

## Giving the EU a federal state constitution: explanatory notes on the so-called 'Reform Treaty'

*'The most striking change [between the EU constitution in its older and newer version] is perhaps that in order to enable some governments to reassure their electorates that the changes will have no constitutional implications, the idea of a new and simpler treaty containing all the provisions governing the Union has now been dropped in favour of a huge series of individual amendments to two existing treaties. Virtual incomprehensibility has thus replaced simplicity as the key approach to EU reform. As for the changes now proposed to be made to the constitutional treaty, most are presentational changes that have no practical effect. They have simply been designed to enable certain heads of government to sell to their people the idea of ratification by parliamentary action rather than by referendum.'*

Dr Garret FitzGerald, former taoiseach, *Irish Times*, 30 June 2007

### **The 2004 and 2007 EU constitutional treaties**

It is useful to refer to the two treaties that have aimed or are aiming to establish an EU constitution as the 2004 EU constitutional treaty and the 2007 renamed constitutional treaty, because that is an accurate description of each of them.

The 2004 treaty – which was titled the 'Treaty Establishing a Constitution for Europe' – was both a constitutional treaty and a constitution. The substantive clause of the first sentence of its first article read: 'This Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common'. Clearly this would have been a different European Union from the one currently existing.

The 2007 treaty is likely to be known as the 'Reform Treaty' or the 'Treaty of Lisbon'. While being an EU constitutional treaty in that it amends and renames the two existing European treaties, viz. the 'Treaty on European Union' (TEU) and the 'Treaty Establishing the European Community' (TEC), thereby turning these two treaties together into an EU constitution, it is not in itself that constitution. The two amended treaties, one of them renamed, would be that. Together they would have exactly the same legal effect as the 2004 'Treaty Establishing a Constitution for Europe' in that they would turn the existing European Union, which is not at present a state, into a supranational European federation and would make us all real citizens of that federation, instead of being merely notional or honorary 'EU citizens' at present.

The amended 'Treaty on European Union' would become the constitutive part of the new EU constitution, the part which would establish a new European Union that would be constitutionally, legally and politically quite different from the present EU, and the 'Treaty on the Functioning of the Union' – the renamed TEC – would become the constitution's 'implementational' part, which would set out how the new Union would work and its main policies. The effect of this amending and renaming process would be that the constitution of the new Union would be set out in two treaties instead of one, both having equal legal value.

### **The EU 'constitutional concept' in rhetoric and reality**

When the IGC Mandate stated that 'the constitutional concept is abandoned' and that 'The TEU and the Treaty on the Functioning of the Union will not have a constitutional character', or when British Foreign Secretary David Miliband states that the 2007 constitutional treaty differs 'in absolute essence' from the 2004 one, they are seeking to distract attention from the new method of giving the EU the constitution of a European federation, without actually calling it a constitution or without admitting that they are engaged in a constitution-making process.

Therefore, the IGC Mandate is profoundly misleading in referring to the 'constitutional concept' as being a matter merely of legal form and nomenclature: 'The constitutional concept, which consisted of repealing all existing treaties and replacing them by a single text called 'constitution', is abandoned', or, 'The TEU and the Treaty on the Functioning of the Union will not have a constitutional character'.

In reality the essence of the 'constitutional concept' consists in bestowing a federal-style state constitution on the new European Union which the so-called 'Reform Treaty' would have the effect of establishing. British Foreign Secretary Miliband is right in stating that the 2007 treaty, unlike the 2004 one, does not embody such a constitution in itself. The so-called 'Reform Treaty' would nonetheless have the effect of creating an EU constitution by amending and renaming the two existing European treaties and thereby turning these together into a constitution. It is therefore perfectly valid to refer to the 2007 treaty as being, like the 2004 one, an EU constitutional treaty, even if it is not in itself the EU constitution. Instead, it creates that constitution indirectly rather than directly.

