> Art III-193.

<sup>76</sup> Art III-218.

<sup>77</sup> Art III-223 and 223(2).

<sup>78</sup> The analogue to Art 308 EC is Art I-17 the ‘flexibility clause’ which allows the Union to take action to achieve one of the Constitution’s objectives where such action is not covered by provisions in Part III. The House of Lords Select Committee on the European Union were fretful that this provision could be used to effect change under CFSP without proper constitutional safeguards: *Ninth Report* HL 61 (2002-03).

<sup>79</sup> Art III-227(7).

inspiration from so many differing traditions, the EUC could only become a recipe for confusion. To some extent, this only reveals the subjectivism that often accompanies the rule of law and constitutionalism. In promoting an extended corpus of human rights, in seeking to make the role of the institutions more clear, in taking steps to advance democratic protection and involvement and to conduct business on a more open and transparent basis the draft constitution promotes those ideals of rational governmental discourse that d'Estaing refers to in his Preamble. It is an exercise in layered constitutionalism in which different layers, and those operating within various layers, may learn from each other. A meeting with destiny awaits the British nation when it is likely to be asked to approve our entry into the Euro along, perhaps, with the new constitution, in a referendum. To date, the government has been unwilling to countenance this latter prospect. The new spirit and detail of constitutionalism, which this draft constitution represents, requires such consent. This is not a constitution that you can be in and out of; it is not something to accept in bits and pieces. It comes, I believe, as a job lot. One purchases wholesale or not at all.

The draft constitution places constitutionalism at its very centre along with transparency, the rule of law and all the other features we have seen. It represents a major step in global constitutionalism at a time when an extension of the rule of law – meaning the suppression of arbitrary power and the promotion of equality – has never faced such difficult barriers. We should not forget that what many in Europe may broadly agree upon in terms of the virtues of the rule of law and constitutionalism are not accepted, indeed are resisted in many parts of the world. We should not accept the goodness of those virtues on an ethnocentric basis simply because we are the ‘continent that has brought forth civilisation’ as d'Estaing proclaimed. Their value and merit have to be accepted because of the good they are capable of achieving in adjusting and regulating relationships between people and peoples – in creating a ‘universal right of humanity’ as Kant expressed it.<sup>80</sup> It is a form of constitutionalism readily recognisable because it has borrowed from national constitutional traditions and constitutionalism, but it is very different from a statement of nationalism and national constitutionalism.

The d'Estaing Convention has produced a lasting testimony to what I believe may be referred to as European constitutionalism; a true convergence of national and international aspirations in promoting the rule of law and constitutionalism.

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<sup>80</sup> See I. Ward *A Critical Introduction to European Law* 2<sup>nd</sup> ed (2003) p.276.