PEOPLE'S MOVEMENT
GLUAISEACHT AN PHOBAIL

The People's Movement campaigns against any measures that further develop the EU into a federal state and to defend and enhance popular sovereignty, democracy and social justice in Ireland.

A Brief Critique of the Provisions of the Proposed Constitution for Europe

It was argued that the changes made by the Nice Treaty were necessary to facilitate the enlargement of the EU. It is logical that the need for any further institutional developments should be assessed following a period of operation of these changes. However, this proposed Constitution was drafted before the provisions of Nice came into force. As Martin Howe, QC has said: *'This demonstrates that the process of EU centralisation has developed a momentum of its own that has virtually disconnected the process from external events or objective justifications. Issues such as enlargement are merely used as a pretext to justify an agenda that is pursued with quasi-religious enthusiasm for its own sake'.*

THE ORIGINS OF THE CONSTITUTION.

The Laeken Declaration of Heads of State and Government of December 2001 declared the following objectives for the EU:

- **The Union must be brought closer to its citizens;**

  But the proposed Constitution means that more decision – making is transferred to the Union in domestic policy and criminal justice matters – making the Union more remote. In excess of twenty-seven new policy areas would be shifted from national parliaments to Brussels, and not a single power would be repatriated to the Member States.

- **The division of competencies must be made more transparent;**

  Instead, a new category: "shared competences" would be created. No assurances are given regarding power sharing, as Member States are forbidden to legislate in these areas if the Union decides to act.

- **The union is behaving too bureaucratically;**

  Presently, the *Acquis Communautaire* or laws and regulations of the EU is comprised of 97,000 pages. Additionally, the Constitution proposes the creation of a new legal instrument. This "non-legislative act" allows unelected Commission to pass binding laws.

- **There must be more transparency and efficiency;**

On the contrary, the Constitution would concentrate more power in those institutions repeatedly accused of waste, fraud and mismanagement.

Most importantly, the Laeken Declaration suggested the *possibility* of a Constitution; "The question ultimately arises as to whether this simplification and re-organisation might not lead *in the long run* to the adoption of a Constitutional text of the Union". This suggestion was rapidly seized upon by the Euro-federalists, who set about undemocratically drafting a Constitution. Some members of the Convention were even refused the right to have their amendments translated, distributed, discussed and voted upon.

Gisela Stewart (U.K. Parliament Rep. on the Convention) reported that: *'Not once in the 16 months that I was on the Convention did representatives question whether deeper integration is what the people of Europe want, whether it serves their interests or whether it provides the best basis for a sustainable structure for an expanding Union'.*

Introduction.

The Convention that drafted the Constitution was fundamentally undemocratic. Ireland was represented by just three politicians, Dick Roche TD, Proinsias de Rossa TD and John Bruton TD. John Gormley (Green Party) and Pat Carey (FF) were alternate members. Its 105 members consisted of:

1. Two representatives from each national parliament of the EU Member and Applicant countries,

2. One from each national Government, and

3. Representatives of the European Parliament and the EU Commission. The Constitution was adopted *"by consensus***"** at the EU Convention.

No votes were taken on the over 1,000 amendments submitted and only a few were even considered.

This is the *"convention method"*, so supportive of the aims of Euro- federalists. It enables new measures to be taken to advance integration, without their desirability having being considered by the voters of the Member States, or by their national parliaments. The Convention's composition of *nominated* representatives provided a veneer of democratic authority for the elitist project of creating a Constitution for the EU.

A similar non-elected Convention was used to draft the EU Charter of Fundamental Rights, which was *never discussed by any national parliament.* It is intended that this Charter be made legally binding as Part II of the proposed Constitution.

The adoption of this Constitution would result in a more centralised and undemocratic EU under the control of the larger member states, particularly France and Germany.

Overview.

- The outstanding provision of the proposed Constitution is one that gives it primacy over the constitutions of its Member States.

- It re-establishes the EU on an entirely new basis.

- It establishes an EU government with a President, a Foreign Minister and a European Public Prosecutor.

- It enhances the power of The European Court of Justice, which will interpret and apply a Code of Fundamental Rights.

- It proposes to abolish the national veto in twenty – seven new policy areas.

- It makes the size of a country's population the determinant for legislating in the new EU.

An Analysis of the Major Articles of the Proposed Constitution.

