

An alternative European Treaty?

On 6 June 2005 the BBC Radio Four Today programme came up with another of its rather absurd stunts. It published the following-

We've asked **Conservative MP David Heathcoat Amory** to come up with an alternative text. Mr Heathcoat Amory was a British representative on the convention on the future of Europe, which drew up the constitution.

He opposed the final version and helped produce a minority report outlining a different vision of Europe. His proposed treaty - a term he prefers to constitution - is based on that report and is set out below.

In the run-up to the summit on 16 June, we're seeking suggestions for amendments to his treaty.

A Europe of Democracies

Aware of the need to strengthen democracy and respect for the rule of law in Europe,

Observing the growing gulf between the EU institutions and the people of Europe and the loss of popular support for the EU as proved by successive referendums:

We propose transforming the EU into a Europe of Democracies (ED) which should be a treaty association of free and self-governing European states and an open economic area.

- 1) Europe of Democracies. Europe shall not be governed by constitution. Instead, it shall be organised on an inter-parliamentary basis by means of a Treaty on European Cooperation. This will create a Europe of Democracies (ED) in place of the European Union.
- 2) Open to all democracies. Membership of the ED shall be open to any democratic European state which is a signatory of and respects fully the European Convention on Human Rights.
- 3) Simplified decision-making. ED laws shall be passed by unanimous vote by the ED council in which each member state government is represented on the basis of equality. ED laws may allow for implementing measures to be passed by majority voting by 75 per cent of council members representing at least half the ED total population.
- 4) National parliaments elect the Commission. An ED Commission based in Helsinki shall sit as a secretariat for the council and the national parliaments. Every nation parliament shall elect its own member of the commission. National parliaments shall decide on the annual legislative programme.
- 5) Powers and Competencies. ED legislation shall be confined to cross-border policies areas such as mutual trade and environmental issues. External representation of the ED shall be undertaken by the president of the ED, elected annually by the council by unanimity. The ED shall not have legal personality and will not itself be a party to international agreements.
- 6) Openness and Transparency. The decision-making process and all relevant documents shall be open and accessible and available on demand.
- 7) A European Assembly. There shall be an assembly composed of seconded national parliamentarians which shall meet six times a year to discuss proposed ED laws and advise the council but it shall not itself legislate
- 8) No legal activism. The European Court shall be composed of one judge from each member state, elected by national parliaments for a single four-year term. The court shall resolve

disputes between member states and interpret ED laws. Treaty interpretations shall be referred to the council.

9) No militarisation. The ED shall not have its own armed forces, armaments agency or defence pact.

Francis Bennion's comments

As a constitutional lawyer and parliamentary draftsman I would respond to the above as follows.

I approve of the basic idea, but this document is not a treaty at all, much less a constitution. It has hardly any content. To start with it lacks objects.

Objects

I suggest the objects should be as follows-

The purpose of the ED shall be to facilitate co-operation between the member states on matters concerning trade, finance, communications, the environment, climate change, immigration and asylum, policing, extradition, and such other matters as may be agreed by unanimous vote of the member states.

I do not propose to suggest further additions because this is impracticable in view of the following basic defects.

The institutions

The document provides for the following institutions: a Council, a Commission, an Assembly, a President and a Court.

All it says about the Council is that each member state government shall be represented on it on the basis of equality. It says nothing about the Council's functions.

It says the Commission shall be based in Helsinki (why remote Helsinki?) and shall sit as a secretariat for the Council and the national parliaments. The latter have their own secretariats, so what's the point of that? Again, nothing is said about the Commission's functions.

All it says about the Assembly is that it shall be composed of seconded national parliamentarians (how many?), and shall meet six times a year to discuss proposed ED laws and advise the Council. Nothing else nothing is said about the Assembly's functions.

It says the President shall be elected annually by the Council by unanimity (suppose unanimity is lacking?).

It says the Court shall be composed of one judge from each member state, elected by national parliaments. It is unusual for parliaments to elect judges: they know nothing about the candidates.

It says the Court shall resolve disputes between member states. What happens to existing international courts, such as the International Court of Justice?

The laws

The document says ED laws shall be passed by unanimous vote by the Council. All it says about the extent of the Council's legislative powers is that they shall be confined to cross-border policies areas such as mutual trade and environmental issues. This is so vague as to be meaningless.

What about the existing set-up?

The existing EU set-up is huge and complex. Many thousands of people have legal rights under it, which cannot just be swept away without compensation. Nor can we ignore (as the

document does) the vast structure of existing EU laws, whose validity in Britain depends on the European Communities Act 1972. It is not an answer simply to repeal these; there must be complex transitional provisions. Again these would involve huge sums in compensation.

My conclusion is that this is no way to draft a treaty or a constitution.