

‘Euro-visions’? Some Thoughts on Prospects and Mechanisms for Future Constitutional Change in the European Union[†]

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INTRODUCTION

On the last two occasions that any of the European electorate rejected the result of an Intergovernmental Conference (‘IGC’) that had agreed a Treaty to amend the founding Treaties of the European Community (‘EC’) and European Union (‘EU’), the voters were given a second opportunity to change their minds and reach the ‘correct’ result. In Denmark in May 1993, the Maastricht Treaty was eventually accepted by the electorate in a second referendum after the subsequent adoption by the European Council of a Decision ‘interpreting’ the Maastricht Treaty. In September 2001 in Ireland, meanwhile, the addition of a Declaration to the Treaty on European Union guaranteeing Irish military neutrality provided the basis for a ‘successful’ referendum at the second attempt.

After agreement was reached on the Treaty Establishing a Constitution for Europe (hereinafter, ‘TCE’) under the Irish Presidency in June 2004, one editorial summed up the position of the governments of the Member States as follows:

The difficult task of the political leaders now is to explain in a clear way what they wanted to create, so that their citizens do not decide on the basis of propagandist clichés, but rather on the Union as they wanted it.¹

[†] Sincere thanks are due to various friends and colleagues for comments on and discussions in connection with this paper, and in particular Albertina Albors-Llorens, Catherine Barnard, Alan Dashwood, Rebecca Williams and Bruno de Witte, but the author remains responsible for all views expressed and for any errors and inaccuracies that remain. I have endeavoured to cover events up to the start of July 2006, with some later developments included where possible. All internet references last visited 28 July 2006.

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¹ Editorial, (2004) 41 *CMLRev* 899, 907. In the period leading up to the Spanish referendum, reports were widespread that adverts and flyers summarizing the content of the TCE were to be available

Whether or not this wise advice was heeded is a point that will no doubt be debated by historians, political scientists and lawyers (to say nothing of journalists) for many years to come. However, after a number of ratifications via national Parliamentary approval and a 'Yes' vote in a referendum in Spain, the early summer of 2005 saw the electorates of, first, France (29 May), and then the Netherlands (1 June) reject the ratification of the TCE. In spite of these 'No' votes, a number of other Member States have continued with their national ratification processes: indeed, a referendum in Luxembourg on 10 July 2005 returned a result in favour of the ratification of the TCE. The current state of play with regard to the ratification of the TCE is set out in Table 1, below: at the time of writing (early July 2006), 12 Member States have formally ratified the TCE, three have approved it at national level but have yet to lodge the formal instrument of ratification, two have rejected it in a referendum, seven seem to have suspended the ratification process indefinitely, and Finland expects to ratify by Parliamentary approval during the Finnish Presidency of the EU in the second half of 2006.

There is a serious danger that the history of previous ratifications may come back to haunt the EU and its Member States over the TCE. The statements by the European Council in June 2005 and June 2006, agreeing to continue a 'period of reflection' on the TCE could certainly be read as having left open the possibility of submitting the TCE to second referendums in both France and the Netherlands. However, the past practice with regard to Denmark and Ireland risks leading to angry reactions from press and populace alike, as the *Private Eye* cartoon illustrates presciently. A cynical saying has it that if 'the people don't like it, change the people', while the late Lord Williams of Mostyn (erstwhile Leader of the House of Lords) once opined that he believed that the people wanted a liberal democracy, and if they did not then 'they would be wrong'.² Even if only some account is taken of

at football stadiums around the country, in an attempt to publicize the document and the referendum: see reports on the internet at (eg) <http://www.tsr.ch/tsr/index.html?siteSect=200002&tsid=5453308> and <http://www.robert-schuman.org/lettre/lettreat194.htm>, and the Spanish government's 'Information Note' of 19 February 2005 on the referendum (available at <http://www.es-ue.org/Documents/NOTA%20ARTESANOS%20CAGRE.INGLES.doc>). In the event, voter turnout was a somewhat disappointingly low 42.3% of those registered to vote, but no-one could argue that strenuous efforts had not been made to make the populace aware of the event and its source (although other reports suggested that one poll found that as many as nine out of ten Spaniards confessed to being unsure of what the TCE actually concerned, let alone what its provisions contained: see <http://www.socialistworld.net/eng/2005/03/01europe.html>). For a contemporary (and not entirely favourable) audit of the conduct of the Spanish referendum, see Madroñal (for Mas Democracia and Democracy International), 'Spanish Referendum on the EU Constitution—Monitoring Report' (20 February 2005, available at: <http://europeanreferendum.org/fileadmin/pdf/monitoring/di-spain.pdf>).

² The full quote reads: 'My Lords, given the alternative, I prefer a liberal democracy. I believe that that is what the overwhelming majority of countries, were the will of the people to be supreme at all times, would want—and if they did not, they would be wrong' (*Hansard*, 21 June 2001, Column 113; available at: <http://www.publications.parliament.uk/pa/ld200102/ldhansrd/vo010621/text/10621-08.htm>).

Table One *State of play on the ratification of the TCE (as of July 2006)*

Member State	Referendum?	Referendum Date	Referendum Result	Previous (European) Referendums?
Belgium	N	(Final approval from last regional Parliament, 8 February 2006)	(Y) (But yet to lodge formal instrument of ratification)	–
Czech Republic	Originally: Y; but later cancelled.	(Postponed (until end-2006/start of 2007?))	–	June 2003–Joining EU (Yes)
Denmark	Y	(Referendum indefinitely postponed)	–	1972–Joining EEC, etc (Yes) 1986–SEA (Yes) 1992–TEU (No) 1993–TEU (Yes) 1998–ToA (Yes) 2000–Euro (No)
Germany	N	(Parliamentary approval, 27 May 2005)	(Y) (Constitutional Court action has delayed ratification)	–
Estonia	N	(Parliamentary approval, 9 May 2006)	(Y)	September 2003–Joining EU (Yes)
Greece	N	(Parliamentary voting completed, 19 April 2005)	(Y)	–
Spain	Y	20 May 2005 (Parliamentary approval 18 May 2005)	Y (76.7% in favour; 42.3% turnout)	–
France	Y	29 May 2005	N (54.7% against; 69.3% turnout)	1972–Enlargement (Yes) 1992–TEU (Yes)
Ireland	Y	(Referendum Postponed indefinitely)	–	1972–Joining EEC (Yes) 1987–SEA (Yes) 1992–TEU (Yes) 1998–ToA (Yes) 2001–ToN (No) 2002–ToN (Yes)

Table One *(Continued)*

Member State	Referendum?	Referendum Date	Referendum Result	Previous (European) Referendums?
Italy	N	(Parliamentary voting completed, 6 April 2005)	(Y)	1989–Consultative referendum on possible draft EC Constitution (Yes)
Cyprus	N	(Parliamentary approval, 30 June 2005)	(Y)	–
Latvia	N	(Parliamentary approval, 2 June 2005)	(Y)	September 2003–Joining EU (Yes)
Lithuania	N	(Parliamentary voting completed, 11 November 2004)	(Y)	May 2003–Joining EU (Yes)
Luxembourg	Y	10 July 2004 (Parliamentary approval 25 October 2005)	Y (56.52% in favour; 87.77% turnout)	–
Hungary	N	20 December 2004 (Parliamentary voting completed)	(Y)	April 2003–Joining EU (Yes)
Malta	N	(Parliamentary approval, 6 July 2005)	(Y)	March 2003–Joining EU (Yes)
Netherlands	Y	1 June 2005	N (61.6% against; 62.8% turnout)	–
Austria	N	(Parliamentary approval 25 May 2005)	(Y)	1994–Joining EU (Yes)
Poland	?	(Parliament failed to vote on ratification procedure, 5 July 2006)	–	June 2003–Joining EU (Yes)
Portugal	Y	(Planned for April 2005, but postponed after resignation of government and dissolution of Parliament in December 2004)	–	–

Table One *(Continued)*

Member State	Referendum?	Referendum Date	Referendum Result	Previous (European) Referendums?
Slovenia	N	(Parliamentary ratification, 1 February 2005)	(Y)	March 2003–Joining EU (Yes)
Slovakia	N	(Parliamentary ratification, 11 May 2005)	(Y) (Constitutional Court action has delayed ratification)	May 2003–Joining EU (Yes)
Finland	N	– (Parliamentary ratification expected during second half of 2006)	–	October 1994–Joining EU (Yes)
Sweden	N	(Ratification postponed indefinitely)	–	1994–Joining EU (Yes) 2003–Euro (No)
United Kingdom	Y	? (Was likely early 2006, but ratification process now indefinitely suspended)	–	1975–Remaining in the EEC, etc. (Yes)

[The relevant information concerning Member State ratifications is available at: http://europa.eu/constitution/ratification_en.htm.]

the results in the French and Dutch referendums, neither of these approaches is open to the EU in the first decade of the 21st Century. So long as national ratification of any Treaty amendment is required, the same ‘people’ will have to be engaged: the key question is whether or not the position that they take in the future may change, and information and accountability will be key in any such development. Meanwhile, a commitment to representative democracy, coupled with some limitations upon what laws the representatives of the people can actually adopt, will clearly form an important part of any future EU developments, but the idea that any (political) elite can force this upon an unquestioning electorate, against their express will but paternalistically ‘in their best interests’ flies in the face of the forces unleashed by those same referendums.

This chapter is of necessity of a preliminary and incomplete nature, given the current status of the TCE and the ongoing ‘period of reflection’ in the aftermath of the French and Dutch referendum results in 2005. First, an outline will be given of possible ways of making changes of a constitutional nature within the EU. It will



Private Eye, Issue No. 1161
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be suggested that careful matching of procedures to issues should be conducted to increase the chances of successful future constitutional reform. Second, strategies for coping with the results of the two negative referendums will be discussed, examining briefly the legal position of the TCE and some of the political moves made during the first part of the period of reflection, as well as seeking to unpack some of the reasons that lay behind the rejection of the TCE in France and the Netherlands. It will be argued that an understanding of these complexities is important to provide the necessary background to any future constitutional reform proposals, whether in the form of Treaty amendments or by other means. Third, two particular issues will be raised which, it is suggested, can safely and legitimately be pursued even in the absence of any (imminent) ratification of the TCE as it stands: these are the improvement of the transparency of EC proceedings (particularly those of the Council) and the application of the principle of subsidiarity in conjunction with national Parliaments. In conclusion, it will be suggested, first, that the raised profile for the EU and its workings that has resulted from the TCE ratification process will, in time, prove to be a highly beneficial development. Second, it is concluded that any moves to implement reforms that were embodied in the TCE, but do not require Treaty amendment to be brought about, must pay careful attention to the concerns raised throughout the EU and, crucially, seek to explain the reasons for such reforms clearly and straightforwardly, both to the citizenry and to national political representatives. Only in this way can the ground be prepared for future constitutional change via Treaty amendments in the years to come.

TYPOLGY: APPROACHES TO EFFECTING CONSTITUTIONAL CHANGE IN THE EU

In making any assessment of how constitutional reform may move forward in the EU, it may be helpful to provide an outline of the various devices that might be

employed by the EU and its Member States in the future. What follows is an attempt to provide a brief summary of the major methods that could be used, along with some discussion of the problems and prospects for the use of such methods, including a summary in tabular form (see Table 3, below). This will set the scene for the subsequent discussion of how the EU might attempt to deal with the situation that has arisen after the French and Dutch referendums (Section 3) and which particular areas might appropriately be addressed even without Treaty amendments (Section 4).

The 'Standard' Intergovernmental Conference Process

At an Igc where the reform of the existing EC and EU Treaties is on the agenda, the great bulk of the preparatory work is carried out, and much of the agreement reached, by representatives of national governments and national ministers from the relevant departments. However, issues of high sensitivity, dispute and controversy tend to be left to the Heads of State or Government at the final summit meeting. Such deliberations do not take place in public, although increasingly much of the relevant documentation is made available on the internet.³

It should not be forgotten that the IGC process has, over the history of the EU, secured many bold, innovative and far-reaching developments in the constitutional and institutional structure and operation of the EU: in particular, both the Single European Act and the Treaty of Maastricht made extensive contributions in this regard. At the same time, however, it was becoming clear that the nature of the IGC process also tended to create very complex compromises between Member States. The three pillar structure, various opt-outs, protocols on specific topics and areas of European-level activity in which some Member States did not participate were the price of such compromises, which were not always conducive to a clear understanding of the nature and functions of the EC and EU and were often heavily criticized.⁴ Furthermore, and this is one of the main reasons behind the complex bargaining, the 'all or nothing' nature of the negotiations (requiring unanimous agreement among all Member States) allowed very robust defences of (perceived) national interests to stall, or at least exert very strong influence, over IGC discussions and ultimate agreements.

This complex bargaining process and defence of national interests was further facilitated by the secrecy of such inter-governmental deliberations, but this often

³ J-C Pirijs, *The Constitution for Europe: A Legal Analysis* (Cambridge: CUP, 2006) (hereinafter, 'Pirijs (2006)'), at 50: see http://www.consilium.europa.eu/cms3_applications/Applications/igc/doc_register.asp?content=DOC&lang=EN&cmsid=900 for access to what has been made available from the 2003–2004 IGC that led to the adoption of the TCE.

⁴ See, eg, the sustained and powerful critique of the outcome of the Maastricht Treaty provided by D Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *CMLRev* 17, and also JHH Weiler, 'Neither Unity Nor Three Pillars, The Trinity Structure of the Treaty on European Union' in: J Monar *et al.* (eds.), *The Maastricht Treaty on European Union, Legal Complexity and Political Dynamic* (Brussels: European Interuniversity Press, 1993) and A von Bogdandy and M Nettesheim, 'Ex Pluribus Unum: Fusion of the European Communities into the European Union' (1996) 2 *ELJ* 267.

also led to speculation about horse-trading across issues and a general sense that the Member State governments did not wish there to be effective scrutiny of, or external input into, the IGC decision-making process.

On a substantive level, there was widespread dissatisfaction with the mismatch observed between, on the one hand, issues that it had been agreed needed to be resolved and, on the other hand, the actual (and rather limited) outcomes of the Amsterdam and Nice IGCs. Nice, for example, was explicitly convened to deal with the 'Amsterdam left-overs'⁵ (and specifically the need to address the structure and operation of the EU institutions to improve their efficiency and effectiveness, and to prepare for the forthcoming substantial enlargement of the Union), yet few major improvements were achieved. Indeed, the Member State Heads of State and/or Government themselves recognized these shortcomings even as they signed the Treaty of Nice itself, as the inclusion of the 'Declaration on the Future of the Union' agreed by the IGC⁶ made abundantly clear.

The Convention Process

Thus, there were dissatisfactions with the process and outcomes of Amsterdam and Nice,⁷ alongside a sense that the issues that needed to be tackled by future constitutional reform in the EU would create an agenda too large and complex for an IGC to deal with satisfactorily under its normal procedures.

All of this led the European Council (in first the Nice⁸ and then the Laeken⁹ Declarations) to decide upon charging a Convention with responsibility for discussing the institutional reform questions that remained after Nice, so as to prepare the ground for the ensuing IGC envisaged under the Italian Presidency towards the end of 2004. This Convention seems consciously to have been modelled upon the group set up to draft the EU's Charter of Fundamental Rights, so a brief summary of that

⁵ 'Protocol on the institutions with the prospect of enlargement of the European Union' annexed by the Final Act of the Amsterdam IGC to the EU, EC, ECSC and Euratom Treaties (1997) (available at: <http://europa.eu/eur-lex/en/treaties/selected/livre545.html> and <http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html>).

⁶ 'Declaration on the Future of the Union': Declaration 23, Treaty of Nice [2001] OJ C80/1 (hereinafter, 'Nice Declaration 23') (available at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12001C/pdf/12001C_EN.pdf), 85–86.

⁷ See, eg: J Lodge, 'Intergovernmental Conferences and European Integration: Negotiating the Amsterdam Treaty' (1998) 3 *International Negotiations* 345; W Wessels, 'Nice Results: The Millennium IGC in the EU's Evolution' (2001) 39 *JCMS* 197; and L Hoffmann, 'The Convention on the Future of Europe: Thoughts on the Convention Model', Jean Monnet Working Paper 11/02 (November 2002; available at: <http://www.jeanmonnetprogram.org/papers/02/021101.html>), 2–7.

⁸ Nice Declaration 23 (n. 6, above).

⁹ Laeken European Council, 'Declaration on the Future of the European Union' (Presidency Conclusions, SN 3001/1/01 REV 1, 14–15 December 2001), paras. 3–4 and Annex I (hereinafter, 'Laeken Declaration') (available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf and http://europa.eu.int/constitution/futurum/documents/offtext/doc151201_en.htm).

group's structure and approach is apposite, to understand the benefits that the European Council hoped to bring to the work of preparing the 2004 IGC.