EU LAW WOULD HAVE PRIMACY OVER THE LAW OF MEMBER STATES

The most notable Article of all, Article I-6 provides that: *"The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States."* Member states would become subsidiary states within a greater European State, which would take precedence in representing them internationally. This Article blatantly exposes the planned federal character of the EU. An earlier Draft proposed that the EU exercise *"certain common competences on a federal basis."* Irish politicians objected, fearing a backlash from the electorate. The Constitution now sets up a smokescreen and refers to the exercising of common competences *"in the Community way."* (Article I-1). The word 'federal' subsequently disappeared to be replaced with the vague phrase *"the Community way"*. However, even a cursory reading quickly reveals the federal nature of this Constitution.

No EU treaty has ever claimed primacy of EU law over national law, as proposed in Article I-6 of the Draft Constitution. This doctrine has been diligently developed over the years in the case-law of the EU Court of Justice (ECJ), but it has not been accepted by the German, French or Italian Constitutional Courts. These have rejected the contention that EU law has the supremacy of federal law and have held that EU law is binding in national law only to the extent that national law allows. The draft Constitution abrogates this position by formally stating that the ECJ, like the Supreme Court of any Federal State, has the legal power to define its own powers. This amounts to a Constitutional revolution. Article I-6 is seeking to embed the Constitution within the legal systems of the Member

States so that it supplants the national constitutions as the fundamental source of legal authority. The national courts will then be required to be totally compliant with the EU Constitution.

An important point to note is that EU governments accepted the ECJ's affirmation of the dominance of EU law in the 1960s, when the then EEC dealt with a narrow range of issues. It is one thing for Member States go along with a principle applied to a restricted range of matters like customs duties or tariffs. It is quite another to forfeit national sovereignty to an EU Constitution whose writ covers everything from tax policy to fundamental human rights.

THE EU ACQUIRES LEGAL PERSONALITY AND REQUIRES LOYAL COOPERATION FROM MEMBER STATES

The proposed Constitution alters the legal relationship between the EU and its Member States. It makes the EU an international entity with its own legal personality, separate from and superior to its Members. Article I-1 states: *"…this Constitution establishes the European Union on which the Member States confer competencies.* Competencies is another word for 'powers'. This is not the European Union established by the Maastricht Treaty in 1992 but is a radically different entity. For example, the EU rather than its Member States will have the power to sign and negotiate international treaties and conventions.

Article I-5 (2) states that: *"Following the principle of sincere (formerly loyal) cooperation, the Union and the Member States shall … assist each other in carrying out tasks which flow from the Constitution."* The word "*loyal*" forcefully demonstrated the EU's constitutional dominance over its Member States while Article I-7 grants the EU independent legal personality, allowing it, for example, to negotiate international treaties independent of its Member States.

Article I-5 continues: *"Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the objectives set out in the Constitution."* National governments must give priority to Union objectives, *even in areas of policy that have not been transferred to the EU,* because of the all encompassing range of the Union's objectives, even if the Union's objectives conflict with democratically decided national policy objectives.

You can judge for yourself whether Taoiseach Bertie Ahern was correct when he claimed that the draft Constitution "*does not fundamentally change the relationship between the EU and its member-states." (Irish Times* 24-10-2003).

NEW 'LAWS' WOULD REPLACE DIRECTIVES AND REGULATIONS.

Article I-33 (1) provides that the terms *"European laws"* and "*European framework laws"* shall replace the words "regulations" and "directives" used at present.

THE DOUBLE MAJORITY RULE

Article I-25 (1) would replace the qualified majority weighted voting system recently agreed in the Nice Treaty. Under this system the qualified majority required to pass an EU

law is at least 72% of the votes in a 25-member EU. It is proposed that from 2009, a 55% Member States (at least 15) representing 65% of the EU's population could make EU laws. This is known as the "double majority" rule. This change would make EU laws much easier to pass, provided the bigger states with large populations agree with them. They would also find it easier to assemble a blocking minority – at least four member states – in order to prevent the enactment of measures they disagree with.

Under the Nice Treaty rules Ireland has 2% of the weighted votes, while under the Draft Constitution's population criterion it would have 0.7% - effectively our relative power would be reduced by a further factor of four! Under the proposed Constitution, some 40% of the power to make EU laws would be held by the four largest nations, Germany, France, Britain and Italy. In an EU of twenty-five States, twelve States could be outvoted and have a measure imposed on them by 13, as long as the latter contained 60% of the EU population.