As everyone knows, the whole purpose of this more roundabout legal path towards an EU constitution is to avoid using the word 'constitution' in either the text or title of the new treaty. That alarms and upsets people, as V. Giscard d'Estaing and others have acknowledged. The legal-political effect of ratifying the so-called 'Reform Treaty' however would be exactly the same as ratifying the 2004 EU constitutional treaty which French and Dutch voters rejected in their referendums.

Both treaties, the 2004 one and the 2007 one, would be international treaties that would hand over national state powers to a supranational federal-type entity. The content of the handover and the extent of the diminution of national sovereignty involved would to all intents and purposes be identical in each. The Open Europe organization, London, estimates that all except 10 of the 250 or so articles of the new treaty would be the same in legal substance as its predecessor. They would be mostly identical in wording also, except that the word 'constitution' would be omitted throughout. In other words, 96% of the new text would be the same as the EU constitution which the peoples of France and the Netherlands rejected.

In face of this strategy of deception it is necessary to explain to people that under the so-called 'Reform Treaty', the EU constitution would become the two amended and renamed constituent treaties together:

the ‘Treaty on European Union’ and the ‘Treaty on the Functioning of the Union’. It is also desirable that democrats and EU-critics concentrate on explaining to the public the character of the European federation which the new treaty would have the effect of establishing, rather than be distracted by the mechanics of the legal process involved. They need to point out that the abandonment of the word ‘constitution’ the second time around has no practical significance and is designed purely to obfuscate and deceive.

Supporters of the new treaty will naturally try to make much of the change of name and legal procedure, for they have no other argument to fall back on. That is why democrats need to show that they are playing with words and procedural tricks. V. Giscard d’Estaing, who chaired the convention which drew up the original constitution, admits that the purpose of the new constitution-making process is deception: ‘All the earlier proposals will be in the new text, but will be hidden and disguised in some way’. Belgian Foreign Minister Karel de Gucht has said: ‘The aim of the Constitutional Treaty was to be more readable; the aim of this treaty is to be unreadable. The constitution aimed to be clear, whereas this treaty had to be unclear. It is a success.’

### **The name and reality of a state constitution**

*‘Those who are anti-EU are terrorists. It is psychological terrorism to suggest the spectre of a European superstate.’*

Giorgio Napolitano, president of Italy, *Sunday Express*, London, 17 June 2007

*‘The Constitution is the capstone of a European federal state.’*

Guy Verhofstadt, Belgian prime minister, *Financial Times*, 21 June 2004

*‘When we build the euro – and with what a success – when we advance on the European defence, with difficulties but with considerable progress, when we build a European arrest-warrant, when we move towards creating a European prosecutor, we are building something deeply federal, or a true union of states. The Charter of Fundamental Rights of the European Union must become a charter of rights that is applicable and effective ... I wish this Constitution to be the Constitution of a rebuilt Union, able to reflect its social cohesion, deepen its political unity, express its power externally.’*

Pierre Moscovici, former French minister for Europe, *Le Monde*, 28 February 2002

*‘We already have a federation. The 11, soon to be 12, member states adopting the euro have already given up part of their sovereignty, monetary sovereignty, and formed a monetary union, and that is the first step towards a federation.’*

German foreign minister Joschka Fischer, *Financial Times*, 7 July 2000

*‘And I am also quite clear that I am advocating a more powerful Europe, also a more closely integrated Europe ... In short I am advocating a United States of Europe.’*

Guy Verhofstadt, Belgian prime minister, speech at the LSE, 21 March 2006

As regards nomenclature, what makes a state constitution into a constitution is not that there is a legal document which has the word ‘constitution’ in its title, but that there is a legal and political act, sometimes though not always expressed in a constitutional document, which constitutes and establishes a state, which maintains that state in being thereafter and which lays down the rules for running it as its constitution is implemented over time.

