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**HOW TO ADOPT A EUROPEAN CONSTITUTION
AND HOW NOT TO ADOPT ONE**

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I. Introduction – Europe at Peace

To present this lecture¹ here in Berlin on 10 November 2001, on the eve of the anniversary of the armistice of 11 November 1918, is a moving experience. Born in 1941, I was brought up in a world overshadowed by the war of 1914-18, and already embroiled in a yet more ghastly conflict. I am of a generation, perhaps the last generation, for whom war in Europe is a real memory, though less vividly so than the first lean and miserable years of the peace, with so much evidence of destruction scattered around one. Only later did I come to appreciate fully the far greater scale of the destruction that confronted citizens of this city and so many others in Germany and elsewhere on the mainland of our continent. My Europeanism is born of the conviction that such things must never be repeated among us.

The prosperity of Europeans is not a zero sum game in which one gets better off to the extent the neighbours get worse off. The European Community in its guise as single market has shown that the prosperity of each part contributes to the prosperity of every other, though not always in the very short run. As a member of the European Parliament, I attended the ceremony in Strasbourg in May 2004 at which the ten new member states were welcomed and their representatives took up seats in the Parliament. That was a remarkable and moving experience.

No less remarkable was the experience I had between February 28, 2002 and July 17, 2003, when I served as a substitute member of the European Parliament's delegation to the Convention on the Future of Europe. Representing the Scottish National Party, I was the substitute member of the two elected by the parliamentary group of the Greens and European Free Alliance. My colleague Johannes Voggenhuber, of the Austrian Green Party, ensured by well-timed partial absences that I had a full opportunity to participate in the Plenary Sessions, especially on 'regional' issues and those concerning the principle of subsidiarity. Substitutes had also a full part to play in working groups and by way of written contributions to the proceedings and amendments to proposed constitutional texts.

II. Convention and Constitution

Whatever may be said about the quality of the draft constitution that the Convention produced, the process which produced it was remarkable for its openness and its discursive character. Debate was intense, and carried on in public. The Convention website and the associated Forum were open to public inspection, and still are. Members of the Convention consulted widely both in their home constituencies (mine was the whole of Scotland) and with sister parties in all corners of Europe. Admittedly, the openness of Convention proceedings was not fully mirrored in coverage in the press or other media in the member states, at any rate not till the end, when the draft was almost complete – then they protested that all this had been cooked up more or less in secret in Brussels.

The draft constitution is, I think, just about as good as one can contrive in all the circumstances of the present time. Indeed the final form adopted in October 2004 in Rome incorporates some

¹ Erstmalig verfasst und veröffentlicht wurde der Text als Vortrag im "Forum Constitutionis Europae" des Walter Hallstein-Institutes für Europäisches Verfassungsrecht an der Humboldt-Universität zu Berlin, 10. November 2005, www.whi-berlin.de/maccormick.htm

further changes, some of them genuine improvements, to meet various sensitivities of particular member states. In the real world, any constitutional developments have to be evolutionary, adjusting and improving the institutional package we have inherited. There is no room for revolutionary new beginnings. But there is room for real improvement. In terms of increasing the democratic openness and controllability of the union's institutions, the constitution made excellent proposals. In relation to subsidiarity, the definition was improved and a process for increasing scrutiny was devised. In terms of trying to create conditions for an effective Commission and Council in a Europe of 27 or more members, sensible compromises were achieved, as likewise in relation to the external representation of the Union.

Many people were exultant when the referendum first in France then in the Netherlands rejected ratification of the Treaty Establishing a Constitution for Europe. But, many were greatly disappointed. I am of the latter party. Let me repeat that the treaty does a good job of restating in formal and explicit terms the existing functional but implicit constitution of the European Union that emerges from the Union and Community Treaties. This is a view which I have argued at length in my recent short book *Who's Afraid of a European Constitution?* I shall not repeat the arguments on this occasion, nor shall I repeat the argument in my *Questioning Sovereignty* of 1999 concerning the importance of both democracy and subsidiarity in the Union. Let us for the moment simply suppose that in its substance there is a good case for ratifying and implementing the constitution contained in the Treaty, as fourteen member states have already decided, including Germany, and also Spain and Luxembourg, where referendums produced results opposite to those in France and the Netherlands. However good the case for the constitution may be, it does not look as though it can come into force in the current divided state of European opinion. So what went wrong? Did we miss the moment, or was there no constitutional moment in the first place?