AN INCREASE IN POWER FOR BOTH PARLIAMENT AND COMMISSION

The Commission, with its monopoly in proposing EU laws and setting the legislative agenda, would have a wider range of measures to propose. The European Parliament, with its power to amend EU laws emanating from the Council of Ministers, would get more laws it could amend. The Draft Constitution also extends the range of laws coming from the Council of Ministers that the Parliament is given power to amend under the so-called *"co-decision procedure."* This gives the Parliament the power to block EU laws if the Council does not accept its amendments. The EU Parliament increases its legislative power in some forty-four new areas in this fashion.

THE NATIONAL VETO WOULD BE ABOLISHED IN ALMOST FIFTY FURTHER AREAS

Under the Draft Constitution majority voting on the Council of Ministers would replace unanimity – The Veto system - in almost fifty new policy areas, *in addition to the 35 areas agreed in the 2002 Treaty of Nice.*

A list of the new areas where the national veto would be abolished may be found on the People's Movement website.

Article I-15 gives the EU power to adopt measures to coordinate the economic, employment and social policies of Member States. Articles III-62 and III-63 provide for majority voting on company taxes relating to *"administrative cooperation or combating tax fraud and tax evasion",* once the Council has decided unanimously that these are desirable. This is the thin end of the wedge, affecting national taxation schemes and was opposed among others by Dick Roche and John Bruton, delegates to the Convention, as being too far - reaching. Mr. Roche also opposed its extension to social policy and to Common Foreign and Security Policy

In the first decades of the EEC majority voting was confined mostly to trade matters. Over time it has been extended to more and more policy areas and the threshold for a blocking minority has come down also, making it easier to pass EU laws. The Constitution would extend majority voting much further.

THE COMPETENCE OF THE COMMISSION AND EU COURT OF JUSTICE WOULD BE EXTENDED TO SECURITY AND FOREIGN POLICY AND ALSO TO JUSTICE AND HOME AFFAIRS.

The Draft Constitution, Article I-19 (1) proposes to abolish the present "three-pillar" structure of the EU and sets all areas of EU policy in *"a single institutional framework."* It would give the EU Commission and Court a policy competence in the former "second-pillar" area of security and foreign policy and the "third-pillar" area of justice and home affairs, where they did not possess them before. The Constitution thus seeks to eliminate "intergovernmental" policy areas between Member States, where EU law has not applied up to now and the Commission and EU Court of Justice (ECJ) have had no function. The proposed Constitution thus gives the decisions of the ECJ the force of law in Member States *on present 'second-pillar' and 'third-pillar' issues.* Legally this gives the EU the full constitutional structure of a Federal State. This will have the effect of widening the jurisdiction of the ECJ because in EU law the scope of specific Treaty bases is interpreted by reference to general principles. The ECJ has already pointed out in the EEA Agreement case, that it interprets the legal texts that it enforces largely by reference to their 'objects and purposes.' This means that identically worded provisions in two different treaties can be interpreted to have very different effects. Changing the legal basis of the EU from a series of treaties to a self-contained Constitution would fundamentally alter the ECJ's view of the 'objects and purposes' of the legal texts which it is applying. In practice, there would be a presumption that the Member States are only permitted to exercise power in the residual areas left to them under the Constitution. But even in those areas, they would have to fit in with any over-arching EU policies or foreign policy imperatives in accordance with their general duty to 'facilitate the attainment of the Union's tasks and refrain from any measure that could jeopardise the objectives set out in the Constitution.' (Art. I- 5(2)) ' "

THE UNELECTED COMMISSION WOULD MAKE LAWS

Article I-36(1) empowers the Council of Ministers by majority vote to give the Commission power to make laws - so-called delegated regulations, supplementing or amending so - called *"non-essential elements*" of European laws or framework laws. The catch is that the Commission decides what is *'essential'*.

Article I-25 (3) proposes that the EU Commission, the body of non-elected persons that proposes all EU laws would consist of a number of members corresponding to two thirds of the number of member states. This contrasts with the Nice Treaty position whereby each Member State retains a Commissioner until the EU reaches 27 members. So, unless every Member State has a representative with voting rights on the Commission, we could periodically find ourselves bound by EU regulations, superior to national law, emanating from a law-making Commission on which no Irish person participates in making the decisions.

