National Constitutional Concepts in the New Constitution for Europe

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Notion of constitutional concept varies over time and space. Constitution for Europe as a further step in guaranteeing rights and separating powers. Amongst others French, Italian, German and Swedish national concepts in the Treaties of the European Communities and of the European Union. Several causes for difficult tracing of national concepts in the Constitution for Europe. Convention method: instead of by diplomats and EU experts, drafting by members of Parliament and (former) members of Government. More room for national concepts. The Intergovernmental Conference: the Empire strikes back, but with mixed impact. Parallels with other constitution making procedures. Concept of constitution: structure and size no argument for denying constitutional character; Constitution octroyée v. contrat social; Franco-American revolution v. British tradition.

Part One

Introduction

The present essay takes the Constitution for Europe and the European Convention's work as a starting point in order to determine how concepts that stem from national constitutional law have found their way into this new common European instrument. It is by no means comprehensive. The literature on common principles of constitutional[1] law has been developing in the last decade, but system-

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[1] *See* R. Bieber, Pierre Widmer (eds.), *L'espace constitutionnel européen* (Zürich, Schulthess Polygraphischer Verlag 1995); P.C. Müller-Graff & E. Riedel (eds.), *Gemeinsames Verfassungsrecht in der Europäischen Union* (Baden-Baden, Nomos 1998); M. Jachtenfuchs, *Die Konstruktion Europas. Verfassungsideen und institutionelle Entwicklung* (Baden-Baden, Nomos 2002); A. Pizzorusso, *Il patrimonio costituzionale europeo* (Bologna, Il Mulino 2002); M. Scudiero (a cura di), *Il diritto costituzionale Comune europeo: principi e diritti fondamentali* (Napoli, Jovene 2002); J. Schwarze (ed.), *Die Entstehung einer europäischen Verfassungsordnung – The birth of a European constitutional order*, 2nd edn. (Baden-Baden, Nomos 2001); R.C. van Caenegem, *An Historical In-*

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atic comparative European constitutional law remains a field with very few general studies[2] and with a scarcity of resources for researchers who do not master several languages.[3] The essay's first ambition is to help fostering research on the topics that are touched upon.[4] Further research in this field should always keep a comparative dimension. Too many reflections on the interaction between European Community law and national legal orders are founded on a scarce variety of the latter, ignoring the important differences in method, concepts and style, which exist between European countries. The examples presented in the present essay are taken from a variety of national constitutional settings, but they remain limited, and it is most probable that some important concepts have been missed. As explained in the first part of the essay, one should also remain very cautious in trying to establish a firm link between a concept, which appears in the Constitution for Europe, and the concept(s) of national constitutional law it might be derived from.

troduction to Western Constitutional Law (Cambridge, Cambridge University Press 1995); J. Ziller (ed.): *L'européanisation des droits constitutionnels à la lumière de la Constitution pour l'Europe – The Europeanisation of Constitutional Law in the Light of the Constitution For Europe* (Paris, L'Harmattan, 2003).

[2] To my knowledge the best achievement in the field is still C. Grewe & H. Ruiz Fabri, *Droits constitutionnels européens* (Paris, PUF 1995), which covers all former 'Western' Europe. Not systematically comparative, but comprehensive for the 15 old member states is L. Prakke & C.A.J.M. Kortmann (eds.), *Het Staatsrecht van de landen van de Europese Unie*, 6th edn. (Deventer, Kluwer 2004), recently translated into English: Lucas Prakke & Constantijn Kortmann, *Constitutional Law of 15 EU Member States* (Deventer, Kluwer 2004).

[3] Strangely enough there is no systematic publication in book form of the Constitutions of EU member states in the English language, to my knowledge. For translations in some of the most important European languages, *see*: I. Álvarez Vélez & F. Alcón Yustas, *Las Constituciones de los Quince Estados de la Unión Europea* (Madrid, Dykinson 1996); C. Grewe & H. Oberdorff (eds.), *Les Constitutions des Etats de l'Union européenne* (Paris, La Documentation française 1999); S. Gilcart, E. Cerexhe & L. le Hardÿ de Beaulieu, *Douze constitutions pour une Europe* (Bruxelles, Kluwer Belgique 1994; though some texts are outdated, the introductions remain very useful); A. Kimmel, *Die Verfassungen der EG-Mitgliedstaaten*, 4th edn. (München, Deutscher Taschenbuch Verlag 1996); M. Lesage, *Constitutions d'Europe centrale, orientale et balte* (Paris, La Documentation française 1995). *See* also the 'knowledge portals' on the website *After 2004: The Integration of the European Constitutional Treaty into the National Constitutions* <www.uc3m.es/uc3m/inst/MGP/NCR/portada.htm> (original versions and English translations), and *Conseulaw* <www.iue.it/OnlineProjects/LAW/conseulaw> (original versions and English and French translations).

[4] The essay has first been written in the framework of a research project on 'The National Constitutional Reflection of European Union Constitutional Reform', for a Conference that was held in Madrid at the Universidad Carlos-III on 5-7 September 2004. A Spanish and an Italian version of the original paper will be published in early 2005; exact references will be given in part II of this essay, which will be published in the next issue of this Review. In the framework of the aforementioned project two other papers have examined the theme of 'The Influence of National Constitutional Law on EU Law': 'The Emergence of a European Parliamentary Model' by Stefania Ninatti and 'The Influence of National Constitutional Law on the Drafting of the Charter of Rights' by Roberto Toniatti (available on <www.uc3m.es/uc3m/inst/MGP/reports.htm>). These papers also provide an important field for further research in European constitutional law and should not be left aside by young scholars looking for interesting research topics.

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This essay has a second ambition. By pointing at well-established constitutional concepts and at their sources, it also hopes to contribute to a better understanding of the possible interpretations and evolution of the Constitution for Europe itself. Whereas the Constitution is the successor of the Treaties of Paris, Rome, Maastricht and so forth, it differs from all preceding European Communities and European Union Treaties in that it does not simply continue the Community law tradition, but takes up constitutional law traditions of the member states.

The part of this essay published in the current issue will first discuss the notion of 'constitutional concept' and sketch the influence of national constitutional concepts on the European Communities and the European Union Treaties, and via them on the Constitution for Europe itself, which is to a large extent a codification of those treaties. Secondly, it will give some indications on the role of national constitutional concepts in the drafting method and form of the constitutional treaty. The second part of the essay, to be published in the next issue of this *Review*, will examine the most important of these concepts as they appear in the Constitution for Europe, as models for the institutional setting, for the protection and promotion of European citizens' rights, and for checks and balances in the vertical and horizontal delimitation of powers.

The notion of constitutional concept

It is quite difficult to find a commonly shared definition of the notion of constitutional concepts. As the boundaries of constitutional law vary over time and space, it is not easy to go beyond the statement which is at the root of European constitutionalism: Article 16 of the *Déclaration des Droits de l'Homme et du Citoyen* of 26 August 1789: '*Toute société dans laquelle la garantie des droits n'est pas assurée ni la séparation des pouvoirs déterminée n'a point de Constitution*'. It is indeed possible and legitimate to see the Constitution for Europe as a series of further steps in guaranteeing rights in the European Union (EU) and in separating powers, i.e., in organising the relationship between *les gouvernants et les gouvernés* as well as in establishing checks and balances between institutions. My proposal is to consider as constitutional concepts all those concepts in member states whose role it is to guarantee rights and separate powers in the organisation of the State.

