

# THE ROLE OF MEMBER STATES' CONSTITUTIONAL CONCEPTS IN THE NEW CONSTITUTION FOR EUROPE

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## 1. - Introduction

### 1.1. - Constitutional Concepts

It would be quite difficult to find a commonly shared definition of the notion of constitutional concepts in most member States of the European Union; and 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 (CfE) 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<sup>1</sup>. This essay will consider as constitutional concepts all those concepts in EU member states whose role it is to guarantee rights and separate powers in the social organisation of the State, and will thus try and uncover the role of these concepts in the proposed constitution of the new European Union, which will serve as a renewed framework for the social organisation that is composed of States and peoples at the European level.

In member states' law these concepts may be explicitly formulated in a Constitution in the formal sense<sup>2</sup> – whatever its name be : constitution, basic law, constitutional laws or other – or in the *bloc de constitutionnalité* – a concept used mainly in France and Spain. They may as well 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. Clearly, political practice is also a major source of constitutional concepts, not only in the United Kingdom, where conventions of the constitution still represent a major part of constitutional law, but also in member states with rather detailed and recent written constitutional charters. One clear example of a convention of the constitution 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 which is applied in all member states. In a number of cases, member states' constitutional concepts may even be found only explicitly in doctrine, provided there is a sufficiently broad consensus on the existence

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<sup>1</sup> This is the line followed in J. ZILLER: *La nuova Costituzione europea*, Il Mulino, Bologna, 1° ed. 2003, and 2° ed. 2004; French version : *La nouvelle Constitution européenne*, La Découverte, Paris, 2004.

<sup>2</sup> For foreign language versions of the Constitutions of EU member states, see amongst others: C. GREWE & H. OBERDORFF (eds.): *Les Constitutions des Etats de l'Union européenne*, La Documentation française, Paris, 1999; S. GILCART, E. CEREXHE & L. LE HARDY DE BEAULIEU: *Douze constitutions pour l'Europe*, Kluwer Belgique, Bruxelles, 1994 (though some texts are outdated, the introductions remain very useful); III: *Die Verfassungen der EG-Mitgliedstaaten*, Beck-Texte im DTV, München, 1996; and the knowledge portals "After 2004: ..The Integration of the European Constitutional Treaty into the National Constitutions" : <http://www.uc3m.es/uc3m/inst/MGP/NCR/portada.htm>; and "Conseulaw": <http://www.iue.it/OnlineProjects/LAW/conseulaw/>

and meaning of a concept; this usually appears through the fact that such concepts are almost unanimously quoted in handbooks.

This variety of sources is, as such, a factor which makes it often difficult to recognise member states' constitutional concepts on a comparative basis<sup>3</sup>, and this is being worsened by the consequences of differences in sub-disciplinary boundaries, between constitutional law, administrative law, international law and criminal law or even at times between public and private law. Formally some principles are considered as part of constitutional law in one country, as part of administrative law in another country, but the borders are too contingent to be taken into account: a typical example is that of electoral law for local government. Local government is considered quite often as an administrative matter, and not as a constitutional matter – a fact which is being reflected by the use of the formula “administrative elections” in a number of member states, like France or Italy for instance. The problems linked to this diversity are acknowledged by the European Court of Justice (ECJ) and doctrine, who have to struggle with constitutional principles common to the member states.

Beyond *principles*, the notion of *concept* adds a more generic dimension which does not make it easy to draw boundaries. In some countries, a concept might be very clearly defined in strict 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: it is certainly common to all member states, but its consequences vary greatly from one country to another. 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 basis of a unified system of court which takes very different shapes. In Germany, the separation of powers is part of a larger concept, that of a liberal democratic constitutional order (*freiheitlich demokratische Grundordnung*), which has been defined extensively by the Federal Constitutional Court in its decision of 1952 about the prohibition of the communist party<sup>4</sup>. According to this decision, the liberal democratic constitutional order includes parliamentary responsibility of the Government, hence prohibiting apparently a congressional/presidential type of government, a prohibition which may easily be explained by the history of the Weimar Republic, but which would be foreign to most of the other member states, even though they all have a parliamentary system of government.

In order to complicate even more methodological issues, 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 paper is therefore developed on the basis of a rather intuitive methodology, not on a mechanical *reine Rechtslehre*.

## 1.2. - *The Role of National Legal Concepts in the Constitution of the European Communities and of the European Union*

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<sup>3</sup> To my knowledge the best achievement in the field is still C. Grewe & H. Ruiz Fabri: *Droits constitutionnels européens*, PUF, Paris, 1995, which covers all former “Western” Europe.

<sup>4</sup> Decision of the First Senate of the BUNDESVERFASSUNGSGERICHT, of 23 October 1952.

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 ECJ in its case law, and the Commission in drafting legislation, a fact that is well-known to all specialists of EU law. A very brief, tentative and non exhaustive survey of these influences is necessary for the purpose of this essay, as the CfE is far more the result of codification and consolidation of existing EU and EC law principles, than an exercise in institutional change.

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<sup>5</sup>, one of the main initiators of the Schuman Plan and the European Coal and Steel Community (ECSC), Paul Reuter, a professor of public law, has invented the institutional setting around High Authority and Council, the key feature of the Community method, referred to in Article I-1, CfE. Paul Reuter, who later became one of the main French International Public Lawyers, was a professor of constitutional law and administrative law as well as of budgetary and tax law. The ECSC system of remedies was drafted by Maurice Lagrange, a member of the *Conseil d'Etat* who later became advocate general at the ECJ. 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 European Economic Community. The Treaty of Rome already shows a far more diversified influence than the Treaty of Paris did. One striking example is the fact that the system of preliminary rulings was proposed at the Messina conference by the Italian delegation, on the basis of their country's experience with questions for preliminary rulings addressed by ordinary courts to the *Corte costituzionale*.

A clear French influence is to be found, beyond Paul Reuter's drafting hand, in **the institutional system of the Communities**, based on what is now called, under US American influence, "agency model": the experience of '*administrations de mission*', with as models the *Commissariat général du Plan* and the *Secrétariat général du comité interministériel pour la coopération économique européenne (SGCI)*. 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 coordinating Allied logistics during the two world wars. Quite clearly Jean Monnet's excellent contacts with senior US politicians and officials explains in that case how the US agency model was imported in France. The community **system of judicial review**, not astonishingly copies to a great extent the system of French administrative law at that time, 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 Art. 173 (1) of the Treaty establishing the European Economic Community (EECT), now 230(2) Treaty establishing the European Community (ECT), and still present in Art. III-365 (2) CfE. A French influence is also to be found in the system of **preventive judicial review of**

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<sup>5</sup> Jean MONNET, *Mémoires*, Fayard, Paris, 1976.

**external agreements:** the system as such was only introduced in 1958 in the new French Constitution, but it was already discussed in constitutional law circles since a few years. The Italian origin of the **preliminary ruling system** of Art. 177 EECT, is documented in archives, although Germany also has a system of preliminary rulings for constitutional review. The **limitations to standing for individual plaintiffs in the actions in annulment** in art. 230 ECT – which contrasts 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 EECT and later within the European Court of Justice (ECJ)<sup>6</sup>.

The **general principles of law**, which are mentioned in the framework of the rules applying to non-contractual liability of the Community, Art. 215 (2) were known to all member states, and 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. They would later on play a prominent role in EC/EU law, not only on the basis of Art. 215 (2), but in the more general fashion of general principles of law common to the member states which are a major source of community law. Later the “constitutional traditions common to the member states”, of Art. 6 TEU after the revision by the Treaty of Amsterdam were a further development of this source or law.

In the light of Article I-3 CfE, it is also worthwhile mentioning the treble origin of EC **competition rules:** although not being usually considered as constitutional concepts within member states, the general principles of competition law – which undoubtedly comes from the United States in its 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 EC, and absent as well in German as in US law, namely the principles relating to **state aids:** they have no equivalent in federal constitutional law, in neither country. 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”<sup>7</sup> – there is not indication, however, of any French influence upon Art. 92-94 ECT.

Even more straightforward, the EECT took over the French **distinction between overseas departments (*départements d'outre-mer*) and overseas territories (*territoires d'outre-mer*)** in Art. 227(2-3) EECT, which is at the roots of distinction between outermost regions and overseas territories in Art. 299 (2-3) ECT after Amsterdam, and further developed by art. IV-440 CfE.

With enlargements, other influences started to make their way in the treaties, but the role of the legal traditions of the founding members remained important. This is specially true for the very important influence which German constitutional law has had on the new constitutions of the last quarter of the XXth Century (Greece, Spain and Portugal in the seventies, and Central and Eastern European countries in the nineties),

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<sup>6</sup> For a more detailed demonstration, see : J. ZILLER: « Dialectique du contentieux européen : le cas des recours contre les actes normatifs » in *Les droits individuels et le juge en Europe - mélanges en l'honneur de Michel Fromont*, Strasbourg, Presses Universitaires de Strasbourg, 2001, p. 443-464.