THE ECJ DECIDES ON THE ALLOCATION OF POWERS

Article I-13 (2) Extends the area of *exclusive competence* by providing that the EU alone shall conclude any international agreements that is necessary *"to enable the Union to*

exercise its competence internally, or affects an internal Union act." At present the EU negotiates international treaties on behalf of its Members mainly in relation to trade and tariff matters. This Article would give the EU power to negotiate and sign *treaties on its own behalf* in relation to international conventions governing a wide range of issues. This Article, together with the Common Foreign and Security Policy articles would deprive the Member States of most of their present treaty-making powers and remove their last vestiges of independence.

Article I-14 set out the areas of shared competence between the EU and Member States while Article I-12 (2) provides: *"The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence."* It is thus the Union, not its Member States that has primacy even in these shared areas. In case of dispute, it is the EU Court of Justice that will decide the policy boundaries and whether it is the Union or national States will make the laws, national supreme courts having been rendered subservient by the Articles of the Constitution.

Article I-12 (3) provides that: The Union shall have competence to promote and coordinate the economic and employment policies of the Member States while Article I-12 (4) provides that *"The Union shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy."*

Article I-17 provides for the Union on its own initiative, to "*take supporting, coordinating or complementary action"* with respect to its Member States. The areas for such action at European level include: "*industry; education, vocational training, youth and sport; culture, and civil protection*." This 'action' would effect vast areas of public policy. One is reminded of the much trumpeted principle of subsidiarity from the Maastricht Treaty, repeated in (Article I-11 (3)**,** and might expect large – scale repatriation of power. The opposite is the case, as the Constitution would rapidly accelerate the pace of centralisation in Brussels.

THE CONSTITUTION COULD BE AMENDED WITHOUT FURTHER TREATIES.

Article IV-444 (1), known as the '**Escalator Clause'** provides that: *"Where* (the Constitution provides in) *Part 111 for the Council of Ministers to act unanimously in a given area, the European Council can adopt, on its own initiative and by unanimity, a European decision allowing the Council of Ministers to act by qualified majority in that area*." This provision enables a summit meeting of EU Presidents and Prime Ministers to move policy areas from unanimity to majority voting without having to draw up new treaties and get them ratified by parliamentary vote or referendum. **It allows the EU to abolish national vetoes on any item without the agreement of national parliaments *and will probably obviate the need to hold referendums on any further amendments to EU policies or to this Constitution***. National parliaments are to be given four months notice before this is done, ***but their permission is not required***. This enables the EU to shift legislative power from elected national parliaments to the EU Council of Ministers without the authorisation of National Parliaments. It effectively empowers them to act as they please. Peter Hain, Labour Party leader of the British House of Commons, dubbed this escalator clause *"a formula for permanent revolution,"* while Convention President Giscard d'Estaing, called it *"a central innovation"* of the draft Constitution. It could also

be a pathway to dictatorship. Note: Part III contains 342 of the Constitution's 448 Articles)

In addition, Article I-18, titled the ***"flexibility clause,"*** states that if the Constitution has not given the EU sufficient power to attain one of its very wide objectives, the Council of Ministers, acting unanimously, *"shall take the appropriate measures."* **This article effectively permits the EU to do what it likes, as long as the Council of Ministers acts unanimously.** It would enable the EU to take extra powers to itself without further treaty negotiation, ratification by National Parliaments or referenda. This Article is blatantly dictatorial and undemocratic and potentially reduces the Dail to the status of little more than a County Council.

THE END OF AN INDEPENDENT FOREIGN POLICY

Article I-16 (2) provides: *"Member States shall actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the acts adopted by the Union in this area. They shall refrain from action contrary to the Union's interests or likely to impair its effectiveness."* "Loyalty" and "solidarity" would become unequivocal constitutional obligations in relation to EU foreign policy, ending any possibility of an Irish independent foreign policy and signalling the death knell of the remaining vestiges of neutrality. We would definitely be constitutionally obliged to support EU common positions in the UN General Assembly.