In member states' law, these concepts may be laid down in a Constitution in the formal sense – whatever its name be: constitution, basic law, constitutional laws or other – or in the *bloc de constitutionnalité* – a wording used mainly in France and Spain to sum up different rules which are taken as a reference by the constitutional judge. These may also take the form of judge-made law, i.e., principles discovered by the judges and thus only written in the case-law of constitutional or sometimes ordinary courts. Political practice is a third source of constitutional concepts, not only in the United Kingdom, where conventions of the con-

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stitution still represent a major part of constitutional law, but also in countries with rather detailed and recent written constitutional charters. One clear example of such a convention is the widespread custom according to which governments resign after general elections, an important feature of parliamentary responsibility, which is rarely stated as such in written constitutions but is applied in all member states. The Constitution for Europe implicitly refers to this custom in Article I-27 when stating that the European Council takes into account the elections to the European Parliament when proposing a candidate for President for the Commission. In a number of cases, national constitutional concepts may even be found only explicitly in doctrine, provided there is a sufficiently broad consensus on their existence and meaning as may appear in handbooks.

The variety of sources is by itself an obstacle to recognising member states' constitutional concepts on a comparative basis. This problem is enhanced by differences in sub-disciplinary boundaries between constitutional law, administrative law, international law and criminal law or even at times between public and private law. Some principles, considered as part of constitutional law in one country, are part of administrative law in another. These sub-disciplinary boundaries are too contingent to serve as a basis for defining common constitutional concepts. A typical example is that of electoral law for local government. Local government is considered quite often as an administrative, not as a constitutional matter, and elections to local councils may thus be considered as a question of administrative law, according to a logic which does not take into account the necessarily political nature of these elections in a democratic country.

The notion of *concept* also has a more generic dimension, which makes it hard to draw boundaries. In some countries, a concept might be very clearly defined in strictly legal terms, whereas in another the same concept remains in the realm of legal theory. An excellent example is the concept of separation of powers, which is certainly common to all member states. Moreover, the consequences of a concept may vary greatly from one country to another. Again, the concept of separation of powers is an excellent example. In countries as diverse as France or Sweden, it is at the root of the separation between administrative courts and 'judicial' courts, whereas in Denmark, Spain or the United Kingdom, it is one of the bases of a unified court system. In Germany, the separation of powers is part of a larger concept, that of a liberal democratic constitutional order [*freiheitliche demokratische Grundordnung*], which has been defined extensively by the Federal Constitutional Court [*Bundesverfassungsgericht*] in its decision of 1952 about the prohibition of the communist party.[5] According to this decision, the liberal democratic constitutional order includes parliamentary responsibility of the Government, hence

[5] 23 Oct. 1952, BverGE 2,1.

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prohibiting apparently a congressional and a presidential type of government. This prohibition may easily be explained by the history of the Weimar Republic, but is foreign to most of the other member states, even though they all have a parliamentary system of government.

In order to complicate methodological issues even more, some legal orders clearly recognise the existence of supra-constitutional principles – like Germany or seemingly Italy – whereas others would certainly not accept the mere idea of supra-constitutionality – like Belgium or the Netherlands for instance – and whereas the issue is being hotly debated in still other countries, like France.

There is hence quite some room for disagreement about what is a constitutional concept and what is not, and this essay is therefore developed on the basis of a rather intuitive methodology, not on a mechanical *reine Rechtslehre*.

National legal concepts in the treaties of the European Communities and of the European Union

National legal concepts, and indeed constitutional concepts, have very much influenced the drafters of the European Community (EC) and European Union (EU) treaties, as well as the European Court of Justice in its jurisprudence and the Commission in drafting legislation. This is well-known to all specialists of Union law. Because the text of the Constitution for Europe is to a far greater extent the result of codification and consolidation of existing EU and EC law principles than of institutional change, a brief, tentative and non-exhaustive survey of these influences is undertaken in order to find out which concepts of the Constitution for Europe have their origin in national constitutional concepts.

The personality of the drafters of EC treaties explains why and how constitutional concepts have found their way in the founding treaties. While diplomats have played their role, lawyers have had a prominent influence, which is illustrated by two key figures amongst Jean Monnet's collaborators. Next to the economist and journalist Pierre Uri, who has been, according to Monnet's Memoirs,[6] one of the main initiators of the Schuman Plan and the European Coal and Steel Community (ECSC), there was Paul Reuter, a professor of public law. He has put into legal terms the institutional setting around High Authority and Council, the key feature of the 'Community method', referred to in Article I-1 Constitution for Europe ('The Union (...) shall exercise on a Community basis the competences [the Member States] confer on it'). Paul Reuter, who later became one of the leading French scholars of Public International Law, was a professor of constitutional and administrative law and of budgetary and tax law. The Coal and Steel system of remedies was drafted by Maurice Lagrange, a member of the *Conseil*

[6] Jean Monnet, *Mémoires* (Paris, Fayard 1976).

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d'Etat, who later became Advocate General at the European Court of Justice. The initial French draft was then negotiated with the German government and with those of the four other future member states, Belgium, Italy, Luxembourg and the Netherlands. Georges Vedel, another professor of constitutional and administrative law, was amongst the counsels of the French government who participated in the drafting of the Treaties of Rome establishing the European Economic Community (EEC) and the European Community of Atomic Energy (EURATOM).

In the Treaties of Rome, the French influence remained strong. A clear example is to be found in the institutional system of the Communities, created under American influence (the 'agency model'). The French *Commissariat général du Plan* and the *Secrétariat général du comité interministériel pour la coopération économique européenne* (*SGCI*) served as models. Both organisations had been set up in view of the management of the Marshall funds, in which Jean Monnet had been involved on the basis of his experience in co-ordinating Allied logistics during the two world wars. Quite clearly Jean Monnet's excellent contacts with senior US politicians and officials explain how the US agency model was imported into France.

Another example provides the Community system of judicial review which, not astonishingly, copies to a great extent the system of French administrative law as developed by the *Conseil d'Etat*, Maurice Lagrange's home institution. This is particularly clear with the institution of the Advocate General, transposed from the *Commissaire du gouvernement* in the *Conseil d'Etat*, and the grounds for annulment as enumerated in Article 173(1) of the EEC Treaty, now 230(2) of the Treaty establishing the European Community (ECT), and still present in Article III-365(2) Constitution for Europe.

A French influence is also to be found in the system of preventive judicial review of external agreements: the system as such was only introduced in 1958 in the new French Constitution, but it was already being discussed in constitutional law circles a few years earlier. Even more straightforward, in its Article 227(2-3), the EEC Treaty copied the French distinction between overseas departments [*départements d'outre-mer*] and overseas territories [*territoires d'outre-mer*], which is at the root of the distinction between outermost regions and overseas territories in Article 299(2-3) EC Treaty after Amsterdam, and which is further developed by Article IV-440 Constitution for Europe.