<sup>7</sup> For a more detailed explanation, see : J. ZILLER : « Mondialisation et interventions publiques dans le marché – Du contrôle juridictionnel de l'intervention publique à l'encadrement juridique par l'intégration économique régionale ou globale : aides publiques et fiscalité – quelques pistes pour un programme de recherche » in *Revue Internationale De Droit Economique*, 2-3, 2002, N° spécial *Mondialisation Et Droit Economique*, p. 316-328.

especially upon the issues of constitutional review, fundamental rights, and parliamentary mechanisms. German constitutional concepts are very present in EU law with the developments towards a more political Union: it is well known that the **principles of proportionality and subsidiarity** have a German origin, although in a very different way. Proportionality is a classical element of German judicial review in administrative and constitutional law<sup>8</sup>. It has made its way very early into the case law in the ECJ, before being taken over in most national legal systems and before its consecration in article 3B ECT with the Treaty of Maastricht. The principle of subsidiarity however, is not spelt out in the German Basic Law, although it is quite clear that it is governing the choices in exercising joint competences. It is also common knowledge that its incorporation in EC 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 based on proposals by Spain and the European Commission during the 1991 Intergovernmental conference (IGC). European citizenship is being acquired only through citizenship of a member state;; in the same way Art. 3 of the 1871 Constitution of the German Empire created such a double citizenship, with consequences very similar in the Empire to those of European citizenship in the Union. 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. It is quite probable that this precedent was sufficiently known in Denmark as to foster the hostility towards any evolution of European Citizenship which is demonstrated in the Danish declaration at the Edinburgh summit of 1992, and which served as a basis for the second referendum on the ratification of the Maastricht treaty.

A French influence is especially evident with the concept of **services of general interest**, whose saga is quite typical of the mix of influences in EC/EU law. The French notion of *service public* is unique in that it is closely linked to the way in which the *Conseil d'Etat* has developed its field of competence both for 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 the lawyers who established the Dutch version of the Treaty of Rome: in article 77 (ex-73) ECT the text speaks about “the concept of ‘*public service*’ ”, with inverted commas, thus underlining how foreign the notion was to Dutch law. This in turn explains why Art. 86 (ex-90) ECT – which has obviously been given more attention in the drafting process –, speaks of “services of general economic interest”, because 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, with different words, 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

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<sup>8</sup> See amongst others D.-U. GALETTA: *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo*, Giuffrè, Milano, 1998; J. ZILLER: «Le principe de proportionnalité» in *Droit Administratif et Droit Communautaire*, *Actualité Juridique, Droit administratif - Numéro spécial*, juin 1996, pp. 185-188.

clause protecting those services, which has become Art. 16 ECT with the Treaty of Amsterdam.

Last but not least, Swedish constitutional concepts have become very important in the EU 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 in 1954 this Swedish, almost two century old institution. The Swedish direct influence appears in the introduction of the right of **access to documents** in the ECT by the treaty of Amsterdam (Art. 255 ECT).

### *1.3. - The Difficult Identification of national constitutional concepts' influences on the European Constitution*

Clearly, Member States' constitutional concepts cannot be limited to their present day constitutions, even when it comes to the 2003-2004 drafted CfE. Direct and indirect influences on the development of the EC/EU 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. 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 cooperation in criminal matters (Art. III-270 CfE), but eventually suppressed in the final draft submitted to the summit of 18 June 2004. The diversity of groups and persons who found their way into the quite open preparation of the 1996-97 IGC that produced the Amsterdam Treaty, and much more clearly in the 2003-2004 European Convention, allows for more 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.

Therefore 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, 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 has therefore to be present in features that can only be understood as a reaction to the "bitter experiences" which are alluded to by the Preamble of the CfE in its final formulation. This means amongst others that the role of national constitutional concepts may as well have been that of a direct model, inspiring the relevant clause(s) of the CfE, or more indirectly of making the proposals of the Praesidium acceptable to the members of the Convention, or making individual members' proposals interesting to the Praesidium.

Trying to assess the role of national concepts on the CfE cannot be limited to explicit and direct influences. Even an analysis based upon solid social sciences methodology would not disclose the unconscious influence of non 'experts' in EU law and policies. This essay will also not be limited to final text as adopted by the IGC: 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. Some of the proposals put forward by the Convention, but which have been suppressed by the IGC, might well serve as a ready-made innovation that in order to justify a second referendum in the case where "and one or more Member States have encountered

difficulties in proceeding with ratification”, as foreseen by the Declaration n° 30 “on the ratification of the Treaty establishing a Constitution for Europe”. In case none of these difficulties occur for the approval of the CfE, revisions might still occur quite soon, even though amendments to the Treaty still require unanimity both at the stage of signature and of ratification. As a matter of fact, the most rigid form of constitutional amendment procedures has not found its way in the CfE, namely revisions at fixed terms, as experienced by France with the Constitution of 1848 and by Portugal with the 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”. The present paper will nevertheless stick to 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 CfE is especially difficult to assess in certain cases due to the filter of language : certain language versions of the drafts are more apt to show the direct link between a provision of the CfE and the relevant concept (e.g. the reference to “regional and local self-government” in the German version of Art. I-5 CfE). 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<sup>9</sup>. As a minimum, the German, English, Italian, French and Spanish versions of the CfE have to be taken into account in order to track the concepts. The language problems are not limited to diverging versions, as shown by the new vocabulary for normative instruments. Early comments by EC/EU lawyers working on the English language versions have been more sensitive to the risks of confusion between the ECT regulation and the CfE regulation. Indeed the expressions ‘*Act of Parliament*’, or ‘*statute*’, are usually preferred in Britain (unlike in the USA) to ‘*law*’, and ‘*delegated legislation*’ or ‘*order*’ to ‘*regulation*’. Politicians and lawyers working in most of the other languages on the contrary have found that the use of ‘*Gesetz, legge, ley, loi*’ etc. and ‘*Verordnung, regolamento, reglamento, règlement*’ etc. were on the contrary helpful in order to clarify the EU language, as it was making a direct reference to the vocabulary of national constitutional law.

This essay will try and give some indications about the role of national constitutional concepts in the drafting method and the form of the constitutional treaty (section 2), before examining the most obvious of these concepts as they appear in the CfE, as models for the institutional setting, in the protection and promotion of European citizens’ rights, checks and balances in the vertical delimitation of powers and in the horizontal delimitation of powers (section 3).

## **2.- 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**

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<sup>9</sup> This is explainable both because its formulation of part I had been submitted to the *Académie française* by Valéry Giscard d’Estaing between the Thessaloniki 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 IGC, 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.

The sober comment of the conclusions of the Thessaloniki summit on 20 June 2003, about the Convention's draft "a good basis" for the IGC to come, gave no indication as to the final outcome. 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 2004, the IGC 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 Articles I-5/I-6, with the introduction of the principle of equality between member states on one side – a request of the political level –, and on the other side more prominence given to both the principles of loyalty to the Union and primacy of Union law – a choice made 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 to try and play the game of being the new Union's *pouvoir constituant*. Technically speaking, the CfE 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 past IGCs, drafts' drafts were very much the work of the Council's secretariat and of the national offices of the presidency of the Council, largely dominated by EC law specialists<sup>10</sup>; whereas the biggest part of the CfE is the work of the European Convention: this has probably allowed for more influence of national constitutional concepts as opposed to ad-hoc EC/EU concepts.

### *2.1 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 would have been struck by the resemblance of Giscard d'Estaing with Athos (the elder wise man), of Dehaene with Portos (all flesh and muscles), and of Amato with Aramis (the subtle intellectual). In Dumas' novel, a fourth companion, who is not formally a Musketeer, plays a dominant role : d'Artagnan. More than thirty years later, the same d'Artagnan died at the siege of Maastricht, and it is therefore most conceivable that his spirit remained in this location. In December 1992, the British Permanent Representative to the EC played a major but quite discreet role, and was probably invested by 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 establishing draft's drafts, and thus setting the agenda in strategic and constitutional terms.

2.1.1. Lawyers and Non Lawyers in the Leadership of the Convention – Giuliano Amato, before becoming a politician who led twice the Italian government 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*

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<sup>10</sup> See amongst others, F. DELOCHE-GAUDEZ, « Le secrétariat de la convention européenne : un acteur influent », *Politique Européenne*, n°13, printemps 2004, pp. 43-67, available on [http://www.sciences-po.fr/recherche/forum\\_europeen/pdf/pol\\_eur\\_deloche.pdf](http://www.sciences-po.fr/recherche/forum_europeen/pdf/pol_eur_deloche.pdf), Andrew MORAVCSIK ...

*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 in laws, and this, as well as his experience in Belgian politics, certainly also accounts for his support to number of proposals. Valéry Giscard d’Etaing is not a lawyer, but his interest for constitutional embedding of a protection of the opposition – based on his admiration for the Westminster system – are testified by the reforms which he fostered in France to that effect in the nineteen seventies, which also permitted the development of a solid judicial review exercised by the *Conseil Constitutionnel*. This interest in a constitutional protection of parliamentary democracy had also led him to play a determining role in the promotion of direct election of the European Parliament, as well as in institutionalising the European Council meetings, on the basis amongst others of proposals put forward by the *Comité d’action pour les Etats-Unis d’Europe* led by Jean Monnet<sup>11</sup>. Sir John Kerr is not a lawyer either, but according to his collaborators a very brilliant mind<sup>12</sup>, able to grasp constitutional concepts very quickly: behind him lay the entire Secretariat<sup>13</sup> of the Convention. The diversity of the Secretariat and the working and coordination methods, which Sir John clearly imported from the best Whitehall tradition, has probably allowed for more influence of national traditions than the traditional working methods of IGCs. 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.

A more methodical study of the Convention’s Internet site would probably help in tracing the iteration of concept through the contributions of the members of the Convention. A more developed system of enquiries would probably be too costly in that it might not bring conclusions different than those resulting from intuition and a rapid scrutiny of the cv’s of the members of the Convention. 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.

Interviews with members of the Convention 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 specially of the Praesidium. It is rather well known, for example, that the mention of the “essential State functions” in article I-5, which seems at first sight some kind of reminiscence of the French *Conseil Constitutionnel*’s doctrine of “*essential conditions of the exercise of State sovereignty*” was called the ‘Cristophersen clause’ in the Praesidium. It’s proponent was the representative of the Danish parliament, Henning Christophersen, who acted on the basis of his experience as a minister of the Danish government, but also as member of the European Commission under Jacques Delors’ presidency. He had insisted that this

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<sup>11</sup> MONNET, *n. 5*.

