

Conference Report: A Critical Assessment of the European Union Constitutional Treaty

ESTELLE ASKEW-RENAUT AND KATJA MIRWALDT*

Abstract

The report summarises the presentations and discussions at the European Union Constitutional Treaty conference held at the Moot Hall in Colchester on 3 November 2004. The Conference was a public information event aimed at sixth formers and university students as well as the general public. It was also an event to mark the 40th anniversary of the University of Essex. The speakers included Essex politicians drawn from local government, Westminster, and the European Parliament, as well as academic experts, lawyers and journalists. The conference also heard from the Irish Ambassador to the United Kingdom. The intention was to present a critical and balanced assessment of the Constitutional Treaty and to contribute to the debate that must now begin in the UK, as a European Union member state, on whether to ratify the Constitution. The Constitution will first be considered in Parliament and thereafter the electorate will have the opportunity to vote on the Constitution in a referendum. The conference focussed on two topics: the possible impact of the EU Charter of Fundamental Rights, and the roles of the European Parliament and national Parliaments under the proposed Constitution. Inevitably much of the debate was concerned with the question as to whether the Constitutional Treaty should be accepted by the British people at all.

1. Introduction

Participants from across the political spectrum and the European Union (EU) gathered on 3 November 2004 at the Moot Hall in Colchester, Essex, to discuss the draft EU Constitutional Treaty.¹ The conference was organized by the Jean Monnet European Centre of Excellence and the European Union Law Centre,² both based at the University of Essex, with sponsorship from the University and the United Kingdom Office of the European Parliament. The conference was hosted by the University of Essex as part of its 40th anniversary celebrations.

In their opening remarks John Bouckley³ and Professor Ivor Crewe⁴ welcomed the large audience gathered in the Moot Hall, and in particular the Sixth Form College students. The aim of the conference was to inform members of the public about the Constitution. The process of ratification will involve its provisions first being considered by Parliament in 2005 and thereafter, at some point in 2006, it will be submitted directly to the electorate in a referendum. The conference addressed three broad topics: the

* Estelle Askew-Renaut and Katja Mirwaldt are PhD Candidates in the Departments of Law and Government respectively at the University of Essex.

¹ Treaty Establishing a Constitution for Europe, 29 October 2004, CIG 87/2/04, Rev 2.

² The organizing committee for the conference consisted of Professors Emil J. Kirchner, Kevin Boyle, Lorna Woods and Steve Peers, with Lynn Baird, Sarah Pratt, Estelle Askew-Renaut and Katja Mirwaldt.

³ John Bouckley is the Mayor of Colchester.

⁴ Professor Ivor Crewe is the Vice-Chancellor of the University of Essex.

making of the Constitutional Treaty, the possible impact of the EU Charter of Fundamental Rights,⁵ and the future role of national parliaments and the European Parliament. There was a degree of overlap between these topics and this conference report summarizes the themes which emerged throughout the different presentations and discussions.

2. The Making of the Constitutional Treaty

With respect to the making of the Constitutional Treaty, the participants deplored the failure of pro-Europeans to inform the public and dispel the myths about the EU. The European Convention, the body that drafted the Constitutional Treaty, and the EU generally are poorly reported in UK mass media. Lord Phillips of Sudbury⁶ praised the fact that the majority of the audience were members of the public and welcomed the opportunity the conference offered to provide information and public debate.

2.1 The Making of the Constitution – an Observer’s View

Peter Norman⁷ spoke about the body that had drawn up the draft Constitutional Treaty, the European Convention. As a journalist he had the opportunity to follow all stages of the Convention. Norman began by noting the significance of the signing of the Constitutional Treaty the previous week in Rome by twenty-five countries which had in previous decades fought against each other. The European Union had put a definitive end to some of Europe’s long-standing divisions. A major departure from previous treaty-making lay in the deliberative drafting procedure, with the unparalleled involvement of members of the public, EU institutions, and politicians from member states, accession countries as well as candidate countries.