Notwithstanding all these French influences, the Treaties of Rome already show a far more diversified influence than the Treaty of Paris did. One striking example is the system of questions for preliminary ruling of the European Court of Justice, which was proposed at the Messina conference by the Italian delegation on the basis of their country's experience with questions for preliminary ruling addressed by ordinary courts to the *Corte costituzionale*. The limitations to standing for individual plaintiffs in the actions in annulment in Article 230 ECT – which con-

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trasts with the very open attitude of the *Conseil d'Etat* in the same matter – is most probably due to the combined influence of German and Italian lawyers during the negotiation of the EEC Treaty and later within the European Court of Justice.

The general principles of law, which are mentioned in the framework of the rules applying to non-contractual liability of the Community (Article 215(2) EEC, now Article 288 ECT) and which had been playing a prominent role in the development of French administrative law, an almost entirely judge made law until the latest decades of the XXth century, were known to all member states. Later on they would play a prominent role in Community and Union law, not only in the context of non-contractual liability, but more generally as 'general principles of law common to the member states', which became a major source of Community law. The 'constitutional traditions common to the member states' referred to in Article 6 EU Treaty, after the revision by the Treaty of Amsterdam, are a further development of this source of law.

In the light of Article I-3 Constitution for Europe, which states that 'an internal market where competition is free and undistorted' is one of the objectives of the Union, it is also worthwhile mentioning the treble origin of the Community's competition rules. Although they are not usually considered as constitutional concepts within member states, the general principles of competition law – which undoubtedly come from the United States in the more technical and detailed elements – are indirectly rooted in the German Constitution, as a part of its social market economy. One set of rules is however specific to the Community and absent as well in German as in US law, namely the principles relating to state aids. In neither country do these have an equivalent in federal constitutional law. Strangely enough, the precedent for this type of rule is to be found in French, judge-made, administrative law with the *Conseil d'Etat*'s case-law of the early nineteen thirties about 'municipal socialism' [*socialisme municipal*] – there is no indication, however, of any French influence upon the Articles 87-89 ECT.

With enlargements, other influences started to make their way into the Treaties. For instance, Swedish constitutional concepts had become very important in the Treaties even before this country joined the European Union in 1995: the European Ombudsman was created by the Maastricht Treaty upon Danish initiative, Denmark having adopted this Swedish, almost two centuries old, institution in 1954. The Swedish direct influence appears in the introduction of the right of access to documents in the EC Treaty by the Treaty of Amsterdam (Article 255 ECT).[7]

[7] Cf. Tim Koopmans, 'The Court of Justice and National Legal Traditions' in *La Cour de justice des Communautés européennes 1952-2002: Bilan et Perspectives. Actes de la conférence organisée dans le cadre du cinquantième anniversaire de la Cour de justice* (Bruxelles, Bruylant 2004) p. 15.

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Nevertheless, the role of the legal traditions of the founding members also remained important. This is especially true for German constitutional law, which has greatly influenced the new constitutions of the last quarter of the XXth century (Greece, Spain and Portugal in the 1970s, and Central and Eastern European countries in the 1990s), especially when it comes to the issues of constitutional review, fundamental rights, and parliamentary mechanisms.

German constitutional concepts are also very present in the development towards a political Union. It is well-known that the principles of proportionality and subsidiarity have German origins, although in very different ways. Proportionality is a classical element of German judicial review in administrative and constitutional law.[8] It has made its way very early into the case-law in the European Court of Justice, before being taken over in most national legal systems and before its consecration in Article 3B (now Article 5) ECT by the Treaty of Maastricht. The principle of subsidiarity, although not spelt out in the German Basic Law, is quite clearly governing the choices in exercising joint competences. Its incorporation in Community law was suggested to the President of the European Commission Jacques Delors in 1987, during visits to the German *Länder*.

The mechanism of double citizenship also has its most similar precedent in German constitutional concepts, although its introduction into Community law is based on proposals by Spain and the European Commission during the 1991 Intergovernmental conference. European citizenship is being acquired only through citizenship of a member state; Article 3 of the 1871 Constitution of the German Empire created such a double citizenship with very similar consequences. It was only in 1913 that a reform of the German law on citizenship [*Staatsangehörigkeitsgesetz*] created a direct Empire citizenship that could be acquired by persons who were not citizens of one of the Empire's constituent states.

The 'investiture' of the European Commission and its President by the European Parliament is another institution which has its sources in national constitutional concepts of the founding members. The Treaty of Maastricht submitted the future appointment of the Commission to an approval by the Parliament (Article 158(2) EEC). The question of whether this meant that the Union institutions were following the principles of parliamentary democracy or not was discussed in terms reminiscent of the discussions amongst French politicians and constitutional lawyers since the time of the 'crisis of 16 May', which was at the roots of the parliamentary system of the Third Republic in France.[9] In the same way as in

[8] *See* amongst others D.-U. Galetta, *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo* (Milano, Giuffrè 1998); J. Ziller, 'Le principe de proportionnalité', *Droit Administratif et Droit Communautaire, Actualité Juridique, Droit administratif-Numéro spécial*, June 1996, p. 185-188.

[9] On 16 May 1877, the president of the French Republic, General Mac Mahon, a monarchist, forced the republican Prime Minister Jules Simon, whose cabinet still enjoyed the confi-

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France drafters of constitutional texts have struggled with the mechanisms leading to the appointment of the President of the Council of Ministers for about 85 years, the drafters of the EU Treaty amendments have tried out different formulae before agreeing upon what has become Article I-27 Constitution for Europe. Some of the subtleties of these mechanisms will be reviewed in part II of the present essay.

The saga of the 'services of general interest' is typical of the mix of influences in Community and Union law. The French notion of *service public* is closely linked to the way in which the *Conseil d'Etat* has developed its field of competence both as regards judicial review and public liability. It has therefore very different consequences from those attached to the same words in other legal systems (*servizio pubblico* in Italy, or even *service public* in Belgium). Furthermore the translation into German and Dutch might generate quite some confusion, an element which was obviously present to those who established the Dutch version of the Treaty of Rome: Article 73 (ex-77) ECT speaks of 'the concept of "*public service*"' ['*openbare dienst*'], with inverted commas, thus underlining how foreign the notion was to Dutch law. This in turn explains why Article 86 (ex-90) ECT, which has obviously been given more attention in the drafting process, speaks of 'services of general economic interest': unlike the concept of public service, the notion of general interest was common to all member states. For years, French doctrine has struggled with this difference of vocabulary before realising that it was not incompatible with the French notion of '*service public industriel et commercial*'. Once this had been understood, the French government fought for the inclusion of a new clause protecting those services, which has become Article 16 ECT with the Treaty of Amsterdam.

The difficult identification of the influence of national constitutional concepts on the European Constitution

The increasing diversity of groups and persons involved in the preparation of the 1996-97 Intergovernmental Conference that produced the Amsterdam Treaty, and in the 2003-2004 European Convention, allows for a greater variety of constitutional influences than diplomatic conferences usually do. The latter are prepared in conditions which lead to a domination of diplomats and public international lawyers who share a far more common language than politicians and constitutional lawyers do.

dence of parliament, to resign. According to Mac Mahon, in the parliamentary system instituted by the constitutional laws of the Third Republic, the cabinet not only needed the (political) confidence of parliament, but also that of the head of state. However, he overplayed his cards and lost the ensuing battle with parliament. Two years later a republican majority in both houses of parliament forced him to resign. Since then, and until 1958, the French heads of state have only played a marginal and essentially ceremonial role in French politics.