Charter of fundamental rights

In the Conclusions of the Cologne European Council in June 1999, the Member States agreed to set up:

a body composed of representatives of the Heads of State and Government and of the President of the Commission as well as of members of the European Parliament and national parliaments. Representatives of the European Court of Justice should participate as observers. Representatives of the Economic and Social Committee, the Committee of the Regions and social groups as well as experts should be invited to give their views. Secretariat services should be provided by the General Secretariat of the Council.¹⁰

Detailed provisions on the composition and working methods of this body were adopted by the European Council in the Conclusions from its Tampere meeting in October 1999¹¹: there were to be 'Fifteen representatives of the Heads of State or Government of Member States, . . . [o]ne representative of the President of the European Commission, . . . [s]ixteen members of the European Parliament to be designated by itself, . . . and [t]hirty members of national Parliaments (two from each national Parliament) to be designated by national Parliaments themselves', making 62 in total (plus two observers from the Court of Justice and two from the Council of Europe, including one from the European Court of Human Rights).¹²

This body would draft 'a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens'.¹³ This rationale suggested that the exercise of drafting the Charter was focused more strongly upon explaining to the public what had been achieved by the EU in the field of fundamental rights (thereby securing support and legitimacy for EU activities) than on the substance of the rights enumerated.¹⁴ In turn, this suggested that 'in many ways, and this is by now an obvious point, the process of drafting the Charter was always going to be at least as important—if indeed not more so—than the substantive document which eventually emerged'.¹⁵ Here, too, the Tampere Conclusions were innovative, requiring that 'hearings held by the Body and

¹⁰ Presidency Conclusions, Cologne European Council (3 and 4 June 1999) (hereinafter, 'Cologne Conclusions') (available at: http://europa.eu.int/council/off/conclu/june99/june99_en.htm), paras. 44–45 and Annex IV.

¹¹ Presidency Conclusions, Tampere European Council (15 and 16 October 1999) (hereinafter: 'Tampere Conclusions') (available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm).

¹² *Ibid.*, Annex, paras. A(i) and (iii).

¹³ Cologne Conclusions, Annex IV.

¹⁴ See, eg, G de Búrca, 'The drafting of the European Union Charter of Fundamental Rights' (2001) 26 *ELRev* 126 (hereinafter, 'de Búrca (2001)').

¹⁵ *Ibid.*, at 131.

documents submitted at such hearings should be public'¹⁶ and suggesting that '[o]ther bodies, social groups and experts may be invited by the Body to give their views'¹⁷: a clear contrast with the criticisms of past IGCs as having lacked transparency and openness to popular contributions.

While acknowledging that there were limitations to the way in which the Charter process operated, de Búrca has concluded that:

It was established as a novel, experimental, relatively deliberative and open forum for constitutional debate, contrasting quite starkly with the traditional state-dominated IGC processes of tough bargaining and closed diplomacy as the means for Treaty change in the European Union.¹⁸

On the other hand, it is by no means clear that the public profile that the European Council had sought to gain through this process was in fact achieved to any significant extent. Any potential great impact (itself perhaps somewhat wishful thinking) of the proclamation of the Charter at the Nice IGC was dissipated by the Member States' inability to agree upon how to deal with the Charter's legal status, and was almost completely overshadowed by the duration, difficulty and controversy of the Nice IGC negotiations and results on institutional reform.

With this background of the recent history of the EU prior to the discussions at Nice and Laeken, we now have a greater insight into some of the reasons behind the approach taken by the Nice IGC and the Laeken European Council to the preparation of the 2004 IGC.

The Treaty establishing a Constitution for Europe

In the year leading up to the Laeken European Council, the combination of issues post-Nice and the views of the Member States in the Council, the Commission and the European Parliament had seemed to coalesce around the idea of setting up a Convention process with a membership drawn from national Members of Parliament ('MPs'), Members of the European Parliament (MEPs), the Commission and representatives of Member State governments.¹⁹ Given the wide-ranging nature of the issues on the agenda most protagonists were led to agree that the Convention model would provide a 'democratic, transparent and credible mechanism for future reform',²⁰ which was felt necessary given the matters at stake, and desirable given the largely favourable reactions to the use of the model when drafting the Charter (as discussed above). The eventual composition of the Convention on the Future of Europe ('CFE'), as established by the Laeken Declaration, is illustrated in Table 2. From these members, a 'Praesidium' was established, which was created to act as a

¹⁶ Tampere Conclusions, Annex, para. B(ii).

¹⁷ *Ibid.*, para. A(vi).

¹⁸ de Búrca (2001) (n. 14, above), 138.

¹⁹ PP Craig, 'Constitutional Process and Reform in the EU: Nice, Laeken, the Convention and the IGC' (2004) 10 *EPL* 653 (hereinafter, 'Craig, (2004)'), 655–660.

²⁰ *Ibid.*, 657.

kind of steering board for the work of the CFE, preparing drafts to be presented to and discussed by the plenary Convention. It consisted of 13 members in total (again, the membership of the Praesidium is indicated in Table 2) and did not operate in public.

Table Two *Composition of the Convention on the Future of Europe*

Source	Details	Number	Alternates	Observers	Praesidium
European Council appointments	Chairman	1	–	–	1
	Vice-Chairmen	2		–	2
HSG* of the Member States		15	15	–	3**
HSG* of Accession States		10	10	–	1***
HSG* of the Candidate States		3	3	–	–
National Parliaments of the Member States		30	30	–	2
National Parliaments of Accession States		20	20	–	–
National Parliaments of Candidate States		6	6	–	–
European Parliament		16	16	–	2
European Commission		2	2	–	2
Economic and Social Committee		–	–	3	–
European Social Partners		–	–	3	–
Committee of the Regions		–	–	6	–
European Ombudsman	In person	–	–	1	–
Total: 220 involved (118 at any one time)					

* HSG 5 Heads of State or Government.

** Drawn from the rotating Council Presidency (Spanish, Danish and Greek representatives).

*** An 'invitee': the Slovenian representative.

One group²¹ of commentators has asked whether the composition of the CFE properly respected what it describes as the 'procedural aspect' of the subsidiarity principle. This, they argue:

implies that the burden of proof rests with those who want to centralise and that the decision whether to centralise or not must not be taken by those who have a vested interest in centralization.

The procedural dimension of the subsidiarity principle is a special case of the classical constitutional principle that the rules must not be made by those who later have to keep them. If those who will have to play by the rules are called to formulate these rules, they will not adopt the rules which are best for the citizens but those which are best for them.²²

Thus, the CFE should not have contained any member who had a 'vested interest in centralization', so that it should have consisted 'only of representatives of the parliaments of the member states (including experts which they might have appointed). These representatives would not be eligible for public office or mandate in the European institutions in the future.'²³ At the same time, however, Rasmussen has commented that the lack of familiarity of many 'conventioners' with 'the true nature and purpose of their new assignment and . . . with the working cultures of large EU-gatherings' created a malaise and necessitated many months of acclimatisation and 'learning by doing'.²⁴ There will thus always be costs and trade-offs to be made in the composition of any such body: reduction in expertise on the nature of the system and its operation to date may meet some legitimacy criteria (on input) and yet may endanger others (the output of any Convention process).

More generally, it is important that criticisms of Convention on the Future of Europe be placed in the practical context of what was possible to achieve in the circumstances, while not allowing pragmatic considerations to prevent us from raising concerns about how the process played out and the substantive outcome²⁵ of its deliberations.

It was probably inevitable that there would be some moves towards infusing the CFE process with intergovernmental elements (see, eg, the arrival of the German and

²¹ 'The European Constitutional Group', which has a variety of members with legal, political science and economics backgrounds. A full list of members is published in the article cited in *n. 22, below*.

²² 'The Constitutional Proposal of the European Convention: an Appraisal and an Explanation' (2004) 24 *Economic Affairs* 22, 26.

²³ *Ibid.* The Group applies this reasoning to the creation of Constitutional-level rules, but its strong decentralizing message would presumably also apply to the legislative process under any EC constitutional arrangements: see, eg, at 23, para. 12 of the Group's appraisal of the TCE, proposing the removal of the legislative initiative from the Commission on similar grounds of innate centralizing tendencies.

²⁴ H Rasmussen, 'The Convention Method' (2005) 1 *EuConst* 141 (hereinafter, "Rasmussen (2005)"), at 144. See also G Stuart, *The Making of Europe's Constitution* (London: Fabian Society, Fabian Ideas 609, December 2003) (hereinafter, 'Stuart (2003)'), 18–19.

²⁵ For an assessment of which see, eg, AA Dashwood and AC Johnston, 'The Institutions of the Enlarged EU under the regime of the Constitutional Treaty' (2004) 41 *CMLRev.* 1481, 1500 ff.) (hereinafter, 'Dashwood & Johnston (2004)').

French Foreign Ministers, Fischer and de Villepin respectively, in the late autumn of 2002), particularly once it became clear that the CFE intended to draw up an entire Treaty with constitutional character (rather than restrict itself to offering recommendations to the IGC).²⁶

It is also clear that one key driver behind the increasing Praesidium control exercised over the drafting process towards the key submission date of the European Council meeting of 20 June was the very tightness of that submission deadline.²⁷ The Member States refused to allow the CFE any extra time for the delivery of its work, despite the fact that detailed discussions and drafting on the key institutional provisions had commenced so late in the Convention's work programme.²⁸ The control that the Praesidium was able to exert was further facilitated by the way in which working groups had been discharged once the final report on their respective topics had been submitted, and by the Praesidium Secretariat's drafting responsibilities.²⁹

Further, a proper and careful treatment of the institutional questions would inevitably require some 'back and forth' with the views of key Member States: after all, there would have been little point in producing a draft of a Constitutional Treaty that would have been utterly unacceptable (even if only in parts) to certain Member States. This would have required issues to be reopened at the IGC stage, with the risk either of many more changes via horse-trading, or else unravelling the whole document. In this regard, the parallel with the acceptability to the European Council of Commission proposals under the EC's legislative procedures is a good one: while the European Council has no *formal institutional* role in the actual EC legislative process, nevertheless it is obvious that its members' positions on the Council (which can always prevent the adoption of EC legislation) require the broad political stance of the European Council to be taken seriously in the Commission's proposals for legislation. In the CFE, the Convention found itself in a not dissimilar position *vis-à-vis* the publicly expressed views of the larger Member States: this was naturally enhanced when such national political heavyweights as Fischer and de Villepin joined the Convention fray.

Nevertheless, one 'inside' account³⁰ of the Convention process has highlighted significant shortcomings of the way in which the enterprise was pursued, which deserve to be taken seriously given that the author (Gisela Stuart) was at the time both a UK MP and a member of the Praesidium of the CFE. Her basic criticisms related to a number of topics. First, they concerned presumptions that were made

²⁶ Craig, (2004) (n. 19, above), 668–669.

²⁷ *Ibid.*, 669.

²⁸ See, eg, Rasmussen (2005) (n. 24, above), 145: 'as late as May 2003, after 15 months of Convention-time and less than a month before the deadline, the Convention's crucial proposals about the institutional issues had not really reached the floor of the Convention'.

²⁹ For a similar conclusion concerning the role of the 'leadership' and Secretariat in the Convention that drafted the EU's Charter of Fundamental Rights (which could have served as a prescient prediction for the course of the CFE), see de Búrca (2001) (n. 14, above), 134–135.

³⁰ Stuart (2003) (n. 24, above).

in steering the discussions: of the inviolability of the *acquis communautaire*, of the need to find ways to do more on a European level and of the appropriateness of drafting a 'Constitution' to fulfil the mandate of the Laeken Declaration.³¹ Second, she expressed misgivings about the power wielded by the 'elite' on the Praesidium, not least due to the difficulties in coordinating discussions among the national parliamentarians to try to come to some consensus view.³² Third, the procedures and operation of the CFE came in for heavy criticism. In particular, the time frames involved in the receipt and consideration of documents, allied to the absence (until the closing stages of the CFE) of simultaneous translation led to the passage of 'large parts of the text . . . without detailed discussion', even in the Praesidium itself.³³ Also, the way in which 'consensus' was 'achieved' in both the Praesidium and the CFE seemed to have the character of having been 'declared' to exist by the President and recorded by the Secretariat, reflecting deals struck by various Member States in the late stages of the CFE rather than deliberations within the Praesidium or the full Convention.³⁴

Thus, on the CFE itself, one may conclude that the method itself seemed to have much to commend it, building as it did on the generally well-received model of the body that had prepared the EU's Charter of Fundamental Rights. Certain aspects of the CFE's operation were encouraging, particularly with regard to the availability of documentation and the possibility for external contributions via the CFE's website. However, criticisms can be levelled at the practical operation of the CFE, and while some of the difficulties may be acknowledged to be inherent in the operation of a process involving such complex and finely balanced issues, others are less easy to explain away as the necessary price of this new way to prepare the ground for an IGC.

Convention plus referendum(s) plus IGC

The significance of the choice to set up a Convention to 'prepare' the ground for the IGC is clearly a topic that will continue to generate much debate and analysis³⁵ in the years to come, but Article 48 TEU meant that an IGC was required to give formal status to whatever came out of the CFE. As Piris has explained, subject

³¹ *Ibid.*, 14–19.

³² *Ibid.*, 17–18.

³³ *Ibid.*, 20–21.

³⁴ *Ibid.*, 23–25.

³⁵ For contributions on the topic to date, see (eg): G Milton and J Keller-Noëllet, with A Bartol-Saurel, *The European Constitution: its Origins, Negotiation and Meaning* (London: John Harper Publishing, 2005); P Norman, *The Accidental Constitution: the Making of Europe's Constitutional Treaty* (Brussels: EuroComment, 2nd edn., 2005); P Magnette and K Nicolaïdes, 'The European Convention: Bargaining in the Shadow of Rhetoric' (2004) 27 *West European Politics* 381; and J Jarlebring, 'Taking Stock of the European Convention: What Added Value does the Convention bring to the Process of Treaty Revision?' (2003) 4 *German Law Journal*, No. 8 (available at: http://www.germanlawjournal.com/pdf/Vol04No08/PDF_Vol_04_No_08_785-799_european_Jarlebring.pdf).

to 'a serious technical/legal review of the text',³⁶ the final IGC agreement in June 2004 'did not fundamentally modify the essential features of the draft proposed by the Convention'.³⁷ Indeed, there were strong voices throughout the IGC process that called for the CFE's draft to be left intact and discouraging attempts to re-open bargaining over the content of the Draft Constitutional Treaty.

However, perhaps the key issue (from both a practical and theoretical standpoint) is the marriage of the Convention method with the requirement of a further stage of approval of the output of the Convention. In particular, the significant element was in the form, not (just) of an IGC, but of national ratification processes which required (or adopted) a referendum to secure national constitutional approval for the TCE. It could be suggested that this was a further response to the Laeken goals of transparency, democracy and the involvement of EU citizens in the process, while also permitting the electorate a vote in a way that avoided the shackles of standard parliamentary democracy (executive-legislative connections and control over the political agenda) and specifically encouraging the citizenry to engage with the questions raised and fostering increased communication on the topics at stake, both to the electorate and between groups in different Member States.³⁸ All of this could be argued to enhance the legitimacy of the output of the CFE further, were such votes to secure agreement with its text, the TCE.

There are, however, those who have questioned whether choosing to pursue national ratification of the TCE via referendum would really bring substantial legitimacy benefits at all.³⁹ In part, this is argued to be due to the different legal force, legal bases and specific criteria (on matters such as minimum turnout requirements) that will arise from having referendums at Member State level,⁴⁰ rather than an EU-wide referendum. A further criticism is that most of the referendums were initiated and approved by the executive or by the majority in the relevant national Parliament, rather than 'bottom-up', as a result of a citizens' initiative or the actions of a Parliamentary minority: this is said to reduce the preventive function of such a referendum,⁴¹ and it is interesting to note that in the Netherlands the Prime Minister was opposed to holding even a consultative referendum on the TCE, yet the Dutch Parliament insisted that a referendum be held and passed an *ad hoc* law to ensure that this would take place. Finally, if one accepts that the key determinant of the

³⁶ One problem which the Working Party of Legal Experts uncovered was that 'the Commission would have legally "disappeared" upon entry into force of the Constitution, due to the absence of proper transitional provisions' (!): Piris (2006), at 53.

³⁷ *Ibid.*, at 50.

³⁸ A Peters, 'Referendums on the Constitutional Treaty 2004: A Citizens' Voice?' (hereinafter 'Peters, (2005)') in D Curtin, AE Kellermann and S Blockmans (eds.), *The EU Constitution: The Best Way Forward?* (The Hague: TMC Asser Instituut, 2005) (hereinafter, 'Curtin *et al* (2005)'), 39–57, at 47–49.

³⁹ Peters, (2005) (n. 38, above).

⁴⁰ Including, of course, the point that citizens in some Member States will not have any such 'direct democratic voice' at all, due to their country's provisions and position on the ratification of the TCE.

⁴¹ Peters, (2005) (n. 38, above), 53–56.

legitimacy of constitutional arrangements is their acceptance by society and the proof of the quality, efficacy and (perhaps) efficiency of their performance (output legitimacy),⁴² then any number of referendums will not add to the overall legitimacy of the TCE.

Thus, while the ideas behind the composition of the CFE, the organization of its work and its output have attracted praise from many quarters, it should be noted that both the theoretical basis of the overall procedure for securing the relevant Treaty amendments and the practical putting into operation of the Convention method have also been subject to criticism as a mechanism for effecting future EU constitutional change. Criticisms have also been made of the next possible method for developing the EU's constitutional order—judgments issued by the European Court of Justice. Such concerns have been expressed both in theoretical terms and in the practical consequences of its judgments—it is to this method that we now turn.