<sup>12</sup> DELOCHE-GAUDEZ, *n. 11 supra*.

<sup>13</sup> DELOCHE GAUDEZ, *n. 11 supra*.; H. BRIBOSIA, « A few Impressions of a *rédacteur* in the European Convention Secretariat », *EUI review*, winter 2003, pp. 4-5.

sentence would be a condition for Danish approval: strikingly the wording also reminds of the Danish Supreme court's decision on the Maastricht treaty. The high number of members of Parliament in exercise in the Convention certainly accounts for the success of the proposals which increased the European Parliament's role, along the lines of European *parlementarisme rationalisé*. This critical mass effect is probably more important than individual contributions, however detailed and legally accurate they were.

2.1.2 The Role of Governments, More Limited than Usual – It is also common knowledge that Members 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 MMs. Joschka Fischer and Dominique de Villepin in January 2003, which notably contained the ideas of a permanent President of the European 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 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, and 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 since decades, whereas the French Foreign Minister usually is clearly subordinated to the President. But France has had both the experiences 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 “*l'inauguration des chrysantèmes*”, from 1877 to 1958. It is hence difficult to draw any unambiguous conclusion of the Franco-German origin of the proposal.

2.1.3 Institutional Experts Behind the Scene – A very important feature of the preparation of the CfE, as opposed to previous treaty reforms, has been the limited influence of the Commission on the final outcome, which was due to a great part to the lack of homogeneity of the Prodi Commission in general, and more specifically about the European Constitution. The most obvious sign of this lack of internal agreements has been the presentation of the so-called “Penelope”<sup>14</sup> proposal as being a contribution by Michel Barnier and Antonio Vitorino for Romano Prodi, and not for the entire Commission.

In former occasions the interaction between the Commission and the General Secretariat of the Council was extremely intense, both for the drafting of new legal bases for community action, and for the final formulation of some major breakthroughs, hidden behind expert language. A prominent example of this was the formulation of Art. 100A TEC 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 mention

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<sup>14</sup> *Etude de faisabilité contribution à un avant-projet de constitution de l'union européenne* – « 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 Gasse » 04/12/2002. The document carries the warning: « la présente étude de faisabilité n'engage pas la Commission européenne ».

of “measures” as instruments for the approximation of legislations, rather than staying only with the instrument of the directive as provided for since the Rome Treaty in Article 100, an apparently minor change which had a major importance on the scope of article 235 TCE<sup>15</sup>. Specialists of EC law obviously enjoy the refinements that are lying behind the choice of one specific word instead of another, but clearly also, this type of refinement does not contribute to the clarity towards citizens which remains an objective of constitutional drafting – though very difficult to achieve. This type of expert influence is far from being absent from the CfE, especially in the Third part, which has been mainly drafted by the six legal experts chosen by the Commission, the Council and the Parliament (the Commission’s legal experts had been members of the team that drafted the Penelope project). The first part of the CfE, however, is to a larger extent immune from these refined EC lawyers’ game, a feature which leads to heavy criticisms of a lot of specialists, but also to some compliments by others.

2.1.4 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”. 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 compared with the US and Swiss traditions, which leave a bigger room for semi-direct democracy. Art. I-46 CfE certainly represents one of the most prominent influence 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 made 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.

## 2.2 *The Empire Strikes Back: the IGC as Masters of the Treaties in the Phase of Approval*

2.2.1 The Legal Experts and the Restoration of EC Law – Many expert EC lawyers have probably welcomed the general revision of the Convention’s text undertaken in September 2003 by the General Secretariat of the Council, and continued together with national experts, which has produced Document CIG53/03, the real basis of negotiation of the IGC. Others, and especially those who were 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**) 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 1. Alongside of being the

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<sup>15</sup> See J. DE RUYT, *L’Acte unique européen*, Bruxelles, 1989, pp. 167-168, who does not however mention the role of the two directors general.

consequence of non disputed expertise, which was needed for the production of the final text that the Convention's secretariat had had no time to properly revise, these changes were the sign of a quite logical professional conservatism. At the end of the day, however, only the change of locus of Art. 10 really changes the balance between constitutional concepts and EC concepts: other changes may be considered either way.

2.2.2 The Mixed Impact of the IGC – There was an even bigger worry after the preparatory meeting of the IGC which was held on 5 and 6 September 2003 at Rive 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 IGC made a few small changes, mainly in the sphere of simplified revision procedures, which resulted in a more or less unintentional increase of the role of some constitutional concepts. However most of the steps backwards towards intergovernmentalism, which were introduced during the IGC, indeed meant departing more from member state's constitutional concepts.

In the final text of the CfE, the European Commission looks less like the typical Community institution supposed to represent only the general common interest, but it does not look more like a typical State executive – be it of a Federal state: when national constitutions indicate the **numbers of members of the Executive** (as the Belgian, Irish and Luxembourg constitutions do, for instance), the number are reduced to less than fifteen, in order mainly to guarantee collegial decision making and to avoid an artificial proliferation of portfolios. The Belgian constitution tries and guarantees a balance between the two major components of the Belgian population, whereas the CfE'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 in a form that reminds the national systems: the role of the European Council in the legislative procedure, for cooperation in civil and criminal matters, which is similar to that of Heads of States in parliamentary regimes.

2.2.3 Pouvoir Constituant v. Drafters of the Constitution – From the Laeken summit of December 2001 onwards, actors and commentators of the constitutional process have tried and made 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 CfE and some more recent constitution making procedures. Two precedents are worthwhile being considered under the heading of the role of national member states constitutional concepts in the European Constitution.

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 occupied by Western-Allied set up a Commission of experts for constitutional questions, composed of Representatives of the Länder governments, with 14 assistants and four 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. The text which they adopted, before being ratified by the *Länder* parliaments from 18 to 21 May, had first been approved on 12 May by the British, French and US Military governors – who had 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, who had voted two days before 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 laid down in Art. 90 of the 1946 Constitution. This constitutional law was laying down five principles, which had to be applied by the future new Constitution (universal suffrage, separation of powers, parliamentary responsibility of government, independent judiciary, respect of fundamental essential liberties and rights as laid down in 1789 and 1946, and association of ex-colonies), as well as the drafting procedure: 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 CfE, amongst which the plurality of drafters, the clearly distinguished successive phases and the constraints deriving from either Allied occupation or the framework of the Constitutional law – to be compared with the Laeken Declaration. More interestingly in view of the future, both German and French constitutional doctrine have developed interpretation techniques on the basis of these complex adoption procedures, which allow both for flexibility and for legal certainty.

### 2.3 *The Concept of a Constitution*

The endless discussion about the nature of what the European Convention was writing – Constitution or Treaty – has also been discussed within the Convention itself, but not in the IGC which, by its very nature could only be working on a Treaty amending the EU/EC treaties. If one admits, as seemingly the majority of commentators does one year later, that it is a treaty – i.e. that both international customary law codified in the Vienna Convention of 1969, and the national constitutional clauses on treaty-making are applicable to its adoption – with a constitutional content, another discussion theme arises, which seems more interesting, and for which the role of member states' constitutional concepts is far more relevant: what kind of Constitution?

2.3.1 We the People or They the People? *Constitution Octroyée v. Contrat Social* – The constitutional tradition of a number of European states, like revolutionary 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 being primarily a self-limitation of the State. This tradition is illustrated by the French Charter of 1816, or the Italian *Statuto albertino*

of 1848 as well as by most German Constitutions throughout the XIXth century, with the exception of the never applied Constitution of the Paulskirche, of 1848. As a matter of fact, both traditions melt in European democratic constitutional texts, post world-war I and post world-war II, 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 Art. I-1 cannot be considered as solely indicating the technical nature of a treaty: due to the hazards of alphabetical order the text starts by “His majesty the Kingdom of Belgium...” 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, [...]”. Amongst the many reasons that explain the reluctance of many about mentioning God in the CfE, one should remember the difference between the two French Constitutional Charters: the 1816 started with the words “...” whereas the 1830 Charter, which was born out of the July revolution said “...”. The French reluctance to insisting on **God and Religion** is not only due to its now one century old tradition of *laïcité*, it is far more a reminiscence of the long standing historical link between the Catholic Church and absolute monarchy.

In this light, the formula of Art. 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 CfE, do not demand a referendum, cannot diminish this contractual dimension. Far from being a metaphysical debate, the nature the Constitution might have an important impact on the application of the rights it contains. The German theory of **horizontal effect of 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, whereby constitutionally guaranteed rights can only affect the ‘vertical’ State/citizen relationship. 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 interindividual relationships. The EC-law discussion of the horizontal effect of directives should certainly not be confused with the discussion on fundamental rights. The restrictions to the scope of fundamental rights that are recalled in the Preamble of the Charter - Part II of the Constitution, and in its Art. II-112, do not imply a limitation to a possible horizontal effect of those rights, which can derive only from Art. II-111 on the field of application of the Charter. The “social contract” nature of the CfE, which is also in line with the ECJ tradition on direct effect of the Treaty as formulated in *Van Gend & Loos*, allows to my view for an extension of rights to private relationships, provided the conditions for direct application of EC law are met.

2.3.2 Unconventional Conventions: Franco-American Revolution v. British Tradition? – A somewhat simplistic approach to comparative constitutional law sometimes insists on a supposedly fundamental divide between written Constitutions as

they have been shaped by the American and French Revolutions on the one hand, and conventions of the Constitution as they still exist in the United Kingdom, but which were characteristic of many other state societies in the past, to start with the unwritten *Lois fondamentales du Royaume* which were the constitution of the *Ancien Régime* in pre-revolutionary France. This kind of approach overlooks an interesting feature of European constitutionalism, the tradition of *parlementarisme rationalisé*, 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 at its best with the Belgian constitution of 1831, which is often presented as a codification of the British conventions of that period.