At the final meeting of the Constitutional Convention, on 12 June 2003, there were congratulatory speeches about the hard work we had done and our success in achieving a final text that had consensus among the large majority of participants, whatever reservations on significant details many of us also had. The most amusing remark of the day was by French Conventioneer and former Minister for European Affairs Alain Lamassoure. He said that we had done quite well to achieve as much as we had in eighteen months. Of course, it had taken us longer than the Americans took at Philadelphia. But then, he said, they had solved their British problem before the Convention started. With hindsight now, one can not but see it as a sad irony that another problem we turn out not to have solved is actually a French one.

III. Ratifying a Treaty and Adopting a Constitution

Even if there is a French problem, the real problem we all face lies deeper and implicates us all. The process of ratifying – or refusing to ratify – the *Treaty Establishing a Constitution for Europe*, signed in Rome on 29 October 2004, draws to our attention the paradox implicit in the hybrid entity that is a ‘constitution-treaty’. In its nature as a treaty, it must be referred to each signatory state for ratification by whatever procedure is necessary to bring it lawfully into operation in respect of that state. Each state is entitled and even also obliged to weigh its merits as a treaty that will create obligations for the citizens and for the state. In its nature as a constitution, or at least a putative constitution, however, it is of interest to the citizens of the Union as such and to the Union as a whole. Implicitly, two questions are open:

1. In each state, the question is: ‘Shall we as French/Germans/Latvians/Maltese etc. etc.. agree to ratify this treaty in view of the balance of advantage and disadvantage we see for our own country in taking this step’
2. In the Union as a whole: ‘Shall we as Europeans and citizens of the European Union adopt this constitution in view of the balance of advantage and disadvantage we see for our European Union in reshaping it as an entity so constituted?’

The ratification procedure that was mandated by the Treaty unfortunately fails to ensure that there is any way for the second question to be clearly articulated and answered. The process of state-by-state ratification involves a series of debates that focus firmly on the first question, and that raise the second question only so far as some may see it to be implicit in the first. At least some of the citizens of all the Union’s member states may be presumed to think that a significant part of the good for their own country includes participating in and contributing to a well-constituted European Union. To that extent the question ‘Is this constitution good for Europe?’ is part of the question ‘Is this treaty good for the UK [or for France or for whichever is your own member state]?’

As recently as 28 May 2005, in a lecture to the World Congress in Philosophy of Law at Granada, I put forward the argument that the state-by-state ratification process was quite adequate and not objectionable from the point of view of democratic constitutionalism. I even suggested that the process of so adopting a constitution, if the constitution were indeed adopted, might be itself a vehicle for developing a sense of ‘constitutional patriotism’ in Europe. After the lecture, however, my friend and colleague Joachim Nergelius from Lund in Sweden took me aside and suggested I was mistaken. He said that the tone and content of the debate in France were not at all addressed to the European question – it was all about French politics and about the impact of a particular vision of Europe on France itself. The same, I must say, subsequently appeared to be true about the debate in the Netherlands.

I was not able to be in France during the ratification debate, nor in the Netherlands, but the newspaper and television reports certainly seem to bear out the substantial truth of this. In the UK, the ratification debate never really got into full swing, since the French referendum followed so closely on a British general Election in which the promised ratification referendum largely neutralised the constitution as an election issue. One can however say without fear of contradiction that the debate would have been almost entirely run along the lines of my first question, not my second one. A largely Euro-sceptical and deeply constitution-sceptical press had already set the scene for a debate of what I would consider a narrowly nationalistic, even little-Englander, kind. So I conclude that Nergelius was right and I was wrong about the character of the state-by-state ratification process.

However that may be, it is not for me as a retired politician (though still in full activity as a law professor and constitutional commentator) to decry the will of the people. Of course it is right that democratic states must decide questions of constitutional concern to themselves by some appropriate form of democratic constitutional decision-making. If a state’s constitution requires or permits a referendum, then one cannot complain when the result goes against one, any more than the other side can if our side prevails. Nobody can and nobody should be able to force the

people of France or of the Netherlands, or any other country, to sign up to a treaty that they believe to be on balance adverse to the best interests of their country.

In that case, however, what about the constitution? When do we as Europeans get to decide about its quality as a constitution for our whole European confederation or commonwealth or whatever we shall call this entity of its own kind, this *sui generis* Union? After all, fourteen countries have already ratified, presumably on some mixed view about national interest and European common good. It seems a pity if the unexceptionable democratic right of each country to take its own view in its own time about ratifying the Treaty excludes the right of Europeans as Europeans to reflect on whether a constitution would be good to have, and in particular whether this constitution is worth having.