Peter Norman proceeded to review the reasons why the European Convention was called to act, and whether or not, in agreeing the draft Treaty, it had succeeded in its aims. Since the mid 1990s the EU has appeared an unaccountable monolithic structure, with little legitimacy in the eyes of its citizens. Owing to these concerns and the upcoming enlargement of the EU, the Nice summit in 2000 attempted to lay down the issues to be addressed, namely a clearer delineation of competences; the possibility of a legally binding bill of rights; the simplification of over 1,000 pages of existing Treaties; and a stronger role for democratically accountable parliaments.⁸ In the 2001 Læken Declaration,⁹ the heads of state and governments of the EU member states went even further by requiring that a debate commence on the future of the EU, which would address the need for more transparency, democracy and efficiency.

The European Convention body discussed and drafted the Constitution over twenty-five months and produced a draft Treaty in early 2003, which grew substantially through subsequent amendments. Peter Norman described the document as complex and lacking in majesty. Nonetheless, he praised the clarification of competences, the simplification of the decision-making procedures and the written recognition of the primacy of EC law.

⁵ O.J. C364/1, 18 Dec. 2000 (the ‘EU Charter’).

⁶ Lord Phillips of Sudbury OBE is the Chancellor of the University of Essex.

⁷ Peter Norman is a *Financial Times* journalist and author of *The Accidental Constitution – the Story of the European Convention* (Brussels: EuroComment, 2003).

⁸ See the Presidency Conclusions from the Nice European Council of 7-9 Dec. 2000; *Declaration on the Future of the Union*, Declaration No. 23 to the Treaty of Nice, O.J. C/80, 10 Mar. 2001.

⁹ *Læken Declaration on the Future of the European Union*, 15 Dec. 2001.

Peter Norman welcomed the fact that, for the first time, the Council of Ministers of the EU would be open to public scrutiny. He questioned the feasibility of the new post of Foreign Minister of the EU, which merged the roles of the Commissioner for External Relations and the High Representative for the Common Foreign and Security Policy. His concerns also extended to the change to the presidency of the EU, with the creation of a longer term President whose restricted portfolio might operate as a straitjacket. Peter Norman thought that the biggest loser in the Constitutional Treaty was the European Commission, the executive arm of the EU. The Commission would see its membership shrink and its influence lessen, as a group of member states would be entitled to propose new legislation in specific areas, previously the Commission's privileged remit.

In his view, the Constitutional Treaty is more than the usual compromise as it formally recognizes the EU's hybrid character. The subsequent discussion raised parallels and differences with the United States Constitution. It was pointed out that importantly, unlike the American Constitution, the Constitutional Treaty derives its legitimacy from the member states rather than the people.

2.2 The Making of the Constitution – an Insider's View

His Excellency the Irish Ambassador Dáithí O'Ceallaigh¹⁰ gave an account of the tremendous positive impact that membership of the EU has had on Ireland over the last thirty years. Similar positive economic and social development had occurred in many other smaller member states, such as Portugal. In his view, smaller member states tend to accomplish successful presidencies of the EU because they find their national interest best served by conducting efficient presidencies.

The Ambassador proceeded to review the aims of the recent Irish Presidency (held from January to June 2004), during which salient issues had been the successful enlargement of the EU on 1 May 2004, the choice of a president of the new European Commission, and the final negotiations between governments on voting rules under the draft Constitution. He explained how the Irish presidency of the EU had worked to build consensus. Two texts of the Constitution were prepared, the first containing all agreed points, the second with the still contentious points. As the presidency progressed, more and more of the issues (such as European Commission membership and issues relating to qualified majority voting) were moved from the second text to the agreed text, until only that text remained: the present Constitutional Treaty.

Professor Emil Kirchner¹¹ deplored the fact that the Constitutional Treaty would abolish the role of the presidency as an 'honest broker'. Mr O' Ceallaigh also felt that the abolition of the six-month rotating presidency would be a loss to the citizens of member states, who live and breathe the EU during those six months. However, he recognized that the financial burden associated with these presidencies was enormous, particularly for the smaller member states. In addition, under the current system each member state would only hold the rotating presidency once every 12 and a half years, which would do little towards bringing the EU closer to its citizens.