Judicial Decisions

One clear possible device for the development and change of constitutional rules and principles is formed by court judgments. This mechanism is naturally one with which the English common lawyer is particularly familiar,⁴³ but it has also been a key element that has characterized the establishment and development of many important principles in the legal order of the European Community.⁴⁴ The principles of the supremacy and⁴⁵ the direct effect⁴⁶ (including the development of the so-called vertical direct effect of directives)⁴⁷ of Community law arose out of the interpretation by the European Court of Justice (hereinafter, 'ECJ') of the scope, wording and purpose of the E(E)C Treaty, as does the principle of Member State liability for sufficiently serious breaches of Community Law.⁴⁸ The doctrine of the

⁴² *Ibid.*, 56–57.

⁴³ For a brief summary see, eg, AW Bradley & KR Ewing, *Constitutional and Administrative Law* (Harlow (England): Pearson Longman, 14th edn., 2006), at 16–17.

⁴⁴ See, generally, H Rasmussen, *The European Court of Justice* (Copenhagen: Gadjura, 1998), R Dehousse, *The European Court of Justice—The Politics of Judicial Integration* (Basingstoke: Macmillan, 1998), esp. Ch. 2, and AM Arnall, *The European Union and its Court of Justice* (Oxford: OUP, 2006).

⁴⁵ Case 6/64 *Costa v ENEL* [1964] ECR 1141 and Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

⁴⁶ Case 26/62 *NV Algemene Transport—en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1. For detailed discussion, see (eg) S Prechal, *Directives in EC Law* (Oxford: OUP, 2nd edn., 2005) (hereinafter, 'Prechal, (2005)'), chs. 6, 7 and esp. 9.

⁴⁷ See, *inter alia*, Case 152/84 *Marshall v Southampton and South West Area Health Authority (Teaching)* (*Marshall* (No. 1)) [1986] ECR 723, Case C-188/89 *Foster v British Gas plc* [1990] ECR I-3133 and Case C-91/92 *Dori v Recreb Srl* [1994] ECR I-3325: again, see Prechal (2005) (n. 46, above), chs. 6 and 9 and the references cited therein for discussion.

⁴⁸ Cases C-6 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357 and Cases C-24 and 48/93 *Brasserie du Pêcheur SA v Germany* and *R v Secretary of State for Transport ex parte Factortame Ltd.* [1996] ECR I-1029. For discussion, see (eg) Prechal (2005) (n. 46, above), Ch. 10.

pre-emption of Member State law by EC law has a similar history.⁴⁹ Overall, the 'constitutionalisation'⁵⁰ of the EC Treaty has been developed in no small part through the judgments of the ECJ.

An example *par excellence* of this mechanism of constitutional evolution is the infusion of the EC legal order with fundamental rights principles, via the case law of the ECJ and, latterly, the Court of First Instance (hereinafter, 'CFI'). While academic opinion has differed⁵¹ on the reasons behind the ECJ's development of the EC fundamental rights jurisprudence, the effect of this case law has essentially been to incorporate fundamental rights principles in the EC legal order through the device of drawing inspiration from the 'constitutional traditions common to the Member States',⁵² as well as various international human rights instruments,⁵³ including in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').⁵⁴ These principles have assumed significance for the interpretation of EC legislation and the provisions of the EC Treaty and play an increasingly important role in delimiting the scope of legitimate Member State action within the field of EC law (whether when implementing EC legislation or when derogating from EC rules, such as the free movement provisions). This constitutional evolution has continued since the adoption of the EU's Charter of Fundamental Rights in the year 2000. While the Charter has yet to be accorded any clear legal status (the Nice European Council in December 2001 merely 'proclaimed' the Charter) and the ECJ has yet to mention it in any judgment, both a number of Advocates General and the CFI have referred to the Charter, whether as indicative of a common agreed position among the Member

⁴⁹ See, eg, Opinion 1/75 *Re Understanding on a Local Costs Standard* [1975] ECR 1355 and Case 16/83 *Criminal Proceedings against Prantl* [1984] ECR 1299. For discussion, see E Cross, 'Pre-emption of Member State law in the European Economic Community: A Framework for Analysis' (1992) 29 *CMLRev.* 447 and S Weatherill, *Law and Integration in the European Union* (Oxford: Clarendon Press, 1995), Ch. 5 (esp. 135–144).

⁵⁰ GF Mancini, 'The Making of a Constitution for Europe' (1989) 26 *CMLRev.* 595 (reprinted in GF Mancini, *Democracy and Constitutionalism in the European Union* (Oxford: Hart Publishing, 2000), Ch. 1). See, also, on the ECJ's role in the infusion of the EC (legal) order with democratic principles, GF Mancini and D Keeling, 'Democracy and the European Court of Justice' (1994) 57 *MLR* 175.

⁵¹ Compare, eg, J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *CMLRev.* 669 and the response by JHH Weiler and N Lockhart, '"Taking Rights Seriously" Seriously: The European Court and its Fundamental Rights Jurisprudence' (1995) 32 *CMLRev.* 51 (Part I) and 579 (Part II); see, generally, FG Jacobs, 'Human rights in the European Union: the role of the Court of Justice' (2001) 26 *ELRev.* 331.

⁵² Case 11/70 *Internationale Handelsgesellschaft v Einfuhr—und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, esp. para. 4.

⁵³ Case 4/73 *Nold v Commission* [1974] ECR 491. Particular reference has been made to the UN's International Covenant on Civil and Political Rights: see Case 374/87 *Orkem v Commission* [1989] ECR 3283.

⁵⁴ Case 36/75 *Rutili v Ministre de l'Intérieur* [1975] ECR 1219 and Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629.

States on fundamental rights and values in the EC⁵⁵ or as even an indirect source for determining the relevant fundamental rights in the EC legal order.⁵⁶

In providing a brief assessment of the use of judicial decisions as a means of constitutional development, let us take the example of the ECJ's jurisprudence on fundamental rights. Decisions by the courts can form a highly reactive and evolutionary process, particularly in terms of the recognition of (ranges of) such rights as 'fundamental' and the sufficiently authoritative nature of the relevant *source* of such rights (as discussed above). Formal *EC law* authority for such rights is then acquired by virtue of a declaration by the ECJ or CFI that they form a part of the EC legal order.

Yet, as a result of the incremental nature of this process, there will always be some degree of uncertainty as to exactly which rights were/are covered, and how 'fundamental' each right is (particularly in situations where such rights clash—eg internal market rights versus ECHR-inspired fundamental rights (such as freedom of assembly and expression)).⁵⁷ These difficulties lead some⁵⁸ to conclude that the need for a written charter of such rights was strong, hence the creation of the EU Charter of Fundamental Rights—although its current legal status has done nothing to alleviate these uncertainties and has, indeed, merely added to them, providing as it has another source of 'inspiration' for the development of EC jurisprudence (for the CFI and the Advocates General, at least).

These issues of the judicial role in adopting and developing constitutional principles can naturally also be linked to broader debates concerning the desirability and legitimacy of the ECJ's so-called 'judicial activism', although this field of study also extends further to encompass other questions of pseudo-'policy-making' by the ECJ, particularly in fields of social and commercial relevance. It is beyond the scope of this Chapter to engage with this literature here, but it should simply be noted that the appropriateness of reliance upon the judicial role to establish and develop constitutional law at the EC/EU level must be assessed in this broader context.⁵⁹

⁵⁵ See, eg, the Opinion of Advocate General Tizzano in Case C-173/99 *R v Secretary of State for Trade and Industry ex parte BECTU* [2001] ECR I-4881, paras. 26–28.

⁵⁶ Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, in which Art. 47 of the Charter was specifically invoked to bolster arguments in favour of providing an effective judicial remedy by relaxing the rules on *locus standi* under Art. 230(4) EC. The CFI's ruling was later overturned by the ECJ in Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-3425, which made no explicit reference to the Charter in its judgment. For discussion, see A Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: Has the European Court of Justice Missed the Boat?' [2003] *CLJ* 72.

⁵⁷ See, eg, Case C112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659 and Case C-36/02 *Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundestadt Bonn* [2004] ECR I-9609.

⁵⁸ See, eg, T Eicke 'The European Charter of Fundamental Rights—unique opportunity or unwelcome distraction?' (2000) 5 *EHRLR* 280. Others, meanwhile, would continue to question whether the creation of such an EU Bill of Rights was such a high priority, when the alternative of facilitating accession to the ECHR could have been pursued: see, eg, JHH Weiler 'Does the European Union Truly Need a Charter of Rights?' (2000) 6 *ELJ* 95.

⁵⁹ From a wide literature, see: H Rasmussen, *On Law and Policy in the Court of Justice* (The Hague: Martinus Nijhoff, 1986); TC Hartley, 'The European Court, Judicial Objectivity and the Constitution

Ultimately, however, any constitutional development which is specifically precluded by Treaty provisions,⁶⁰ or requires an explicit Treaty basis to move forward,⁶¹ simply cannot be effected by means of judicial decisions on cases that come before the EC courts. Furthermore, the courts must await cases before their pronouncements can have legal effect: they do not pick and choose particular issues that come before them in the way that a politically-driven law-making process can and does. Whether the ECJ (and CFI) have been too bold or too timid in identifying the boundaries set by these kinds of constraints is a matter for conjecture, but this methodological limitation means that EU constitutional reform via judicial decision will, in the future, be at best only an ancillary and/or residual (yet nevertheless important interstitial) device.

Inter-Institutional Agreements and Other Devices Adopted by the EC Institutions

There are numerous past examples in EEC, EC and EU practice of resort to Inter-Institutional Agreements (IIAs)⁶² and other institutional legal acts, declarations and practices to put in place systems of great institutional and constitutional significance. For example, the early development of the principle of subsidiarity stems from a fairly detailed specification of basic principles and guidelines laid down in the Conclusions of the Presidency from the Edinburgh European Council (11–12 December 1992)⁶³ and was fleshed out by an Inter-Institutional Declaration of the European Parliament, the Council and the Commission 10 months later.⁶⁴ Before its entry into the Treaty framework (in what is now Article 255 EC), the question of access to documents held by the European institutions was first raised by a Declaration attached to the Treaty of Maastricht⁶⁵ and was then dealt with by means

of the European Union' (1996) 112 *LQR* 95 and cf. AM Arnall, 'The European Court of Justice and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 *LQR* 411; A-M Slaughter, A Stone Sweet and JHH Weiler, *The European Courts and National Courts: Doctrine and Jurisprudence* (Oxford: Hart Publishing, 1997); and A Stone Sweet, *The Judicial Construction of Europe* (Oxford: OUP, 2004).

⁶⁰ This was the key reason given by the ECJ in its judgment in Case C-263/02 P *Commission v Jégo-Quéré* (n. 56, above) for refusing to relax the criteria for *locus standi* under Art. 230 EC: see para. 36 of the judgment.

⁶¹ Eg accession by the EC/EU to the ECHR: see Opinion 2/94 *Re Accession of the Community to the European Human Rights Convention* [1996] ECR I-1759.

⁶² For a useful recent analysis and many helpful references, see I Eiselt and P Slominski, 'Sub-Constitutional Engineering: Negotiation, Content, and Legal Value of Interinstitutional Agreements in the EU' (2006) 12 *ELJ* 209 (hereinafter, 'Eiselt and Slominski (2006)').

⁶³ Reproduced in D Pollard and M Ross, *European Community Law: Text and Materials* (London: Butterworths, 1994), 52–56.

⁶⁴ Inter-Institutional Declaration of 25 October 1993 of the European Parliament, the Council and the Commission on Democracy, Transparency and Subsidiarity [1993] OJ C329/133.

⁶⁵ Declaration 17 on the right of access to information, attached to the Final Act of the TEU (7 February 1992, available at: <http://europa.eu.int/en/record/mt/final.html>).

of Code,⁶⁶ which was then enshrined in formal Decisions by both the Council⁶⁷ and the Commission.⁶⁸ Finally, and perhaps most significantly in practical terms, the budgetary arrangements of the EU rely heavily upon decisions reached at various European Councils⁶⁹ and IIAs⁷⁰ to ensure their (relatively) smooth operation.⁷¹

These developments are often subsequently enshrined in Treaty provisions (see Article 255 EC on transparency and access to documents and the current Protocol on the application of the principles of subsidiarity and proportionality)⁷² or legal acts (see the legislation on access to documents)⁷³ by later constitutional changes. However, this does not prevent them from having some degree of constitutional significance in their own right, which can continue to be important even if not transformed into binding legal rules.

IIAs obviously may not amend primary or secondary EC legal provisions but they may have legal effects that bind the parties to such agreements and create potentially enforceable expectations as to the course of conduct to be adopted by the institution(s) in question,⁷⁴ although this latter effect will be easier to establish where there is clear intention on the part of the institutions to create a legally enforceable regime and/or where there is explicit Treaty authorization for the adoption of an IIA.⁷⁵ Such legal effects may also be felt by, and be of benefit to, third parties to the IIA in certain circumstances, although this will obviously be dependent upon the extent to which the IIA lays down clear and detailed provisions.

Using the device of an IIA (or other Inter-Institutional declaration or statement) has the advantage of allowing the institutions to put flesh on the bare bones of basic points agreed at an IGC, a European Council meeting or even *ad hoc* in response to particular developments. If they endeavour to achieve precisely specified goals,

⁶⁶ Developed by the Commission: see COM(1993) 258 [1993] OJ C166/5. For the current legislation in this field, see n. 158, below.

⁶⁷ Council Decision 93/731 of 20 December 1993 [1993] OJ L340/43.

⁶⁸ Commission Decision 94/90 of 8 February 1994 [1994] OJ L46/58.

⁶⁹ See, eg, the so-called 'Delors II' package agreed at the Edinburgh European Council: accessible from <http://www.ena.lu/europe/european-union/conclusions-edinburgh-european-council-1992.htm>.

⁷⁰ See the Inter-Institutional Agreements between the European Parliament, the Council and the Commission on budgetary discipline and improvement of the budgetary procedure of: 29 October 1993 [1993] OJ C331/1 and 6 May 1999 [1999] OJ C172/1 (also available at: <http://europa.eu/eur-lex/en/treaties/selected/livre612.html>). See also the Inter-Institutional Agreement of 13 October 1998 between the European Parliament, the Council and the Commission on legal bases and implementation of the budget [1998] OJ C344/1.

⁷¹ For substantive discussion, see I Begg, 'Future Fiscal Arrangements of the European Union' (2004) 41 *CMLRev.* 775.

⁷² Protocol 30 annexed to the EC Treaty (first adopted at the Amsterdam IGC): text available at [1997] OJ C340/1 and <http://europa.eu/eur-lex/en/treaties/dat/amsterdam.html#0105010010>.

⁷³ For the current legislation in this field, see n. 158, below.

⁷⁴ See, for discussion, F Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations' in G Winter (ed.), *Sources and Categories of European Union Law* (Baden-Baden: Nomos, 1996), 453.

⁷⁵ Eiselt and Slominski (2006), 211–213, citing in particular (at 215–219) the establishment of the Ombudsman in the aftermath of the Maastricht Treaty.

then their outcome will often secure relatively clear and precise results that genuinely shape the future conduct of the institutions involved. Further, the negotiations between the institutions on the conclusion of IIAs are often relatively transparent and allow a fair grasp of the issues at stake to be clear to the outside observer. However, the ability of such outsiders to influence and contribute to such negotiations is clearly limited, while the impact of such IIAs may be far less striking where the relevant subject-matter lacks precision or is so controversial that reaching workable consensus between the institutions proves too difficult.

Having canvassed the basic possible methods by which constitutional change and reform might be developed in the EU, we can now try to draw together these strands to provide a framework for the analysis of future proposals for such reform.

A Possible Framework for Analysis

While this is not the place to define or analyse in detail the notion of legitimacy and its application to the decision-making and, indeed, constitution-making processes of the EU, it may be useful to set out one way in which we might approach the question of how legitimate each method for effecting constitutional change in the EU might be.⁷⁶ Clearly, other models can also be devised that give greater or less weight to various factors: here, it is assumed that each of the relevant methods satisfies the criterion of 'legality', in the sense that its appropriate procedures have been followed correctly. Broadly speaking, 'input legitimacy' refers to the source and quality of the inputs into the process in question,⁷⁷ 'output legitimacy' encompasses the question of whether or not the product of the process is acceptable and convincing to those subject to that product (here, the relevant rules)⁷⁸ and 'social legitimacy' embodies the idea of a direct linkage between the citizens in a society and the institutions and processes that apply to them.⁷⁹

Table 3 (below) provides a representation of the range of some of the issues at stake, which may perhaps form a helpful framework to apply when considering the analysis of proposed constitutional changes. The content given to each cell in the table is merely the present author's indication of some of the ways in which the

⁷⁶ From the literature on the legitimacy of such techniques and processes, for a useful summary see D Beetham and C Lord, *Legitimacy and the European Union* (London: Longman, 1998), esp. Ch. 1.

⁷⁷ Including relatively direct democratic links in the form of Parliamentary representatives and their involvement in the process and indirect links via the role of Member State governments in the Council which were then democratically legitimised at their own domestic level. See, eg, H Abromeit and S Wolf, 'Will the Constitutional Treaty Contribute to the Legitimacy of the European Union?' (2005) 9 *EioP*, No. 11 (available at: <http://eipo.or.at/eiop/texte/2005-011a.htm>).

