

The Health of Nations and the Health of Europe

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IT IS AN honour to be invited to give this year's Mackenzie Stuart Lecture. Jack Mackenzie Stuart was a distinguished graduate of this University and of ours in Edinburgh. As a member, and subsequently the President, of the Court of Justice of the European Communities he made a great contribution to the cause of European integration through implementing the laws of the Communities, subsequently the 'European Union'. As well as performing the ordinary tasks of judging and also latterly of presiding over the Court's business, he was an apparently tireless publicist for that cause throughout Europe, but most particularly at home in the UK. By seeking to make the work of his Court and the law it administered less mystifying to the ordinary citizen and to the lawyerly public, he made it also less threatening. His geniality of demeanour and plain manner of speech and writing were great assets in all this. But it was frequently remarked how powerful was the intellect that lay behind the bluff no-nonsense manner. I have reason for gratitude to Lady Mackenzie Stuart and to him for kindness and hospitality and the opportunity to discuss matters European after his return to Edinburgh on his retirement from the Court in 1988. His death deprived Scotland of a distinguished son.

We need to face up, however, to the question whether European integration through the European Union was the worthy project Jack Mackenzie Stuart thought it was. Some say it has been a disastrous mistake. Are they right about this? Visiting Cambridge, I enter the territory of Professor Philip Allott, most formidable among the serious intellectual critics of the EU

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project. The title of this lecture reflects that of his recent book *The Health of Nations*.¹ This is one of the most powerful contributions to neo-idealist legal and political theory there has recently been, and it is very scathing about the European Union.

I. THE EU AS EUROPE'S MISSED OPPORTUNITY: ALLOTT'S OBJECTION

Allott's critique of the EU is set in the context of a conception of law and human society grounded in the thought of Hegel and his predecessors and successors down to R. G. Collingwood. (Since Collingwood's time, little of English-speaking philosophy has much impressed Allott.) In the framework of this neo-idealist perspective, he advances a fierce critique of contemporary ideas of world order—'international unsociety' he prefers to call this. Humanity has not yet transcended the conception of the world as a collectivity of sovereign states co-existing in a Hobbesian—or occasionally a Lockean—'state of nature'. In this, no genuine sanction-backed law is binding on all of them, but at best they observe the promptings of a 'law of nature'. They inhabit a world of thought that first came to light in the work of de Vattel in the eighteenth century and has never yet been surpassed.² In a perhaps anachronistic way, it is nowadays fashionable to talk about the 'Westphalian' form of state, on the ground that the new world order whose prophet de Vattel became was that which had emerged out of the Peace of Westphalia at the end of the Thirty Years' War.

The dreadful destruction done during, and the exhaustion following, the great religious and dynastic conflicts of the early seventeenth century led to the development of a new structure of mutually opposed sovereign states living in a state of nature with respect to other states. The 'state of nature' is, I guess, more or less that same thing that Allott calls 'unsociety'. The long-term upshot of the post-Westphalian state of nature was, arguably, that other thirty years war of the twentieth century, from 1914 to 1945, including the uneasy truce from 1919 till 1939. After that came the great attempt in Western Europe to break out from the finally catastrophic Vattelian or Westphalian world order, or, rather, world disorder. The Paris and Rome Treaties marked a determination to bring European states together in a new way, with a pooling of sovereign rights and yet without simply replicating state sovereignty on a grander continental scale. This

¹ P Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge, Cambridge University Press, 2002), hereinafter cited as *HoN*. In this lecture I restate some themes from a review essay about *HoN*, see N MacCormick, 'How to Have a Healthy Constitution?' (2003) 40 *CMLRev* 1537.

² *HoN* 14.41–45.

ought to have been a welcome development. For Allott's apprehensions concerning the kind of world order—or relative disorder—constructed by and around states on the Vattelian model are surely well founded. On that ground, the condition of 'post-sovereignty'³ that can be said to characterise the European Union and its Member States should have much to commend it. The propensity of the states within the Union to menace each other has been radically reduced, or perhaps even finally abandoned, while the Union has by no means adopted the posture of an ambitious empire, nor could it as presently constituted.