Now, admittedly, the work of the European Convention has been to a large extent an exercise of codification, which is thus in the 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<sup>16</sup>. 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. This declaration was clearly based on the idea of *codification à droit constant*, a technique which has been amongst others applied to a very broad field by the French Committee of Codification, whose first President was Guy Braibant; he was the representative of the French Prime Minister in the Herzog Convention in 2000. But the European tradition of constitutional codification does not limit itself to *codification à droit constant* it has always tried to improve rules and mechanisms which were not satisfactory at the same time as it was laying on paper those practices which had been tested in parliamentary practice: this is also what the Convention tried to do.

The **structure and size** of the CfE are often quoted against its the 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 Napoleon. They are forgetting that the whole sentence clearly speaks against the democratic character of a short text : it was Daunou, who wrote the Constitution of December 1799 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 lead 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 Cadix of 1812 each contained more than three hundred articles.

The length of Part III CfE 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 has to be avoided – a clear demand of a number of authorities throughout Europe the Convention. The same consequences derive from the conditions for direct applicability of treaty provisions, one of the major feature for “ensuring the

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<sup>16</sup> 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, <http://www.iue.it/RSCAS/e-texts/Report-Treaties.pdf>

Community acquis” as recalled by indent 5 of the Preamble and implemented by Art. IV-438 (4) CfE on legal continuity. There is not such a 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 articles amount to the same length as about 300 or more medium sized CfE articles.

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 of three constitutional laws; but a non negligible part of legislators, 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 – in line with Art. 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 Fifth Republic is even a better example of this type of incoherent setting, with 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 own – very short – preamble of the Constitution of 1958, as well as bits and pieces of former laws adopted during the first (1793-1799), second (1848-1852), third (1875-1940) and fourth (1946-1958) Republics, which have constitutional value by way of the mention, by the 1946 preamble, of “*principes fondamentaux reconnus par les lois de la République*”. Austria, Sweden, of Finland until 2000 have also a Constitution that is composed of a series of constitutional laws, some devoted to institutional provisions, some others to more substantive ones like liberty of opinion. The British Constitution also belongs to this tradition, with a constitution which is made of unwritten conventions of the constitution on one side, and a number of written text 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 or the **1999 Devolution to Scotland and Human Rights Acts**.

This is not to say that the end result of the Convention and IGC’s work is beautiful or better than national constitutions, only that it is not foreign to European constitutional concepts. Even more, the precedents in national constitutional law offer therefore a variety of instruments for the interpretation and application of the CfE, including its Preamble, protocols and declarations.

This being said, the European Convention would have been well advised to take over 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 on Legal personality and IX on 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 and bad reasons. The good reasons are all

those that justify the inclusion of Part III in the CfE. The 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.

2.3.3. 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 immensely over space and time. The most clear example – already quoted, is that of God or the Christian roots. Arguments based on numbers, on the number of constitutions which mention God for instance, cannot be sufficient when it comes to an element that touches upon deeply rooted convictions, and precedents may be found in order to substantiate any claims. As for any feature which has a highly dividing potential, the burden of the proof that such a mention is indispensable should be on those who ask for its insertion in the CfE: one constitutional concept which is written nowhere but which is common to the political conscience of western democracies, especially in Europe, 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 a non contentious 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 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 CfE is very clearly based on the common European tradition of a compromise, which is only enhanced by intergovernmental negotiation, and explains why so many commentators are unsatisfied by the political content of the CfE: too liberal or too social, forgetful about the Christian roots in its Preamble or too open to an influence of the churches in article I-52 on the status of churches and non confessional organisations.

### **3. National Constitutional Concepts Which Have Made their Way in the Constitution for Europe**

#### *3.1 Not that Unfamiliar: Member States’ Institutions as Models for the Institutional Setting of the Constitution for Europe*

At the beginning of the XXIst century, the trend towards assimilation between representative democracy, majoritarian democracy and the Westminster model seems overwhelming, even in the most well-established bastions of consociational democracy, i.e. Austria, Belgium and the Netherlands. The question as to whether this trend is also

present in the CfE or whether the European Union cannot be other than a consociational democracy, if any, certainly goes beyond the scope of the present essay. Three institutional concepts however, need to be addressed here, as they are very clearly related to member states' experience. They are also interesting because they show why some concepts have been able to make their way in the final text of the CfE and others not.

3.1.1 Habsburg's Eagle: Bicephal Executives in the European Tradition – Many comments produced during the Convention and afterwards have been very critical about the two most visible institutional innovations of the CfE: the Permanent President of the European Council and the Minister of Foreign affairs. According to these critics this new institutional setting would create a permanent source of litigation, due to the competition of both new figures with the President of the European Commission and with each other. Furthermore, the “double hat” of the Minister of Foreign affairs would be a more than bizarre system, full of contradictions and potential conflicts of interest. From the perspective of national constitutional concepts, these kind of criticism are at least exaggerated if not totally misplaced.

The European constitutional tradition, derived from parliamentary monarchies, has constantly been based on a **double headed executive** – Head of State and Head of Government – and constitutional history has demonstrated that this was almost always a workable solution, and that competition between both heads was rather easy to channel. In Europe, mono-headed executives are usually linked to authoritarian regimes, and on the contrary, two-headed executives are being considered as an important element of constitutional checks and balances. Even the French constitution of the Vth Republic, too often presented as a form of “presidentialism”, remains in the straightest line of European parliamentary tradition. In France the double legitimacy of governments (appointment by the Head of State and support by the majority in Parliament) has been reproduced in a context of direct election of the Head of State, thus a system of representative democracy, instead of the traditional monarchical hereditary passing on of power, which is not deemed to be compatible with democracy. The difficulties of the ‘*cohabitation*’ between François Mitterrand and Jacques Chirac in 1986-88, and to a much lesser extent between Mitterrand and Lionel Jospin in 1997-2002 are contrasted by the smooth collaboration between Mitterrand and Edouard Balladur in 1993-1995. The CfE however is far less constraining than national constitutions as it does not include the traditional institution of countersign, which had been thought of in order to restrain the monarch, but has ended up in monitoring the Head of Government. There is nothing of the kind in the relationship between the President of the European Council and the President of the Commission which have no institutional means to impede directly each others work.

The European constitutional tradition also has a very widespread experience of ‘**double hats**’, or *dédoublement fonctionnel* as the French international lawyer Georges Scelle would have put it. This is especially clear in the organisation of local government and federalism on the continent. Elected French Mayors or Austrian *Landeshauptmänner*, for instance, are not only the elected executives of their constituency, they are also representatives of the State in the same constituency. The other way round, prefects, appointed by the national government were both representatives of the State and local executives (of the *département*) until 1982 in France. Even more strikingly, the British Chancellor, who has the function of an Attorney general, is both member of the executive

and to a large extent of the judiciary, as long as the reform of the judiciary announced in 2003 by the Blair government will not have been enacted.. The member states' constitutional concepts could and should thus be used in order to find the appropriate solutions to frictions that might come out of the peculiar position of the Minister for Foreign Affairs.

The double or even treble involvement in EU foreign relations of the Presidents of the European Council, and of the Commission as well as the Minister for Foreign Affairs is also a very classical concept in constitutional law. As a matter of fact, Heads of State and Ministers of Foreign Affairs even benefit from a presumption in international law that they may exercise Treaty making power, as recalled by the Vienna Convention on the law of treaties. This presumption is however reversible, and it should soon become common knowledge in international society, that only the Minister for Foreign Affairs can sign or ratify a Treaty in the name of the European Union – in his capacity of Chairman of the Foreign affairs Council. The rationale might be different in the CfE and in national constitutions, but the formal similarity remains striking.

3.1.2 The Unborn Child : the Legislative Council as a Reflection of the German Bundesrat – The first information which came out of the preparatory meeting of the IGC at Riva del Garda in September 2003 indicated that there was a consensus amongst the 25 Ministers of Foreign Affairs in order to suppress the Legislative and General Affairs Council as proposed in Art. 23 of the Convention's draft. Hardly any explanation was given against the institution, apart from a too heavy workload due to the accumulation of general affairs and external relations. While it is easy to guess that governments, and especially Ministers of Foreign Affairs, were afraid of the innovation, and mainly of the fact that the Ministers of European Affairs would thus become a very heavy weight in national governments, there seems to have been no serious discussion. As indicated by vice-president Amato, the most obvious difference between an IGC and the Convention was that in an IGC nobody is asked to give reasons, because the sovereign is speaking, while in the Convention the necessity to persuade was leading to an explanation for every proposal. From the point of view of national constitutional concepts, this has clearly been a missed opportunity to discuss the specific nature of the Council of ministers, and especially to decide whether it should follow the model of the German *Bundesrat* or remain a totally genuine institution.

Unlike the Austrian Federal Council (*Bundesrat*), the German Federal Council (*Bundesrat*) is not, legally speaking, a House of Parliament. This has been confirmed by the Federal Constitutional court, which has set out that its members do not have the status of members of parliament. Furthermore, the *Bundesrat* does not have a full legislative power, it only has a vetoing right : the legislative procedure in Germany is to some extent comparable to the distribution of roles between Congress and the President in the United States of America. More importantly even, the *Bundesrat* participates quite clearly in the executive function, as it has a power of approval of ordinances (*Verordnungen*) in the fields of joint competences, and as its permission is necessary in order to give temporary legislative power to the Federal Government, with the procedure of legislative emergency of Art. 81 Basic Law, which has never been used. This clearly shows a great similarity with the proposed Legislative and General affairs Council. Interestingly enough, most *Länder* choose to have a delegation at the *Bundesrat* composed of their Head of

Government, their Ministers of Justice and/or of Home affairs, and two or three other ministers, according to the number of seats they have in the Bundesrat (from three to five). But unlike the possibilities left open by the Convention's draft which was mentioning the possibility for each member state of having up to three ministers sitting in the Legislative Council, the composition of the delegations to the *Bundesrat* does not normally change during the corresponding legislature of the relevant *Land*.