3. The EU Charter of Fundamental Rights

The second part of the conference explored the content of the EU Charter of Fundamental Rights, as well as its significance within the Constitution. Currently each of

¹⁰ Dáithí O'Ceallaigh has been Ireland's Ambassador to the Court of St. James' since 2001.

¹¹ Professor Emil J. Kirchner is a Professor in the Department of Government of the University of Essex.

the twenty-five member states of the EU is bound to protect the rights contained in the European Convention on Human Rights (ECHR),¹² and the final court for grievances under the ECHR is the European Court of Human Rights in Strasbourg. Once the Constitution is signed and the EU Charter is legally binding, member states will need to know whether, when making law, they should abide by the rights in the ECHR, in the EU Charter, or both. Finally, individuals need to know to which court they may bring their grievances – the European Court of Human Rights or the European Court of Justice in Luxembourg.

3.1 The Development of Human Rights Protection in the EU

Professor Lorna Woods¹³ addressed the history of human rights protection in the EU and its development by the European Court of Justice (ECJ). As is well documented,¹⁴ the original European Economic Community Treaty¹⁵ did not refer to fundamental rights, apart from an oblique reference in the preamble to ‘preserve and strengthen peace and liberty’.¹⁶ The historical development of the protection of human rights by the ECJ has confirmed that there are ‘fundamental human rights enshrined in the general principles of Community law and protected by the [ECJ]’,¹⁷ and that these general principles are inspired by constitutional traditions of the member states¹⁸ and the ECHR¹⁹ – the underlying principles of which ‘must be taken into consideration in Community law’²⁰ as an interpretation tool.²¹ Therefore, the ECJ would interpret the laws of the EU in the light of the constitutions of the member states and the rights contained in the ECHR. Problems arose as those constitutions do not all protect the same rights to the same extent, and the ECJ did not necessarily interpret the ECHR rights in the same way as the European Court of Human Rights might have done.²² The special status of the ECHR was confirmed by the addition of Article 6(2) of the Treaty on European Union,²³ which commits the EU to respect fundamental rights ‘as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the member states, as general principles of Community law’.

¹² European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 UNTS 221, ETS 5.

¹³ Lorna Woods is a Professor in the Department of Law of the University of Essex.

¹⁴ T. Tridimas, *The General Principles of EC Law* (Oxford: EC Law Library, 1999), 202-244; J.H.H. Weiler ‘Eurocracy and distrust: some questions concerning the role of the European Court of Justice in the protection of fundamental human rights within the legal order of the European Communities’ (1986) 61 *Wash. L. Rev.* 1103.

¹⁵ Treaty establishing the European Economic Community, 25 Mar. 1957, 298 UNTS 11. Now Consolidated Version of the Treaty establishing the European Community, 2002 O.J. C325.

¹⁶ Sixth Recital, Preamble, EEC Treaty.

¹⁷ Case 29/69 *Erich Stauder v. City of Ulm-Sozialamt* [1969] ECR 419.

¹⁸ Case 11/70 *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹⁹ Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission* [1974] ECR 491; Case 36/75 *Roland Rutili v. Ministre de l’intérieur* [1975] ECR 1219.

²⁰ Case 222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

²¹ Case 249/86 *Commission v. Germany* [1989] ECR 1290.

²² See for example the Irish abortion information cases (Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd (SPUC) v. Stephen Grogan and others* [1991] ECR I-4685 and *Open Door Counselling and Dublin Well Woman Centre Ltd. v. Ireland*, Judgment of 29 October 1992, A/246).

²³ 1992 O.J. C224/1 now Consolidated Version of the Treaty on European Union, 2002 O.J. C325.

Despite the judicial activism of the ECJ, its judgments have been criticized²⁴ as few applicants have actually succeeded in winning on human rights points. Human rights values were interpreted in the light of the demands of European integration, and would not be considered by the ECJ as ‘supreme’ over, say, the EC Treaty.²⁵ Nonetheless, and as Professor Woods pointed out, in view of the judgments of the ECJ the political institutions of the EU did adopt declarations²⁶ affirming the importance of fundamental rights – without however listing what those rights were, which court would protect them, or how these obligations would interact with the ECHR. There therefore remained a need for a clear catalogue of rights that the EU institutions would abide by, to enhance the level of protection of individuals against lawmakers, and to increase the legitimacy of the EU.