For Allott the European Union is nevertheless a missed opportunity, representing the outcome of a failed revolution. That Europeans have tried to reach beyond the imperatives of mere sovereignty he is ready to acknowledge. In attempting this, however, they have lost their way and have ended doing no more than to externalise each state's executive power, denaturing it into a new form of legislative power. The European Institutions, especially the Council of Ministers, actually function as a device that enables democratically elected governments to evade democratic accountability. In secret in Brussels, ministers make laws that their parliaments cannot reject or amend. They do so in response to programmes put forward by a Commission, which is equally unaccountable and not even elected by anyone.⁴

Hence there has emerged a 'Europe' that is comprehensible to, and comprehended by, an élite corps of civil servants and academics and international business people, but which is not characterised by any genuine Europe-wide public discourse. Had matters developed differently, there might have emerged what Allott would have welcomed as a genuinely European 'public mind'. That would in turn have been reflected in the private minds of all interested citizens as participants in a continental consciousness concerning common problems and possible solutions. No such consciousness has come into being. Treaties have been made and re-made, and have established a common bureaucracy and executive-based deliberative and decision-making bodies. These use the states' in-principle democratic institutions to transmit the European institutions' output into locally binding law in each of the states. This process has illegitimately over-empowered the executive and administrative branches of government in all Member States. Parliaments have correspondingly lost power, and grown less effective in holding the domestic executive seriously to account. The result of all this is a 'Union' alienated from those it calls its citizens, while representative government within the states has largely forfeited its capacity for

³ See N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, Oxford University Press, 1999) 131–36.

⁴ See *HoN* 6.26–32

independent action. It can be no surprise that enthusiasm for politics and politicians is everywhere on the wane.

II. RECAPTURING THE OPPORTUNITY: WHAT ABOUT THE CONVENTION?

What could be done about this state of affairs? Allott suggests a ‘possible programme for the reinvigorating of the public mind of Europe’. Naturally, this requires us in the first place to concern ourselves about the conditions for the coming into existence of such a public mind.⁵ In the second place, it has to be recognised that the present Union, by reason of the design defects sketched above, is wholly incapable of being or becoming the context or even the catalyst for the development of this public mind. The whole design of the European Union would have to be thought out afresh from the bottom up—no mere tinkering with existing institutions could be successful to the desired end. ‘Europe’ as concept and as continent contains, but is neither reducible to nor should it be confused with, the technocratic organisation that the states have built up through the Treaties.

Somebody might at this point object that there has recently been an attempt at root-and-branch re-thinking through a highly public discourse. The European Convention that was convened following the Laeken European Council of December 2001 met weekly for a year and a half from February 2002 under the presidency of Valéry Giscard d’Estaing. It delivered a new draft constitution for the Union in June and July 2002. That Convention was a substantially parliamentary assembly—the majority of its members were elected parliamentarians either from Member State parliaments or from the European Parliament, though each government was also (rightly) represented, as was the European Commission. Its deliberations were in public and all its doings were, and remain, posted up on a website available to interested parties everywhere. Its members made sustained and serious efforts to alert their constituencies to what was going on and to ensure a wider dialogue about the future direction of the Union.⁶ During a year of uncharacteristically open deliberation in 2003–4, an Intergovernmental Conference convened successively by the Italian and the Irish governments succeeded in agreeing on 18 June 2004 the essentials of a new ‘Treaty establishing a Constitution for Europe’. After necessary linguistic polishing, the text of this Treaty in all the official languages was signed in Rome on 29 October 2004. In essence, it is the Convention’s con-

⁵ HoN 9.48 covers the points summarised here.

⁶ For a vivid account of the Convention and its working, see P Norman, *The Accidental Constitution: the Story of the European Convention* (Brussels, EuroComment, 2003) and A Lamassoure, *Histoire Secrète de la Convention Européenne* (Paris, Albin Michel, 2004).

stitution, with minor amendments—some of them real improvements, some necessary compromises. Now the ratification debates are under way in all the countries of the Union, some working towards a decision by referendum, others by legislation alone. What more could be done to generate an open and public discourse?

At least it must be said—I as a participant⁷ in the Convention want to say—that all this represents a serious attempt to begin a re-thinking of the EU project through a genuinely public discourse. It may yet turn out to have prefigured a genuine re-launch of the project of European integration on a properly democratic footing, and with continuing limitations on any undue pretensions to grand sovereignty at the all-Europe level. To this, it might again be replied that even the Convention has in the end been able to do no more than tinker with and adjust the existing institutional design. If the Union's deepest premises are false, it cannot be claimed that Convention or Constitution-Treaty can cure them on an incremental or gradualist basis.