IV. An All-Europe Referendum?

From time to time the suggestion has been raised that there might somehow be an all-Union referendum on a constitution – this one perhaps, or some other improved version. It has hitherto seemed to me constitutionally impossible to achieve this. But in the aftermath of the French and Dutch referendums, a different possibility has occurred to me. A Constitution Treaty could itself make a provision about an all-Europe referendum. The provision would be for a referendum to be held if all the states ratify the treaty. So the treaty itself would provisionally establish the constitution, but provide for its coming into force only if assented to by all the people and peoples of the Union through a single referendum.

At present, Article IV 447 provides that:

1. This Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements. The instruments of ratification shall be deposited with the Government of the Italian Republic.
2. This Treaty shall enter into force on 1 November 2006, provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the second month following the deposit of the instrument of ratification by the last signatory State to take this step.

It would be possible to produce a different version of paragraph 2 as follows:

2. After all the instruments of ratification have been deposited, a referendum shall be held in each member state during a single four day period starting on a date to be fixed by resolution of the European Parliament and the Council on a proposal by the Commission. The question to be posed is the following ‘Shall the European Union adopt and put into effect the Constitution contained in the Treaty establishing a Constitution for Europe?’, and the answer must be either ‘Yes’ or ‘No’.

One could then add some essential further provisions:

3. This Treaty shall enter into force on the first day of the second month following the referendum provided that, taking account of the aggregate votes cast in the referendum, a majority

of voters throughout the Union has voted ‘Yes’, and provided that in each of at least four fifths of all the member states the majority has been for ‘Yes’.

4. Special provision may be made for establishing a relationship between the Union and any state a majority of whose voters has registered a ‘no’ vote, if subsequently to that vote the state by its own constitutional process resolves to exercise the power of withdrawal from the Union under Article 1 (60) of this treaty. Such provisions shall be no less favourable than the relationship obtaining between that state and the other states of the Union under the Treaty on European Union and the European Community Treaty as these were in force on the day prior to entry into force of the present Treaty.

The idea is simple. Treaty ratification must still take place according to each state’s constitutional process. But the incentive to include a referendum at this stage, unless such is a strict requirement of national law, would be greatly reduced from the present position. In ratification debates in national Parliaments, it would be clear that no Parliament was denying the citizens an independent say. For such a say would be expressly included in the Treaty being ratified.

V. Towards a Real European Debate

All member states would however be agreeing to a treaty that might come into force despite some single-country negative results. But notice the condition I suggest applying to this. The condition is that a state whose citizens found unacceptable the constitution thus adopted might then demand, and the state might in its own time decide in favour of, a withdrawal from full membership of the Union. This would seem to me to strike a fairer balance than at present between the pro-constitution citizens and states, and the anti-constitution ones. There is not, nor should there be, any guarantee that a procedure of this kind would produce either a majority for the constitution or a majority in a sufficient number of the states. The point is that there would be an opportunity for a real Europe-wide debate about what kind of Union, if any, the citizens want.

It would be a debate about whether it is right to give it a political constitution by the common will of citizens. The alternative is to muddle along with a ‘constitutional charter’ that has been spelled out of the treaties by the Court and carried on by the acquiescence of the states, sometimes a grumbling and reluctant acquiescence? An authentic constitutional patriotism in and for a European Union would require, surely, some such authentication as this, and might even emerge from the act of articulating it.

Of all the complaints about the European Union in its present form, the hardest to rebut is the objection that says the citizens never consented to more than a common market. But then they woke up to find themselves in an ever more expansive political union, now a political and monetary union for most of them. I used to think that only a certain kind of perhaps even rather paranoid British Euro-sceptic took this line. I never believed it myself, since at the time of the UK referendum of 1975 the political and constitutional implications of the EEC, as then established, was perfectly clear to me. But perhaps the perspective of a Professor of Public Law is indeed an unusual one in relation to matters of this sort. Again, it became clear during the French and Dutch referendums that more than a few citizens of these countries had the same opinion. I have also heard members of the UK’s ‘Yes’ campaign of 1975 publicly acknowledge that the campaign instructions for members of the European Movement were clearly to stress the economic reasons

for a Yes vote while evading any joinder of issue about political implications. There has indeed been a democratic deficit in the process of authentication of the existing constitution of the Union.