⁷⁸ Also sometimes known as 'technocratic legitimacy': for discussion, see, eg, C Lord and P Magnette, 'Notes Towards a General Theory of Legitimacy in the European Union' (ESRC 'One Europe or Several?' Working Paper 39/02, 2002; available at: <http://www.one-europe.ac.uk/pdf/w39lord.pdf>).

⁷⁹ See, eg, JHH Weiler, 'After Maastricht: Community legitimacy in post-1992 Europe' in WJ Adams (ed.), *Singular Europe: Economy and Polity of the European Community after 1992* (Ann Arbor: University of Michigan Press, 1992), 11–41.

Table Three *A framework for analyzing different methods for effecting constitutional reform in the European Union*

	Input legitimacy	Output legitimacy	Social legitimacy	'Pragmatics' – practical chances of success	Possible areas responding to methodology?
'Normal' Treaty amendment procedures (IGC, etc)	Yes: Role for MS governments	Yes: If–quality, clarity, comprehensible	Yes: If high trust in national leaders	Dependent upon issues involved, legitimacy (perceptions) and possible need for national referendums	Any now (after referendum experiences re TCE)?
	No: Lack of transparency, accountability, input from other sources	No: If–unworkable, deviating from stated positions or goals, etc.	No: If seen as a <i>fait accompli</i> , unclear and damaging national interests		Perhaps re minor technical changes that can clearly be explained as such
Convention Process	Yes: Some enhancement over standard IGC	Yes: Fair degree of praise for many key reforms	Yes: Some clear input from national representatives	After a decent interval and with a clear mandate	Drafting of a possible replacement for, or amendment to, the TCE (at some future date)
	No: Qs of composition, procedure, 'genuine' debate; still subject to IGC approval	No: Sheer bulk and complexity of full consolidated text, fears re clarity and direction of some reforms	No: Lack of profile, no widespread appreciation of function of CFE, still led to IGC	(possibly with reformed procedures), certainly a possibility	

Judicial decisions	Yes: Expertise	Yes: If–quality, clarity	Yes: If–respect for judiciary	Yes: Legal force	Many and varied: dependent upon cases that arise
	No: Democratic credentials	No: If–usurping functions or perceived as over-‘activist’	No: If–ECJ/CFI seen as empire-building or out of touch	No: Reactive only	
Amending Institutional practice(s)	Yes: Response within institutions’ own control	Yes: If–reasons given are clearly present in the changes made	Yes: If–clear reasons given why, and not major changes		
	No: No formal external input	No: If–changes are a sop or subject to many exceptions	No: Lack of decision-making transparency		
– Inter-Institutional Agreements				Reasonable	National Parliaments and subsidiarity mechanism
– Rules of Procedure				Progress already made in this direction	Transparency in proceedings (eg Council)

methods (and the issues that they raise) might be analysed, while acknowledging that others may take a different view.

With this background in mind, the next questions that must be addressed concern how the situation after the French and Dutch referendums might be addressed in terms of legal options and political possibilities. The latter dimension also requires consideration of the various reasons given for concern about the TCE in those negative referendums—these reasons will help to inform any plans about what the EU should do to address questions of institutional and constitutional reform in the future.

‘“CRISIS” MANAGEMENT’ STRATEGIES IN THE LIGHT OF THE RESULTS IN THE FRENCH AND DUTCH REFERENDUMS

‘Crisis Management’ Approaches

Some form of ‘crisis’⁸⁰ in the delicate process of ratifying the TCE was foreseen in a number of quarters, even during the CFE and certainly during the abortive attempts to conclude the 2003 IGC at the December European Council of that year. While most predicted that the UK’s announcement that it would hold a referendum would be the toughest hurdle, there was open discussion of building a mechanism into the ratification process to ensure that the TCE would not be prevented from entering into force by its rejection by one or two ‘difficult’ Member States.⁸¹ In the event, these proposals did not find their way into the TCE and the unanimous ratification requirement of Article 48 TEU has governed the TCE ratification process. The only caveat to this is Declaration 30 ‘on the ratification of the Treaty establishing a Constitution for Europe’, annexed to the Final Act of the IGC:

The Conference notes that, if two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.⁸²

This is clearly not a crisis management strategy in itself, but rather an acknowledgment that there may well be a crisis that will need to be addressed by the European Council. As Table 1 shows, the ‘four fifths’ threshold has yet to be

⁸⁰ See, eg, the editorials in (2005) 42 *CMLRev.* 905 and (2006) 33 *LIEI* 101, which both speak openly of the situation of ‘crisis’ after the votes in the French and Dutch Referendums, and N Eschke and T Malick (eds.), *The European Constitution and its Ratification Crisis: Constitutional Debates in the EU Member States* (Bonn: Zentrum für Europäische Integrationsforschung, Discussion Paper C156, 2006; also available at: http://www.zei.de/download/zei_dp/dp_c156_eschke_malick.pdf) (hereinafter, ‘Eschke and Malick, (2006)’).

⁸¹ See, for a summary, B de Witte, ‘The Process of Ratification and the Crisis Options: A Legal Perspective’ in Curtin *et al.* (2005) (hereinafter, ‘de Witte (2005)’), 21–38, at 21–27.

⁸² See the Treaty establishing a Constitution for Europe [2004] OJ C310/1 (accessible at: <http://www.eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML>), at 464.

met (12 Member States have ratified the TCE, three have completed the national procedures but have yet (for various reasons) to lodge a formal instrument of ratification, two have rejected it and eight have yet to complete the necessary procedures (of which six seem to have postponed their procedures indefinitely, pending the outcome of the period of reflection)).

Legal position

This issue has been discussed carefully and in detail elsewhere, so for present purposes only a brief summary of the legal options open will be provided.⁸³ Essentially, first, neither a partial entry into force of the TCE nor treating the TCE as a 'refoundation' of the EU would be a legal option open to the Member States—the fact that the TCE seeks to amend provisions relating to a pre-existing international organization, which would amend the rights and responsibilities of the current Member States, prevents both of these possibilities (unless agreed unanimously by all Member States).

Second, the Member States could acknowledge that the current Treaty regime will govern the EU for the foreseeable future and that the TCE will not enter into force. Thus, the founding Treaties, as last amended by the Treaty of Nice and the various Accession Treaties of 2004, will apply, and any amendments to their operation will have to be made within the limits and under the powers that those Treaties provide. Such amendments might proceed by way of changes to rules of procedure, by the adoption of agreements between the EC institutions to act in a particular manner or by seeking closer cooperation among those Member States that wished to move in the direction of the TCE provisions. This last approach could be achieved either by using the provisions in the EC Treaty on enhanced cooperation⁸⁴ or by cooperation between Member States outside the EU institutions and framework.⁸⁵

The third obvious possibility is to pursue consensus by some sort of renegotiation of the TCE, by whatever means seem most appropriate. This could, as with Maastricht and Nice, simply be a case of minor reassurances to clear up difficulties or confusions (say by the addition of Protocols or Declarations), or it could stretch to the full-blown and genuine renegotiation of the TCE, leading to perhaps significant substantive changes to the text. This could be accompanied by some provisional application of the TCE, at least regarding those parts of the Treaty that were

⁸³ This section draws heavily on the work of previous writers, particularly de Witte (2005), (n. 81, above), 21–38, but also J Shaw, 'What happens if the Constitutional Treaty is not ratified?' in I Pernice and J Zemanek (eds.), *The Treaty on a Constitution for Europe: Perspectives after the IGC 2004* (Baden-Baden: Nomos, 2005) (also available at: <http://www.arena.uio.no/cidel/Shaw.pdf>); and C Grant, *What Happens if Britain Votes No?* (London: Centre for European Reform, 2005).

⁸⁴ Articles 11 EC and 43 and 45 TEU: see, for discussion of these provisions post-Nice, J Shaw, 'Enhancing Co-operation after Nice: Will the Treaty do the Trick?' in M Andenas and JA Usher (eds.), *The Treaty of Nice and Beyond: Enlargement and Constitutional Reform* (Oxford: Hart Publishing, 2003), 207–237.

⁸⁵ Eg by concluding international agreements between those vanguard Member States: see, for discussion, B de Witte, 'Old-fashioned flexibility: International Agreements between Member States of the European Union' in G de Búrca and J Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Oxford: Hart Publishing, 2000), 31–58.

relatively uncontroversial, although this would have to go hand-in-hand with negotiations to conclude a permanent Treaty. This last element could be seen to overlap with elements of the second suggested approach to 'crisis management', in that provisional application and changes to the existing practice may well cover the same ground.

Fourth, and perhaps most momentously, the possibility has been mooted that one or more Member States which simply cannot agree to the TCE may withdraw from the EU, whether voluntarily (if agreed to by the other Member States) or if forced to do so by the remaining Member States. This latter approach could not be effected via exclusion of the reluctant Member State(s), but rather by the collective withdrawal of the other Member States and the founding of a new organization.⁸⁶

This was the legal background to the political discussions that developed after the French and Dutch referendums, leading up to the Brussels European Council I in mid-June 2006. Those discussions were certainly wide-ranging and had occasionally engaging moments, but were perhaps most striking for their lack of particularly high profile in the media and at the national political level. It is to some brief observations on the political and diplomatic discussions to which we now turn.

Political angles

*(a) 'Factum est illud, fieri infectum non potest'*⁸⁷

One element which has cast a long shadow over political and diplomatic discussion and debate since early June 2005 is that there is no way to turn back the clock and do things differently. One horse has bolted and it is far too late to shut the stable door—ratifications which have already been completed by some Member States (whether by Parliamentary vote or popular referendum) cannot simply be deemed not to have occurred. Second, a cat has well and truly been let out of the bag—for those Member States with no tradition of (or constitutional requirement for) referendums on such matters,⁸⁸ new vistas have been opened up. This is either because a Member State decided itself to subject the TCE to popular ratification, or (even if not the former) because the citizenry have seen that other countries *did* adopt that route and may suggest that it would somehow be disenfranchisement not to offer the same chance to them as well in any future ratification process.

However, there were reports of French overtures to Germany in early 2006, suggesting that the EU Charter of Fundamental Rights might be dropped from the TCE framework, paving the way to focus upon a pared down version of the TCE, perhaps for agreement during 2007.⁸⁹ This was one instance where something already on paper, and indeed the original result of an earlier Convention process, seemed at least to be open to discussion (although there is no sign of this proposal

⁸⁶ See, eg, E Philippart and M Sie Dhian Ho, 'Flexibility and the New Constitutional Treaty of the European Union' in J Pelkmans *et al.* (eds.), *Nederland en de Europese grondwet* (Amsterdam: Amsterdam University Press, 2003), 137ff.

⁸⁷ 'Done is done, it cannot be made undone': TM Plautus, *Aulularia* (London: Penguin, 1965).

⁸⁸ For a helpful survey of the bases for referendums on the TCE in the various EU Member States, see Peters, (2005), (n. 38, above), 40–45.

⁸⁹ S Taylor, 'Sarkozy plots with Berlin to salvage constitution', *European Voice*, 6 April 2006.

in the eventual European Council conclusions from the Brussels summit on 15–16 June 2006).

(b) *'Aegroto, dum anima est, spes esse dicitur'*⁹⁰

As one Dutch journalist has wryly remarked, the '*grondwet wil maar niet sterven*',⁹¹ despite (obviously premature, not to say exaggerated) proclamations of its death by various politicians and newspapers⁹² in the time since the Dutch referendum result. In many ways, this should not be overly surprising—the motivations behind the creation of the CFE, identified by the European Council at Nice and Laeken, still resonate strongly and the amount of time, money and effort invested in the CFE and its output militate against simply ditching the various provisions of the TCE. While the TCE may ultimately prove very difficult to adopt in its present form without some amendments, subtractions or additions, much of what it has come to represent will be at the forefront of any future thinking, discussions and negotiations in this area. Life will not ebb away from what some have likened to a coma patient,⁹³ at least not while those in control of the life support instruments continue to reflect upon how to resolve what to do about the patient's legacy.

(c) *'Ich werde dieses Volk vor seinen Spiegel zwingen, sein Lachen wird ihm gefrieren'*⁹⁴

In periods of reflection, one is forced to take a good look at oneself, and it is clear that this was (on the face of it, at least) what the European Council intended when it proclaimed just such a period of reflection at its meeting on 17–18 June 2005.

In this case, however, it is not 'the people' who are being forced to take the hardest look at themselves, but rather the reactions of the French and Dutch people (at least) that have forced the political and bureaucratic 'elites' (ie the leaders of the Member States and their governments, the Commission and the European Parliament) to do so. In spite of the effort made to publicize the issues discussed by the CFE, in spite of the desire (expressly stated in the Laeken Declaration) to engage with the views and concerns of the citizens of the EU about its institutions and their operation, about future enlargement and about the EU's policies and role going forward, and in spite of the design of not one but two Conventions (on the Charter and the

⁹⁰ 'It is said that for a sick man, there is hope as long as there is life': MT Cicero, *Ad Atticum* (Cambridge (Mass.): Harvard University Press, 1999).

⁹¹ 'Constitution just does not want to die': P de Hen, 'Grondwet wil maar niet sterven' (29 May 2006, available at <http://www.elsevier.nl/opinie/commentaar-artikel/asp/artnr/100473/index.html>).

⁹² See, eg, *The Guardian*, 4 June 2005.

⁹³ See, eg, the editorial in (2006) 33 *LIEI* 101, and the recent publication of the House of Commons Foreign Affairs Committee, *Developments in the European Union* (Sixth Report of the Session 2005–2006, HC678, 26 July 2006; available at: <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmfaaff/768/768.pdf>), 20–24. The MPs on the Committee 'recommend that the Government encourage its European counterparts . . . explicitly to abandon the Treaty as a package, in the interest of making progress on some of the real and important issues which are at present caught up in the paralysis created by its rejection' (*ibid.*, para. 64).

⁹⁴ 'I will force these people [to stand] in front of their mirror[s]: their smile will freeze on their lips': M Frisch, *Andorra* (London: Methuen, 2001).

<i>Merkel/Chirac</i>	[Hints at dropping Charter of FRs and paring down TCE]	Review of the TCE	Concrete decision to be taken
<i>PRESIDENCY CONCLUSIONS</i>	<ul style="list-style-type: none"> – Pursue measures to enhance functioning of the under the existing Treaties; – Debate on all aspects of further enlargements (Dec 2006). 	<ul style="list-style-type: none"> – Presidency report to European Council (re TCE and future developments); – Adopt political declaration (Berlin 25–3–07) re Europe’s values & ambitions. 	<p>Steps to ‘continue reform’ (or at least decide on the basis therefore) to have been taken by the end of 2008.</p>
(16 June 2006)			

CFE) that were intended to facilitate that engagement, the EU still seems some distance away from securing popular and public debate on, and support for, institutional change.

In the end, what must now be seen as the *first* 'period of reflection' led to a decision not to decide anything yet, but rather that something should be decided by a certain time (preferably, it seems, under the next German Presidency). In the interests of economy of space, Table 4 (above) provides a summary of the various options mooted and discussed and the basic outcome of the European Council in Brussels in June 2006.

'Lost among Echoes of Things Not There?'⁹⁵ Reasons behind the 'No' Votes and their Significance for the Road Ahead

It is obviously difficult to gain any robustly verifiable picture of the major driving forces behind the French and Dutch referendum 'No' votes, and in any assessment of the current position concerning views on the EU, one must also remember that significant proportions voted in favour of ratifying the TCE. However, if future constitutional changes are to be made (whether in the form of the TCE or in some other form (or by some other route(s)), an understanding of what needs to be explained, communicated and amended will be vital. This is especially important if (as seems the current trend) a number of the elements of the TCE are to be introduced by methods not requiring Treaty amendment (see heading 'Key Substantive Topics for Consideration' below). This is because a clear answer must be prepared to the question: 'why are the EU institutions simply going ahead and implementing the TCE's provisions anyway, even in the absence of ratification by all Member States?' (This ratification will, of course, in a number of cases also require popular consent.) Any answer to this question must be able to show that the decision to make such changes is based upon introducing those elements from the TCE that specifically *address* the concerns raised by those who were opposed to the EU that they felt would result from accepting the changes to be made by the TCE. Otherwise, the EU and its institutions run the serious risk of appearing to be treating the 'No' votes in the French and Dutch referendums as simply the 'wrong' answers to the question. Indeed, to appear to take this view flies in the face of the substance of the Laeken Declaration, which led to the Convention on the Future of Europe and the TCE in the first place:

Within the Union, the European institutions must be brought closer to its citizens. Citizens undoubtedly support the Union's broad aims,^[96] but they . . . want the European institutions

⁹⁵ Peter Gabriel, 'Humdrum' (Track 5, *Peter Gabriel* (Atlantic/Wea, 1977)). The present author has used this description in a number of talks on the TCE, trying to clarify what the outcome of the CFE and the subsequent IGC had actually agreed, and what it had not. Perhaps, however, a modification is in order, to acknowledge that many concerns were in fact lost among echoes of things 'already there', in the sense that the vast bulk of the pre-existing Treaties would be left intact by the TCE.