Let us put both point and counter-point on hold for the moment. If there were to be a more open discourse, starting from the Convention and the ratification debates, this would surely help to deal with a third element in Allott's plea for the European public mind. This is found in his call for the coming-to-consciousness of an 'invisible college of European intellectuals' that will carry on the great tradition of European philosophy. To do so, it would have to resume engagement with the dialectic of idealism that his book expresses. Not being an adherent of his philosophical school, I do not go the whole way with this point. In my own lived experience, however, I must say that what now seems the absurd intellectual isolationism that tended to characterise UK academic lawyers, even those of us engaged mainly in legal theory, 40 or even 30 years ago is happily a thing of the past, and has been so for a couple of decades at least. I see similar developments in other parts of the academy of which I have less, or no, direct knowledge, but wherein, everywhere, the impact of 'critical' thinking has been considerable. I have also seen a converse process, in which colleagues from other parts of Europe take a greater interest than before in ideas from the English-speaking world. This process has accelerated with the tendency for English to emerge as a universal second language among intellectuals everywhere.

These developments have not been caused solely by the existence of the European Union, though it has played an important part. Some, for example, owe yet more to the hegemony first of IBM and later of Microsoft.

⁷ For each of the 16 MEPs elected to take part in the Convention, there was an alternate member elected from the same political group in the European Parliament. Having been elected the alternate member from the Greens/European Free Alliance Group, I took an active part in all meetings of the Convention and in two of its working groups. I also consulted extensively in my own constituency (Scotland) and by visiting meetings all over Europe organised by other parties within the European Free Alliance.

Nevertheless, one cannot underestimate the benefits achieved through liberation of Europeans from threats of war in their own continent, and from closed borders with difficult border-crossing, foreign exchange problems and all the rest of it. There has been one multi-factored process of easing interchange and interaction among Europeans, and between them and the world beyond Europe. To this, the mind-set of the founding parents of the Communities, now the Union, was an essential precursor. Of course, the Cold War also made its own contribution. Certainly, in the preservation of uneasy peace NATO was at least as important an element, and a more widely inclusive one than the Communities, in west-European solidarity. It engaged the USA in what was even more decisively a guarantee of peace than the ECSC, the EEC, and Euratom, alias 'the Communities'.

The Universities need to be reconceived, at least on the side of the humanities, says Allott, and some of them need to be reconstituted as 'European universities'. Certainly, the style of managerial revolution that first Thatcherism and then Blairism have wished on the universities of the UK has set back many of the virtues that depend on the existence of relatively self-governing communities of scholars and scientists. Other European countries may have suffered less than us from narrow cost-benefit philistinism, though they have their own problems, some even worse than ours. Nevertheless, the effects of Erasmus and Socrates programmes, and the growth of mobility especially at master's degree and doctoral level, have beneficially 'Europeanised' learning, and extended the invisible college well beyond the bounds of Europe also. Perhaps it is easier to see this from relatively peripheral Edinburgh than from nearer-the-centre Cambridge, but in an evolutionary way rather than by any apparatus of central command, we are well on the way to the destination Allott thinks is important to reach.

There is also a very acute problem concerning Europe's relationship to the United States of America. On this, Allott is of the opinion that Europe will have to free itself from an attitude of dependency, and ought to develop a capacity for sharing with the USA in the responsibility for ameliorating the state of the world and the condition of humanity. After all, we bear historically a large share of the responsibility for things that have gone wrong, and are still going wrong, elsewhere in the world. Looking back at the disaster-for-Europe that the Iraq war of 2003 represented and its aftermath continues to represent, one cannot but endorse the general point. In 2003, Europe did not pull together, but pulled apart. The root cause seems to me to have been an insufficient determination, especially on the part of the Blair government, to ensure a common European position, if necessary one of non-co-operation with the USA until the full United Nations avenue had been explored. A readiness to observe such international law as does exist in the Vattelian scheme of things would also have helped. Could anything better show the importance of working for a genuinely common

European foreign and security policy than the aftermath of this ill-justified war and its desperate outcome for Iraqis in particular, as well as for the hard pressed soldiery of the 'coalition'?

For the rest, as I have read and re-read Allott's views of the way in which European consciousness should develop, and of the ways it should contribute to a mutually respectful constitutionalism, not only within Europe but in the international community generally, I find myself thrust back in imagination to the debates in and surrounding the Convention in which I participated. On every point—and there are many—on which I agree with Allott, I feel the more firmly that a re-launch of the European Union under a new constitution derived from the work of the Convention may well prove the right way forward, for reasons to be suggested in the fourth part of this lecture.