THE UNION WOULD BE FINANCED FROM ITS OWN RESOURCES

Under the heading "The Union's Resources" Article I-54 proposes that *"The Union shall provide itself with the means necessary to attain its objectives …"* and *"* **...** *the Union's budget shall be financed wholly from its own resources."* It provides that *"A European law of the Council of Ministers shall lay down the limit of the Union's resources and may establish new categories of resources or abolish an existing category."* Such a law would require unanimity on the Council of Ministers and approval by the Member States. This raises the possibility of the EU levying its own taxes and would make the EU budget wholly independent of its Member States.

A PRESIDENT FOR THE EU

Article I-22 provides for a political president of the EU, elected by qualified majority vote, to *"drive forward the work"* of the EU summit meetings and represent the EU internationally. The President would receive ambassadors to the EU and sign Treaties and important laws in its name. There would be a Head of State of the European Union, superior to the Heads of State of the Member States. The President would be selected for a period of up to five years. The rotating Presidency confirmed by the Nice Treaty would be abolished. Ireland insisted that the terms of the Nice Treaty should be adhered to and Dick Roche said that opening Nice would cause an 'allergic reaction'! No doubt, his allergy will have receded on time for the referendum campaign, by which time his powers of recollection will have faded with his 'allergy'.

THE CREATION OF AN EU FOREIGN MINISTER

The Constitution provides for an EU Minister for Foreign Affairs, distinct from national Foreign Affairs Ministers (Articles I- 28 and I- 40 (4)) As (s)he will be appointed by majority vote of the Presidents and Prime Ministers at an EU summit. It is possible that under this Constitution, that Ireland could be represented internationally by an EU Foreign Minster that we do not want. The Union Foreign Minister *"… shall express the Union's position in international organisations and at international conferences"* (Art.III-197 (2)).

The Foreign Minister's position is strengthened by Art. III-305 (1) which states that: *'Member States shall coordinate their action in international organisations and… uphold the Union's positions in such Fora. The Union Minister for Foreign Affairs shall organise this coordination.* This must be the end of an independent foreign policy!

THE CREATION OF AN EU INTERIOR MINISTRY

Though there is no overt statement to this effect in the proposed Constitution, an examination of Article I-42 and a series of more detailed articles in Part 2 (area of security, freedom and justice) can only lead to this conclusion. The Art I-42 (1) states that one of three main means to establish such an area will be *'by operational co-operation between the competent authorities of the Member States, including police, customs and other services …'* Internal security now extends to non- military crisis management, external border management and the maintenance of public order. There is every possibility that the term 'operational' may be used to exclude the committee from all normal mechanisms of democratic and judicial control and rules on access to documents.

Article II-5 establishes a co-ordinating committee of non-elected senior officials from home/interior ministries is to be internal security among which is included operational co-ordination for *'demonstrations on a European scale'*. No decision – making procedures are proposed in Art. II-5: though the European Parliament will be informed of its work. This means that the new committee will operate outside of any parliamentary scrutiny or accountability. Art. II-21 ensures the enforcement of co-operation between the authorities of Member States.

This coordinating committee would become the center of EU-wide operational decision-making and implementation for policing, public order and external border management. It would also organise ad hoc, informal and unaccountable meetings at EU and international levels. This committee would be the emerging 'Interior Ministry of the EU' overseeing the coercive powers of the emerging EU state.

A COMMON DEFENCE POLICY

The Constitution states unambiguously in Article I-41 that: "*The common security and defence policy*" it proposes "***shall*** *include the progressive framing of a common defence policy for the Union. This* ***will*** *lead to a common defence, when the European Council, acting unanimously, so decides*". This Article is an example of the incremental 'policy creep' that has characterised each successive EU treaty. This step by step approach is best illustrated by referring back to a similar Article in the Nice Treaty. You will recall that one of the most contested Articles in that treaty stated that the progressive framing

of a defence policy "***might*** *lead to a common defence,* ***should*** *the European Council so decide".* Article I-41 (3) requires **all** Member States to *"make civilian and military capabilities available to the Union for the implementation of the common security and defence policy …"* and to *"undertake progressively to improve their military capabilities."* This means there would be an EU constitutional obligation on Ireland to provide military resources to the EU for its security and defence policies and to increase military spending as necessary in order to ensure compatibility.

So, should the Irish people decide to accept this proposed constitution at referendum, what remains of our military neutrality would finally disappear and we would be committed to the EU objective of a common defence – and constitutionally committed at that! There is no ambiguity, there is no fudge. This is the end of the line. It is simply a matter of when it will happen, not if it will happen.