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Direct and indirect influences on the development of the constitutional framework come from persons who have a political, historical and legal culture encompassing quite often not only their own country, but also others, be it in the form of clichés.[10] Nevertheless, for several reasons it is not always easy to identify the influence of national constitutional concepts.

Clearly, member states' constitutional concepts cannot be limited to their present day constitutions, even when it comes to the 2003-2004 drafted Constitution for Europe. National constitutional concepts may well include historical experience, even remote experience: the fact that several European countries have known a system of absolute monarchy, the impact of revolutions on England and France especially, and the great diversity of constitutional experimentation in France, Germany or Spain, for instance, offer a vast reservoir of past and present concepts. The experience of authoritarian and totalitarian regimes therefore has to be included in the 'bitter experiences' which are alluded to by the Preamble of the Constitution for Europe in its final formulation. This means amongst other things that national constitutional concepts not only served as a direct model, inspiring specific clause(s) of the Constitution for Europe; there also has been a more indirect influence of historical constitutional experiences, which have been underlying in the debates in the presidium as well as in the Convention.

Trying to assess the role of national concepts in the Constitution for Europe cannot be limited to conscious influences. However, even an analysis based upon solid social sciences methodology would not disclose the unconscious influences of non- 'experts' in EU law and policies. Furthermore, the assessment ought not be limited to the final text as adopted by the Intergovernmental Conference: some of the ideas which have been discussed in the Convention might reappear in the future – most prominently that of a Legislative Council might well surface again quite quickly. Indeed, some of the proposals put forward by the Convention, which were suppressed by the Intergovernmental Conference, might well serve as a ready-made innovation in order to justify a second referendum in case 'one or more Member States have encountered difficulties in proceeding with ratification' (as foreseen by the Declaration No. 30 'on the ratification of the Treaty establishing a Constitution for Europe'). But even in case the ratification of the Constitution for Europe encounters no difficulties, revisions might still occur quite soon, even though amendments to the Treaty require unanimity both at the stage of signature and of ratification.[11] The present essay will nevertheless stick to

[10] This has been illustrated by the very unhappy reference to an opposition between common law and civil law, which was introduced in the legal basis for judicial co-operation in criminal matters (Art. III-270 Constitution for Europe), but eventually suppressed in the final draft submitted to the summit of 18 June 2004.

[11] As a matter of fact, the most rigid form of constitutional amendment procedures has not found its way into the Constitution for Europe, namely revisions at fixed dates in the future, as

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proposals which appear either in the Convention's draft or in the final text approved at the June 2004 European Council meeting.

Last but not least, the role of national constitutional concepts in the Constitution for Europe is especially difficult to assess in certain cases due to the filter of language. Certain versions of the drafts and final text are more apt to show the direct link between a provision of the Constitution for Europe and the relevant concept (e.g., the reference to 'regional and local self-government' in the German version of Article I-5 Constitution for Europe). For this reason, no language version can be considered as being more accurate than any other, even though the French version has served as basis for the final text of the Treaty.[12] As a minimum, the German, English, Italian, French and Spanish versions of the Constitution for Europe have to be taken into account in order to track the concepts. The language problems are not limited to diverging versions, as is shown by the new vocabulary for normative instruments. Early comments by Union lawyers working on the English language versions have been more sensitive to the risk of confusion between the concept of a 'regulation' in the EC Treaty and the (different) concept of a 'regulation' in the Constitution for Europe, than comments in French, German or Italian literature for instance.[13] Indeed, the expressions '*Act of Parliament*', or '*statute*', are usually preferred to '*law*' in Britain (unlike in the USA), and '*delegated legislation*' – or '*order*' – to '*regulation*'. Politicians and lawyers working in most of the other languages on the contrary found that the use of '*Gesetz, legge, ley, loi*', etc. and '*Verordnung, regolamento, regolamiento, règlement*', etc. is helpful in clarifying the Union's language, as it is directly referring to the vocabulary of national constitutional law.

From the European Convention to the Treaty of Rome II: The role of national constitutional concepts in the drafting method and the form of the constitutional treaty

The sober comment of the conclusions of the Thessalonica summit on 20 June

existed in the French Constitution of 1848 and in the Portuguese Constitution of 1974. One might think that such a procedure would have been chosen by the Convention if its members – including the President – really had been convinced that they were drafting a Constitution 'for the next fifty years'.

[12] This is explainable both because its formulation of part I had been submitted to the *Académie française* by Valéry Giscard d'Estaing between the Thessalonica summit of 20 June 2003 and the final session of the Convention on 13 July, and even more because French was the primary working language for legal experts during the whole Intergovernmental Conference, and for diplomats during the Italian presidency in the second half of 2003, where most of the changes to the Convention's draft were made.

[13] According to Art. I-33(1), para. 4 of the Constitution for Europe 'A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution'.

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2003 – calling the Convention's draft 'a good basis' for the Intergovernmental Conference to come – gave no indication as to the final outcome of the diplomatic conference. Due to the strategic choices made by the Italian presidency, to which the final comprehensive text of the draft had been handed over on 18 July 2003, the Intergovernmental Conference did not depart very much from the Convention's draft in general terms. Some amendments however have changed the balance, both in political terms – with a few steps back to intergovernmentalism, dominated by member states' interests – and in technical terms – with a more classical Community law perspective. These two contradictory moves best appear in the reformulation of the Articles I-5 and I-6, with on the one hand the introduction of the principle of equality between member states, on political request, and on the other more prominence given to both the principles of loyalty to the Union and primacy of Union law– a result obtained by the legal experts of the Council.

The political situation and the realism of the triumvirate who led the Convention's work have prevented the latter from being the new Union's *pouvoir constituant*. Technically speaking, the Constitution for Europe remains a global amendment of both the EC and EU treaties, and the member states retain the function of *pouvoir constituant* in their role of 'Masters of Treaties'. Contrary to what happened in the past, however, the role of drafters has changed. In the past Intergovernmental Conferences, drafts were very much the work of the Council's secretariat in Brussels and of the national offices of the presidency of the Council – i.e., usually the foreign ministry of the country in charge of the Presidency. Therefore Intergovernmental Conferences were largely dominated by Community law specialists,[14] whereas the biggest part of the Constitution for Europe is the work of the European Convention. This has probably allowed for more influence of national constitutional concepts in the Constitution for Europe, as opposed to *ad hoc* Community and Union concepts in the previous treaties.

The Three Musketeers: Members of the European Convention as Vectors of National Constitutional Concepts in the Drafting Phase – Any reader of Alexandre Dumas' 'Three Musketeers' who has followed the work of the European Convention will have been struck by the resemblance between Giscard d'Estaing and Athos (the elder wise man), between Dehaene and Portos (all flesh and muscles), and between Amato and Aramis (the subtle intellectual). In Dumas' novel, a fourth companion, who is not formally a Musketeer, plays a dominant role: d'Artagnan. In the follow-up novel 'The Viscount of Bragelonne', the same d'Artagnan died more

[14] *See* amongst others, F. Deloche-Gaudez, 'Le secrétariat de la convention européenne: un acteur influent', *Politique Européenne* No. 13, printemps 2004, p. 43-67, also available on <www.sciences-po.fr/recherche/forum_europeen/prepublications/pol_eur_deloche.pdf >.