⁹⁶ This claim would no doubt be castigated by some as presumptuous at best, even at the time of Laeken.

to be less unwieldy, rigid and, above all, more efficient and open. . . . [They] feel that deals are all too often cut out of their sight and they want better democratic scrutiny.⁹⁷

As one might perhaps have predicted,⁹⁸ many of the concerns that were cited by those voters willing to state that they had voted 'No' related to matters that were only loosely related (if at all) to the TCE itself. They can be divided into a number of basic groups.

One group concerns the discovery of principles and rules that had long been a part of the EC legal order, whether explicitly laid down in the Treaties or developed by the ECJ as inherent to the system that the founding Treaties had created. For example, concerning the former, complaints have been made by some in France about the focus on economic liberalism and free trade at the expense of more 'social' concerns. Concerning the latter, meanwhile, the principle of the supremacy of EC law provides an excellent illustration: this was highlighted by the decision of the CFE to attempt to codify the principle in Article I-6 TCE, and which led to heated debate, both academic and journalistic, on the proper scope of the principle (both as developed by the case law and as recorded in the TCE).⁹⁹

A second group relates to public perception about the consequences of both implemented EU projects (like the single currency and the recent 2004 enlargement) and EU future plans (like the next planned enlargement). Thus, the spectre of the proverbial Polish plumber hovered over the French referendum debate and vote, while in the Netherlands the possibility that Turkey might be admitted to the EU¹⁰⁰ assumed a similar role. In both countries, these issues received extensive media coverage in the lead up to the respective votes, which naturally intensified in the Netherlands in the immediate aftermath of the French 'No' vote. Similarly, there was widespread Dutch media coverage of the introduction of the Euro, both on technical matters such as the Stability and Growth Pact and on consumer perceptions that the introduction of the Euro¹⁰¹ had led to a general increase in the prices of goods. Recent survey data and

⁹⁷ Laeken Declaration (n. 9, above), section I.

⁹⁸ Whether from even a cursory scan of the numerous press reports on the referendums in both France and the Netherlands or on the basis of earlier work on voting practices in previous elections to the European Parliament. Cf., however, the recent comments of A Tompkins, 'Why Europe needs a new, democratic convention' (27 July 2006, available at: <http://euobserver.com/9/22158/?rk=1>), arguing that the content of the TCE itself was indeed central to the referendum outcomes.

⁹⁹ For discussion, see M Dougan, 'The Convention's Draft Constitutional Treaty: A "Tidying-Up Exercise" That Needs Some Tidying Up Of Its Own' (Federal Trust Online Paper 27/03, August 2003, available at <http://www.fedtrust.co.uk/default.asp?pageid=267&mpageid=67&subid=277&groupid=6>), esp. 7–8 and P Cramér, 'Does the Codification of the Principle of Supremacy Matter?' (2004–2005) 7 *CYELS* 57 (Ch. 4).

¹⁰⁰ Although it should be noted that if one were to take the number of people who gave possible Turkish accession to the EU as a reason for voting 'No' in the French referendum then (in spite of the extensive coverage and emphasis that the point received at the time) it only in fact amounted to between 6 and 7% of the French electorate that actually expressed that point of view: see Eschke and Malick, (2006), (n. 80, above), 17.

¹⁰¹ Key reasons for which appeared to be: (a) a feeling that the Dutch Guilder had been undervalued when the Netherlands joined the Euro; (b) concern that other Member States were not respecting

analysis¹⁰² from the Netherlands shows a strong correlation between negative perceptions about the Euro and the possible future expansion of the EU, on the one hand, and a 'No' vote in the TCE referendum, on the other. This held true in spite of two interesting trends. First, survey data from the end of 2004¹⁰³ indicated that 75 per cent of Dutch citizens felt that EU membership was a 'good thing' and that 73 per cent of the Dutch supported a constitution for Europe. Second, in Dutch national elections an overwhelming majority of voters have consistently voted for political parties that were strongly in favour of the TCE: of the 150 seats in Parliament, 128 belonged to parties that supported the ratification of the TCE, yet the survey showed that between 37 per cent and 63 per cent of voters who had voted for each of those parties had in fact rejected the TCE in the referendum.

This data could be said to be consistent with the argument which suggests that European issues are of little or no significance to voting decisions in national elections: indeed, research suggests that voting behaviour in European elections tends instead to be actuated by the national political arena and its concerns, rather than by any conscious choice as to European-level considerations.¹⁰⁴ Arts and van der Kolk, the authors of the recent Dutch survey referred to above, conclude that the 'gap between voters and parties will probably not disappear after the referendum. Even after the lively referendum campaign, most . . . respondents indicated that they were only 'somewhat interested' in European affairs. . . . [National] political parties do not have incentives to adjust their position on this issue; it will not change their electoral prospects.'¹⁰⁵ This echoes a point¹⁰⁶ made by Moravcsik and Nicolaïdis about the politics of referendums, which process they argue is based upon the ('naïve') theory that:

greater publicity and participation encourages public education, which brings about greater support for sensible policies. . . . The central problem is that the EU will not . . . become

the Stability and Growth Pact; and (c) the aforementioned consumer perception that retailers had used the introduction of the Euro as an excuse to raise prices.

¹⁰² K Aarts and H van der Kolk, 'Understanding the Dutch "No": The Euro, the East, and the Elite' (2006) 39 *PS: Political Science and Politics* 243 (hereinafter 'Aarts & van der Kolk, (2006)'). See also K Aarts and H van der Kolk, *Nederlanders en europa: het referendum over de Europese grondwet* (Amsterdam: Bert Bakker, 2005).

¹⁰³ Published in Eurobarometer 62 (December 2004) (available at http://europa.eu.int/comm/public_opinion/archives/eb/eb62/eb62first_en.pdf), which interestingly records that, at the same point in time, 70% of the French citizens questioned were also in favour of a constitution for Europe.

¹⁰⁴ See, eg, C van der Eijk *et al*, *Choosing Europe? The European Electorate and National Policies in the Face of Union* (Ann Arbor: University of Michigan Press, 1996) and E Oppenhuis, *Voting Behaviour in Europe* (Amsterdam: Het Spinhuis, 1995), esp. at 90. It should also be noted that a plausible alternative explanation could be sought more squarely within the recent and momentous developments in Dutch domestic politics (in the wake of the murders of Pim Fortuin and Theo van Gogh on 6 May 2002 and 2 November 2004 respectively), which may have changed the way in which the electorate relates to political elites and the various types of societal interests that they have long been seen to represent.

¹⁰⁵ Aarts & van der Kolk, (2006), (n. 102, above), 245.

¹⁰⁶ See also the discussion in AC Johnston, 'Democracy in the European System: Towards a Critical Approach' (1998) 9 *ELSA SPEL* 77, esp. the text accompanying n. 86–91.

the primary forum to address the issues that matter most to voters Thus, the common voter cannot be convinced to educate themselves, deliberate or vote on the basis of EU policies.

The recent referendums demonstrate what happens when voters are encouraged to participate actively in a debate about abstract matters unconnected with issues of concrete concern. They simply import into EU debates gripes about national policies, even when they have almost nothing to do with ongoing EU policies, let alone the substance of the constitution.¹⁰⁷

This foray into opinion polls, and the explanatory analysis of the data gathered therefrom, also bridges the gap to the next set of reasons behind the rejection of the TCE in France and the Netherlands.

This third cluster of reasons can be grouped around issues arising at the *national* level that were not related to the EU or the TCE in any meaningful way at all. This phenomenon is familiar from the numerous studies of voting issues and behaviour in European elections since 1979¹⁰⁸ and has already emerged from the discussion of the second set of reasons, above. Particular trends that have been noted in various countries in the past have included the phenomenon of a safe 'protest vote' against the incumbent government or leader, particularly if recent domestic political developments have rendered the leader or government unpopular.¹⁰⁹ Recent strong Conservative performances in the European Parliament elections in the UK have often been ascribed in no small part to this phenomenon and similar suggestions have been made in attempts to explain the rejection of the TCE in the French

¹⁰⁷ A Moravcsik and K Nicolaïdes, 'The Future of the Constitutional Process of the European Union' (input to the European Parliament Symposium, 13–14 October 2005) (hereinafter, 'Moravcsik & Nicolaïdes (2005)'), section 1.

¹⁰⁸ See, eg, the long-running series of volumes edited by Juliet Lodge: *The 2004 Elections to the European Parliament* (Basingstoke: Palgrave Macmillan, 2005); *The 1999 Elections to the European Parliament* (Basingstoke: Palgrave Macmillan, 2001); *Euro-Elections 1994* (London: Continuum International Publishing Group—Academi, 1995); *The 1989 Election of the European Parliament* (Basingstoke: Palgrave Macmillan, 1990) and *Direct Elections to the European Parliament, 1984* (Basingstoke: Palgrave Macmillan, 1986). See also van der Eijk *et al* and Oppenhuis, n. 104, above; and the discussion in Johnston (n. 106, above) in the text accompanying nn. 71–84 (headed 'The Dangers of Democratic Supranationalism').

¹⁰⁹ See, eg, for a contemporary reaction to the reasons behind the French 'No' vote, the comments of L Pech, 'Non-sense: France's No to the European Constitution' (31 May 2005, available at: <http://jurist.law.pitt.edu/forumy/2005/05/non-sense-frances-no-to-european.php>). He suggested that 'it may be argued that the French No vote is the ultimate fruit of a degenerate politico-administrative elite, which simply cannot escape from its roots of intellectual constraints in a bureaucratic model of economic growth (read stagnation) and social organisation (read bankrupted model). With the end of the Cold War and subsequently, the EU's enlargement to 25 Member States, it [has] been necessary to explain the rationale and the continuing benefits of European integration. Unfortunately, the European Community has been constantly used as a convenient fig leaf to hide national incompetence in tackling national issues.' Again, the theme of national political elites and their failure to explain the (and their) activities on an EC level rears its head. Contemporary and subsequent events in France have led to the deep unpopularity of both the President, Jacques Chirac, and his beleaguered Prime Minister, Dominique de Villepin: see, most recently, 'France's president: The man who deserves a red card', *The Economist*, 15 July 2006, 41–42.

and Dutch referendums, in the face of the aforementioned survey data which suggested strong popular support both for EU membership and its benefits, and for the adoption of a constitution for the EU.¹¹⁰

This series of reasons for the rejection of the TCE in the French and Dutch referendums undoubtedly makes the explanatory task (suggested at the outset of both this contribution and this section) an extremely difficult and sensitive one. Seeking to communicate why any elements of the TCE should nevertheless be introduced into EC law and practice by means short of formal Treaty amendment will always run the risk of creating an impression of trying to by-pass the results of these referendum results (while at the same time receive support from those keen to emphasize the need not to marginalize the equally 'valid' choices made by those Member States who have already ratified the TCE). Before moving to consider two particular areas in which, it is argued, that the so-called 'cherry-picking' exercise should nevertheless be encouraged and adopted, it is important to gain a sense of how the EU's institutions reacted to the results of the referendums in France and the Netherlands. These reactions will play an important role in shaping debate and action, both during the ongoing period of reflection and in the longer term.

EU Institutional Reactions to the Results of the French and Dutch Referendums?

Citizenship initiatives

Some aspects of such programmes run a number of risks, in particular those of elitism and/or patronizing the citizenry. The warnings about these sorts of initiative provided a decade ago, in the aftermath of the Maastricht Treaty (see, eg, Ward),¹¹¹ seem equally apposite today, albeit from a slightly different perspective. The proposal of the Adonnino Committee to create a European flag has since been implemented, while the ideas of a European hymn, motto and 'Europe day' have found expression in the TCE itself (Article I-8 TCE).¹¹² The attempts to encourage the

¹¹⁰ *Ibid.*, and see also his most recent comments, 'The future of the EU Constitution: Escaping the Ratification Maze' (11 July 2006, available at <http://jurist.law.pitt.edu/forumy/2006/07/future-of-eu-constitution-escaping.php>): 'Furthermore, it is manifest that the French and Dutch No votes cannot be understood as a simple No to the idea of a constitution for Europe or even the idea of further European integration . . . There were certainly voters exclusively concerned with and ideologically favorable to the EU and who nonetheless rejected the Constitution. Above all, however, the French No was a patchwork of inconsistent claims: essentially a no to what is called there "Anglo-Saxon" Europe and its "neo-liberal" policies, a no to unemployment and social dumping and finally, a no to Turkey. With ideological absolutism on the left side of the political spectrum and a deeply unpopular government and President, these ingredients have proven fatal to the Constitution.' See also Aarts & van der Kolk, (2006) (n.102, above).

¹¹¹ I Ward, *The Margins of European Law* (Basingstoke: Macmillan, 1996) (hereinafter, 'Ward, (1996)').

¹¹² The statement in the fifth sentence of Article I-8 TCE that 'Europe day *shall* be celebrated on 9 May throughout the Union' (my emphasis) is perhaps a further illustration of the tendency to pursue

development of a cultural European identity have clearly moved with the times: Wistrich's pleas¹¹³ (which chimed with ideas of the kind regularly backed by the Commission in the past) for a cultural space for the free movement of orchestras and fine art seem today to have been replaced by obsessions with football (perhaps forgivable in World Cup year, when the tournament was held in Germany) and the Eurovision song contest, particularly as the fiftieth anniversary of the founding of the EEC approaches. Indeed, among the many plans under discussion to mark this auspicious year, the Commission is reported to be pushing for the inclusion of a Eurovision-style singing contest,¹¹⁴ while it seems that Germany will be going ahead with its plan (during its Presidency of the EU in the first half of 2007) 'to let "thousands" of its bakeries bake 50 sorts of cakes with recipes from all 25 Member States'.¹¹⁵ The less said about such 'initiatives', the better. While earlier critiques of such proposals focused squarely upon the danger that this would lead to a situation in which 'European citizenship will . . . be restricted . . . to those who choose to spend what is left of their earnings on art galleries and orchestras',¹¹⁶ some elements of these latest schemes seem to take the approach that 'any publicity is good publicity', although the recent 'straight bananas' and 'bent cucumbers' episodes would suggest that this orientation is something of a fallacy.

Nevertheless, other elements of the Commission's current approach towards such citizenship initiatives could well prove more promising. For example, the Commission recently adopted a proposal for a decision to establish a programme of 'Citizens for Europe',¹¹⁷ whose adoption is still pending. While some of the actions

attempts to prescribe some 'European-ness' for the citizens of the EU. The cynic would add that far greater affinity might be secured through this route were 9 May each year to be granted public holiday status throughout the EU: nothing breeds positive feelings like an extra day's holiday.

¹¹³ E Wistrich, *The United States of Europe* (London: Routledge, 1994), 90–91.

¹¹⁴ M Beunderman, 'Commission pushes unpopular EU singing show idea' (14 July 2006, available at <http://euobserver.com/9/22095?rk=1>). A direct link with the Eurovision song contest in its present format might prove tricky institutionally for the EU, if only because the countries involved in Eurovision include some candidate countries (Turkey, Bulgaria, Romania), some potential future members (Albania, Bosnia & Herzegovina, Croatia, FYR, Macedonia, Moldova) and many other non-EU Member States (Armenia, Israel, Norway, Russia, Switzerland and Ukraine). Furthermore, it has been suggested that voting practices within the Eurovision song contest exhibit a marked degree of regionalism and mutual back-scratching: see, eg, D Gatherer, 'Comparison of Eurovision Song Contest Simulation with Actual Results Reveals Shifting Patterns of Collusive Voting Alliances' (2006) 9 *Journal of Artificial Societies and Social Simulation*, No. 2 (available at: <http://jasss.soc.surrey.ac.uk/9/2/1.html>), and the references cited therein (I am indebted to Alex Mills for this reference). Some would suggest that this makes the model an inappropriate one for the EU to associate itself with, while others might take a different view. For the Eurovision song contest 2006, see <http://www.eurovision.tv/english/index.htm>.

¹¹⁵ Beunderman, *ibid.*

¹¹⁶ Ward, (1996), (n. 111, above), 7.

¹¹⁷ Commission, 'Proposal for Decision of the European Parliament and of the Council establishing for the period 2007–2013 the programme "Citizens for Europe" to promote active European Citizenship' COM(2005) 116 final (6 April 2005) (available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0116en01.pdf).

proposed run the risk of sounding either like rather wishful thinking¹¹⁸ or even (unless very carefully organized) potentially favouring some groups over others in political debate and lobbying,¹¹⁹ the focus on encouraging town-twinning activities has already won some support from a UK commentator.¹²⁰ The present author has benefited enormously from the opportunity to participate in such activities over many years, both in terms of improving linguistic competence and in terms of meeting, getting to know and understand the way in which colleagues (and now good friends) in other Member States approach issues of common interest.¹²¹ Similar benefits of communication, experience and sharing of knowledge and ideas stem from the Erasmus and Socrates student exchange programmes, in which the present author has again been privileged to be a participant. In time, such understandings and linkages can help people to understand and appreciate those areas in which they may well face common problems that may warrant common solutions, but also where there are similar problems to which the best solutions are likelier to be reached by exchange of information, ideas and experience, rather than by centrally-mandated homogeneity. These kinds of issues will often be those that are of direct interest to the citizenry¹²²: if the EU can become capable of assisting in facilitating such contacts and exchanges, its profile and reputation may well be revived in the medium-term. However, these proposals are no 'quick-fix' to the oft-bemoaned absence of a 'European identity' and, indeed, may foster only certain elements thereof over time on particular issues.