3.1.3 A Failed Attempt at Introducing American Democracy: the Congress of the Peoples of Europe – From the early sessions of the European Convention until May 2003, the President of the Convention tried to push forward the idea of a Congress of the Peoples of Europe, which was very much resisted by the parliamentary members of the Convention. The reasons of Members of the European Parliament were quite obvious and logical, as they feared that this institution would reduce their own legitimacy. The reasons of members of national parliaments are less clear, as this kind of institution would have increased their own roles: it seems quite probable that their resistance was linked to a general diffidence against Giscard d'Estaing, who was seen as the most clear case of French aspirations to *grandeur* and whose initiatives were thus perceived as ways and means to serve the governments of “big” member states, and specially his own one.

In the debates of the plenary sessions, which were neither very clear nor leading to any constructive consensus when discussing the “Congress” proposal, two constitutional concepts were emerging. Giscard's idea was mainly based on his acute perception of the communication deficit of which the EU is suffering since long. His model was the US tradition of the President's yearly speech on the State of the Union, as he repeatedly put it forward. This however was not indicating very clearly the nature of the Congress: strikingly Giscard did propose a common meeting of the European Parliament and delegations of the National Parliaments, on the model of the COSAC, and not a common meeting of the European Parliament and Legislative and General Affairs Council, which would somehow correspond to the Common session of the US **Congress**, or also to the institution of the *Congrès* in France i.e. a common meeting of the two houses of Parliament, which adopts constitutional amendments.

Another idea however was mentioned by a few members of the Convention, notably Germans: the Congress of the Peoples of Europe could evolve, or even start as, the institution that would elect the President of the European Council. The precedents are European ones: in Germany (Federal Assembly – *Bundesversammlung*), in Italy (with the addition of 3 delegates for each region to members of Parliament) and in France from 1958 to 1962 (With a specific electoral assembly appointed by local councils). In those three countries (in the primary version of the 1958 Constitution for France) a compromise has been found between a direct or even semi-direct (like in the USA) election, and a mere election by the Parliament, in order to give a broader basis to the President's mandate, and hence a bigger legitimacy in order for him to exercise his function as a moral authority. In these three cases, the election is made by a broad assembly which gathers not only members of Parliament but also specially appointed representatives of regional and local governments. This resembles more the proposed composition of the Congress of the Peoples of Europe. Such a model of electoral system could possibly have worked with a procedure by which the candidate(s) would be proposed by the European Council, as for the President of the Commission.

### *3.2 Beyond the Charter: Member States' Legal Concepts in the Protection and Promotion of European Citizens' Rights*

The influence of national constitutional concepts on the EU Charter of fundamental rights has gone through somewhat different ways than the concepts which are discussed here, due to the codification task of the Herzog Convention. The European Convention and the IGC only made a quantitatively minor change to the Nice Charter : the reference to the Praesidiums' explanations in the Preamble and in article 52 of the Charter (Art. II-112 CfE), which will be discussed later in this essay under the heading of vertical delimitation of powers. Two concepts which are related to Citizens' rights, even central in the second case, find however their expression in part I CfE and need therefore to be briefly discussed here.

3.2.1 A Latecomer Due to Enlargement: the Protection of Minorities – **Protection of minorities**, other than through the principle of non discrimination, are foreign to the dominant constitutional concepts in Western Europe, mainly because of the inherent tension between recognising minorities' rights the one hand, and guaranteeing individual freedom and equality on the other. The French Revolutionary tradition is probably paramount of this concept. The consequence is that protection of minorities has long been more a concept of international public law than a constitutional concept. This is clearly stated in Article 1 of the Council of Europe's Framework Convention For The Protection Of National Minorities signed in Strasbourg, on 1 February 1995: *"The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation."* This may be the main explanation of the fact that the Convention's draft did not include the protection of minorities, although a number of proposals have been made by members of the Convention in this sense (as well from Central Europe, as from northern Europe – including Scotland): the protection of minorities was deemed to be mainly a competence for pan-European institutions like the Council of Europe.

The inclusion by the IGC of the protection of "the rights of persons belonging to minorities" in Art. I-1 CfE is deemed to be mainly due to the insistence of the Hungarian government. Although the intention might be also to protect minorities in the EU's external relations, there seems to be a clear link with a constitutional concept which is embedded in the the Constitution of the Republic of Hungary of 1949 as revised and restated on 1 December 1998. As there is no implementing provision for the protection of minorities in parts II and III of the CfE, it is worthwhile quoting Article 68 of the Hungarian Constitution, which might serve as guidance for discussion at EU level :

"(1) The national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent factor of the State.

"(2) The Republic of Hungary shall provide for the protection of national and ethnic minorities. It shall ensure their collective participation in public affairs, the fostering of their cultures, the use of their own languages, education in their own languages and the use of names in their own languages.

"(3) The laws of the Republic of Hungary shall ensure representation of the national and ethnic minorities living within the country.

"(4) National and ethnic minorities shall have the right to form local and national self-governments.

“(5) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the statute on the rights of national and ethnic minorities.”<sup>17</sup>

While “the fostering of their cultures, the use of their own languages, [...] and the use of names in their own languages” would probably be acceptable to other EU member states, some other provisions of this article would clearly clash with opposite constitutional concepts, based on the indivisibility of the people, as the French constitution’s article 3, according to which, “No section of the people nor any individual may claim the exercise [of National sovereignty]”, even though after the march 2003 revision, article 1 states now that Article 1 [France’s] organisation is decentralised<sup>18</sup>”; the majority view on this clause, and especially its interpretation by the *Conseil constitutionnel* is that this forbids a protection of collective minority rights, while individual minority rights are allowed, for instance in the field of languages.

This is a very interesting case of clearly opposed constitutional concepts – much more than in the too often discussed case of God or the Christian roots – between member states of the Union: the exact consequences of this opposition in the light of the right to cultural diversity (Art. II-22 of the Charter) and the protection of the equality between member States and the respect for their fundamental structures by art. I-5 CfE is an open field for discussion and investigation.

### *3.3 European Checks and Balances : National Concepts in the Vertical Delimitation of Powers between EU institutions*

The European Convention quite clearly wanted to go further down the road leading from the “agency model” of the primary institutional setting of the European Communities towards a more classical system of representative democracy. The vertical delimitation of powers was present in the initial setting, albeit in a form which differs to some extent from the two classical regimes derived from Montesquieu’s tripartite **separation of powers**. The Community system, exactly like the parliamentary or presidential/congressional systems, is not so much based on a rigid separation between the three branches of government than on a system of checks of balances which avoids the monopolisation of either function by one single institution. A number of classical constitutional mechanisms and concepts which serve the **checks and balances** in the separation between legislative and executive functions have been taken up by the Convention in its draft, as a response to the “democratic deficit” argument, and they have been maintained by the IGC with a small variation. The diversity of national traditions might also explain why hardly anything has been done in order to reinforce the EU judiciary.

3.3.1 Directly Elected Legislators: Representative Democracy and the Formal Concept of Law – The European Convention reinforced quite importantly the role of the European parliament in the **legislative function**. At the level of symbols, the Parliament has achieved to get even the title role, as in national systems. This is a probably unforeseen side-effect of the suppression of the Legislative Council, as there is no clearly identifiable other institution whose main function is law-making. In the CfE, as opposed to the former community system, the Council of Ministers’ role in legislation remains

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<sup>17</sup> English text on <http://www.kum.hu/Archivum/Torvenytar/law/const.htm>, consulted on 2/08/2004.

<sup>18</sup> Translations by the author.

fundamental, but instead of being the main legislator provided the Parliament does not put its veto, it's position is now that of the vetoing power, as appears in the ordinary legislative procedure of Art. III-396.

The fact that this procedure is laid down in a section called “provisions common to institutions [...]”, following the presentation chosen for the first Treaty of Rome almost fifty year earlier, is not contrary to the tradition of a number of national constitutions which are setting down their legislative procedure in a section dedicated to the relationships between the main political institutions.

The legislative procedure itself does not depart any more from the parliamentary paradigms, since the European Parliament has a full legislative power. The declensions of systems of readings and of iterations between two houses are varied enough in Europe to provide with procedures which may serve as a direct model for the EU legislative procedure. It is more than probable that members of the Convention who were familiar with their own national systems thought that they were merely reproducing what they new at European level, though they were simply going further down the way which was opened by the Single European Act. German or French members of the Convention might think that the conciliation system, which improves the procedure set up by the Maastricht treaty, is to a large extent cloning their own joint committees. Clearly, rather than the result of a mere copying process, what the Convention has produced is due to the principle that the same causes produce the same consequences. This consideration also applies to the new **budgetary procedure**, which is far more similar to a national one than the traditional community budgetary procedure was: in modern constitutions too, a number of specific rules apply to the law by which a budget is being approved.

More importantly from the point of view of concepts, the CfE takes over a formal concept of the european law which is a direct result of the importance of representative democracy. In most European constitutional systems, two **concepts of the law** coexist indeed.

One is based on its content: the (written) law or regulation is a general and impersonal norm, as opposed to an individual decision, or a contract implementing the general norm. This was clearly the option of the ECT, as indicated in Art. 230 (“a decision which, although in the form of a regulation [...], is of direct and individual concern”). This substantive concept of law (*loi au sens matériel*) does not really distinguish between *law* and *regulation*. In the same way as traditional EC law has two normative instruments of same hierarchical level, directives and regulations.