III. EUROPEAN SOCIETY, OR UN-SOCIETY?

Allott's ambition does not by any means stop at the call for a better, more fully self-conscious European Union. His sense is that without a European society expressing a genuine European public mind, the Union has no capacity to be or become more than a bureaucratic device for the exercise of executive power among Member States to the disadvantage of democratic institutions. Others have called for the development of a European *demos*,⁸ in order for rule by this *demos*, democracy, to be a possibility on an all-European basis. Yet others have deplored the absence of a European political class,⁹ with a common stock of political ideas geared to a common understanding of current problems, potentially articulated through party programmes and manifestoes. He, however, sets his sights on the common public mind of Europe, seeing this as crucial in the light of his own brand of social idealism. From that point of view the potential *demos* or potential political class will be a consequence, not a cause, of the emergence of the common public mind. I suspect, however, that the idea of '*demos*', 'people', '*Volk*' would not seem to him to capture appropriately the full-scale revolution in thought that he is calling for. His analysis of the development of European constitutionalism suggests that Germans developed their collective self-conception round the concept of 'state', French people theirs around the idea of 'the nation', but the British (or, occasionally 'the English') developed theirs round the idea of 'society'. On the other hand,

⁸ See D Grimm, 'Does Europe Need a Constitution?' (1995) 1 *European Law Journal* 282, and, in opposition thereto, J Habermas, 'Comment on the Paper by Dieter Grimm' (1995) 1 *European Law Journal* 303.

⁹ L Siedentop, *Democracy in Europe* (London, Allen Lane, 2000) especially at 122–50, opines that without an 'open political class', the conditions for effective democratic self-government in Europe cannot be achieved.

his own position, both in respect of Europe and in respect of all-humanity, is to try and procure or develop through a revolution in thought a genuine concept of all-Europe as a society—a society of societies, that also has individuals as its members. The same will go for the needed transformation of ‘international unsociety’ into a genuine society of all humanity, a society embracing all other societies.

What are we to make of this apparently mystifying talk about ‘public minds’? You have a mind, I have a mind, but how can the amorphous ‘public’ have a mind? At the heart of all Allott’s argumentation is an insistence on the character of the human world as being through and through ideal. Even the natural sciences in their explanation and prediction of natural events and processes necessarily do so through the presentation and manipulation of ideas, the conceptual frameworks and categories of our thinking. Science is an intrinsically social achievement of humans, and the knowledge it yields is a common stock of largely shared ideas. The world of human interaction is even more one in which activity and action and intercommunication depend on thoughts and ideas, like those of ‘economy’, ‘money’, ‘trade’, ‘law’, ‘constitution’. These are not the private content of individual minds. They have a very public existence in the dialectical engagement of practical people and theorists, who in their attempts at self-understanding have developed them and operationalised them in an always-ongoing interchange of concepts and conceptions. Each of us as a private self is dependent for self-understanding on a public stock of ideas and the linguistic forms which give them expression. (Allott is strangely unsympathetic to the ‘linguistic turn’ in the mid-twentieth century and subsequent philosophy associated with Wittgenstein and others, and his and their successors. Much of what he says would be meat and drink to some followers of Wittgenstein, I suppose. The impossibility of a private language is the counterpoint to the call for a public mind.) The public stock belongs in the common public languages that we all speak, no doubt in a variety of possible registers and with greater or less reliance on professional jargons and idiolects. If the speech of individuals is rightly taken to be a manifestation of the individual mind, the common public speech current in society is quite as legitimately taken to be a manifestation of a ‘public mind’ in a sense that does not risk descent into some form of mystical vitalism.

Putting all that has been said so far in slightly different terms, one may conclude with effortless banality¹⁰ that human life is essentially social. Human understanding alike of the natural world and of the human social world is grounded in socially developed concepts and theories. These develop in a dialogical or dialectical way, through the posing of theories, their critical testing and the rise of counter-theories, with in due course some

¹⁰ My banality, not Allott’s.

kind of *Aufhebung* to a new level of understanding through a new synthesis of formerly antithetical elements. Each individual's thinking about any problem necessarily relies on concepts and theories already developed by others and transmitted through educational systems, communication media, books, public debates, and the like. Thus each private mind utilises—and potentially reworks—part at least of the common stock of society's knowledge and understanding. Private minds are as much manifestations of the public mind as vice versa. This I find entirely convincing. There is more to be said for Allott's argument concerning the public mind than may at first meet the eye.