The Commission's 'Plan-D' and a 'Citizen's Agenda'

Both before and after the negative votes in the French and Dutch referendums, journalists and politicians were regularly heard to wonder whether the EU had a 'Plan

¹¹⁸ Eg the organization of 'high-visibility' events 'by or in cooperation with the European Commission which are substantial in scale and scope, strike a significant chord with the peoples of Europe, help to increase their sense of belonging to the same community, make them aware of the history, achievements and values of the European Union, involve them in intercultural dialogue and contribute to the development of their European identity' (COM(2005) 116 final), para. 4.3.

¹¹⁹ See 'Action 2: Active civil society in Europe', proposing the provision of structural support for both European public policy research organisations (ie think-tanks) and for organizations of civil society at European level (COM(2005) 116 final), para. 4.2.

¹²⁰ See, eg, P Sain ley Berry, 'Not singing but twinning' (28 July 2006, available at: <http://euobserver.com/9/22174/?rk=1>).

¹²¹ On the occasion of the formal twinning of the towns of Newbury (Berkshire, UK) and Feltre (Belluno province, Italy) (held in Feltre, 2 August 2003: see <http://www.newburytowntown.org.uk/Autumn%202003.pdf> for a brief summary report of the ceremony), the author was fortunate to be given the opportunity to provide a personal view on the importance of such twinning and exchange activities for the future of the EU and its citizens.

¹²² See the discussion under the heading above, '“Lost among echoes of things not there?” Reasons behind the “No” votes and their significance for the road ahead', on the question of issues that are of genuine interest to citizens. It might also be suggested that, along with a role for national Parliaments (see heading below, 'National Parliaments and subsidiarity mechanism'), the Committee of the Regions may also be able to assist in facilitating such exchanges of practice and information.

B' to deal with the TCE ratification process. Equally regularly, the existence of any such Plan B was denied by the Commission and the Member States alike. On 13 October 2005, the Commission published its contribution to the period of reflection in a Communication, which was sub-headed 'Plan-D for Democracy, Dialogue and Debate'.¹²³ This was the Commission's response to the European Council's declaration on the ratification of the TCE,¹²⁴ which had suggested that the Commission should play a 'special role' in the organization of public debate during the period of reflection. Although prompted by the 'No' votes in the French and Dutch referendums, this plan was not presented as a rescue package for the TCE, but rather 'to stimulate wider debate between the European Union's democratic institutions and citizens'¹²⁵ and as 'a starting point for a long-term democratic reform process'.¹²⁶ Member States undertook to conduct 'broad-ranging national debates on the future of Europe',¹²⁷ while the Commission promised to conduct a wide range of actions on the European level to stimulate wider public debate, to promote citizens' participation in the democratic process and to use various tools to generate a dialogue on European policies.¹²⁸

The Commission's 'A Citizen's Agenda for Europe',¹²⁹ adopted on 10 May 2006, stressed the need to shift to a 'policy agenda for citizens', drawing upon continued dialogue with the public via (*inter alia*) the implementation of Plan D. On the same day, the Commission published its report on its implementation of Plan D and how it fitted into the ongoing period of reflection.¹³⁰ The brief Annex to this Communication (described as a 'comprehensive stocktaking') indicated those actions pursued by the Commission, while the discussion of the various issues raised in the

¹²³ Communication from the Commission, 'The Commission's contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate' COM(2005) 494 final (available at http://ec.europa.eu/commission_barroso/wallstrom/pdf/communication_planD_en.pdf) (hereinafter, 'COM(2005) 494 final' or 'Plan-D'). The Committee of the Regions would have transformed this '3-D' Plan-D into one with a fourth dimension: that of Decentralization (see the Opinion of the Committee of the Regions of 15 June 2006 (CONST-IV-002, published on 27 June 2006) (available at <http://coropinions.cor.europa.eu/coropiniondocument.aspx?language=en&docnr=528&year=2006>)).

¹²⁴ 'Declaration by the heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe' (SN 117/05, 18 June 2005, available at: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/85325.pdf).

¹²⁵ COM(2005) 494 final, at 2.

¹²⁶ Communication from the Commission, 'The Period of reflection and Plan D' COM(2006) 212 final (10 May 2006) (hereinafter 'COM(2006) 212 final') (available at http://ec.europa.eu/commission_barroso/president/pdf/com_2006_212_en.pdf).

¹²⁷ COM(2005) 494 final, section 3.

¹²⁸ *Ibid.*, section 4: these actions were to include visits by Commissioners to Member States and their national Parliaments, creating a 'European Round Table for Democracy' (consisting of citizens from different backgrounds, to debate on common European issues), examining ways to increase levels of voter participation and the use of focus groups as a first step in policy-making processes.

¹²⁹ Commission Communication, 'A Citizen's Agenda: Delivering Results for Europe' COM(2006) 211 final (10 May 2006) (available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0211en01.pdf).

¹³⁰ COM(2006) 212 final.

debates is presented as a 'synthesis' compiled by the Commission (although there is no reference to particular publications or other sources from which the synthesized material was drawn). The Presidency Conclusions after the Brussels meeting of the European Council on 16 June 2006 expressed the European Council's 'gratitude' for the Commission's contribution, which also formed part of the basis for the European Council's assessment of the 'reflection period'.¹³¹ However, the experience of the Netherlands¹³² in its attempts to organize some kind of national debate on European issues suggests that the idea of encouraging such activities is one which interests the EU and the Commission rather more than it engages either national politicians or their electorates. Indeed, the Commission itself noted (in the Annex to its report on Plan D) that while it 'sees itself mainly as a facilitator . . . it must be pointed out that the involvement of the Member States in the launch of national debates remains uneven'.¹³³ This, one fears, is putting it mildly.

KEY SUBSTANTIVE TOPICS FOR CONSIDERATION

Obviously, there are many interesting and significant institutional and substantive issues that may yet arise from what one might style the 'wreckage' of the TCE ratification process, but given the results of the recent Brussels European Council (and the Member States' decision to continue the 'period of reflection well into 2007'), it is premature to reach even interim conclusions on many of these matters. The status and future of the EU Charter of Fundamental Rights, for example, are questions that have featured in discussions between the Member States during the period of reflection to date,¹³⁴ but it is clear that any change in the status of the Charter will require much further discussion and a Treaty amendment to bring it beyond having merely been 'declared' and into legal effect.

One area, however, in which genuine and significant activity and progress has been visible in the year since the Dutch 'No' vote is that of increasing the degree of transparency in the activities of the Council, particularly during the legislative process. Proposals have also been forthcoming on transparency, information and communications from the European Commission and the European Parliament, which will be noted briefly below. Another topic worthy of brief consideration here is that of the principle of subsidiarity and the role of national Parliaments and the way in which their views and scrutiny can feed into the EC legislative process. This second issue is apposite here due both to recent EC-level initiatives and to the fact

¹³¹ Presidency Conclusions, Brussels European Council, 15/16 June 2006 (Document 10633/06, 16 June 2006), paras. 2 and 3.

¹³² After earlier bold declarations, September 2005 saw the Dutch government's attempts to put a national debate in place falter and then founder—see the series of online reports (in Dutch) at: http://www.elsevier.nl/nieuws/europese_unie/nieuwsbericht/asp/artnr/63325/index.html; http://www.elsevier.nl/nieuws/europese_unie/nieuwsbericht/asp/artnr/66469/index.html; and http://www.elsevier.nl/nieuws/europese_unie/nieuwsbericht/asp/artnr/66611/index.html.

¹³³ COM(2006) 212 final, at 10.

¹³⁴ See, eg, S Taylor, 'Sarkozy plots with Berlin to salvage constitution', *European Voice*, 6 April 2006.

that it is another area from the TCE that may respond to implementation by means other than the adoption of a new Treaty (with all of the ratification questions that that would raise).

Improving the Transparency of EC Proceedings (Particularly in the Legislative Process)

Proceedings in the Council

One element of the TCE which received widespread praise¹³⁵ was the CFE's decision to recommend (and the IGC's approval) that Council legislative proceedings should be accessible to the public: see Article I-24(6) TCE. For many, the loss of this improvement in the transparency of a key aspect of the EC's legislative procedures was one of the sadder casualties of the failure to secure ratification of the TCE. It is thus unsurprising that the matter was prominent on the agenda after the European Council meeting of 16–17 June 2005 and has featured in reports, proposals and statements from a variety of EC institutional actors, national politicians and commentators.

The European Parliament has made a number of proposals and calls on the Council to open up its proceedings: as UK Labour MEP Gary Titley remarked in backing such calls, 'We're not trying to create Dallas or Big Brother, we just want to enhance scrutiny. The only legislative body that doesn't meet in public nowadays is North Korea'.¹³⁶ In December 2003, indeed, a complaint was made by a German MEP to the European Ombudsman, that the Council's then current rules of procedure unjustifiably limited how far the Council's legislative meetings could take place in public, to the extent that it amounted to an instance of maladministration, falling within the purview of the European Ombudsman under Article 195 EC. After careful consideration and passing reference to the provisions of the TCE, the Ombudsman concluded that the Council's refusal to amend its rules of procedure to facilitate greater transparency in its legislative proceedings did indeed amount to maladministration, on the basis of the exhortation in Article 1(2) TEU that EU decisions 'are taken as openly as possible and as closely as possible to the citizen'.¹³⁷ The key factor was that it was perfectly *possible* for the Council to amend its rules of procedure to provide for greater transparency in this regard, so that a

¹³⁵ The present writer has co-authored elsewhere on this topic (Dashwood & Johnston (2004), n. 25, above), while others have given a similar welcome to this proposed reform: see, eg: J Kokott and A R  th, 'The European Convention and its Draft Treaty establishing a Constitution for Europe: Appropriate answers to the Laeken questions?' (2003) 40 *CMLRev.* 1315, at 1332; J Monar, 'Transparency in the Exercise of Power in the "Constitutionalized" Union: the problem of Diffused Leadership and Responsibility' in Curtin *et al* (2005), 209–220 (esp. 210–211); and P  ris (2006) (n. 3, above), 34–35 and 181–183.

¹³⁶ Quoted in a news story on the BBC website (6 September 2005, available at: <http://news.bbc.co.uk/1/hi/world/europe/4218776.stm>).

¹³⁷ 'Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the Council of the European Union in complaint 2395/2003/GG' (Strasbourg,

failure to do so amounted to 'a public body [failing] to act in accordance with a rule or principle which is binding upon it'—the definition of 'maladministration' adopted by the Ombudsman and welcomed by the European Parliament.¹³⁸

In response to this finding, the Council decided at its meeting of 20–22 December 2005¹³⁹ to conduct in public meetings concerning legislative proposals under co-decision that were presented orally by the Commission and all final Council legislative deliberations under co-decision. However, these measures were subjected to criticism by both the European Parliament¹⁴⁰ and the European Ombudsman,¹⁴¹ which intensified in the run up to the Brussels European Council of mid-June 2006.¹⁴² The UK, however, despite having pushed the transparency issue very strongly itself during the UK Presidency in 2005,¹⁴³ seemed to acquire a serious case of cold feet on the topic during the Austrian Presidency.¹⁴⁴ Whatever the reasons for this change of heart,¹⁴⁵ it is clear that the UK's u-turn baffled many officials in

4 October 2005, available at: <http://www.ombudsman.europa.eu/special/pdf/en/032395.pdf>). (See also the Ombudsman's earlier 'Draft recommendation to the Council of the European Union in complaint 2395/2003/GG' (Strasbourg, 9 November 2004, available at: <http://www.ombudsman.europa.eu/recommen/en/032395.htm>), to which the Council responded on 17 February 2005 (rejecting the Ombudsman's finding of maladministration).) On the Ombudsman generally, see A Peters, 'The European Ombudsman and the European Constitution' (2005) 42 *CMLRev.* 697.

¹³⁸ See the Annual Report of the European Ombudsman for 2002 (10 February 2003, available at: http://www.ombudsman.europa.eu/report02/pdf/en/rap02_en.pdf), at 18.

¹³⁹ Council Press Release 15479/05 (Presse 349), concerning the 2702nd Council Meeting on Agriculture and Fisheries (20–22 December 2005), 53–54. See also the Information Sheet published by the General Secretariat of the Council of the EU, entitled 'Openness and transparency of Council proceedings' (TRA/00, December 2005, available at: <http://ue.eu.int/ueDocs/newsWord/en/misc/87866.doc>).

¹⁴⁰ For a summary, see http://www.europarl.europa.eu/news/public/story_page/008-7064-093-04-14-901-20060404STO07063-2006-03-04-2006/default_en.htm.

¹⁴¹ Press Release EO/06/7 (5 April 2006, available at: <http://www.ombudsman.europa.eu/release/en/2006-04-05.htm>).

¹⁴² See, eg, European Ombudsman Press Release EO/06/13 (13 June 2006, available at: <http://www.ombudsman.europa.eu/release/en/2006-06-13.htm>).

¹⁴³ See the documents considered in the House of Commons Select Committee on European Scrutiny, *Seventeenth Report of Session 2005–2006* (13 February 2006, available at: <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-xvii/34-xvii.pdf>), section 4, 'Transparency in the Council' (in which the then Minister for Europe, Douglas Alexander, made clear that the UK government had supported the wider option of having the Council meet in public for all stages of deliberation where the Council acts in a legislative capacity: see paras. 4.4–4.7 and 4.12); see also the earlier news story on the BBC website (<http://news.bbc.co.uk/1/hi/world/europe/4218776.stm>) on 6 September 2005 for details of the UK's initiative during its EU Presidency.

¹⁴⁴ See A Balzan, 'UK having second thoughts about transparency initiative' (8 June 2006, available at <http://euobserver.com/9/21797/?rk=1>).

¹⁴⁵ See the comments reported in Balzan (*ibid.*): the suggestion is that the views of the new UK Foreign Secretary (Margaret Beckett) on the matter are coloured by her previous experiences as Minister for Environment, Agriculture and Fisheries, particularly on the negotiation of fishing quotas. The fear, apparently, was that 'EU deal-making could be hampered if cameras are allowed into meetings as ministers would be more interested in their national audiences back home'.

Brussels¹⁴⁶ and MPs in the UK¹⁴⁷ and may well have lost some of the goodwill that the UK had managed to generate on the matter during 2005.

Nevertheless, the European Council conclusions in June 2006 did indeed move to approve greater Council transparency: the Presidency conclusions from the Brussels European Council (16 June 2006)¹⁴⁸ are reproduced in Appendix 1 (below).¹⁴⁹ For present purposes, the key agreements reached were, first, that all Council deliberations on legislative acts under the co-decision procedure should take place in public (subject to the possibility of a decision by Council or Coreper to meet in private) and, second, that all public deliberations are to be broadcast on the internet and a recorded version must be available for at least a month after the meeting took place. The first point brings current Council practice a step closer to the position that would have been reached under the TCE (see Article I-24(6) TCE), although naturally any assessment of the significance of this step (and the other measures on transparency adopted by the European Council) will depend upon the frequency with which the Council has recourse to the clause allowing an opt-out from public deliberations. The Finnish Presidency has promised to use the possibilities provided by the new 'Overall Policy on Transparency' (such as deciding that subsequent discussions on non-co-decision legislation should take place in public, proposing that public debates be held on matters of importance to citizens and developing information provision, communications and mailing lists to give greater publicity to any Council public deliberations) to achieve marked improvements in the provision of information and the openness of the Council's procedures.¹⁵⁰ Essentially, as a result of these recent developments, the default position with regard to deliberations under the co-decision procedure is one of public accessibility, while under other procedures the Council's doors will remain closed, unless the Presidency proposes, and the Council agrees, otherwise.

On Tuesday 11 July 2006, the first Council (ECOFIN) meeting was televised on the web. It must be noted that there have been mixed reactions in the press coverage of this event,¹⁵¹ particularly due to the decision to black out certain parts of

¹⁴⁶ And indeed satirical commentators back home: see 'Brussels Sprouts', *Private Eye*, Issue 1162 (4 July 2006), at 9.

¹⁴⁷ See, eg, the clear comments in favour of far-reaching transparency reforms in the House of Commons Select Committee on European Scrutiny, *Twenty-Third Report of Session 2005–2006* (11 April 2006, available at: <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-xxiii/34-xxiii.pdf>), paras. 21.6 and 21.12–21.14.

¹⁴⁸ Presidency Conclusions, Brussels European Council, 15–16 June 2006 (Document 10633/06, 16 June 2006), Annex I.

¹⁴⁹ Included at the end of this chapter.

¹⁵⁰ See, eg, Hill & Knowlton's *Guide to the Finnish Presidency of the European Union* (10 July 2006, available at: <http://www.hillandknowlton.be/HK/pressoffice/presidency/Finnish2.pdf>), at 16 ('Open the doors of the Council Meetings', by H Hautala, Finnish MP and Chair of the Finnish Green Parliamentary Group).