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than thirty years later, at the siege of Maastricht, and it is therefore most conceivable that his spirit remained in this location. In December 1991, the British Permanent Representative to the EC played a major but quite discrete role and was probably invested with d'Artagnan's spirit: it was Sir John Kerr, who later became the Convention's General Secretary. These were the four leading figures in steering the process of the Convention and in establishing drafts' drafts and thus setting the agenda in strategic and constitutional terms.

Giuliano Amato, before becoming the politician who led the Italian government twice in ten years time, was a professor of constitutional law and always remained a very respected author in public law and competition law. His leadership of Working groups III on *Legal personality* and IX on *Simplification*, as well as his participation in the Praesidium, have clearly given him ample opportunities to propose concepts he was familiar with. He has always indicated that one of the main priorities of the Convention should be rendering EU law more democratic and more accessible, following lines that were well established and known to the European citizens on the basis of national experiences. Jean-Luc Dehaene is also a doctor of laws, and this, as well as his experience in Belgian politics, certainly also accounts for his support of a number of proposals. Valéry Giscard d'Estaing is not a lawyer but his interest for a constitutional embedding of the protection of the opposition – based on his admiration for the Westminster system – is testified to by the reforms which he fostered in France to that effect in the 1970s, which also permitted the development of a solid judicial review exercised by the *Conseil Constitutionnel*.[15] This interest in the constitutional protection of parliamentary democracy had also led him to play a determining role in the promotion of the direct election of the European Parliament. His interest in constitutional questions is also confirmed by the institutionalising of the European Council meetings, which he initiated on the basis, amongst others, of proposals put forward by the *Comité d'action pour les Etats-Unis d'Europe* led by Jean Monnet.[16] Sir John Kerr is not a lawyer either but, according to his collaborators, a very brilliant mind,[17] able to grasp constitutional concepts very quickly. Behind him lay the entire Secretariat[18] of the Convention, which by the diversity of its staff and its working and co-ordination methods, which Sir John imported from the best

[15] In 1974, Giscard initiated an amendment on the French Constitution which gave 60 members of either chamber of the French parliament (*Assemblée nationale* and *Sénat*), and by that way *de facto* the parliamentary opposition, the right to submit *lois* (Acts of Parliament) to the *Conseil constitutionnel* for constitutional review, a right which until then only the president of the republic, the prime minister and the presidents of either chamber enjoyed (Art. 61). The opposition has seized the opportunity; since 1974 almost every major *loi* is submitted for review.

[16] Monnet, *supra* n. 6.

[17] Deloche-Gaudez, *supra* n. 14.

[18] Deloche Gaudez, s*upra* n. 14; H. Bribosia, 'A few Impressions of a *rédacteur* in the European Convention Secretariat', *EUI review*, winter 2003, p. 4-5.

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Whitehall tradition, has probably allowed for more influence of national traditions than the traditional working methods of Intergovernmental Conferences. As said before, the latter usually rely very heavily on the General Secretariat and legal service of the Council and are thus more oriented towards improving existing EU concepts than towards introducing other concepts from a foreign environment.

More generally, the composition of the Convention speaks for a widespread and diverse constitutional and political experience of the members of Parliaments and former members of Government. As to expertise in constitutional law, CV's might be deceiving. A more methodical study of the Convention's internet site would help in tracing the iteration of concepts through the contributions of the members of the Convention. Interviews with them would probably show that a number of clauses that might seem inspired by specific legal considerations stem in reality from tactical or strategic actions by some members of the Convention and especially of the Praesidium. It is rather well-known, for example, that the concept of 'essential State functions' in Article I-5 of the Constitution for Europe,[19] though reminiscent of the French *Conseil Constitutionnel's* doctrine of '*essential conditions of the exercise of State sovereignty*',[20] was called the 'Cristophersen clause' in the Praesidium. Its proponent was the representative of the Danish parliament, Henning Christophersen, acting on the basis of his experience as a minister of the Danish government but also as member of the Delors Commission. He had insisted that this sentence would be a condition for Danish approval: strikingly the wording also reminds one of the Danish Supreme court's decision on the Maastricht treaty.

The high number of members of different Parliaments in the Convention certainly accounts for the success of the proposals, which streamlined the European Parliament's role, along the lines of the European *parlementarisme rationalisé* in its first, post World War I phase. The critical mass effect is probably more important than individual contributions, however detailed and legally accurate they were.

The Role of Governments: More Limited than Usual – It is also common knowledge that member states' governments have had an almost direct influence on innovations that were eventually adopted by the Convention. The most obvious case is the contribution of Joschka Fischer and Dominique de Villepin in January 2003, which notably contained the ideas of a permanent President of the European

[19] Art. I-5(1) reads, as far as relevant here: 'The Union (…) shall respect their essential State functions (of the Member States), including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security'.

[20] *See* the case note of Carcassonne in this issue of EuConst on the decision of the *Conseil constitutionnel* of 19 Nov. 2004 on the Constitution for Europe.

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Council and of a Minister of Foreign Affairs. This particular case however shows how difficult it is to trace the national constitutional concept that lay behind such an innovation at the European level. A simplistic first glance approach would underline how opposed the relevant French and German experiences are: in Germany, clearly, the President has only a formal role, whereas in France he is the most prominent member of a two-headed executive; for the same reason, the German minister of Foreign affairs is almost a peer to the Chancellor – and has had the title of vice-chancellor for decades, whereas the French Foreign Minister usually is subordinated to the President. But France also has had both the experience of rivalry between the two heads of the executive in the so-called *cohabitation* periods, and of a Head of State whose powers were limited to ceremonial functions (*l'inauguration des chrysanthèmes*) from 1877 to 1958. It is hence difficult to draw any unambiguous conclusion of the Franco-German origin of the proposal.

Less influence of Institutional Experts Behind the Scene – A very important feature of the preparation of the Constitution for Europe, as opposed to previous treaty reforms, has been the limited influence of the Commission on the final outcome. This was due, to a great extent, to the lack of homogeneity of the Prodi Commission. It had difficulties finding a single political line in general and more specifically about the European Constitution. The most obvious sign of this lack of internal agreement has been the presentation of the so-called 'Penelope' proposal by Michel Barnier and Antonio Vitorino for Romano Prodi and not for the entire Commission.[21] It is most interesting to contrast the 'Penelope' proposal with the Convention's work, as it remains far more in the tradition of Community law – even though being sometimes also more innovative, as for instance when it concerns entry into force.

On former occasions, the interaction between the Commission and the General Secretariat of the Council was extremely intense, both in the drafting of new legal bases for Community action and in the final formulation of some major breakthroughs which were hidden behind expert language. A prominent example of this was the formulation of Article 100A (presently Article 95) ECT in the Single European Act, which was due to a last moment negotiation between the General Directors of the Legal Services of the Commission Claus-Dieter Ehlermann and of the Council, Hans Joachim Glaesner. They came to an agreement on the

[21] *Etude de faisabilité. Contribution à un avant-projet de Constitution de l'Union européenne* of 4 Dec. 2002, available on <europa.eu.int/constitution/futurum/documents/offtext/const051202_fr.pdf>. The cover states: 'Document de travail à la demande du Président Prodi et en accord avec MM. Barnier et Vitorino, ce document a été élaboré par un groupe de travail placé sous la responsabilité de François Lamoureux et composé de Marie Lagarrigue, Paolo Stancanelli, Pieter Van Nuffel, Alain Van Solinge, avec l'assistance technique de Marguerite Gazze'. The document carries the warning: 'La présente étude de faisabilité n'engage pas la Commission européenne'.