This drive led to the drafting of the EU Charter. This was not an ordinary policy initiative, in that it was not aimed primarily at the policy-maker or the lawyer, but largely at the citizen. A 62-member body was responsible for the drafting, made up of the representatives of the then fifteen member states, and members of the national parliaments, the European Parliament, and the Commission. Two representatives of the ECJ and the Council of Europe also participated. In addition, the drafters interviewed various experts, NGO representatives, and members of the public. The text of the EU Charter was ‘solemnly proclaimed’ in December 2000 during the signing of the Treaty of Nice. The question of ‘whether and, if so, how the Charter should be integrated into the Treaties’²⁷ was left to the general debate on the future of Europe, which was initiated on 1 January 2001. The EU Charter now appears as Part II of the new Constitution, which means that once the Constitution has been ratified by all twenty-five member states the EU Charter will have the legally binding force that has been lacking since its proclamation.

3.2 The EU Charter of Fundamental Rights – Will It Make Any Difference?

Professor Steve Peers²⁸ addressed the question as to whether the inclusion of the EU Charter in the Constitution would have a substantial impact on the protection of human rights in the EU. The text of the EU Charter clearly addresses the institutions of the EU, as well as the member states themselves, but only when they are ‘implementing Union law’.²⁹ This terminology in effect codifies the current legal situation and is supported by the explanatory notes to the Constitutional Treaty.³⁰ This means for example that in the fields of health care and the right to strike, where there is no EU law, the EU Charter would not apply.

²⁴ Coppel & O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) 29 *CMLRev* 669 at 683; B. de Witte, ‘The Past and Future Role of the European Court of Justice in the Protection of Human Rights’ in P. Alston (ed.), *The EU and Human Rights*, (Oxford: Oxford University Press, 1999), at 878, referring to Coppel & O’Neill’s article.

²⁵ E.g. Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719. Although see the recent judgment in Case C-112/00 *Eugene Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659.

²⁶ European Parliament Resolution concerning the fundamental rights of member states’ citizens when Community law is drafted (1973 *O.J.* C26/7); Joint Declaration on fundamental rights of the European Parliament, the Council and the Commission (1977 *O.J.* C103/1).

²⁷ European Council Decision on the drawing up of a Charter of fundamental rights of the EU, Annex IV to the Conclusions of the Cologne European Council, 3-4 June 1999.

²⁸ Steve Peers is a Professor in the Department of Law of the University of Essex.

²⁹ Art. 51(1) of the EU Charter; Art. II-111(1) of the Constitutional Treaty.

³⁰ The explanations must be ‘given due regard by the courts of the Union and of the Member States’ (Art. II-112(7) of the Constitution); Declaration concerning the explanations relating to the Charter of Fundamental Rights, Declaration No.12 annexed to the Constitution.

Professor Peers proceeded to review the substantive content of the EU Charter. He highlighted the fact that the vast majority of the rights in the document are taken from other instruments of international law that the member states are already bound by.³¹ Further, Article 52 of the EU Charter³² states that rights which are contained in both the ECHR or national constitutions, and the EU Charter, should be interpreted in the same way to avoid the risk of divergence. As such, Professor Peers argued that a legally binding Charter would not represent a significant shift in the content of the rights protected in the EU. It would, however, make them more visible, and would allow individuals to enforce those rights in a more direct way.

This point was highlighted by Professor Richard Bellamy,³³ who quoted the UK House of Lords EU Select Committee's opinion that the need for a bill of rights in a Constitution was 'beyond argument'.³⁴ A bill of rights was essential in a democracy in order to ensure citizens' equal treatment, and to ensure that the government was held accountable. That sense of democracy and protection of rights was currently missing from the EU in at least two ways. First, although through its case law the ECJ had declared itself bound to protect rights, there had been instances where national courts had questioned that commitment.³⁵ Further, even when the ECJ did attempt to protect human rights, it sometimes failed to take into account the differences in legal traditions in the member states on very sensitive issues such as abortion and euthanasia. Professor Bellamy questioned whether the EU Charter and its inclusion in the Constitution would resolve these problems.