¹⁵¹ For an immediate reaction, see M Beunderman, 'First EU ministers' webcast proves tedious' (11 July 2006, available at: <http://euobserver.com/9/22066/?rk=1>).

the meeting, which were deemed too sensitive for public consumption. As one commentator has argued,¹⁵² what 'no-one seems to have [appreciated] is that immediately you black out a screen, ordinary viewers will be immediately convinced that all manner of corrupt, heathen and morally reprehensible practices are taking place behind it'. Only two items were held open to public view (the Finnish Presidency's economic and financial programme, and the mandate of the European Investment Bank), while discussions on the juicily controversial and sensitive topic of the operation of the Stability and Growth Pact (the basis for the Euro) were kept firmly under wraps. The Dutch Finance Minister, Gerrit Zalm, expressed concern that such debates on relatively technical matters would be highly unlikely to excite the interest of the citizenry: these topics, he said, were 'not attractive enough' to raise genuine public interest.¹⁵³ From a purely personal perspective, when the present author tried to access the webcast, he found that the media player chosen to run the broadcast on the Council's website was not easy to manipulate. There seemed to be no possibility to pause, rewind or skip ahead within the recording, which does not facilitate access for those minded to attempt to follow such matters. Still, the steps that are being taken are clearly ones in the right direction.

Other Transparency Developments and Initiatives in the EC Institutions¹⁵⁴

It should not be forgotten that issues of the transparency of decision-making and the accessibility of information are not only raised in connection with the activities of the Council. Indeed, the European Ombudsman has recently reported that a quarter of all complaints received by his office in 2005 concerned transparency questions, and 68 per cent of all complaints were directed against the Commission (with 2.2 per cent targeting the Council, 9.2 per cent the European Parliament and 11.6 per cent the European Personnel Selection Office).¹⁵⁵

The Commission launched its 'Transparency Initiative' in 2005,¹⁵⁶ which led to the publication of a Green Paper on a 'European Transparency Initiative' in the

¹⁵² See, eg, the comment by P Sain ley Berry, 'A webcast full of black holes' (14 July 2006, available at <http://euobserver.com/9/2207/?rk=1>).

¹⁵³ See Beunderman, n. 151, above.

¹⁵⁴ Comitology remains a contentious area in this regard and one too complex to engage with in any detail here. For the current Comitology Decision, see Council Decision 1999/468/EC of 28 June 1999 [1999] OJ L184/23. From a large and burgeoning literature, see, eg, K St Clair Bradley, 'Comitology and the Law: Through a Glass, Darkly' (1992) 32 *CMLRev.* 693; E Vos, *Institutional Frameworks of Community Health and Safety Regulations* (Oxford: Hart Publishing, 1998); C Joerges and E Vos, *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart Publishing, 1999); the House of Lords Select Committee on the European Union, *Reforming Comitology* (Session 2002–2003, 31st Report, HL Paper 135, 1 July 2003; also available at: <http://www.publications.parliament.uk/pa/ld200203/ldselect/ldcom/134/134.pdf>); and M Savino, 'The Constitutional Legitimacy of the EU Committees' (Paris: Centre d'Études Européennes, Cahiers Européennes, No. 03/2005; available at: <http://www.porteurope.org/IMG/pdf/TheConstitutionalLegitimacySAVINO.pdf>).

¹⁵⁵ Annual Report of the European Ombudsman 2005—Executive Summary and Statistics (13 March 2006, available at: http://www.ombudsman.europa.eu/report05/pdf/en/short05_en.pdf), esp. 28–29.

¹⁵⁶ See Commission Staff Working Document, 'Report of the Inter-departmental Working Group on a possible 'European Transparency Initiative' SEC(2005) 1300 final (November 2005, available at: http://ec.europa.eu/commission_barroso/kallas/doc/transp_report_en.pdf).

spring of 2006.¹⁵⁷ The consultation on the Green Paper ended on 31 August 2006. The issues to be covered are summarized as: 'fuller information about management and use of Community funds[,] professional ethics in the European institutions and the framework in which lobby groups and civil society organisations are operating'. In the first of these areas, the Commission will act to set up and develop a website covering the beneficiaries of EC projects and programmes, and to facilitate better scrutiny of the use of EU funds under centralized management. Other matters under review include: the possibility of requiring mandatory reporting of the beneficiaries of EU funds under shared Member State and EU management; a review of the legislation and practice on access to documents¹⁵⁸; and the suggestion that there is a need for a more structured framework for the activities of lobbyists and interest group representatives when they engage with the EU institutions.¹⁵⁹

Finally, on the issue of transparency and communication, it should be noted that the European Parliament has announced that it plans to launch its own internet TV channel.¹⁶⁰ An internal pilot programme will run from September 2006 and, if successful, the European Parliament hopes to launch a fully-fledged version in the second half of 2007.

In concluding on the topic of transparency, it must be acknowledged that some significant progress has been made in enhancing transparency in the legislative activities of the EC, even in the absence of the ratification of the TCE. Given the apparent success of pressure by the European Parliament in achieving improved Council transparency, it is to be expected that there will be more (and more regular) calls from the European Parliament, individual MEPs, national MPs and the press for further developments in this area, as well as scrutinizing ever more carefully other significant areas of policy-making and decision-taking which suffer from excessive opacity.¹⁶¹

¹⁵⁷ Commission Green Paper, 'European Transparency Initiative' COM(2006) 194 final (3 May 2006) (available at: http://ec.europa.eu/commission_barroso/kallas/doc/com2006_0194_4_en.pdf). For access to the consultation responses and other information, see: http://ec.europa.eu/commission_barroso/kallas/transparency_en.htm#1.

¹⁵⁸ Regulation 2001/1049/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43. Council Decision 1999/468/EC on access to Council committee documents, insofar as they are Council documents, see in particular Annex II ('Specific Provisions Regarding Public Access to Council Documents') to the Council's Decision of 22 July 2002 [2002] OJ L230/21. For recent discussion of the operation of the latest legislation, see B Driessen, 'The Council of the European Union and Access to Documents' (2005) 30 *ELRev.* 675 and D Chalmers, C Hadjiemmanuil, G Monti and A Tomkins, *European Union Law* (Cambridge: CUP, 2006), 317–329.

¹⁵⁹ See COM(2006) 194 final (n. 157, above), section I.

¹⁶⁰ M Beunderman, 'Parliament set to launch own web TV channel' (12 July 2006, available at <http://euobserver.com/9/22073?rk=1>). Recordings and live broadcasts of European Parliament sessions are also now available on the European Parliament's website, at: http://www.europarl.europa.eu/eplive/public/default_en.htm?language=EN.

¹⁶¹ For a recent example of further disquiet about the opacity of meetings relating to EU matters, see House of Lords European Union Committee, *Behind Closed Doors: the meeting of the G6 Interior Ministers at Heiligendamm* (40th Report of the 2005–2006 Session, HL Paper 221, 19 July 2006; available at: <http://www.parliament.the-stationery-office.co.uk/pa/ld200506/ldselect/lddeucom/221/221.pdf>), in which the Committee provides strong criticism of the UK government's failure to publicize and report

National Parliaments and the Subsidiarity Mechanism

The Presidency Conclusions from the Brussels European Council (16 June 2006) place great emphasis on the importance of these linked issues of the role of national Parliaments and the enhancement of the assessment of the principle of subsidiarity. Indeed, these topics are closely related to the transparency questions discussed under the heading Improving the transparency of EC proceedings (particularly in the legislative process), above: after all, if the Council deliberates and takes decisions in secret, then national Parliaments will lack any (let alone adequate) access to the information that they require if they are to hold their respective national governments to account for actions on the European level in the name of their particular Member State.¹⁶² And the national electorate will have no means by which to judge national political parties on their performance on European issues. Thus, improvements in transparency of the kind canvassed in the immediately preceding paragraphs have a vital knock-on effect upon the extent to which national Parliaments can play a genuine and significant role by feeding their thoughts and concerns into the EC's legislative and policy-making processes.

Preliminaries: thoughts on the role of national Parliaments in the implementation of EC law

One important element in framing the role of national Parliaments concerns the classic idea of EC directives as an instrument of subsidiarity, allowing a degree of national level discretion to be exercised, so as properly to incorporate the EC rules into the national legal system.

Yet there are, it may be argued, flaws in this reasoning, at least when its operation is observed in practice. In general terms, the ECJ's case law under Article 226 EC concerning Member States' failure to implement such directives has often required such a degree of clarity in that implementation that verbatim adoption of the EC directive's wording in national law seems the only safe course.¹⁶³ More

to Parliament on the practice of the Interior Ministers from the G6 (France, Germany, the UK, Italy, Spain and Poland) of meeting at regular intervals to discuss how to take forward EU policy on security and justice and home affairs matters (in particular, on immigration). See, eg, paras. 12 and 13 of the Report: 'Ministers returning from Council meetings are expected to report back by written ministerial statement; the same should apply to meetings of the G6. The Home Office should publish the Conclusions of all G6 meetings—in English. We recommend that the results of subsequent G6 meetings should be fully publicized by the Home Office. A written ministerial statement should be made to Parliament. The papers should be sent to this Committee, and to the Commons European Scrutiny Committee and Home Affairs Committee'.

¹⁶² See, eg, M Höreth, *Die Europäische Union im Legitimationstrilemma: Zur Rechtfertigung des Regierens jenseits der Staatlichkeit* (Baden-Baden: Nomos, 1999) and I Pernice, 'The Role of National Parliaments in the European Union' in D Melissas and I Pernice (eds.), *Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004* (Baden-Baden: Nomos, 2002) (also available at http://www.ecn.net/elements/constitutional_debate/perspective2004/content.html).

¹⁶³ See T Weir, 'Difficulties in Transposing Directives' *ZEUP* 2004, 595 and AC Johnston and H Unberath, 'Law at, to or from the centre? The European Court of Justice and the Harmonisation of

specifically, concerning the role for national Parliaments, meanwhile, much will depend upon national constitutional arrangements and how they operate *vis-à-vis* EC law and its incorporation in the national legal order. For example, in the UK the vast majority of implementation takes place via secondary legislation adopted by the relevant Minister, under the auspices of the European Communities Act 1972, subject only to approval by Parliamentary resolution. This itself relies upon the interest and diligence of MPs in scrutinizing such use of these delegated legislative powers: this scrutiny is not always as rigorously conducted as it might be.¹⁶⁴

On the other hand, for national Parliaments to be able to play their part in the system of dual legitimation, they have to be kept informed of the progress of legislation through the Council's decision-making process. Machinery was created for this purpose by a Protocol, which was annexed to the EC Treaty by the Treaty of Amsterdam. A Protocol on the application of the principles of subsidiarity and proportionality was annexed by the same Treaty to the EC Treaty. The TCE's wording significantly strengthened the two Protocols, which are discussed in the following paragraphs.

*The TCE and national Parliaments*¹⁶⁵

It is worthwhile to remind ourselves of the provisions of the TCE that would have enhanced the role of national Parliaments, before moving to discuss whether, and if so how, similar developments might be brought about even in the absence of the ratification of the TCE.

(a) Protocol 1 to the TCE: the role of Member States' Parliaments in the European Union

The new version of the Protocol makes it a legal requirement that draft legislative acts originating from the Commission be 'forwarded to national Parliaments *directly* by the Commission, *at the same time as* to the European Parliament and the Council'.¹⁶⁶ It is further provided that '[t]he agendas for and the outcome of meetings of the Council, including the minutes of meetings where the Council is deliberating on draft European legislative acts, shall be forwarded directly to national Parliaments, at the same time as to Member States' governments'.¹⁶⁷ Adherence to these provisions should at least keep national Parliaments informed of EC

Private Law in the European Union', Ch. 5 in F Cafaggi (ed.), *The Europeanization of Private Law* (Oxford: OUP, 2006).

¹⁶⁴ See *Oakley Inc. v Animal Ltd.* Litigation: [2005] EWHC (Ch.) 210 and EWHC (Pat.) 419, [2005] Eu LR 713, overturned by the Court of Appeal: [2006] Ch 337, concerning a challenge made against use of s. 2(2) European Communities Act 1972. The issue was exactly what the government may do when implementing (eg not covering measures that are not *mandated* by an EC obligation): see M Howe, '*Oakley Inc v Animal Inc: Designs Create a Constitutional Mess*' (2006) 28 *EIPR* 192, for discussion of the Court of Appeal's judgment.

¹⁶⁵ These paragraphs are closely based upon Dashwood & Johnston (2004) (n. 25, above), 1487–1490.

¹⁶⁶ Protocol 1, Art. 2, third para. (emphases added): this is instead of leaving it to the Member States to pass on the information, as under Art. 2 of the current Protocol.

¹⁶⁷ Protocol, Art. 5.

legislative activity and better equip them to scrutinize matters in a careful and timelier fashion.

(b) Protocol 2 to the TCE: the application of the principles of subsidiarity and proportionality

The main change to this Protocol is the establishment of a procedure giving national Parliaments a formal role in helping to ensure compliance with the subsidiarity principle. According to Article 5 of the Protocol, any national Parliament, or any chamber of a national Parliament which is bi-cameral, will have six weeks from the date of transmission of a draft European legislative act, in which to send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers the draft does not comply with the principle of subsidiarity. According to Article 6, second paragraph, for the purposes of this procedure, national Parliaments are to have two votes, one of which must go to each chamber of a bi-cameral Parliament, like that of the UK. If reasoned opinions challenging a measure's compatibility with the subsidiarity principle represent at least a third of all the votes allocated to the national Parliaments (currently, one third of 50, ie 17), the Institution which originated the draft is required to review it. Following such a review, the Institution concerned may decide to maintain, to amend or to withdraw the draft, and it must give reasons for its decision. If it opts to maintain the draft, and the measure is one that requires the approval of the Council (as legislative acts normally will), voting for its adoption would clearly entail a substantial political risk for any Minister from a Member State whose Parliament had sent in a written opinion on the issue of subsidiarity.

There is also an intriguing rider added by Article 7 of the Protocol to the jurisdiction of the Court of Justice under Article III-365 TCE, which is the provision equivalent to the present Article 230 EC. Judicial review is to be available, on grounds of infringement of the principle of subsidiarity by a European legislative act, not only in proceedings actually *brought* by Member States, but also in proceedings 'notified by them in accordance with their legal order *on behalf of their national Parliament or a chamber of it*'.¹⁶⁸ In other words, an action will be admissible in which the effective protagonist is not the government of the Member States concerned, but its Parliament or one of the chambers of the national Parliament (in which, perhaps, the government may not, for the time being, command a majority). The wording appears to have been carefully chosen, so as to avoid appearing to confer on national Parliaments a legal right under the TCE, which might conflict with constitutional arrangements in the Member States. However, governments would surely find it hard to deny their Parliaments the possibility of taking advantage of this facility, which the TCE would offer them.¹⁶⁹

¹⁶⁸ Emphasis added.

¹⁶⁹ See the earlier, and fuller, discussion of the reinforcement of the subsidiarity principle in AA Dashwood, 'The Draft EU Constitution—First Impressions' (2002) 5 *CYELS* 395, 405–407.

It must be conceded that there are potential dangers in this proposed enhancement of the role of national Parliaments. For example, real or perceived fears of excessive (or excessively intensive/intrusive) action at EC level among the national electorate and/or parliamentarians may prompt increased mistrust of EC institutions and legal rules. The robust response to this must be that this risk must be run as the price of increased transparency and better communication of the EC's activities. On the other side of the same coin, it is possible that greater appreciation of the nature of the EC's powers and proposed activities may instead increase mistrust by national electorates of *national* political institutions: either because they seem powerless¹⁷⁰ to affect such matters or because they are seen as complicit in this process.

Procedural provisions (transparency, timing, judicial review?)

What if a national Parliament's view is at odds with that adopted and developed (even promoted) by its own government in negotiations concerning the proposed EC measure: how can the national Parliament get its view across? Can it force its own government to change tack? The current Danish approach to national Parliamentary scrutiny of such European matters effectively empowers the parliamentary scrutiny committee on EU affairs to direct the Danish government to act in a certain way—thus far, the Danish government has always followed such directions in its actions on the European level.¹⁷¹

A further question is: what if national Parliaments' views against a proposed EC measure reach the threshold required to force their concerns to be considered at the European level, and yet the EC institutions proceed with the measure anyway? Will the national Parliaments be able to get their respective governments to bring an action on the Parliaments' behalf against the EC measure(s) subsequently adopted? Possible alternative approaches might involve: a national MP seeking standing in a national court for a declaration that the national government should bring such an action before the ECJ; or a national MP seeking a declaration preventing the implementation of any EC measure adopted in the face of the concerns of the national Parliaments (which might involve the national court deciding to make an Article 234 EC reference to the ECJ on the matter). On the question of such legal avenues of redress, former European Commissioner Vitorino has stated that no judicial review was intended by the TCE so far as the *withdrawal* of draft acts was concerned: instead, it was to be available only concerning *ex post*

¹⁷⁰ Cf. F Duina and M Oliver, 'National Parliaments in the European Union: Are There Any Benefits to Integration?' (2005) 11 *ELJ* 173, for a more optimistic assessment of how the EC law-making and implementation process may have actually empowered national Parliaments in other areas: eg expanding the range and extent of topics within the reach of national Parliaments and facilitating cross-learning between national Parliaments, thus making the legislative process more efficient.

¹⁷¹ See Art. 6(2) of the Danish Law on accession to the EC (11 October 1972) and, eg, the discussion in J Alboek Jensen, 'Prior Parliamentary Consent to Danish EU Policies', in E Smith (ed.), *National Parliaments as Cornerstones of European Integration* (The Hague: Kluwer Law International, 1996), generally and at 45.

challenges to the validity of legislation once adopted.¹⁷² If the subsidiarity mechanism (whether via Treaty amendment or other constitutional reform process) is to convince electorates and national politicians alike that it is more than mere window-dressing, questions relating to the consequences of national Parliaments' concerns being raised and (possibly) not addressed must be given convincing answers. These answers must apply both at the stage that allows such concerns to feed into (and inform) the EC legislative process, and subsequent to the adoption of legislation which is challenged by national Parliaments on subsidiarity grounds.