On the other hand, Allott seems much too quick to assume that there are, or that we can easily identify, specific 'societies'. Is there, for example, just one society that matches each state or nation that exists? Is there 'British society' because there is a United Kingdom, or vice versa? How do we individuate distinct societies? Certainly, one can go back to the beginnings of sociology to Adam Ferguson's *Essay on the History of Civil Society*¹¹, as Allott does, and follow the idea forward from there. But in Ferguson, 'society' is a condition of human existence, and society becomes civil where common government prevails and civil coexistence is possible. Later on, with Bentham and Austin, the idea of a 'political society' was developed, and 'independent political society' coined as another name for what we call 'the state'. They defined it as the corporate entity comprising a sovereign person or assembly and all the subjects of that sovereign occupying a certain territory. Such a 'society' is the state by another name, coupled with an unsatisfactory explanation of its existence. Elsewhere, the state was taken to be an entity existing apart from the 'civil', '*bürgerlich*' or '*bourgeois*' society that it sustained, or was sustained by, according to your view.

'Society' seems to me a less question-begging idea than 'a society'. Being in society with others is an omnipresent condition of genuinely human existence. The societal condition in which any human lives implies conscious and unconscious interaction with indeterminately many others as well as with the face-to-face others who are more or less always there in such contexts as family, workplace or neighbourhood. Society has no defined boundaries. It is a state of being, not a state in the juridical sense, for the latter is partly defined by geographical boundaries. Hence society is not easily conceptualised as an acting entity. It is a context of action, not an actor. Margaret Thatcher once, notoriously, said that there is no such thing as society. Nonsense—but certainly there is not an entity or an agency that is 'society' or 'a society' and is itself an acting agent or a possessor of wishes

¹¹ A Ferguson, *An Essay on the History of Civil Society* 1767 (ed D Forbes, Edinburgh, Edinburgh University Press, 1966).

or desires. When people talk about what society wants¹², they seem to be asking rather darkly for the opinions held by most people somewhere about desirable courses of action. Certainly, opinions may be widely shared in society or in some segment of it. This is not surprising, since opinions are acquired and deployed in social interaction.

By contrast with this view, Allott holds that ‘law forms part of the *self-constituting* of a society. A society is a collective self-constituting of human beings as society-members co-existing with their personal self-constituting as individuals.’¹³ *Ubi jus, ibi societas*—and vice versa, I suppose. Thus to the question, ‘What makes *a* society as distinct from some other one?’ the answer will be that each has its own law. If so, this must place in some doubt the view that there is as yet no European society in the territorial space of the EU. For, very obviously, there is already a very large corpus of EU law, both primary law, contained in the Treaties, and secondary law, in the many regulations and directives, and now also framework decisions about matters of justice and home affairs, enacted by the Union’s lawmakers. These are, of course, the Council, or Council plus Parliament when co-decision is in issue. There is also, as it is material to remind ourselves at a Mackenzie-Stuart Lecture, a large corpus of case law in the precedents of the Court of Justice and the Court of First Instance. That case law includes the absolutely decisive line of decisions under which supremacy is to be ascribed to Union law when in conflict with Member State law. Equally important is the line insisting that obligations and rights arising in or under the Treaties are to have direct effect on citizens (indeed, on all persons lawfully in any Member State). The *acquis communautaire* is open to criticism for being too huge in scale and too little intelligible as a whole, but it certainly amounts to a lot of law. It also amounts to a system of law that interacts with the legal systems of the Member States. On the face of it, Allott’s criterion for the existence of a society, indeed a ‘society of societies’, seems amply fulfilled in the EU.

Looking at all that, it is no wonder that it has become something of a commonplace that the Union already has a constitution in the juridical sense, what I have elsewhere called a ‘functional constitution’.¹⁴ The Treaties form a constitution for the institutional structure of Commission, Council, Parliament, European Council and Court. In the typically self-referential way of constitutional systems, the judges who declared the constitutional effect of the treaties did so in exercise of the powers conferred on them by

¹² For an example, I would respectfully cite J Smith’s *Justification and Excuse in the Criminal Law* (London, Stevens, 1989) 77–8, discussing what society wants in the way of admitting a defence of necessity to a charge of murder.

¹³ HoN 10.3(1).

¹⁴ N MacCormick, ‘On the Very Idea of a European Constitution: Jurisprudential Reflections from the European Parliament’ (2001) 2 *Juridisk Tidskrift* 529.

the treaties they so interpreted. Certainly, this revolutionary interpretation (if revolutionary it was) has since become part of the general custom of Europe and has passed unaltered through a series of Treaties of Accession and reforming treaties—Single European Act, Maastricht, Amsterdam and Nice.