4. The Role of Parliaments in the Constitutional Treaty

It emerged from the panels on parliaments and peoples that the tension between the European and national levels of governance represents the major obstacle to the democratic accountability of the EU. Parliaments, as the main bodies that hold governments accountable, were considered to be the key democratic institutions. Controversy surfaced over how the competences of the European Parliament to hold the Commission and Council accountable should be balanced with the same competence of national parliaments.

4.1 The European Parliament

All speakers agreed that the democratic qualities of the EU were weak. The European Parliament (EP), as the only directly elected body of the EU, is one of the most prominent champions of redressing this democratic deficit. Dermot Scott³⁶ outlined the evolution of the EP's powers and its contribution to democratic Community-building

³¹ Civil and political rights in the EU Charter are inspired by the ECHR and their interpretation by the ECJ; the social rights are taken from the European Social Charter (1961, ETS No. 35, 36 ILM 31), some International Labour Organization (ILO) Conventions (e.g. Discrimination (Employment and Occupation) Convention and Recommendation, 1958, ILO Convention No. 111) and the UN International Covenant on Economic, Social and Cultural Rights (GA Resolution 2200A (XXI) of 16 Dec. 1966, 993 U.N.T.S. 3); and other rights are inspired by the national constitutions of member states. Finally, the EU Charter repeats the European political rights which already appear in the existing Treaties.

³² Art. II-112(3) and (4) in Part II of the Constitutional Treaty.

³³ Richard Bellamy is a Professor in the Department of Government at the University of Essex.

³⁴ The Future Status of the EU Charter of Fundamental Rights, Sixth Report, Session 2002-2003, para. 45.

³⁵ See the view of Germany's Constitutional Court in *Internationale Handelsgesellschaft* (see n. 18 above) and subsequent case law; and Italy's view in *Frontini/Ministero delle Finanze*, Constitutional Court judgment No. 183/73 of 27 Dec. 1973, *Giurisprudenza cost.* 2401; [1974] 2 CMLR 372 and subsequent case law.

³⁶ Dermot Scott is Director of the UK Office of the European Parliament.

since the 1950s. Originating in the European Coal and Steel Community assembly, where members of national parliaments would also participate in the work of the EP, the first direct elections to the EP were held in 1979. While the information link between the EP and national parliaments was thus broken, the increased political legitimacy that stemmed from direct election enhanced the political clout of the EP. Thus, the EP saw itself as having a direct impact on the conclusion of the Single European Act in 1986.³⁷ Its competences were further enhanced in the Treaty of Amsterdam,³⁸ which substantially increased the co-decision procedure, giving the EP a veto right and the last word in European law making in some areas. Dermot Scott noted that there is disagreement between the EP and national parliaments as to who should hold Council members accountable. Although cooperation between the EP and national parliaments exists, their relations are characterized by jealousies over the legitimacy monopoly.

Christopher Beazley³⁹ pointed out that, considering the fact that the EP is not modelled on national parliaments, its latest inputs have been remarkable. Aside from its recent rejection of the Barroso Commission, one of its main contributions to the democratization of the EU has been to the Constitutional Treaty. Increasingly dissatisfied with the practice of amending the EC Treaty, it was the EP that proposed a more deliberate and participatory procedure for the next Treaty.

Unanimous ratification of the Constitution was seen by panel members to constitute a major challenge. At present some ten countries were committed to holding a referendum, among them countries of considerable political weight, such as Poland, France and the UK. In this context, Beazley pointed out that France and the UK's concerns were mirror images of each other: while the British public was suspicious of a perceived attempt to create a European 'superstate', there was a notion in France that the Constitutional Treaty was an 'Anglo-American plot' to enshrine neo-liberal values in the EU in order to weaken its political cohesion.