In some countries the state constitution calls itself just that: a constitution. In Germany the constitution is called a basic law. In other countries the constitution is a resolution or act of a constituent assembly which has the effect of establishing a state and setting up its basic rules and institutions. As is well-known, the United Kingdom does not have a written constitution that one can point to as establishing and maintaining in being the British state. Britain has a constitution nonetheless, namely the sovereignty of the crown in parliament over the territory and citizens of the UK, a constitution which is expressed and implemented continually in successive acts of parliament.

### **The existing and proposed new European Union**

Both the 2004 and 2007 EU constitutional treaties aim to constitute or establish quite a new European Union for the first time, in the constitutional form of a supranational federation, and in each case with exactly the same difference from the existing European Union, which is constitutionally, legally and politically quite a different entity from a state. What we call the European Union today – a name which derives from the 1992 Maastricht Treaty on European Union – is merely a general descriptive term for the various areas of cooperation between its 27 Member States: the so-called ‘Community’ area of supranational European law deriving from our continuing membership of the European Community, and the ‘intergovernmental’ areas of foreign policy, justice and home affairs, where Member States still interact on the basis of retained sovereignty.

This is made clear in Article A of the Treaty on European Union (TEU), introduced by the Maastricht Treaty, 1992, which states: ‘By this Treaty, the High Contracting Parties establish among themselves a European Union. The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established in this Treaty. Its task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.’

The Maastricht ‘Treaty on European Union’ did not establish the EU as a corporate entity with its own legal personality. If it had done, it would have been a ‘Treaty of Union’ rather than ‘on’ Union. The proposed EU constitution, which would be brought into being by the 2007 ‘Reform Treaty’ and its amending and renaming the two existing European treaties, would in effect become the ‘Treaty of European Union’.

*‘After Nice the forces of political Europe joined others in stoking the fire. The Commission, the Parliament, the federalists, French proponents of integration, the media, all found Nice too “intergovernmental”. Together, they imposed the idea that Nice was a disaster, that we urgently needed a new treaty. Soon a “new treaty” wasn’t enough. It had to be a “Constitution”, and little did it matter that it was legally inappropriate. When the time came, the result had to be ratified. What tiny national parliament, what people, would then dare to stand in the way of this new meaning of history? The results of the Convention, at first deemed insufficient by maximalists, became the holy word when it was realised that selfish governments might water it down.’*

Hubert Védrine, former French foreign minister, *Irish Times*, 8 August 2005

## **Towards a federal European state in three steps**

### **1. Giving the EU legal personality**

The first legal step would be for the treaty to give the new European Union which it would establish its own legal personality and distinct corporate existence for the first time, something that all states possess. This new Union would be thereby endowed with a federal-type state sovereignty of its own, separate from and superior to that of its present Member States. This would make the new European Union into a federation rather like the United States of America in that the USA is separate from and constitutionally superior to its constituent states, California, Texas etc. The local states of the USA still retain their own state constitutions and differ from one another as regards taxation levels, social service provisions and issues such as the death penalty and marriage laws, while being subordinate to the US federal constitution. So it would be with the new EU. Likewise Federal Germany is separate from and superior to the various German *Länder*.

Giving legal personality to this newly constituted federal EU would enable it to sign treaties with other states, have its own political president, foreign minister – however called – diplomatic corps and public prosecutor, and take to itself all the powers and institutions of the existing European Community, which already has legal personality and which now makes the majority of laws for its Member States each year. The constitutional treaty would enable the new Union to sign the European Convention of Human Rights just like any other European state, as its 27 component states have already done and as the new treaty proposes. It would enable the new Union to speak on behalf of its Member States on the United Nations Security Council on agreed foreign and security policy positions, and to have its own UN seat. The latter situation would be analogous to the position of the old USSR which had its own United Nations seat while some of its constituent republics, Ukraine and Byelorussia, had UN seats too.

The symbols of European statehood – flag, anthem, motto and annual holiday – would be removed from the new treaty for, as Taoiseach Bertie Ahern said after the June 2007 Brussels summit, they annoy a lot of people. But the EU state reality they symbolise would nonetheless come into being. The EU flag, anthem and annual Europe Day would continue in use anyway, as they have done for years, without any legal basis in a European treaty.