VI. The Problem of Part III

If we really were looking to a Europe-wide constitutional referendum, there would be other things that might be done somewhat differently from the project of the 2002-3 Convention, carried on by the IGC up to the final meeting in Rome on October 29, 2004. The problem is Part III of the Constitution. This contains a great deal of matter which is not constitutional in any ordinary sense of the term. Part III deals with the policies and functioning of the Union, derived from the present Treaties but adapted to the new context. Its presence raised much adverse comment both in the UK in its preliminary skirmishes about the constitution and again, as it turned out, in France and the Netherlands. The real Constitution in the Giscardian draft was found in Part I – finally, sixty Articles in all, pretty straightforward and eminently readable. Add to that Europe's Charter of Rights – the Charter of Fundamental Rights of the European Union as elaborated by the Herzog Convention and adopted through the Treaty of Nice as a 'political declaration' only. As Part II of the Constitution this is also very clear and readable. The present Part IV amounts to eleven articles making essential 'general and final provisions', including provisions about adopting the Constitution and amending it in future. That again adds little to the bulk. A reasonable public debate could be held about a Constitution on that scale, which quite ordinary citizens could comfortably read on a Sunday afternoon.

The huge bulk of Part III on the other hand was rightly complained of in France. How can ordinary people come to any sensible decision about so huge a stack of complicated legal text? The answer is that they cannot. So a ratification referendum should focus on the more strictly constitutional elements in Parts I, II and IV.

This is not to repudiate Part III taken in its proper place. Properly understood, Part III is both essential and need not cause special concern. For all it does is adjust those existing basic rules of the Union and Community that are included in the two Treaties for the sake of conformity with the amended constitutional framework in Part I and to an extent Part II. From a Conventioneer's point of view, the adoption of Part III was never satisfactorily debated. The text came on to the Convention Agenda late in the day. It is really the result of a technical exercise, carried out with great skill by the legal experts of the three EU Institutions, to ensure that there would be no technical legal vacuum, and no needless legal uncertainty, if the new Constitution came into force. It would have been a disaster simply to adopt (or propose) a constitution on the footing that all consequential amendments should be read into the *acquis communautaire*, simply as a matter of necessary implication. This would have caused huge but avoidable uncertainty about the rules that define EU policies with regard to the Single Market rules and related matters. On that ground, I have previously defended Part III as a reasonable effort to do a necessary job.

I now see that Conventioneers should have protested much more effectually at having Part III foisted on them and pushed into the Constitution. The job had to be done, but it did not have to be done in exactly that way. The Constitution as adopted should have been all of and only what is now in Parts I, II and IV. Part III should have been an annexed Act subject to ratification on the basis of entering into force at the same time as the Constitution. Thus would have been secured

the necessary consequential amendments to carry forward the *acquis communautaire* into its new constitutional setting. If there were to be a Europe-wide referendum, it would not make sense to include ‘Part III’ in what we citizens are asked directly to ratify. It should be available for discussion as an indication that necessary adjustments can be, and will have been made, once the Constitution comes into force, if it ever does.

If it were done in this way, citizens could be voting on a reasonably compact and intelligible text, able to come to a reasonable understanding of what is at stake. That would surely be highly desirable.

VII. Conclusion - A Bright Idea or More than That?

To conclude then. Is all this just an idea about something that might have taken place, or that could take place at some remote future date if the constitution question comes to be re-opened in more favourable circumstances, at some genuine European ‘constitutional moment? Is it just a bright idea, and no more? Is it even a bright idea? You, ladies and gentlemen, must be the judges of that. But perhaps there may be a little more than just an academic point here. The European Council has to return in the Spring to reflecting on the ratification process that is currently stalled. It would simply be an insult to the citizens of France and the Netherlands to ask them to re-think their opposition to the constitution-treaty just as it stands. In these circumstances, there will be great difficulty in re-opening the question in the UK or Ireland, I am sure.

But if we were to look again at a new provisional ratification, to be followed by such a referendum as here proposed, no opponent of the constitution would be deprived of the opportunity to take part in the final decision. No state would have to be forced into a union newly re-constituted under the new Constitution, in the event that a sufficient European majority did bring this about. So at least it may be possible to offer this not just as a pipe dream, but also as one proposal for a way out of the present rather unsatisfactory impasse.

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