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term of 'measures' as instruments for the approximation of legislations, rather than staying with the instrument of the directive as provided for since the Rome Treaty in Article 100 (presently Article 94). This apparently minor change would prove to be of major importance for the scope of the former Article 235 (presently Article 308) ECT.[22]

Specialists of Community law enjoy the subtleties behind the choice of one specific word instead of another, but these are of no help to citizens. This type of expert influence is far from absent from the Constitution for Europe, especially in the Third part, which has been mainly drafted by six legal experts chosen by the Commission, the Council and the Parliament. The first part of the Constitution for Europe, however, is to a larger extent immune from such Community lawyers' subtleties, which leads to heavy criticisms of a lot of specialists, but also to some compliments by others.

The Civil Society v. *Representative Democracy* – One of the apparent failures of the Convention method, as compared to the views initially presented by its promoters, seems to have been the limited importance of its 'Forum', which was meant to increase the influence of civil society on the drafting process. This evaluation might however vary according the attitudes of commentators towards representative democracy, a major constitutional concept which is dominant in the constitutional traditions of EU member states – as opposed to the US and Swiss traditions, which leave a bigger room for (semi-) direct democracy. Article I-46 Constitution for Europe, which states that 'The functioning of the Union shall be founded on representative democracy', certainly represents one of the prominent influences of member states' constitutional concepts in the new Constitution. This being said, civil society has not been absent from the Convention's inputs, especially as Jean-Luc Dehaene did his best to channel its proposals to the Praesidium.

The limited influence of the 'Forum' should not be mistaken for a limited role of academia: the number of specialists of EU and constitutional law who have not been consulted is necessarily far more important than the number of those who have been interviewed by Working Groups or who have openly worked as experts for some delegations, and who can thus be easily traced by working on the Convention documents. But the latter will certainly recognise some of there proposals in the Convention's draft.

[22] *See* J. De Ruyt, *L'Acte unique européen* (Bruxelles, Université Bruxelles 1989), p. 167-168, who does not however mention the role of the two directors general. Art. 235 ECT, presently 308 ECT, provides for an escape from the constraints of specific conferrals of competences, both as to substance and as to form.

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The empire strikes back: the Intergovernmental Conference as masters of the treaties in the phase of approval

The Legal Experts and the Restoration of Community Law – Many experts of Community law have probably welcomed the general revision of the Convention's text undertaken since September 2003, first by the General Secretariat of the Council alone, later together with national experts, which has produced Document CIG53/03, the real basis of negotiation of the Intergovernmental Conference. Others, and especially those in favour of using as much as possible the language and concepts of member states' constitutional law, had reasons to be worried when they saw what the experts had done with concepts as important as Article 10 of the Convention's project (principles of loyalty and supremacy; now Article I-6 of the Constitution for Europe), or as insignificant though subtle as the separate numbering of the Constitution's four parts and the absence of roman numbers before the Articles of part I. Beside being the consequence of non-disputed expertise, needed for the production of the final text that the Convention's secretariat had had no time to properly revise, these changes were also the sign of some professional conservatism. At the end of the day however, it is only the change of locus of Article 10, which was transferred from Title III, on 'Union Competences', to Title I, on 'Definition and Objectives of the Union' in order to give the principle of primacy of Union law more emphasis, that really modifies the balance between constitutional concepts and Community concepts; other changes may be considered either way.[23]

The Mixed Impact of the Intergovernmental Conference – There was an even bigger worry after the preparatory meeting of the Intergovernmental Conference which was held on 5 and 6 September 2003 at Riva del Garda, where the Ministers of foreign affairs quickly and happily killed the Legislative Council without giving any reason. The Italian presidency's firm intention to stick as much as possible to the Convention's text was not sufficient to avoid compromises which were giving more weight to the desire of safeguarding national interests. The Intergovernmental Conference made a few small changes, mainly in the sphere of the simplified revision procedures, which sometimes even resulted in a more or less unintentional increase of the role of some constitutional concepts. However most of the steps backwards towards intergovernmentalism made during the Intergovernmental

[23] However, the French and Spanish constitutional courts have used the juxtaposition of the respect for the 'fundamental structures, political and constitutional' of the member states as required by Art. I-5, and the principle of primacy of Union law, in Art. I-6, to interpret the principle of primacy in a limited way; *see* the case notes of Carcassonne on the French decision and of Schutte on the Spanish decision in this issue of *EuConst*. In the second part of this essay, published in the next issue, I will come back to this subject.

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Conference indeed meant departing further from member state's constitutional concepts.

In the final text of the Constitution for Europe, the European Commission looks less like the typical Community institution supposed to represent only the general common interest, but neither does it look like a typical State executive – be it of a Federal state. When national constitutions indicate the number of members of the Executive (as the Belgian, Irish and Luxembourg constitutions do, for instance), the number is reduced to less than fifteen, in order mainly to guarantee collegial decision-making and to avoid an artificial proliferation of portfolios. The Belgian constitution, however, guarantees a balance between the two major components of the Belgian population, whereas the Constitution for Europe's clauses on the composition of the Commission are dominated by the idea that Commissioners are representatives of the member states – as if there existed no Council.

Another change however which clearly departed from the Convention's ideas, was eventually put into the Treaty: the mediating role of the European Council in the legislative procedure in criminal matters according to Article 270(3) of the Constitution for Europe.[24] This resembles the possibility of Heads of States in a number of European countries, for instance Italy and France, to ask their parliament to have a new debate and a new vote on a piece of legislation already adopted.

Pouvoir Constituant v. *Drafters of the Constitution* – From the Laeken summit of December 2001 onwards, actors and commentators of the constitutional process have drawn parallels with the Philadelphia Convention; nobody had the bad taste to make a parallel between the Convention's Praesidium and the *Comité de salut public* of the French Convention of 1791, which was chaired by Robespierre during the *Terreur*. It is however far more interesting from an academic perspective to note the parallels between the 2002-2004 drafting procedure for the Constitution for Europe and some more recent constitution making procedures. Two precedents are worthwhile being considered.

The first was the drafting of the German Basic Law of 23 May 1949. On 25 July 1948, the Heads of government of the German *Länder* of the three zones

[24] Art. 270(3): 'Where a member of the Council considers that a draft European framework law as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that the draft framework law be referred to the European Council. In that case, the procedure referred to in Article III-396 shall be suspended. After discussion, the European Council shall, within four months of this suspension, either: (a) refer the draft back to the Council, which shall terminate the suspension of the procedure referred to in Article III-396, or (b) request the Commission or the group of Member States from which the draft originates to submit a new draft; in that case, the act originally proposed shall be deemed not to have been adopted'. *See* also the contribution of Monar in this issue of *EuConst.*

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occupied by Western-Allies set up a Commission of experts for constitutional questions, composed of Representatives of the *Länder* governments, with 14 assistants and 4 independent experts, which met at the Castle of Herrenchiemsee in Bavaria. It is known in Germany as the Constitutional Convention [*Verfassungskonvent*]. Their draft was then submitted to a Parliamentary Council, composed of 65 members of the *Länder* parliaments and which met in Bonn from 1 September 1948 to 8 May 1949. Before the text which they adopted was ratified by the *Länder* parliaments between 18 and 21 May, it had been approved on 12 May by the British, French and US Military governors – who also exercised some influence on the drafting during the previous months.