A MILITARY-INDUSTRIAL COMPLEX WOULD BE ESTABLISHED.

Article I-41 further provides that a European Armaments, Research and Military Capabilities Agency be established to provide support for a common defence. Clearly the intent is the establishment of a military-industrial complex – first signalled in the Amsterdam Treaty – to rival that of the US. Art. III-311(b). Tasks the Agency '*to promote harmonisation of operational needs and adoption of compatible procurement methods.'* Working Group 8 of the Convention that drafted the constitution states in its Report that: "*it is essential to step up investment in military research … to ensure that equipment is in the interests of civil industry*". Currently, EU member's investment in military research is running at 20% of that of the US.

The Constitution further provides that civil and military assets may be used for foreign interventions under the Common Security and Defence policy. These interventions ominously include: " … *peacemaking and post-conflict stabilization*" and "*supporting third countries in combating terrorism in their territories*" (Art. III-309).

A TWO-TIER DEFENCE?

The Draft Constitution extends the principle of **"enhanced cooperation,"** which was first introduced by the Treaty of Nice, to security and military matters. This is to be called **"structured cooperation"** and points the way to a two-tier Europe in defence and military affairs (Art.I-41 (6 and 7) and Arts.III-312). It provides for a minority of EU Members, led by the Big States and even against the wishes of some other EU Members, using the common foreign, security and defence policy for their own purposes, as well as the EU agencies set up to serve it. The European Defence Capabilities Agency would access Member State's contributions with regard to capabilities and report to the appropriate bodies annually. The assessments would form the basis for recommendations in accordance with Art.III-312. This inner group of States would be bound by a mutual defence guarantee and would work closely with NATO. This latter process has already begun ahead of any agreement on the Constitution.

THE EU COURT OF JUSTICE (ECJ) WOULD DECIDE OUR RIGHTS

The Draft Constitution proposes that the EU Court of Justice (ECJ) in Luxembourg be given a human rights competence in areas of policy affected by EU law. This removes the competence from national Supreme Courts and the European Court of Human Rights in Strasbourg. It would give the politically appointed EU Court of Justice, the power to rule on human rights issues coming before it and to take key elements of that power away from national Supreme Courts. This would impose a uniformity of human rights standards across the EU, despite significant differences in values between various countries.

The Constitution would give the EU Charter of Fundamental Rights, at present a political declaration attached to the Treaty of Nice, binding legal force. Article II-111 states that *"The provisions of this Charter* are *addressed to the Institutions, bodies and agencies of the Union"* and to the Member States *"when they are implementing Union law."* The ECJ is thus given the power to decide rights under the Charter and the language used throughout is so unclear that it will unavoidably be interpreted at the discretion of the highly politicised judges who are committed to ever closer centralisation of power in the EU.

If the proposed Constitution is accepted, it would overturn a previous ECJ decision which stated that the Union lacked competence in the area of Fundamental Rights. Many new areas of competence would be established: protection of personal data (Art.II-68), conscientious objection to military service (Art.II-70), academic freedom (Art.II-73), freedom of conscience and religion (Art. II-70); rights to education and health services(Arts.II-74 and 95). Yet Article II-111 (2) states: *"This Charter does not … establish any new power or task for the Union, or modify powers and tasks defined in other Parts of the Constitution."* If the EU has no power or resources with which to provide or oblige the provision of these benefits, why include them in the Constitution? On past experience the absence of a Treaty basis for some of these rights may not be sufficient to prevent the ECJ from imposing obligations on Member States to apply all the provisions of the Charter. There is widespread consensus on what constitutes peoples' core human rights, but there is wide divergence in practice throughout the member states. Ireland has *habeas corpus*, trial by jury and the presumption of innocence until proven guilty. On the other hand, some EU States permit preventive detention, without the right to be brought before a court. Property rights, rights of succession, family law, rights relating to children, the treatment of refugees, legal aid, environmental controls, neutrality, censorship of publications, are just some other examples of areas of difference.