The formal concept of law (*loi au sens fromel*) on the contrary puts at the forefront the role of the elected parliament: when the French constitution starts Art. 34 by the words “*La loi est votée par le Parlement*”, it has the same meaning as the use of the expression ‘Act of Parliament’ for a statute in the British tradition. All continental system have therefore a specific word for a statutory law – *loi*, *Gesetz*, *legge*, *ley* etc. – and one or more others for other normative instruments which in most latin languages are subsumed in the term regulation “*règlement*, *regolamento*, *regolamiento*” etc..., while in German the more technically specific word ‘ordinance’ *Verordnung* is being used.

Furthermore, the CfE takes over a very important concept in Art. I-37 (1) second indent on European delegated regulations, which has been developed in a specially deep way by German constitutional law, as a reaction to excessive and dangerous use of **delegated legislation**: the concept of ‘statutory reserve’ *Gesetzesvorbehalt*, know in

italian as « *riserva di legge* ». The concept, although bearing no specific name, is also clearly acknowledged by French constitutional law with the extremely strict limits put to the use of *ordonnances* in Art. 38 of the 1958 Constitution. Most other European constitutions, including the relevant British Acts on delegated legislation, try and set limits to the use of delegation from parliament to government, with more or less success. There is little doubt that the ECJ will be able to find precedents in the jurisprudence of national constitutional courts in implementing those limitations, accordingly to the core democratic content of the concept.

Clearly there are still a number of important exceptions to the principle that European Laws are Acts of Parliament, and the legal experts working for the IGC have further extended these exceptions, probably because they have not thought through the implications of the relationship between law and regulation in a not fully hierarchical system, which will be addressed further in this paper.

A further formulation of the principle of *Gesetzesvorbehalt* is embedded in Art. I-33 (2) CfE : « When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant procedure in the area in question. » This clause may be read very simply as a condemnation of current EC practice. It has however a more deeper signification, which goes to the heart of the relationship between soft law and hard law, especially in view of some perverse effects of the fashion of « new governance », and it also has its precedents in national constitutional concepts. The latter concepts however are not easily identifiable at first glance, as they do not use the vocabulary of governance or that of soft and hard law, and are usually to be found in principles of administrative law. Since the nineteen fifties the *Conseil d'Etat* has repeatedly quashed or « requalified » government documents which, although presented as non-binding, were changing the legal situations. The same trend may be observed in most of the Member states' administrative law jurisprudence, especially British administrative law: judges do not easily admit the use of non binding instruments for reasons of policy flexibility, which at the end of the day hollows out the principle of access to justice.

There is an apparent contradiction between the role that has been finally given to the European Council by Art. III-270 (3) in the procedure for harmonisation of legislation in the field of judicial cooperation in criminal matters, and the mention in Art. I-21 (1) according to which “it shall not exercise legislative functions”. However, this **suspensive legislative veto** of the European Council may be related to a traditional concept of parliamentary regimes, according to which the Head of State may ask Parliament to reconsider a vote.

Las but not least it is quite obvious that the attempt at introducing a kind of ‘**popular legislative initiative**’ under the heading of participative democracy in Art. I-47 CfE is linked to constitutional concepts. Though being generally speaking more developed in Switzerland or in the United States, this kind of tools of semi-direct democracy are also present in the constitutional law of some member states<sup>19</sup>, where

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<sup>19</sup> V. CUESTA, "Designing the first transnational citizens' initiative", in D. Martinelli & B. Kaufmann (eds.), *The European Constitution – Bringing in the People*, Initiative & Referendum Institute Europe, Amsterdam and Presence Suisse, Bern, 2004, pp. 30-33; V. CUESTA, "Six The Future of the European Citizen Initiative" in B. Kaufmann & M. D. Waters (eds.), *Direct Democracy Europe*, Carolina Academic Press, Durham, 2004 pp. 133-139.

there are gaining ground. The caution put around the mere formulation of the popular initiative may be compared to the caution put into Member States constitutions' provision on semi-direct democracy, which are clearly the result of bad experiences with plebiscites in a number of European countries, to start with France and Germany.

3.3.2. The Unachieved Hierarchy: Law and Regulation – Some strong criticisms are being addressed to the absence of a fully fledged hierarchy between European laws and framework laws on one side, European regulations on the other. From the point of view of traditional EC law it would demonstrate the inappropriateness of trying to import the law/regulation divide from constitutional into EC law. From the point of view of a traditional constitutional Kelsenian perception of the sources of law, the system would not be logic either: regulations should be acts which implement laws and thus there should be a clear subordination of the latter to the former. However, the incomplete hierarchy is quite well known from national constitutional law, although most members of the European Convention, apart from a few professors of constitutional law, may not have been conscious of this. Two countries clearly demonstrate this. One of the major concepts of British constitutional law remains that of the **royal prerogative**, according to which the Crown may regulate some fields without needing an Act of Parliament – especially in foreign relations and in the organisation of the civil service. Both the Belgian and Dutch Constitution have long contained similar provisions, and in France, the *Conseil d'Etat* has developed the notion of a general regulatory power, pertaining to the executive even in the absence of specific provisions in the laws, in the famous *Labonne* case of 8 August 1919 about driving licences.

The drafters of the 1958 Constitution further developed this concept on paper by making a straightforward distinction between the fields of competence of Parliament on one side, which were laid down in Art. 34, and of government on the other side, which includes all the rest. As a consequence, Art. 37 sets up the category of *règlements autonomes*, i.e. government decrees which are not based on a law. In 1958 this was however perceived as a dramatic innovation and not a particularly democratic one, whereas the idea was mainly to diminish the workload of Parliament and to help it concentrate on important legislative matters instead of interfering in the daily work of government.

The most strikingly dangerous aspects of this system were soon reduced by the *Conseil d'Etat* successfully claiming its power to review the 'legality' of such decrees, i.e. their conformity to the Constitution, to general principles of law and to international treaties. This reintroduced an element of hierarchy as, contrary to the case of regulations, the laws adopted by Parliament are not submitted to any kind of ex-post judicial review. The *Conseil constitutionnel* started to interpret art. 34 as allowing Parliament to act in the fields not mentioned therein, and the *Conseil d'Etat* maintained a very strict control on the prohibition made to government to act in the fields of art. 34 if it did not have a clear mandate in a law passed by Parliament.

While the protection of the Council against a European Parliament action in the fields where it does not have powers – according to part III CFE – is certainly stronger than that of the French government on the basis of Art. 37 of the French Constitution, the similarities are quite obvious. It is therefore probable that the ECJ will closely look at the

French case when it comes to addressing the issue of possible hierarchical conflicts between European laws and European regulations.

2.3.3 The Unachieved Judiciary: a Traditional European Court of Justice – The European approach to the **judiciary** in the system of separation of powers is evolving. In a way which is completely opposed to the US tradition, two separate European traditions have long contributed to considering the judiciary as a relatively minor branch of government. The authoritarian tradition, derived from a monarchical past, has contributed to a perception of courts as being the servants of the sovereign: while accession to democracy has meant everywhere that the independence of courts became a major part of the principle of the rule of law, the idea remains that this independence is mainly linked to the necessary party-political neutrality of judges. A number of European Constitutions therefore do not clearly present the courts as forming together a third branch of government, but as a series of different institutions. Even more, this is probably one of the – often unconscious – reasons for the preference for the Kelsenian model of a separate court specialised in constitutional review.

The tradition of parliamentary sovereignty is opposed to the authoritarian tradition, which it has been fighting with revolutions. It has had an even more important impact on the concept of the judiciary. In both its English and French versions it is deeply linked to the tradition of parliamentary regimes, which in theory gives predominance to the legislative branch of government, though on different theoretical bases. In France, the tradition stemming from the Revolution was that Parliament adopts “*la loi, expression de la volonté générale*”. The French constitution traditionally does not recognise the existence of a ‘*pouvoir judiciaire*’, but only an ‘*autorité judiciaire*’, and the courts, though genuinely independent, are divided amongst at least four different sets of jurisdictions: *ordinaire, administrative, constitutionnelle, politique*<sup>20</sup>. In most other European countries Constitutions which are more modern include all courts in the judiciary, with the exception of the Constitution of the Netherlands: its article 112 mentions courts which are not part of the judiciary. In the United Kingdom, again with due respect to the necessary independence of courts, the minor position of the judiciary has been symbolically evidenced until 2003 by the judicial role of a section of the upper House (the Appellate Committee of the House of Lords) and of a specific body of the executive (the Judicial Committee of the Privy Council) and more importantly in practice, by the multiplication of so called administrative tribunals, which are not courts, after World War II.

The CfE’s concept of the judiciary seems therefore far closer to those of France, the Netherlands and the United Kingdom than to that of the Belgian Constitution, for instance, which clearly puts the Judicial Power (*pouvoir judiciaire*) on the same footing as the Legislative and Executive Powers in its title III, or the Spanish Constitution, in its Title VI ‘*El poder judicial*’. The aforementioned European traditions have converged with the idea of the European Court of Justice, that its most necessary reforms had already been achieved with the Treaty of Nice: A very noticeable feature of the European Constitution is the lack of real progress towards a European Judiciary (as developed in another essay<sup>21</sup>).

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<sup>20</sup> *Haute Cour and Cour de Justice de la République*.

<sup>21</sup> See R. ALONSO GARCÍA, chapter on *The Judicial Power* in this publication.

The same combination of British and French traditions shows up in the fact that, while gaining more competence with the abolition of the pillar-structure of the Maastricht Treaty, the ECJ has still only a very limited role in reviewing the Union's action in external policy. The French theory of '*actes de gouvernement*' had been developed by the Conseil d'Etat in order to guarantee judicial exemption to the executive in its relationship with other branches of government and in 'high policy' matters; while shrinking more and more, *actes de gouvernement* still include foreign relations. The British courts for long were even far more timid than the *Conseil d'Etat*, in that they refused to apply judicial review to the exercise of the royal prerogative – which includes foreign relations and the organisation of the civil service (i.e. state administration). Only in 1985 did the House of Lords reverse the case law and admit judicial review, in its famous GCHQ case which concerns the organisation of the civil service.