This has, however, given rise to criticism along lines similar to Allott's. The 'functional' or 'juridical' constitution never received the kind of popular endorsement that would have legitimised it as a political constitution. Many people say that when they voted in favour of Europe, they were voting for a common market, not a political Union. So constitutionalised Europe, if it exists, exists as an affront to democracy rather than as a product of it. A powerful indictment along those lines is to be found in the recent *Great Deception*¹⁵, by Christopher Booker and Richard North. This criticism can certainly be overstated, but it is not without some force, for to some extent 'political Europe', as distinct from 'economic Europe', was constructed by stealth rather than by openly challenging the continuing sovereignty-in-the-classical-sense of the states. Thus if European society exists by simple virtue of the existence of European Community law, it may turn out to be a society that comprises only Eurocrats, euro-enthusiasts, and lawyers practising in EU law, not a society of all Europe, even of all Union citizens.

That would be bad news indeed. But there is another picture to be considered, and I would like to turn to this now, and to take head-on the issue whether the Constitution signed on 19 October could pave the way to a more genuinely open and democratic EU.

IV. BACK TO THE CONSTITUTION

The proposed Constitution that has been sent out for ratification (hereinafter simply referred to as 'the Constitution') is flawed in places, as any human work is likely to be. But it also has genuine virtues, in my submission overriding ones. First, I return to the process by which it was devised: the Convention and after it a more than usually open IGC. With 203 full and alternate members, and quite a few observers with speaking rights, Convention sessions engaged a lot of people in each of the debates. There were also present in the room conventioners' assistants, advisers to ministers, diplomats, press persons and Convention staff. The remarkable thing was the extent to which the members attended to their task and both contributed to and listened to others in the debates. When the Convention was sitting, there was always a considerable buzz in and around the large

¹⁵ See C Booker and R North, *The Great Deception: the Secret History of the European Union* (London, Continuum, 2003).

Committee Room (PHS 0C50) in the European Parliament building in Brussels, and in the adjacent public space and Hemicycle Bar. It was not a perfect way to try to write a constitution, but it certainly had the merit of drawing the arguments out into the open air and subjecting them to genuinely critical debate that led to modification of positions by all or most participants.

Openness of deliberation was also fostered by publication on the Convention website of all its official documents, all contributions by Members, all amendments proposed by them, and the verbatim record of proceedings. This connected also to the Forum website, where citizens at large and non-governmental organisations could state and explain their opinions. It was disappointing that during a long period the print and broadcast media in Europe, and (as usual) particularly those of the United Kingdom, made but few comments and published few reports of what was going on. At the conclusion of the Convention's deliberations, newspapers in the UK, and some elsewhere, represented the output of the Convention as a sudden and unexpected bombshell that had been cooked up in some kind of secret conclave. This was very far from the truth.

Also far from reasonable is the complaint that the Constitution is far too long. Part I contains the essence of the Constitution. It establishes the Union; endows it with values and objectives and legal personality; restates the four freedoms and the non-discrimination principle; proclaims Union citizenship and adopts a Charter of Fundamental Rights; declares the exclusive, the shared and the complementary competences of the Union and the principles governing their exercise (the principles of conferral, of subsidiarity and proportionality, and of the primacy of Union law within the scope of the competences conferred); establishes and regulates the Union's institutions, and also the Central Bank, the Court of Auditors and the advisory bodies; simplifies the system of acts through which the Union's institutions can exercise Union competences; specially regulates foreign and security policy and a regime for enhanced co-operation among sub-sets of the states; prescribes steps to enhance the democratic life of the Union; lays down prescriptions concerning the financing of the Union and the management of its budget; and sets conditions for membership of the Union and for resignation of membership. All this is done in the first 60 Articles of the Constitution. It is pretty clear to read, and reading it does not take inordinately long. It certainly makes the outline of the Union's future working much clearer than do the present Treaties its present working.