Article II-112 (1) provides for derogations from the Charter*: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law … limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or by the need to protect the rights and freedoms of others."*

Article II-113 provides that "*Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law … and by the Member States' constitutions."* It will be the ECJ that will decide "the fields of application" on the basis of human rights cases that come before it. The ECJ will have major scope for deciding the boundaries between the EU and national levels and is already notorious for "competency-creep," that is, for using its case-law to extend EU power and the boundaries of its own

jurisdiction to the utmost extent possible, thereby reducing the power of national Courts and Constitutions.

FUNDAMENTAL RIGHTS WOULD NOT BE FUNDAMENTAL

Article II-112 permits limitations of the rights and freedoms recognised by the Charter to *"meet objectives(Art.I-3) of general interest recognised by the Union."* This offers wide scope for limitation by the EU of the 'rights' set out in the Charter. If a right is "fundamental" it must be valid in all circumstances. Ireland's Constitution regards fundamental rights as superior to man-made law, and to be based on the law of nature or natural law. This principle is not accepted in the EU Treaties or the Draft Constitution. Our fundamental rights are adequately catered for in the Irish Constitution. The proposed Charter in widening the remit of the EU Court of Justice could conceivably diminish our rights in the future.

SUB - CONTRACTING ASYLUM POLICY

The provisions of Article III-266(2) provide for *'partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum …'* While it might be desirable to co-operate on the development of resettlement schemes or burden sharing, this provision is open to misuse through Member States subcontracting their protection duties to third countries. Such activity would be inconsistent with the meaning of the 1951 Geneva Convention relating to the status of refugees and with its 1967 protocol. Above all it conflicts with the EU commitment to human rights protection in relations with the rest of the world.

CIVIL AND CRIMINAL LAW AND PROCEDURES WOULD BE 'HARMONISED' ACROSS THE EU

The abolition of the "three-pillar" structure of the existing EU, which meant that justice and home affairs, as well as foreign and security matters, were treated as "intergovernmental" rather than supranational and governed by community law, as in the EU's economic "pillar," brings the EU Court of Justice and the Commission into these policy areas for the first time. The Constitution gives the EU power to harmonise civil law and procedures (Art. III-269) and criminal law and procedures (Art.III-270) in the Member States, with a view to bringing about an EU "area of freedom, security and justice." Article III-274 empowers the European Council to establish an EU Public Prosecutor to bring charges against people for serious offences affecting more than one Member State. A dangerous prospect that is opened up by extending the powers of the ECJ through its new fundamental rights jurisdiction, and the Commission's role in "approximating" civil and criminal law and procedure, could be moves to limit trial by jury and *habeas corpus.* This is the requirement that one be brought speedily before a court if one is arrested, that exists in common law legal systems such as those of Ireland and Britain, but does not in most continental ones. These Articles could also impact regulations regarding oral hearings: the use of live witnesses in civil cases: legal aid: the disposition of property under succession law and many other matters of substantive civil and criminal law. These are presently entirely within the power of EU Members and many important differences exist between them.

PARTICIPATORY 'DEMOCRACY' AS CO-OPTION.

Article I-47 introduces "*the principle of participatory democracy*,": *"The Union Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views on all areas of Union action."* These associations, many subsidised by the EU Commission, are at present nominally consulted by the appropriate EU institutions. They have no real power but provide a façade that masks the undemocratic nature of the decision-making process in the EU.

Article I-47 also provides for a citizens' initiative under which a petition signed by over a million citizens coming from *"a significant number"* of Member States may invite the Commission to submit an *"appropriate proposal"* for action to implement the EU Constitution. ***The Commission in a most democratic manner may respond to or ignore such a petition as it sees fit.*** The provision is therefore practically useless but by mirroring the initiation process for a popular referendum, gives the illusion of democracy.

PROTOCOLS GIVE THE IMPRESSION OF DEEPENING DEMOCRACY.

A *"Protocol on the role of national parliaments"* proposes that national parliaments be informed of proposals for EU laws at the same time as the Council of Ministers and the European Parliament. Most of this information is already available on the web.

A *Protocol on Subsidiarity* states that one-third of member's national Parliaments can complain that a Commission proposal for EU legislation breaches the principle of subsidiarity. If they complain within six weeks of learning about it *"the Commission **may** decide to maintain, amend or withdraw its proposal."* It will read the proposal one more time. The Commission cannot be forced to withdraw or change the proposal.

WE COULD VOLUNTARILY LEAVE THE EU.