To grasp the constitutional significance of this key step to federal statehood for the EU it is necessary to realise that what we call the European Union at present does not have legal personality or corporate existence in its own right, and what we term EU ‘citizenship’ does not have supranational legal content. Properly speaking, therefore, there is no such thing as ‘EU’ (European Union) law, only ‘EC’ (European Community) law. That would change with the new treaty.

The first sentence of the first article of the 2004 Treaty Establishing a Constitution for Europe stated: ‘This Constitution establishes the European Union’. Clearly this would have been quite a new Union in constitutional terms compared with the EU which currently exists. The 2004 EU constitution would have created a federal European Union distinct from and superior to its Member States, with its own legal personality and distinct corporate existence in its own right, empowered to interact with the other sovereign states that make up the international community. The proposed 2007 ‘Reform Treaty’ would achieve exactly the same constitutional result by inserting the following amendment in Article 1 of the Treaty on European Union: ‘The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union. It shall replace and succeed the European Community’. The 2004 treaty says ‘this Constitution establishes’ a new Union; the 2007 treaty says the new Union ‘shall be founded on’ the two amended constituent treaties. The two treaties do exactly the same thing.

If the 'Reform Treaty' is ratified, the two treaties that it would amend would have the same legal value as being in effect the joint constituent treaties, and the joint constitution, of a newly established federal Union. This would be in contrast to the relative position of these treaties in the current EU, where the 'Treaty Establishing the European Community' (TEC) has legal primacy over the 'Treaty on European Union' (TEU).

## **2. Merging the 'Community' and 'intergovernmental' areas**

The second legal step in giving the constitutional status of statehood to the new EU federation would be to abolish the distinction between the supranational 'Community' and the 'intergovernmental' areas – or 'pillars' as they are called in EU jargon – of the two existing European treaties, the Treaty on European Union (TEU) and the Treaty Establishing the European Community (TEC). This would be done by merging the existing European Community with the newly established European Union and giving the latter a unified constitutional structure. Thus all spheres of public policy would come within the scope of supranational EU law-making, either actually or potentially, as in any constitutionally unified state.

One emphasises 'potentially' because new inter-state treaties would still be required to transfer further national powers to the new Union in the future, or to shift powers from the new Union to its Member States. This is because state sovereignty in a federation such as the 'Reform Treaty' would establish is divided between the federal level and the provincial state level. A federal state is normally an entity governed by law. In classical federations both the federal level and the provincial state level are constitutionally bound to act within their respective spheres of competence. Neither level can shift power between them unilaterally, whether bottom up or top down, and the proposed EU constitution contains provisions of this kind.

The abolition of the separate 'Community' and 'intergovernmental' pillars of the present EU is significant also because the existing 'Community' pillar already establishes a supranational authority over the EU Member States, a step which might be regarded as already constitutional in character in that it gives the existing European Community several state-like features – for example the power to make laws binding on its Member States.

An important aspect of the new Union's constitutional structure would be the provision of the 'Reform Treaty' which for the first time would turn the European Council – the quarterly meetings of the EU heads of state or government – into one of the institutions of the new Union. This would mean that in constitutional terms these meetings henceforth would no longer be intergovernmental in character.

Those taking part, whether collectively or individually, would be legally bound to act with their Union hats on, at least in so far as they took their obligations under the EU constitution seriously. The constitutional treaty lays down that the European Council shall define the general political directions and priorities of the new Union and that as one of the new Union's institutions it 'shall aim to promote its values, advance its objectives, serve its interests' and 'ensure the consistency, effectiveness and continuity of its policies and actions'. Furthermore, like all the Union's institutions, acts of the European Council, or if it 'fails to act', would be subject to review by the European Court of Justice (Article 230 ff TEC as applied in the TFU). All spheres of public policy, supranational and national, would thus in principle come within the purview of the EU Heads of state or government in the European Council as they exercise the political government of the new Union.