Then Part II, the Charter of Rights itself, dedicates a further 54 clearly presented Articles to laying down the fundamental rights persons¹⁶ in the Union are to enjoy as against acts by the Union and its institutions, but by

¹⁶ Very few of the rights in the Charter, e.g. those concerning voting in local elections and all-Union elections, are reserved to Union citizens.

the Member States only so far as they are engaged in implementing Union law (otherwise, their own constitutional arrangements specify the rights citizens and strangers have against the state, though all must live up to the standards set in the European convention for the Protection of Human Rights and Fundamental Freedoms). The Charter rights run parallel to those in the European Convention and some more recent human rights instruments. They are ranged under the rubrics of Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice, followed by the four 'horizontal articles' regulating the interpretation and range of application of the rights under the six main rubrics. The Charter is already in force as a 'political declaration' under the Treaty of Nice (2000), and it surely makes sense to incorporate it with legally binding effect in the Constitution, if the Constitution is to be adopted at all.

So one can say that the real Constitution runs to 60 main Articles, with a charter of rights that adds a further 54. Another handful of Articles in Part IV regulates the coming into force of the Constitution and the procedures for its future amendment and related matters. This is neither too long nor an enemy of intelligibility.

Certainly, one has also to contend with the vast scope of Part III, and this is admittedly also part of the Constitution as published and sent for ratification. What Part III does is to amend the present Treaties so as to make them conform with the constitutional framework declared in Part I. It does so, by re-stating with appropriate adjustments all the rest (i.e., other than the matters now in Part I) of what is in the present Treaties dealing with the policies and detailed competences of the Union and with the detailed aspects of the Institutions' ways of working in relation to particular topics. This adds to the overall bulk, and it is regrettable that Part III is built into the Constitution as such. It might preferably have been enacted at the same time by way of a body of associated fundamental law, with a somewhat lighter amendment procedure than applies to the Constitution in the strict and proper sense.¹⁷ There can be no doubt, however, of the necessity to have done the Part III job along with the rest of the constitutional drafting. This, after all, is to be a Constitution for a going enterprise, with continuity of the *acquis communautaire*. To have left it for judicial and scholarly interpretation to figure out what part of the present Treaties was repealed by the Constitution and how the unrepealed parts were to work in the context of a new framework Constitution would have been a citizens' nightmare. It would also have been a dripping roast for lawyers, with many years

¹⁷ Indeed, Art IV-445 does establish a procedure whereby the bits of Part III that regulate the single market can be amended by a simplified procedure whenever the effect is to diminish competences exercised by the Union. This will call for a unanimous vote in the European Council followed by approval by the European Parliament and confirmation by each Member State according to its own constitutional requirements.

of needless legal uncertainty stretching ahead. The method of presentation of the material of Part III is open to objection. The task achieved was, however, an absolutely vital one. Above all, this should be most welcomed by those who most fear 'competence creep', whereby the law-making institutions, with *ex post* approval from the Court, effectively extend the range of what they can do. The implication of the adoption of Part III is that nothing is changed except what is expressly changed. The real use of Part III is not to be read through at a single sitting, but to be referred to in respect of particular issues of moment-by-moment interest.

All in all, with all due allowance for Part III, one may conclude that the Constitution states with a new clarity the Union's real character: it is a union formed by joint decision of its Member States, and it exercises only the powers that they confer on it. (See Articles 1 and 9). It is and remains for all its participants a voluntary union. For the first time, it is explicitly stated, in Article 60, that any Member State may choose, by its own constitutional processes, to withdraw from the Union.

A third point concerns effective democratic accountability of lawmakers and other decision-makers. This will be much enhanced by the Constitution's provisions, particularly those brought together in Article I, Title 6, on 'the Democratic Life of the Union', and in Title 7 on budgetary and financial provisions. The directly elected European Parliament will become an almost all-purpose participant in every legislative act of the Union (a very few are reserved for enactment by Council with Parliament's assent, and the provisions about parliamentary reform are to converse effect). It will also acquire power over approval of the whole budget, with no special exception for 'compulsory expenditure' that effectively ring-fences agricultural spending at the expense of all other heads of expenditure. At the same time, the Council of Ministers, as one house of what is now acknowledged to be effectively a two-chamber legislature, must deliberate and vote in public whenever it is engaged in lawmaking. Its agenda will be divided to separate non-legislative from legislative business¹⁸ (a reform already anticipated since the Seville Council of 2002). Moreover, arrangements under the Subsidiarity Protocol to involve Member State parliaments in *ex ante* scrutiny of Union legislation in draft have considerable potentiality to enhance real democratic accountability in parliaments all over the Union, before ministers set off to the Council to do their legislative business.