The British tradition has clearly played a very important role in the Convention's choices, and it is at the root of one of the most interesting paradoxes of the CfE, as far as the absence of a strong judiciary is concerned. The technique of interpretation by reference to the '*travaux préparatoires*' has been written into the Convention's text upon the very heavy insistence of British delegates, coming from a country where advocates were not allowed to quote parliamentary debates for the interpretation of statutes in court cases until 1999. It is common knowledge that the British government did everything it could to force the Convention to include a reference to 'the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention' into the Preamble of the Charter of fundamental Rights (Part II of the Constitution), a provision which has been even worsened by the IGC. Reading these explanations might very well lead to the conclusion that all this is much ado about nothing, especially as the notion of 'giving due regard' is not really limiting the interpretative powers of courts. The 'explanations' usually only indicate the source of the rights which the Charter is trying to codify, and their meaning, but do not formulate strict boundaries to the interpretation or further development of these rights. Happily enough, the British government did not even try to ask for a mechanism like the '*référé législatif*' by which the French Revolutionary Assemblies required the courts to ask them for a preliminary ruling on questions of interpretation of the laws they had adopted – a system which was soon abandoned as not practicable.

In the light of the European traditions of judicial interpretation (including those of the House of Lords in the last decades) it is however quite probable that the British government only won a Pyrrhus' victory: setting aside the Austrian theories based on literal interpretation of statutes, which have less and less influence, European supreme courts, and even more European Constitutional courts, have a longstanding tradition of creative interpretation. In its 1947 decision *d'Aillières*, the *Conseil d'Etat* even went so far as saying that a statute of September 1945 which explicitly excluded any right of appeal against the decisions of a '*jury d'honneur*' had to be read as allowing nevertheless for the '*recours pour excès de pouvoir*', the traditional French remedy against *ultra vires*.

This being said, comparing the CfE with the most influent modern European constitutions underlines even more the lack of a specific remedy for the protection of fundamental rights, similar to the German *Verfassungsbeschwerde*, or the Spanish *recurso de amparo*. The EU system of judicial review will however most probably undergo an

important change, due to the new system of sources, which makes a distinction between laws and regulations. Quite clearly, the modest change in standing due to the suppression of the condition of an individual interest for proceedings against “regulatory acts which do not entail implementing measures” (Art. III-365 (4)) is modelled on the most widespread system of judicial review in Europe. It not only distinguishes between judicial review of laws – using a typically French vocabulary where *légalité* means *conformité au droit*, not *conformité à la loi*<sup>22</sup>. More strikingly even – in a comparative perspective – it rests mainly on indirect judicial review – *contrôle par voie d’exception* – even of regulations, i.e through proceedings against implementing measures with national courts or the ECJ. This is the most common model in Europe, of which France and the United Kingdom notably depart in allowing for direct actions against decisions of government, disregarding the difference between normative acts and individual decisions<sup>23</sup>.

### 3.4 European Federalism : National Legal Concepts in the Horizontal Delimitation of Powers

British deep-seated reluctance towards using the word “federal” in a European context has once more impeded its use during the Convention’s work, like in the Maastricht IGC twelve years earlier. A pleasant paradox is that the CfE therefore does not refer to a “federal way” but to the “community way” i.e. “*le mode communautaire*”, which probably leaves far less space for rolling back EU powers, than a reference to an ill-defined federalism would have done. This being said, if the word is missing, the thing is there: federalism is clearly embedded in the CfE, and in most cases on the basis of the relevant member states’ experiences.

3.4.1 Federal Loyalty and the Christophersen Clause – A classical concept of European federal constitutions is that of **federal loyalty**, which is embedded in the German constitutional text, together with mechanisms of implementation. The Belgian constitution, very strikingly did not contain such a concept between 1980 and 1993, when the new composite state was not yet called a federation. With the 1993 reform and the official adoption of the form of a Federal state, the principle of *fidélité fédérale* was introduced into the constitution, as a consequence of the international liability of the state, in the form of specific powers allowing federal organs to act in substitution of failing sub-central organs (Art. 169). The principle of community loyalty was already embedded in Art. 10 ECT; interestingly, the Convention deemed that it had also to be formulated in Article 5 on the relationship between the Union and its member states, thus reinforcing the link with the German concept of the principle, which does not exclude the Belgian version, but is far more comprehensive, and mainly turned towards the inside.

The interesting mix of the final formulation of Article I-5 CfE, which puts together federal loyalty and respect of the member states would be more difficult to identify as having its equivalent in national constitutional concepts.

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<sup>22</sup> The problem had been raised in 1957 by the Dutch parliament in the debates about the draft EEC treaty, because *légalité* had first been translated by *wetmatigheid* – the German would be *Gestzesmäßigkeit* – instead of *rechtmatigheid*; *Rechtsmäßigkeit* was indeed used in the German text.

<sup>23</sup> See J. ZILLER, *cited n. 7*.

The so-called Christopersen clause, referring to essential state functions, on the other hand seems a member states' concept, though rather vague. A much more developed comparative law research would probably help finding out if and how such a concept is being used by constitutional courts, administrative courts, and also with any court having to deal with public liability, in order to define the frontiers of what the state – be it unitary or composite – may not delegate, or may not refuse to take care of. A French precedent would easily be found in the *Conseil constitutionnel's* case law on the statutes of overseas territories, which it has automatically been reviewing since 1992 – a side effect of the discussions around the Treaty of Maastricht<sup>24</sup>. This, far more than the mention of “essential conditions of the exercise of sovereignty”, helps writing down a list of essential state functions in the French context. The French precedent mainly shows how difficult such an exercise is, if taken seriously, because the context is very different from the European one: contrary to article I-5 which may only serve as a complementary tool for the interpretation of EU law and cannot reverse the clauses of the Third part of the CfE, the French concept allows for exceptions to the list of competences of the national Parliament, as set down in Art. 34 of the French Constitution.

3.4.2 Bundesrecht bricht Landesrecht or Union Law Über Alles ? – The German federal tradition has been centred on the notion of primacy as early as in the never applied Constitution for the Empire of 1849, which contained a clause 66 named “*Reichsrecht bricht Landesrecht*”, that stated “Empire laws have precedence over the laws of individual States, as long as they have not been expressly given a subsidiary significance”.<sup>25</sup> The clause was part of Art. XIII which regulated the legislative power of the Empire. The wording of Art. 2 of the Empire's Constitution of 1871 was slightly different, but with the same intentions and effects. With the Weimar Constitution, the accent was clearly shifted. Art. 13 named “*Reichsrecht bricht Landesrecht*” came immediately after the clauses on the distribution of competences and went: “If there remain doubts or differences of opinion about the compatibility of a clause of *Land-law* with *Empire-law*, the competent central authority of the Empire or the Land may ask for the decision of a supreme court of the Empire, upon the basis of a clause of an Empire statute”.<sup>26</sup> The Basic Law of 1949 again changes focus: the relevant clause comes just after Art. 30 which contains the principle of conferral. The article is named “Priority of Federal Law” (*Vorrang des Bundesrechts*) and simply states : “*Bundesrecht bricht Landesrecht*”, an obvious reference to the Weimar tradition, to be read however in the context of a specific and detailed procedure for arbitration by the federal constitutional court.

As mentioned before, one of the main changes brought by the IGC's experts to the Convention's text was to suppress Art. 10, which came just after the article on the

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<sup>24</sup> By fear of an European interference in France's relationship with its territoires d'outre-mer (TOM) – a totally unfounded fantasy – French Members of Parliament used the opportunity of the Constitutional amendments in view of the ratification of the Maastricht treaty in 1992, in order to impose the use of organic laws for establishing the statutes of TOM, hence making their review obligatory.

<sup>25</sup> Translation by the author : « *Reichsgesetze gehen den Gesetzen der Einzelstaaten vor, insofern ihnen nicht ausdrücklich eine nur subsidiäre Geltung beigelegt ist* ».

<sup>26</sup> Idem : « *Bestehen Zweifel oder Meinungsverschiedenheiten darüber, ob eine landesrechtliche Vorschrift mit dem Reichsrecht vereinbar ist, so kann die zuständige Reichs- oder Landeszentralbehörde nach näherer Vorschrift eines Reichsgesetzes die Entscheidung eines obersten Gerichtshofs des Reichs anrufen* ».

principles which apply to Union competences, in the relevant section of part I, i.e. Title III on Union competences. Art. 10 (2) was transferred into Art. I-5, as it contained a clause which was apparently only detailing the principle of Union loyalty; fair enough... But no official explanation whatsoever has been given to the fact that the content of Art. 10 (1), which states the primacy clause, was moved to a new place: Art. I-6 in Title I on the principles and objectives of the Union. Whether this change affects the scope of the principle of primacy and the consequences of writing it down in the EU constitution remains open to debate. Comparing it to the German tradition however shows clearly how much emphasis has been shifted, from a principle which needs to be understood in the perspective of limited competences of the Union, due to the principle of conferral, to a general principle which dominates the whole system of relationships between the Member States and the Union. This shift is clearly in contradiction with the intentions of the IGC that lay behind the rather superfluous Declaration according to which Art. I-6 “reflects” the jurisprudence of the ECJ, a meaningless statement in so far as the context of this jurisprudence is being changed by the CfE.