Article I-60 allows for a Member State to withdraw voluntarily from the Union and for the EU to negotiate and conclude an agreement setting out the arrangements for its withdrawal and its future relationship with the Union. The Constitution shall cease to apply to a State wishing to withdraw after the entry into force of the withdrawal agreement or, failing the successful negotiation of that, two years after the notification of its intent to withdraw. If a State were unhappy with the terms of its withdrawal agreement, the suspension of its rights under the Constitution in this way could be used to put it under pressure to agree to measures that were not in its interests. The EU is unlikely to be magnanimous in these circumstances and the withdrawing state would probably have to pay billions for the privilege of bilateral agreements – as Norway does at the moment. A more prudent course of action would be to reject this proposed Constitution.

WHAT HAPPENS IF WE VOTE NO?

Article IV-437 repeals all the existing EC/EU treaties. Article IV-446 provides that "*The Treaty establishing the Constitution is concluded for an unlimited period."* Article IV-445 provides that the treaty embodying the EU Constitution must be ratified by all

the EU Member States *"in accordance with their respective constitutional requirements"* in order to enter into force. That means that the 25 Member States of the enlarged EU must ratify it. This is normal with all EU treaties. A Declaration - which is a political statement that is not legally part of a treaty - is attached to the Constitution. This says that if, two years after the signature of the treaty containing it, four fifths of the Member States have ratified it and one or more States *"have encountered difficulties in proceeding with ratification,"* the matter will be referred to the Presidents and Prime Ministers. There is no mechanism for expelling a State or States from the EU because they are reluctant to re-found it on the new legal basis of this proposed Constitution and give the EU Constitution primacy over their own Constitutions and laws.

CONCLUSION

The legal criteria for statehood are set out in Article 1 of the Montevideo Convention. *"The state as a person in international law should possess the following qualifications: a permanent population; a defined territory; government; and capacity to enter into relations with the other states."*

It is clear that the European Union already possesses the first two attributes. Under the Constitution, it will fully acquire the final attribute since it will have international legal personality, a President and Foreign Minister, and a diplomatic service. The attribute: "government", is made up of many elements.

Martin Howe has also identified the following attributes: '*the EU already has a Citizenship of the European Union, which is reiterated in the Constitution. It has a clearly defined external frontier, with free movement of citizens inside that frontier and the Constitution will provide it with a central immigration policy. It will have a fully developed executive (the President of the Council as Head of State with the Foreign Service and the Commission), a legislature (the European Parliament in conjunction with the Council of Ministers), and a developed three-tier judicial system with the EU Court of Justice as supreme court, a lower Court of First Instance, and a developing further tier of specialist courts and judicial bodies. The Union has its own currency and will have a common economic policy, with legally binding guidelines on the Member States' conduct of macroeconomic policy and on budget deficits. It has a common foreign and security policy, it is developing its own armed forces, and the Constitution will provide it with effectively a system of federal criminal law'.*

Under the European Constitution, the EU will become a classic federal state. Deleting the word "federal" from Article I-1 of the Constitution as was insisted upon by British and Irish representatives will not change the situation. Howe continues: *'EU law is recognisable as a classic federal system of law. Sovereignty is exercised within certain fields by the central European authorities to the exclusion of the authorities of the subordinate units of government, the Member States. Under Art 1-6, the federal laws will apply directly within all parts of the federal state and override any local laws which conflict with them. The subordinate units of government may be punished with fines if they disobey the federal laws'.*

Furthermore, Article I-8 of the European Constitution, headed "The symbols of the

Union" states as follows:

"The flag of the Union shall be a circle of twelve golden stars on a blue background. The anthem of the Union shall be based on the Ode to Joy from the Ninth Symphony by Ludwig van Beethoven. The motto of the Union shall be: United in diversity. The currency of the Union shall be the euro. The 9th of May shall be celebrated throughout the Union as Europe day."

These 'symbols' are the traditional emblems and symbols of a nation state, in this case the federal state of the EU.

Some Reference Works Used:

'*A Critical Analysis of the EU Draft Constitution*', by Anthony Coughlan. It is available on the TEAM website: www.teameurope.info

Martin Howe QC has completed a valuable legal study, *"A Constitution for Europe, a Legal Assessment of the Draft Treaty.* It is available from: www.congressfordemocracy.org.uk or from Congress for Democracy, 58 Keswick RD., Great Bookham, Surrey KT23 4BH, England.