EU Institutional commitments to involve national Parliaments

From the typology of methods for effecting constitutional change discussed under the heading 'Typology: Approaches to Effecting Constitutional Change in the EU', above, securing the possible introduction of an enhanced role for national Parliaments, in particular via the TCE-designed subsidiarity mechanism, seems well suited to the use of some form of EC institutional practice or commitment. Indeed, the Commission has already suggested that it wishes to take one step down the road of introducing the provisions of the TCE: in its 'Citizen's Agenda',¹⁷³ it clearly stated that it 'wishes to transmit directly all new proposals and consultation papers to national parliaments, inviting them to react so as to improve the process of policy formulation'. This, however, would provide less certainty that national Parliaments' views would be factored into the decision-making process than the TCE's mechanism, lacking as it does the formal requirement to review draft legislative proposals if sufficient weight of national Parliamentary opinion requires it. On the other hand, the Commission's proposals do extend more broadly in their coverage of consultation papers as well as draft legislative proposals.

One means for adding teeth to the potential role of national Parliaments would be for the EC institutions to adopt an Inter-Institutional Agreement ('IIA'), in which they would lay down the procedures for communicating with, *and*, importantly, how they intend to deal with contributions that they receive from, national Parliaments. This could form the basis for holding the EC institutions to these stated policies and procedures, by means of the enforcement of the procedural legitimate expectations¹⁷⁴ that would be raised in national Parliaments. Such an IIA could also adopt certain statements to clarify the answers to some of the questions raised under the heading above, 'Procedural Provisions (Transparency, Timing, Judicial Review?)'.

¹⁷² Written evidence to the House of Lords Select Committee on the European Union on the Subsidiarity Early warning Mechanism (20 January 2005) (available on the internet at the following address: <http://www.publications.parliament.uk/pa/ld200405/ldselect/ldcom/999/999we01.htm>).

¹⁷³ Commission Communication, 'A Citizen's Agenda: Delivering Results for Europe' COM(2006) 211 final (10 May 2006) (available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0211en01.pdf), at 9.

¹⁷⁴ See, eg, Case 120/86 *Mulder v Minister van Landbouw en Visserij* [1988] ECR 2321 and the discussions in T Tridimas, *The General Principles of EC Law* (Oxford: OUP, 2nd edn., 2006), Ch. 5, and S Schönberg, *Legitimate Expectations in Administrative Law* (Oxford: OUP, 2000).

On a note of caution, however, perhaps one should not be over-optimistic about the degree of improvement that such reforms would bring to the law-making and policy-formulation processes in the EU, given the ECJ's approach to the scrutiny of subsidiarity arguments under the current Treaty arrangements¹⁷⁵ and the criticisms of how some EC legislation has been justified on subsidiarity grounds.¹⁷⁶ Nevertheless, the degree of communication and scrutiny that even the functioning of this process may bring with it are, it is submitted, sufficient reason to pursue the greater involvement of national politicians in this process.

Actions at national levels

It is hoped that the foregoing discussion has shown that some action can, and should, be taken at the EC level to enhance the role of national Parliaments. It would, however, be negligently unbalanced to present this topic without underlining that responsibility for helping this complex system of scrutiny, legislation and implementation to function effectively also lies squarely at the level of national Parliaments themselves.

(i) Information, scrutiny and accountability mechanisms in national Parliaments
Those changes to the Protocols will only make a practical difference, however, if appropriate procedures for the scrutiny of EU legislative proposals are in place at the national level, and if parliamentarians are willing to invest the time and political energy necessary, in order to hold Ministers more effectively to account for Council decisions in which they have taken part. Experience to date of parliamentary scrutiny, in most of the Member States of long standing, gives scant cause for optimism¹⁷⁷; and concern may be felt about the additional strain that coping with EU legislation will place on the young democratic institutions of some of the Union's recent Members, as well as those of the more established Member States, who risk being swamped by a torrent of EC documentation. Nevertheless, it may be hoped that members of national Parliaments will be spurred on to greater efforts by the enhanced role they are called upon to play under the TCE, more

¹⁷⁵ See, eg, Case C-84/94 *UK v Council* ('The Working Time Directive case') [1996] ECR I-5755 and Case C-491/01 *R. v Secretary of State ex parte BAT and Imperial Tobacco* [2002] ECR I-11543 and S Weatherill, 'Better Competence Monitoring' (2005) 30 *ELRev.* 23. Although cf. Case C-376/98 *Germany v Parliament and Council* ('The Tobacco Advertising case') [2000] ECR I-8419, for some possible indications of more careful ECJ scrutiny of EC competence.

¹⁷⁶ See, S Weatherill, 'Better Competence Monitoring' (2005) 30 *ELRev.* 23 and, further, the strong critique of G Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 *CMLRev.* 63.

¹⁷⁷ In general, see C Harlow, *Accountability in the European Union* (2002), Ch. 4; A Cygan, *The United Kingdom Parliament and European Union legislation* (1998); E Smith (ed.), *National Parliaments as Cornerstones of Integration* (1996); V Bogdanor, 'Britain and the European Community' in J Jowell and D Oliver, *The Changing Constitution*, (3rd edn, 1994). See, for a relatively optimistic assessment of the prospects for reinforced scrutiny, T Raunio, 'Towards Tighter Scrutiny? National Legislatures in the EU Constitution', Federal Trust Online Paper No. 16/04 (available at: <http://www.fedtrust.co.uk/default.asp?groupid=0&search=raunio>).

particularly with respect to the subsidiarity principle: they, after all, have the most immediate interest in ensuring that complied with the principle is strictly enforced. It has even been argued that participation in the legislative process of the Union may reinvent a culture of government accountability at the national level.¹⁷⁸

(ii) Coordination *between* National Parliaments

It is not only the 'vertical' relationship between national Parliaments and the decision-making institutions of the EU that is likely to prove increasingly important, but also the 'horizontal' relationship of national Parliaments *inter se*. A measure of mutual constitutional trust will be necessary, if the best use is to be made of the possibilities which have been created by strengthening the two Protocols, especially the introduction of the subsidiarity mechanism. The loose framework for inter-Parliamentary cooperation, which is provided by Title 2 of the Protocol on the role of Member States' national Parliaments in the EU, may be found to require further articulation.

Why are Reforms in the Areas of Transparency and National Parliaments and Subsidiarity Appropriate Issues to be 'Cherry-Picked' from the TCE?

The first and obvious point to make is that it is legally *possible* to make both sets of reforms (on transparency, national Parliaments and subsidiarity) within the current Treaty framework, whether via changes to the relevant procedural rules or by the adoption of new consultation, communication and publicity policies.

Second, and significantly in terms of linking proposed reforms to concerns voiced during the ratification process, a decision to enhance the transparency of the legislative process (and, indeed, of the activities of the other activities of the institutions) is fully consistent with a variety of possible visions for the future direction of the EU. A similar argument applies to the timelier and more consistent involvement of national Parliaments in the process of law- and policy-making in the EU.

Increased transparency can facilitate and enhance public, press and political scrutiny of the activities of the EU, which can be used both, on the one hand, to explain and justify more clearly what the EU does and how it does it and, on the other, to criticize those aspects of the EU and its operation that cause concern and consternation among citizens, politicians and interest groups alike. It may result in the enhancement of some kind of feeling of European identity across the borders of Member States (perhaps along interest or pressure group lines), but it may equally lead to greater scepticism of the utility of EU activity in a variety of areas. Equally, the greater involvement of national Parliaments via more rapid and intense communication of policy and legislative proposals, and particularly the opportunity

¹⁷⁸ See J. Mather, *The European Union and British Democracy: Towards Convergence* (Basingstoke: Macmillan, 2000), who argues (*inter alia*) that the benefit may be felt not only *vis-à-vis* European policy issues but also in the overall conduct of policy-making, debate and government in the UK.

publicly to voice their concerns and even to trigger reconsideration of such proposals at European level, is likely to have a similar effect in raising awareness and even interest in such matters, with similarly potentially double-edged consequences. The point is that the choice to increase the transparency of the activities of the EU institutions, and to enhance the role of national Parliaments in their operation and scrutiny, does not prejudice such substantive questions, and may prove effective in facilitating better consultation and discussion of just such substantive concerns.

CONCLUSIONS

It is a truism of fruit harvesting that in any such process (whether picking cherries or otherwise) it is usually much easier and less time-consuming to pick the low-hanging fruit. The recent history of the EU 'after the "No"-s' has been an illustration of this basic truth, although even here the harvest has been fraught and subjected to occasionally unexpected interruptions from sharp storms in some areas and persistent droughts in others. This chapter has taken a necessarily interim, incomplete and selective look at events since the adoption of the TCE and has attempted to draw together some of the strands in the debate concerning how the EU might move its constitutional reform forward in the months and years to come.

One positive element to take from the results of the referendums in France and the Netherlands and subsequent events is that the profile of events relating to the EU and its activities has been raised. There are, naturally, some indications that this has not always had beneficial effects, whether viewed in terms of levels of support for the EU and its policies or in terms of the quality and accuracy of information being communicated. For example, a pair of Eurobarometer surveys on citizens' views on the EC's role in energy policy¹⁷⁹ suggests that support for the EC playing a key role in strategic energy decisions has waned markedly over the eight months to July 2006. The EC's approach in the energy sphere has come to the fore recently for a number of reasons, many of which relate to global political and economic developments outside the EC's control and influence. However, the Commission's scrutiny¹⁸⁰ of national government resistance in France and Spain to foreign take-overs of energy assets has highlighted the potential impact of the EC competition and the internal market rules upon national energy policy priorities and has

¹⁷⁹ See Special Eurobarometer 247, *Attitudes towards Energy* (January 2006, available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_247_en.pdf) and the recent report by L Kubosova, 'Public support for EU energy policy wilts' (12 July 2006, available at <http://euobserver.com/9/22078>).

¹⁸⁰ See Commission Press Releases IP/06/802, 19 June 2006 (re Suez-GdF, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/802&format=HTML&aged=0&language=EN&guiLanguage=en>), IP/06/437, 4 April 2006 (re Spanish legislation restricting foreign investment in energy companies, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/437&format=HTML&aged=0&language=EN&guiLanguage=en>) and the recent report that the Commission has sent a letter to the Spanish government concerning the E-On-Endesa merger (see L Kirk, 'Energy merger pitches Spanish government against EU' (8 August 2006, available at: <http://euobserver.com/9/22217/?rk=1>)).

reinforced the profile of EC activity and its potential impact. This has been underlined by both the Sector Inquiry by DG COMP into the energy sector and the Commission's Green Paper on 'A European Strategy for Sustainable, Competitive and Secure Energy'.¹⁸¹ At the same time, part of the reason for public attitudes towards the desirability of an (expanded) EC role in this sphere may be based upon misperceptions of what the EC currently has the power to do, whether as an absolute matter of Treaty competence or due to inability to agree upon any given course of action. As the same recent Eurobarometer survey reports, the 'EU does not have a direct impact on taxes which are levied by member states on energy, in particular petrol for cars', which is clearly a key energy concern of the vast majority of European citizens, given rapidly rising petrol prices and increasing levels of car use.¹⁸²

This chimes with the proposal by Moravcsik and Nicolaïdes to focus future reform efforts upon a combination of, on the one hand, clear policy development on concrete issues of genuine citizen interest and, on the other, the careful conduct of what one might term 'expectation management'¹⁸³ on the part of the citizens of the EU.

European leaders should be as explicit as possible about the limits and constraints on the European Union. . . . The unique genius of the EU lies precisely in its ability to lock in intense interstate policy co-ordination while respecting the powerful rhetoric and symbols that still adhere to national identity. Publics will be reassured if the EU is portrayed as stable and successful in helping nation-states achieve their goals, rather than as an effort to supplant them.¹⁸⁴

It has been one of the purposes of this chapter to show, first, that such policy initiatives and expectation management are aided by improved communication concerning the nature of the Union, and of its powers and activities. It is submitted that the two specific areas discussed in the preceding section—of transparency and the involvement of national Parliaments in assessing subsidiarity—are both good illustrations of concrete steps forward that can be taken by the EU during the period of reflection. Further, their implementation should assist in enhancing the communication necessary between, on the one hand, the EU, its officials and parliamentarians and, on the other, institutions, representatives and citizens at national, regional and local levels. Those who argue that pursuing action in these two areas would somehow illegitimately amount to the implementation of the TCE by the

¹⁸¹ COM(2006) 105 final (8 March 2006) (for details on the Green Paper and consultation thereon see, generally, http://ec.europa.eu/energy/green-paper-energy/index_en.htm), although, somewhat ironically, the latest Eurobarometer report comments that 'during autumn 2005 and spring 2006, the action of the EU was not visible' (see Kubosova, n. 179, above).

¹⁸² See Kubosova, n. 179, above.

¹⁸³ See also on this point, and in similar vein, the contribution made by JQT Rood (available at: http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/rood_/rood_en.pdf) to the European Parliament's *Symposium on the Future of the Constitutional Process of the European Union* (13 and 14 October 2005): available at http://www.europarl.europa.eu/meetdocs/2004_2009/organes/afco/afco_20051013_1500_symposium.htm.

¹⁸⁴ Moravcsik & Nicolaïdes (2005), (n. 107, above), section 4.

back door should be mollified by the realization that increased transparency and scrutiny at national level of EU activities does not commit the EU, its Member States and citizens to any particular vision or theory of the EU and its future development. Instead, these measures are consistent with many approaches to the EU and may help to facilitate better understanding of the organization that we now have and how it came to take the form that it currently possesses, as well as to encourage informed debate about where it should go from here.

If this increased transparency, communication and explanation of what the EU is, what it does, and how and why it does it can be improved steadily in the coming years, then there is scope for some optimism about possible future Treaty changes. The current period of reflection may cause great scepticism about this claim, as it is currently hard to see exactly what the best route may be to achieve changes to the founding Treaties. However, if the procedures and substance of future negotiations leading to proposed amendments to those Treaties could better reflect some of the legitimacy criteria discussed under the heading above, 'Typology: Approaches to Effecting Constitutional Change in the EU', then an enhanced understanding of the EU by the electorate is by no means an impossible dream. The inevitable package deal which any such future Treaty amendment will have to embody will require clear explanation and justification, but if that is conducted in a climate of better information and understanding of what is (and, importantly, what is *not*) at stake, future referendums will have a greater chance of success.

As things stand, *grammatici certant, et adhuc sub iudice lis est*.¹⁸⁵ The consequences of the process that created the TCE, and the events that have followed its adoption by the Member States in 2004, have been, first, a substantial amount of quarrelling among scholars and others alike and, second, a realization that the judges who will rule on this case are likely to be greater in number than ever before in the history of the EU to date. The challenge of the years ahead will be to get them to deliver a verdict that is both workable and widely acceptable for the EU of the future.

Appendix 1: Extract from the Presidency Conclusions from the Brussels European Council (16 June 2006)

An Overall Policy on Transparency

With a view to further increase openness, transparency and accountability, the European Council agrees on the following measures aiming at a stronger involvement of citizens in the work of the Union:

- All Council deliberations on legislative acts to be adopted by co-decision shall be open to the public as shall the votes and the explanation of votes

¹⁸⁵ 'The scholars quarrel, and the case lies still undecided in the hands of the judge' (or, less prosaically, 'on that point the learned disagree'): Q Horatius, *Ars poetica* in *The Satires of Horace and Persius* (London: Penguin, 1974).

by Council Members. The Council or Coreper may decide in individual cases that a given deliberation should not be open to the public.

- The Council's first deliberations on legislative acts other than those adopted by co-decision, which given their importance are presented orally by the Commission in a Council session, shall be open to the public. The Presidency may decide in individual cases that the Council's subsequent deliberations on a particular act shall be open to the public, unless the Council or Coreper decide otherwise.
- The Council shall regularly hold public debates on important issues affecting the interests of the Union and its citizens. Such debates will be held further to a decision by the Council or Coreper, acting by qualified majority. Implementation of this commitment shall start during the incoming Presidency, which would submit proposals for such public debates taking into account the importance of the matter and its interest to citizens.
- The General Affairs and External Relations Council's deliberations on the 18 month programme shall be public, as shall other Council formations' deliberations on their priorities. The Commission's presentation of its five year programme, of its annual work programme and of its annual policy strategy, as well as the ensuing debate, shall be public.
- All public deliberations shall be broadcasted [*sic*] in all languages through video-streaming and there shall be an obligation for a recorded version to remain available for at least a month on the Council's internet site.
- The incoming Presidency is invited, together with the General Secretariat of the Council, to develop new means of giving more publicity to public deliberations, in particular through the Council's web site and mailing list, an easily accessible and constantly updated list of forthcoming debates, appropriate background material, as well as direct communication to target audiences. They will work closely together to provide the media and citizens with an open, rapid and technically advanced communication service.
- The General Secretariat of the Council shall inform the public in advance of the dates and approximate time on which public debates will take place and shall take all practical measures to ensure proper implementation of the rules of transparency.