3.4.3 The New System of Competences of the New European Constitution - Even before the Convention started working, strong demands were made on it to try and establish a *Kompetenzkatalog* in order to separate rigidly the powers of the Union from those of Member States and to make sure that there would be no unforeseeable intrusions of EU institutions in the fields of central or sub-central governments. The loudest voice has been that of the German *Länder*: most of their representatives acted as if the German Basic Law were providing for such a clear delimitation; only a few stated that they wanted to avoid the EU having the same mechanisms as the Federal Republic of Germany, which they deemed of a centralising nature – forgetting obviously to compare it with the constitutions of Weimar or of the Empire.

Although with nuances between those successive constitutional texts, German constitutional law never succumbed to the illusions of a layer-cake type delimitation of competences between the different levels of government. On the contrary, the notion of *Konkurrierende Gesetzgebung* has always been central: joint legislative competences – not ‘competing’ competences, as too often translated in Latin languages (e.g. *compétences concurrentes*). In the German system, powers which are fully and only attributed to one level, be it the Federation or its component states, are the exception. This is the indispensable rationale of both the principles of primacy and of subsidiarity, which would be mere tautological statements in a system of separated competences like the Belgian or US models. This is why the German federal model fits so well the EC type of functional competences, and is being reproduced in Art. I-12 CfE: community law doctrine had since long been using the German categories. The lists of competences are more detailed in the German basic Law than in Part I of the CfE, but this is obviously the right technical choice because the legal basis of Part III constitute a far more detailed and comprehensive list.

German federalism, like US federalism, has been built on the basis of pre-existing sovereign states. Therefore the traditional clause of German constitutions which recalls that residual competences remain with the States is to be considered as a legal tautology, which only serves the function of reassuring public opinion, in the same way as the Xth Amendment to the US constitution. The same is true for the last sentence of Art. I-10 (2),

CfE : “Competences not conferred to the Union in the Constitution remain with the Member States”.

Another fundamental feature of German federalism is that, unlike in most other federal constitutions, the rules about distribution of competence are not limited to law-making: in Germany the scheme of executive competences does not correspond to that of legislative competences. The German federal system has been built in the XIXth century on the basis of pre-existing states with very solid and well established administrations, especially in the Kingdom of Prussia, which covered more than two-thirds of the Empire. It was thus only logical to rely on the principle that State administrations would carry out the implementation of federal legislation. The dissolution of Prussia in 1945 did not entail the transfer of Prussian administration to the Federation in 1949, although for a number of important elements, the Federation became the legal successor to Prussia. The system of executive competences of the Empire and the Weimar Republic was maintained and reinforced. Specialists of European administrative law will probably come to regret that the Convention did not take into consideration Chapter VIII of the German Basic Law, which reaffirms the principle that execution pertains to the State governments before differentiating between administration by the *Länder*, with federal monitoring (*Landeseigene Verwaltung und Bundesaufsicht*), administration with a federal mandate (*Auftragsverwaltung der Länder*), and administration by the Federation (*Bundeseigene Verwaltung*).

Since the 1969 constitutional reform, the German Basic Law also regulates so-called common tasks (*Gemeinschaftsaufgaben*), a concept which is still not unanimously accepted in Germany, because it is considered as a centralising mechanism by many supporters of *Länder* autonomy. The concept is probably the closest possible to the CfE’s complementary competences. At any rate this concept is quite unique in constitutional law: it is therefore not astonishing that the Convention was so uneasy at naming its own concept and at synthesising it.

Even the so-called open method of coordination has clear precedents in German practice, through the very developed and refined mechanisms of cooperative federalism, which at times include Federal institutions (for instance common decisions of the Federal and *Länder* governments<sup>27</sup>), and at times exclude them, like the horizontal conferences of State ministers (*Länderkonferenzen*). But these mechanisms are not written down in the Basic Law: in this, the Convention did not depart from the German model in renouncing to write down the open method of coordination.

3.4.4. More than Lipservice to Decentralisation – Art. I-5 CfE for the first time takes into account the internal subdivisions of member states’ government. Roughly said, there are two models of constitutional concepts regarding the place of local government in federal constitutions. The US model fully ignores local government for the simple reason that the setup and organisation thereof is a state competence. As the US society is largely built bottom up, from local-government to state and from state to Union, this

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<sup>27</sup> In its time, the « Common decision on extremists » *Extremistenbeschluss* of 1972, has been quite famous as a basis for so-called professional exclusions (*Berufsverbote*), see E. W. BÖCKENFÖRDE, Ch. TOMUSCHAT, & D. UMBACH (eds.): *Extremisten und öffentlicher Dienst – Rechtslage und Praxis des Zugangs zum und der Entlassung aus dem öffentlichen Dienst in Westeuropa, USA, Jugoslawien und der EG*, Nomos, Baden-Baden, 1981.

makes little problem for the continuing existence of local freedoms. The German model is based upon deeply rooted local freedoms too, pre-existing to XIXth Century reunification and federalism and even to democracy, which puts a high constitutional value on those freedoms. It is therefore not surprising that the German basic law guarantees local freedoms, even against the Länder, whose competence it is to organise and regulate local government.

By recognising local and regional government within the member states, after 50 years in which EU/EC law ignored internal structures, in application of the principle of indivisibility of statehood – which derives from the international public law relating to state liability – the CfE has made a step into the direction of the German model. The wording of both Art. I-5 and the Protocol on the Application of the Principles of Subsidiarity and Proportionality are doing their best at avoiding any interference of the EU in the internal organisation of Member states. The step towards the German model is however undeniable, especially in the light of the German version of the CfE, which on purpose uses exactly the wording of German constitutional law (*Grundsatz der kommunalen Selbstverwaltung*) when referring to the local and regional self-government: “*einschließlich der regionalen und kommunalen Selbstverwaltung*”. A careful French wording would have referred “*la libre administration des autorités régionales et locales*” – as the French equivalent of “*Communale Selbstverwaltung*” – instead of “*l’autonomie régionale et locale*”. The Italian language version is all right in this respect for lawyers, as it mentions “*autonomia regionali e locali*” as the Italian constitution does. Other language versions remain to be checked. Clearly the English version “inclusive of regional and local self-government” is far less meaningful in a constitutional setting which has permitted one of the highest degrees of centralisation compatible with democracy under the Thatcher government.

3.4.5 From Constitutional Ping-Pong to Intertwined Constitutionalism – In way of conclusion I would like to draw attention to a simple and clear example of iteration of constitutional concepts to the European constitution, and of European concepts to member states constitutional law (a phenomenon well illustrated also by the iterations of the principle of proportionality).<sup>28</sup>

Art. 227 (2) of the Treaty of Rome made an explicit reference to the French constitutional category of *départements d’outre-mer* (DOM – it also referred to Algeria until finally the Maastricht Treaty updated the text, thirty years after independence). This had led to an unprecedented move of the ECJ in the Hansen case<sup>29</sup>. While France had not made any observation in the procedure which involved a question about the applicability of EC law to one of its *départements* (Guadeloupe), the Court asked the French government to indicate its position – which was followed by Advocate General Capotorti and the Court itself in stating that Art. 227 EECT had to be interpreted “*en première ligne*” in the light of member state’s constitutional law. The Hansen case is thus a forerunner of Art. I-5 CfE. The vocabulary of Art. 227 (3) EECT more indirectly also refers to French constitutional law in using the words (*Pays et territoires d’outre-mer* , ‘Overseas Countries and Territories’ (OCT).

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<sup>28</sup> See n.7, *supra*.

<sup>29</sup> 10 October 1978, Case 148/77.

With enlargement to Spain and Portugal, three other territories entered the EC internal market with a legal status which although based on the accession treaty, was very similar to that of the French DOM: the Canary Islands, for Spain, Azores and Madeira for Portugal. A declaration of the Maastricht Treaty and later a full rewriting of Art. 227 (2), now Art. 299 (2) ECT, regulates the legal status of what EC practice and secondary legislation was already calling outermost regions (*régions ultrapériphériques, regiones ultraperifericas, regioes ultraperifericas*) since 1988.

The notion of outermost regions is then taken up in French, Portuguese and Spanish legislation. With the amendments of the French constitution of march 2003, the exact wording of Art. 299 (2) TCE is reproduced in the French constitution when referring to “*adaptations tenant aux caractéristiques et contraintes particulières de ces collectivités*” in the new wording of its Art. 73. In the same year, the Convention quite logically takes over the content of Art. 299 TCE which again quite logically, it divides into a general part on the territorial scope of application of the Constitution and Art. III-330 (III-424 CfE) of its draft taking over Art. 299 (2) TCE, which gives more details on the legal consequences of the concept of outermost regions. For the first time also, the French constitution names Guadeloupe, Guyane, Martinique and Réunion instead of referring to “*départements d’outre-mer*”. During the IGC a French proposal does the same for the relevant Articles III-424 and IV-440 of the CfE, which do not mention anymore the French DOM, but give their names.

This constitutional ping-pong is further developed by an adjunction to the clauses on the territorial scope of the CfE. Art. IV – 440 (7) includes a small “*passerelle*” which allows for a change of status from outermost region to OCT and vice-versa without a constitutional amendment. Full recognition to specific member states constitutional concepts is given by the fact that this change of status is only made possible for the relevant territories of Denmark, France and the Netherlands, but not for Portugal, Spain or the United Kingdom.

This might be considered as an exotic and isolated example. I submit on the contrary that it is a clear illustration of a more general phenomenon of intertwined constitutionalism (*intrecciamento costituzionale*) – for reasons developed elsewhere I prefer this expression to the more often used *multi-level constitutionalism*<sup>30</sup> – to which the entire construction and innovations of the Constitution for Europe are giving due recognition.

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<sup>30</sup> See J. ZILLER: « L’élargissement change-t-il les données du problème ? » in J. ZILLER (dir.): *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*, L’Harmattan, Paris, 2003, p. 315-316.