This newly constituted federal European Union would then possess all the key features of a fully developed state except the power to impose taxes and to take its constituent Member States to war against their will. Indeed the obligation on the new Union to raise its 'own resources' in order to finance the attainment of its objectives, may be regarded as conferring on it taxation powers, although these would require unanimity to exercise. The new Union would have its own government, with a legislative, executive and judicial arm, its own political president, its own citizenship and citizenry, its own currency, economic policy and revenue, its own human rights code, international treaty-making powers, foreign policy, foreign minister and diplomatic corps, crime and justice code and public prosecutor.

All the classical federal states which have been formed on the basis of power being gradually surrendered by lower constituent states to a higher federal authority have developed in this way over sometimes quite a long period of time. The USA, Canada, Australia, Switzerland and 19th century Germany are the most obvious examples. Indeed the EU has obtained its powers much more speedily than some of these classical federations in the short historical time-span of some 60 years. The difference between these classical federal states and the new European Union however is that the former were established by distinct national communities with their own languages, histories, cultures and communal solidarities, which gave them a democratic basis, whereas there is no European people or 'demos' except statistically. The EU elite is seeking to construct a European federation artificially, from the top down, out of Europe's many nations, peoples and states, without their free consent.

### **3. Transforming us from notional EU citizens into real ones**

The third legal step would be to make us all real citizens of this new EU state entity, with the normal citizens' duties of obedience to its laws and loyalty to its authority and institutions. A state must have citizens, who are its members and inhabitants, and it cannot exist without them. One can only be a citizen of a state. If the so-called 'Reform Treaty' is ratified, the new European Union would thereafter have prime call on its citizens' allegiances as the constitutionally, legally and politically superior entity, over and above their obligations to their national constitutions and laws, with all the implications of that.

At present EU 'citizenship' is an entirely notional status attaching to membership of one of the 27 nation states that make up the current EU/EC. Citizens of the Member States have certain European Community rights attaching to their national citizenship, but they are not citizens of a supranational entity, for one can only be a citizen of a state and neither the Union nor Community is yet that. The so-called 'Reform Treaty' would radically alter this position by establishing a real supranational EU federation which people would be made real and not just notional or honorary citizens of.

Henceforth EU citizenship would entail real rights and duties *vis à vis* the new Union, over and above the rights and duties entailed in national citizenship. Those pushing the EU state-building project hope that voters will not notice the radical character of the constitutional change proposed, for after all does not the 'European Union' exist already and are we not already EU 'citizens'? These already familiar terms would continue to be used as if nothing had changed, although their legal substance would be transformed fundamentally.

The audacious plan of the Euro-integrationists is to turn the citizens of the 27 EU Members States into citizens of a supranational European federation, with all the implications of that, if possible without their realising it and without permitting them any say in the matter. One indicator of the change would be that the European Parliament, which at present consists of 'representatives of the peoples' of the

Member States, would under the constitutional treaty consist of ‘representatives of the Union’s citizens’.

That is why the 1992 Maastricht Treaty, which got people to use the terms ‘European Union’ and EU ‘citizenship’ for the first time, was titled a ‘Treaty *on* European Union’, not *of* Union. By amending the two existing European treaties, the so-called ‘Reform Treaty’ would effectively bring into being the ‘Treaty *of* Union’, although it would be called something else. It would in effect be the capstone of the EU federal state edifice, which its champions hope to set in place nearly sixty years after the 1950 Schuman Declaration, which is commemorated annually on 9 May, Europe Day, proclaimed the European Coal and Steel Community to be the ‘first step in the federation of Europe’.

Continuing to use the same terms, ‘European Union’ and ‘EU citizenship’ for the present EU and the new Union that would be established by the so-called ‘Reform Treaty’, while radically changing their legal content so that people will not realise what is happening, is fundamental to the stratagem of deception being currently employed.