Although the EP's position was not official at the time of the conference, Richard Howitt⁴⁰ stressed its definite support of the Constitution. This is due to the Constitution's extension of the co-decision legislative procedure. Richard Howitt argued that by making co-decision the standard legislative procedure, the Constitution would improve the democratic accountability of the Commission and the Council to the EP. In relation to the ratification issue, he proceeded to launch an attack on the anti-European lobby, which failed to confront the real advantages and disadvantages of the Constitutional Treaty and instead contented itself with scaremongering.

4.2 National Parliaments

Alistair McAuley⁴¹ argued that the informal way that the European Economic Community (EEC) had been run was deliberately shaped by the six founding members so as not to be a competing centre of democratic legitimacy. With the gradual enlargement and deepening of the EEC, however, it became ever more pressing to address the lack of electoral connection between the citizens and the Community institutions. He pointed out that holding the executive accountable was a zero-sum

³⁷ *O.J. L* 169, 29 June 1987.

³⁸ *O.J. C*340/1, 2 Oct. 1997.

³⁹ Christopher Beazley MEP is Conservative spokesman on Culture, Media, Education and Sport.

⁴⁰ Richard Howitt MEP is 1st Vice Chair of the Sub Committee on Human Rights of the European Parliament.

⁴¹ Alistair McAuley is a Reader of Economics at the University of Essex.

competence; strengthening the EP would weaken the same competence held by national parliaments or regional parliaments.⁴²

A fundamental controversy emerged over the question of whether the democratic deficit should be addressed at the European level, or whether national institutions should remain at the centre of legitimacy. Bernard Jenkin⁴³ was opposed to the present draft Constitutional Treaty. He expressed the view that the EU is a construct subsidiary to the member states. He asserted that the transition from a treaty-based to a constitution-based EU would convert democratic member states into a non-democratic EU. Institutionalizing, for example, a two-speed Europe in contentious policy areas such as defence should prevent this absorption of national democratic culture. Conversely, it was pointed out that the Constitution would improve the involvement of national parliaments in EU legislation. National parliaments would be granted the power to send legislative proposals back to the EU lawmakers for review if one third of national parliaments agreed that the proposal infringed the principle of subsidiarity.⁴⁴ Richard Howitt held that this early warning mechanism would render the EU *more* democratic.

Some criticism was waged on the strong focus on formalized relations between the executive and parliaments. Professor Kevin Boyle⁴⁵ pointed out that the unusual openness of the EU towards citizen participation and lobby groups constituted a different form of democratic input. Nevertheless, a distinction was drawn between those forms of input and the necessity of accountability for democratic government.

5. Conclusion

All speakers agreed that the way the EU was currently run could be improved. An area of particular concern was the antagonism between European and national institutions as regards the ultimate source of law and democratic accountability at EU level. Nevertheless, there was broad agreement on the fact that the Constitutional Treaty would greatly enhance the accountability and legitimacy of the EU. Ratification was deemed to be a challenging task, especially in those countries committed to a referendum, because it is difficult to inform a sceptical public of the merits of the Constitution.⁴⁶ Informative events like the conference were considered an effective way of genuinely weighing up the advantages and disadvantages ratification would bring.

The conference concluded with the launch of *The EU Charter of Fundamental Rights: Politics, Law and Policy*⁴⁷, a new book edited by Steve Peers and Angela Ward.⁴⁸

⁴² L. Siedentop, *Democracy in Europe* (London: Penguin, 2001).

⁴³ Bernard Jenkin is Conservative MP for North Essex.

⁴⁴ A principle enshrined in Protocol 2 annexed to the Constitutional Treaty, providing that decisions should be taken as closely to the citizen as possible.

⁴⁵ Kevin Boyle is a Professor of Law at the University of Essex.

⁴⁶ On 11 Nov. 2004 Lithuania became the first country formally to ratify the Constitutional Treaty, followed by Hungary on 20 Dec. 2004 and Slovenia on 1 Feb. 2005. For further updates, please see the *EU Constitution Newsletter* from the Federal Trust for Education and Research, available at: <http://www.fedtrust.co.uk/default.asp?groupid=6>.

⁴⁷ S. Peers and A. Ward, *The EU Charter of Fundamental Rights: Politics, Law and Policy* (Oxford: Hart, 2004).

⁴⁸ Angela Ward is a Reader of Law at the University of Essex.