Provisions concerning the election of the President and Members of the Commission, and their dismissal, will enhance the already considerable degree to which the Commission is really answerable to the European Parliament. Yet it will not become the kind of parliament-based executive

¹⁸ See Arts I-46 and I-50.

that can so effectively hog-tie democratic accountability as can governments under constitutional arrangements like those of the UK. The fate of the Santer Commission and now, most recently, the rejected nomination of Mr Buttiglione as Commissioner for justice and home affairs indicate the degree to which the Parliament can exert and sustain pressure on the Commission as well as freely amending legislative drafts brought forward by the Commission. The European Parliament is less visible but can exercise much more initiatives of its own than can the UK Parliament, in respect of which democratic accountability has really become more a matter of five-yearly accountability of the Executive to the electorate via parliamentary elections.

The Principle of Subsidiarity is better defined than before, and it is made clear that legislation may not be undertaken centrally if it can be done more effectively at the level of Member States, expressly including the levels of regional or local government within the states. Under the new Subsidiarity Protocol, the Commission will have to justify measures with regard to impact, including budgetary impact, at levels below that of the central authorities of the Member States. Parliaments will acquire a role in policing this and will be able and encouraged to share that role with 'regional' parliaments or assemblies such as those of Scotland and of Wales.

The principle of conferral stipulates that the Union may act only in accordance with the competences conferred on it.¹⁹ Part III states these extensively, as we have noted, in a way that mainly preserves but does not extend the *acquis*, while adjusting legislative provisions to conform mainly to the new standard bicameral legislative process. With regard to subsidiarity and proportionality²⁰, the aim is to ensure that the Union engages in no greater intensity of action than any legitimate objective justifies, and leaves in other hands those aspects of competence better exercised by other decision-makers closer to citizens affected.

Taking account of all this, and reminding ourselves of the significance of the Charter as Part II of the Constitution, we can fairly conclude that the scheme of government envisaged in the Draft Constitution is, beyond doubt, limited government. The limitations, albeit elaborate, seem fully intelligible and quite workable. This Constitution offers a blueprint for a scheme of government within Europe that is both limited and democratically answerable. It does so by building on the better parts of what has been inherited, and extending the reach of the best parts. The method of achieving this conforms to the Popperian ideal of critical rationalism, not to grand fantasies of what Hayek called 'constructivist rationalism', seeking to cure all human ills according to a perfectly designed blueprint.

¹⁹ See Art I-9(1) and (2).

²⁰ See Art 1-9(3) and (4).

During the period I spent working as an elected representative in the European Parliament²¹ (from which I retired voluntarily at the age of 63), I became more, not less, impressed with the democratic potentialities of the European institutional set-up. This was especially due to the growing role of the Parliament in co-decision, and the relative independence of action each MEP enjoys as a constituency representative with a party political label but weak transnational party discipline. It also reflected the new confidence that the Parliament acquired during the struggle for accountability of the Commission under the presidency of Jacques Santer. With all its imperfections, the Union does work remarkably well. There have been many attempts to create a politically united Europe, but this is the first attempt to establish a Union that is internally democratic, doing so by means that themselves have democratic legitimacy.

In so far as the existing 'functional constitution' of the Union came into being by stealth and as a result of judicial rather than popular decision-making, the present Constitution lacks full democratic legitimacy. The process of adopting this Constitution, if it goes forward successfully, will redeem that legitimacy deficit. By democratic means, the Union will have adopted a Constitution that enhances democracy in its own governance. This will not abolish the sui-genericity of the Union, which will remain a Union of its own kind, neither state nor superstate nor sovereign federal union, but rather the first effective marrying of democratic institutions with the principles of confederal self-government as contrasted with those of full-dress federalism. This will be done by the only way in which constitutional arrangements can successfully develop, namely by immanent critique guiding incremental improvement in already evolving institutions and rules. In the process, surely, we will also see evolving ever more perceptibly the conditions for what could be truly recognised as a European 'public mind', and with it a European political class. It will, I acknowledge, be difficult to persuade Philip Allott and like-minded critics that this is so. For evolutionary development of a failed model would only aggravate the failure. But has it been a failure? Or has it contributed, warts and all, to half a century of peace and prosperity in Western Europe, establishing a beacon of hope for other less fortunate countries which have now at last succeeded in joining the Union since 1 May 2005? I hope and think so, and thus beg to differ from my respected colleague Philip Allott, as I suspect Jack Mackenzie Stuart would have done were he still with us.

²¹ Scottish National Party MEP for Scotland, 1999–2004; alternate member of the European Convention (Greens/European Free Alliance) 2002–3.