The second relevant precedent is the drafting of the Constitution of the French Fifth Republic of 4 October 1958. On 3 June 1958 the National Assembly, which two days before had voted in favour of the newly constituted government with Charles de Gaulle as President of the Council, adopted a constitutional law following the procedure for constitutional amendments in Article 90 of the 1946 Constitution. The constitutional law of 3 June laid down five principles to be respected by the future Constitution: universal suffrage, separation of powers, parliamentary responsibility of government, independent judiciary, respect of the fundamental liberties and rights in the Declaration of 1789 and the preamble of the Constitution of 1946, and association of ex-colonies. It also laid down the drafting procedure for the new Constitution: the draft would be established by the government, on the basis of the opinion of an Advisory Consultative Committee whose members were chosen by the houses of Parliament, and finally submitted to ratification by referendum.

Both precedents are interesting in two respects: the drafting procedures contain some of the typical elements of the 2002-2004 process for the Constitution for Europe, such as the plurality of drafters, the clearly distinguished successive phases and the constraints deriving from either outside forces (Allied occupation) or the internal framework of the Constitutional law. More interestingly, in view of the future, is that both German and French constitutional doctrines have developed techniques of interpretation on the basis of these complex adoption procedures, which allow both for flexibility and for legal certainty.

The concept of a constitution

The endless discussion about the nature of what the European Convention was drafting – a Constitution or a Treaty – did not continue in the Intergovernmental Conference which, by its very nature, could only be working on a Treaty amending the EU and EC treaties. One year later, however, seemingly the majority of commentators does admit that it is a treaty, i.e., that both international customary law codified in the Vienna Convention of 1969 and the national

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constitutional clauses on treaty-making are applicable to its adoption, though with a constitutional content.

The structure and size of the Constitution for Europe are often quoted against its constitutional nature. A number of commentators, probably lacking historical culture, even like to quote the famous '*Il faut qu'une constitution soit courte ...*' attributed to several different authors. They are forgetting that this quote speaks *against* the democratic character of a short text. It was Daunou, who wrote the Constitution of December 1799 (the first Napoleonic constitution, which instituted the '*Consulat*'), who said: '*Il faut qu'une constitution soit courte et obscure*'. As a matter of fact, constitutional history shows that the quest for democracy and checks and balances mostly leads to longer and longer texts: the shortest French Constitutions were those of 1875 – three constitutional laws adopted by a majority that mainly hoped to restore monarchy – and the Constitutional Act of Marshall Pétain in 1940, which instituted an autocratic regime. In contrast, the Revolutionary constitution of 1793 in France or the Spanish Constitution of Cadiz of 1812 each contained more than three hundred articles.

The length of Part III Constitution for Europe is obviously the result of specific constraints due to the nature of the European Union: the principle of conferral calls for detailed regulation of legal bases if centralisation is to be avoided – a clear demand of a number of authorities in the Convention. The same need of detail derives from the conditions for direct applicability of treaty provisions, one of the major features for 'ensuring the Community acquis' as recalled by indent 5 of the Preamble and implemented by Article IV-438(4) Constitution for Europe on legal continuity. There is no such thing as a European tradition of short constitutional texts: federal constitutions in Europe tend on the contrary to be quite long, as demonstrated by the Austrian Constitutional law of 1 October 1920, whose 152 lengthy and detailed provisions amount to the same length as about 300 or more medium sized ones of the Constitution for Europe.

The position of the Charter of fundamental rights and the existence of two preambles, while endogenous to the specific political conditions of the two Conventions of 2000 and 2002-2003, also has precedents which both demonstrate that the solution is inelegant but workable. France, with its long tradition of constitutional experimentation, has known this type of setting twice. From 1875 to 1940, the Constitution was made up of three constitutional laws; but a considerable part of the legislature, as well as the *Conseil d'Etat*, the French supreme administrative court, considered the Declaration of 1789 as part of the Constitution – or at least as a manifestation of general principles of law. They were in line with Article 16 of the Declaration of 1789 according to which a society in which rights are not protected has no constitution. The present day Constitution of the French Fifth Republic is an even better example of this type of incoherent setting, with

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the *bloc de constitutionnalité* to which the *Conseil constitutionnel* refers when exercising judicial review. This bloc incorporates the Declaration of 1789, the Preamble of the 1946 constitution, the – very short – preamble of the Constitution of 1958 itself, as well as bits and pieces of laws adopted during the First (1793-1799), Second (1848-1852, Third (1875-1940) and Fourth (1946-1958) Republics, which have constitutional value on the basis of the reference in the 1946 preamble to the '*principes fondamentaux reconnus par les lois de la République*'.

Austria, Sweden, and Finland (until 2000), also have a Constitution composed of a series of constitutional laws, some devoted to institutional provisions, some to more substantive ones like liberty of opinion. The British Constitution belongs to this tradition, with a constitution made up of unwritten conventions of the constitution on one side and a number of written instruments on the other, including the Magna Charta of 1215, the Bill of Rights of 1628 and 1689, the Habeas Corpus Act of 1679, and, more recently, the 1972 European Communities Act, the 1998 Devolution to Scotland Act and the Human Rights Act.

This is not to say that the end result of the Convention and Intergovernmental Conference's work is beautiful or better than national constitutions, only that as to form, it is not at all foreign to European constitutional concepts. The precedents in national constitutional law offer therefore a variety of instruments for the interpretation and application of the Constitution for Europe, including its Preamble, protocols and declarations.[25]

* * *

If one accepts, with the majority of commentators, that the Constitution for Europe has a constitutional content, the next question is: what kind of a constitutional content?

We the People or They the People? Constitution Octroyée v. *Contrat Social* – The constitutional tradition of a number of European states, such as revolutionary

[25] This said, the European Convention would have been well advised to adopt a constitutional concept common to a number of member states in its system of sources. Organic laws, a concept common to France and Spain, for instance, are being used for writing down detailed rules for the implementation of the Constitution, with a specific decision-making procedure, which is somewhat more rigid than the ordinary legislative procedure, and with a mandatory ex-ante review of their compatibility with the Constitution. The concept of organic laws has been explored, amongst others, by the Convention's Working Groups III (Legal personality) and IX (Simplification), both led by Giuliano Amato. They might have been a solution for the content of part III, but this idea was abandoned for a number of good reasons and of bad reasons. The good reasons are all those that justify the inclusion of Part III in the Constitution for Europe. A bad reason was that this would have increased the number of legislative instruments. Instead, organic laws could have been created in order to replace protocols, hence a zero sum operation which would have had the complementary advantage of creating a hierarchy, which is formally lacking in the present system, between the content of the main treaty and the content of protocols.

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France or Ireland, is in line with the tradition of the United States of America, which sees popular sovereignty as the source of the constitutional pact, mainly considered as a social contract. This contrasts with another European tradition, derived from a monarchic past, which tends to consider the Constitution as primarily a self-limitation of the State. This tradition is illustrated by the French Charter of 1814 and the Italian *Statuto Albertino* of 1848 as well as by most German Constitutions throughout the XIXth century, with the exception of the very ephemeral *Paulskirchenverfassung* of 1848. As a matter of fact, both traditions melted into European post World War I and post World War II democratic constitutional texts, even though, at the beginning of the XXIst century, traditional legal thinking amongst European constitutional lawyers tends to disregard the contractual part of constitutions in a majority of European countries.

In this light, the style of the Preamble and of Article I-1 cannot be considered as solely indicating that the text has the technical nature of a treaty. Due to the hazards of alphabetical order, the text starts by 'His majesty the King of the Belgians ...' in the typical style of a *constitution octroyée*, instead of mentioning the people(s) as *pouvoir constituant*, as most European Constitutions do, like the Irish text of 1937 which starts with the words 'We, the people of Éire, [...]'. One of the many reasons for the reluctance of many Frenchmen about mentioning God in the Constitution for Europe is related to a similar difference between the two French Constitutions. The 1814 Charter started with the words:

> Divine Providence by calling us back in our states after a long absence, has imposed great duties upon us. Peace was the first need of our subjects: we have sought for it without delay; and this peace, so necessary to France as to the rest of Europe, has been signed. A constitutional charter is needed by the present state of the Kingdom; we have promised it and we are publishing it.

It sharply contrasts with the Constitution of the Second Republic, which was born out of the democratic revolution of February 1848 and simply begins 'In the name of the people'. The French reluctance to insisting on God and Religion is not only due to its now one century old tradition of *laïcité*, but it is also a reminiscence of the long standing historical link between the Catholic Church and absolute monarchy.

In this light, the formula of Article I-1 'reflecting the will of the citizens and states of Europe to build a common future' points far more to the tradition of the social contract in a context of representative democracy. The fact that the mechanisms for the adoption of the Constitution for Europe do not demand a referendum cannot diminish this contractual dimension. Far from being a metaphysical debate, the nature of the Constitution might have an important impact on the application of the rights it contains. The German theory of horizontal effect of

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fundamental rights [*Drittwirkung der Grundrechte*] finds its source both in the technicalities of judicial review as known in the Basic Law of 1949 and in a tradition which considers constitutions as an act of self-limitation of State power. According to this theory, constitutionally guaranteed rights normally only have 'vertical' effect, i.e., they protect individuals against the state; they only have horizontal effect, i.e., between citizens, under specific conditions. On the contrary, a social contract approach clearly allows for an application of fundamental rights between the members of the society who have subscribed to the social contract, as demonstrated by a 1947 decision of the French *Cour de Cassation*, which quashed a testament containing an anti-Semitic clause on the basis of the Preamble of the Constitution. In the same way, all rights guaranteed by the Irish Constitution of 1937 are deemed to be applicable in inter-individual relationships.

The discussion on the horizontal effect of directives in Community law should not be confused with the discussion on the horizontal effect of fundamental rights as contained in the Charter of Fundamental Rights of the Union, which is Part II of the Constitution for Europe. The restrictions on the scope of these fundamental rights that are recalled in the Preamble of the Charter and in its Article II-112 certainly do not imply a limitation of their possible horizontal effect. Nevertheless, this limitation might be read in Article II-111, on the field of application of the Charter, which states that 'the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union (...) and to the Member States only when they are implementing Union law'. However, in my view, the 'social contract' nature of the Constitution for Europe, which is in line with the view on direct effect of the Treaty as formulated by the Court of Justice since *Van Gend & Loos*, allows for an extension of rights to private relationships, provided that the conditions for direct application are met.

Unconventional Conventions: Franco-American Revolution v. *British Tradition?* – Some theories of constitutional law insist on a fundamental divide between written constitutions as they have been shaped by the American and French revolutions, on the one hand, and on the other hand such constitutions as in the United Kingdom which still heavily involve conventions. These were characteristic of many state societies in the past, as in the *Ancien Régime* in pre-revolutionary France with its unwritten *Lois fondamentales du Royaume.* These theories overlook an interesting feature of European constitutionalism, the tradition of the *parlementarisme rationalisé* in its post World War I phase, i.e., trying to set in writing the structure of institutions and decision-making procedures of the parliamentary regime – the very purpose of the British conventions of the constitution. This tradition of a codification of constitutional rules and concepts is illustrated best by the Belgian Constitution of 1831, which is often presented as a codification of the British conventions of that period.

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Now, admittedly, the work of the European Convention has been to a large extent an exercise of codification, which is thus in line with one of the major European constitutional concepts. The Laeken declaration was not limiting the Convention to an exercise of *codification à droit constant*, contrary to the exercise which had been commissioned by the European Commission to the European University Institute in 1999.[26] It was far more open to innovation than the Cologne declaration of 1999 setting up the 'body' which had to draft the Charter of fundamental rights. The Cologne declaration was based on the idea of *codification à droit constant*. This is a technique which is presently applied to a very broad field by the French Committee of Codification, whose acting chairman is Guy Braibant. In 2000 he was the representative of the French Prime Minister in the Herzog Convention which drafted the Charter of Fundamental Rights of the European Union. But the European tradition of constitutional codification does not limit itself to *codification à droit constant.* It prefers to improve rules and mechanisms, proven unsatisfactory, while at the same time codifying procedures tested in parliamentary practice. This is also what the Convention tried to do.

Giving back to Caesar what Belongs to Caesar and to God what Belongs to God – What Should There Be in a Constitution? Comparative European constitutional law shows that if a consensus may easily be found on the minimum content of a constitution – guaranteeing rights, establishing the separation of powers – the boundaries of maximum content of constitutions vary over space and time. The clearest example – already quoted, is that of reference to God or the Christian roots. Arguments based on numbers, on the number of constitutions which mention God for instance, are no help in matters touching deeply rooted convictions, and precedents may be found in order to substantiate any claims. For any feature with a highly dividing potential, the burden of proof that it is indispensable should be on those who ask for its insertion in the constitution. One constitutional concept, written nowhere but common to the political conscience of Western democracies, is that constitutions should not be adopted simply on majority grounds, but be the expression of a large societal consensus.

Lawyers know the meaning of an 'exception that confirms the rule': a number of European democratic constitutions have embedded concepts or beliefs that were not the expression of a large consensus. This has usually led either to consensus building, on the basis of an uncontentious provision, or to constitutional amendments, when the procedures and political climate permitted it, or to a *coup d'Etat* or revolution in the opposite case. One of the more recent examples was the

[26] C.-D. Ehlermann, Y. Mény & H. Bribosia, *A Basic Treaty for the European Union – A study for the Reorganisation of the Treaties,* Report submitted on 15 May 2000 to Romano Prodi, President of the European Commission <www.iue.it/RSCAS/e-texts/Report-Treaties.pdf>.

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Portuguese Constitution of 2 April 1976, which contained a left wing programme of nationalisations amongst others, expression of a compromise between the military, the communist party and the socialist party, but which was revised as soon as the very rigid amendments procedure permitted, in 1982 and 1988.

The Constitution for Europe is clearly based on the common European tradition of a compromise, which is only enhanced by intergovernmental negotiation, and explains why so many commentators are dissatisfied by the political content of the Constitution for Europe: too liberal or too social, forgetful of Christian roots in its Preamble or too open to influence of the churches in its Article I-52 on the status of churches and non-confessional organisations.

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To be continued in the next issue of the European Constitutional Law Review: 'National Constitutional Concepts Which Have Made their Way in the Constitution for Europe'.

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