The Convention at Many Crossroads: Report on a Conference at the College of Europe (Bruges), 9-10 May 2003

By Robert Schütze

After nearly fifty years of its existence, the European Community currently faces two constitutional challenges: In a conscious effort to bring Europe closer to its citizens and to break away from the undemocratic executive and judicial constitution-making, Europe has set up a "Constitutional Convention" in charge of constitutional soul-searching. The second project – and indeed one of no less "constitutional" significance – is, of course, the Union's enlargement that will turn it into an organization of twenty-five *plus*. The two projects are in many ways intertwined and can be synthesized into the phrase: "A new Constitution for a new Europe".

Indeed, the Europe of "small steps" seems no longer be viewed as a necessary condition for European integration. This is not to say that European integration prior to the Nice Treaty can be reduced to functionalist spill-overs and technocratic governance. Since the Single European Act (1987), the European project underwent a series of major intergovernmental revisions that did represent "quantitative" leaps in the integration process. However, as much as past enlargements of the EC were limited in number, former Treaty amendments were limited by subject-matter, and it is the very *scope* of the two present constitutional challenges that might make them first illustrations of a new era of "large steps"in the integration process.

The challenge posed by those two ambitious projects lies, however, not only in their scope. It is the very *method* employed to execute them that represents a "paradigmatic" shift from the "normal" policy-making of the European Community: In terms of "constitutional methodology", the work of the European Convention ushers the integration process onto a novel path: After the failure to reach substantive agreement on vital constitutional issues at the Nice IGC, and a first positive experience in drafting a European Charter of Fundamental Rights, the reform discussion was "contracted-out" to a Constitutional Convention with the (autonomously defined) mandate of drafting a "preliminary constitutional Treaty for the European Union". In terms of its composition and working mode, the Convention represents a conscious move away from the nitty-gritty high-politics bargaining that characterizes intergovernmental negotiations, and unlike the later, the Convention has tried to integrate sections of civil society into the constitution-making process.

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With the Convention likely to present its results to the European Council at the end of June (possibly extended until the end of September) in Athens, the conference organized by the Legal Studies Department of the College of Europe and the *Institut d'études juridiques européennes de l'Université de Liège* on 9-10 May 2003 at the College of Europe offered a first opportunity to reflect on and assess the results of this novel form of constitution-making. The need for greater legitimacy ("to bring Europe closer to its citizens") and clarification has been on the top of the official agenda at least since the "Declaration on the Future of Europe" and the Laeken Declaration – both raising numerous questions without answering them. Under the title of "*Making a Constitution for the Enlarged Union*", the conference offered a forum to unite some of Europe's eminent constitutional law scholars to bring their constitutional expectations and historical experiences to the proposals made by the Convention.

Six general themes structured the series of discussions. Jean-Luc Dehaene, Vice-President of the Convention, opened a first series of presentations through insights from *within* the Convention. The future partitioning of the new constitutional treaty into four (!) separate parts provided but one illustration of valuable "insider information". The future Treaty will consist of a brief "pocket" constitution, followed by the Charter in a second part. In a third part, the Treaty will set out the European Union's substantive policies, while the forth part will contain final provisions. In spite of some obvious "transparency"-benefits, the *reason d'être* for such a breaking-up seems to have gone missing in the Convention. No agreement could be reached in attaching different amendment procedures to each of these parts. To contextualize the work of the European Convention, three subsequent papers shed light on the phenomenon of "constitution-making by means of convention": A historical and comparative constitutional law perspective was offered by Horst Dippel (Kassel), who underlined the European Convention's uniqueness and clarified that it would not be a second "Philadelphia". It followed a political-science analysis of the nature of the Convention. Could the Convention be regarded as a "constitutional assembly" or should it be conceived of as an extended "working group" of the European Council? The balanced comparison by Christine Reh (College of Europe) and Bruno Scholl (Cologne) placed the Convention somewhere "in between". Its composition, mandate, decision-making process and convocation exhibited hybrid characteristics. The first theme of the conference was rounded off by a provocative thesis presented by Jesse Scott (EUI, Florence), who looked at the potential catalyzing effect of the Convention for a European public constitutional debate.

The second "workshop" of the conference invited its participants to move from form to substance: The possibilities of converting the "Byzantine Treaties" into a short and readable document were outlined by Bruno de Witte (EUI, Florence). The merger of the EC and the EU Treaties will put an end to the famous "pillar" structure of the European Union introduced at Maastricht. The resulting text will then be

split into various parts, with a "very" constitutional first part and three "secondary" constitutional parts. The repartition might – in the absence of any legal hierarchization of the different parts – create more problems than it intends to solve. The practical advantage of redrafting, i.e. clarifying and up-dating those provisions of the Treaty whose wording has become "misleading" in the light of subsequent institutional practice, might well be outweighed by the legal confusion such a wholesale *do-it-all-at-once*-exercise entails. One of the most pressing items on the post-Nice agenda concerns the issue of simplifying the European Union's instruments and legislative procedures, a subject presented by Koen Lenaerts (Leuven, Judge at the CFI). The absence of clear conceptual definitions amid the variety of Community/Union instruments has long perplexed commentators and has blurred the dividing line between legislative and executive powers. The new constitutional Treaty will make some concrete progress in clarifying the nature of each instrument while connecting each to a specific procedure. The new Articles 24-33 Draft Constitutional Treaty would fundamentally redefine and simplify the Community/Union's means of intervention along the basic distinction between legislative and non-legislative acts.

The scope and use of the European Union's powers formed the third theme of the Conference, to which Jacques Pelkmans, Director of Economic Studies at the College of Europe, gave the opening speech. What powers *should* the Union have? Instead of the constitutional lawyer's focus on the *legal* limits, economic federalism looks at the allocation of tasks in the light of a substantive subsidiarity test: The principle of subsidiarity is *two-dimensional* with a substantive cost-benefit-test as the ultimate arbiter in deciding which matters should be centralized and which shouldn't. Two subsequent papers re-entered classic legal terrain by looking at the possibilities and limits of a categorization of competences and the role given to national parliaments in monitoring the principle of subsidiarity. Had not the Laeken Declaration itself raised the question as to whether Articles 95 and 308 EC should be reviewed in order to achieve a more transparent order of vertical competences between the Union and the Member States? Dominik Hanf's (Liège, College of Europe) and Tristan Baume's (College of Europe) contribution examined the suggestions made by the Convention and identified various shortcomings in Articles 1-16 of the draft constitutional Treaty. The principle of subsidiarity overlaps partly with this interest in competential boundaries. Having been crowned as *the* new constitutional principle of decentralization at Maastricht, subsidiarity remains a legal mystery for many. Even if the European Court of Justice has confirmed its justiciability, a great margin of discretion given to the federal legislator, continues to upsets a number of national (and sub-national) political actors. The desire to involve national parliaments in an *ex ante* monitoring procedure has indeed been one of the central recommendations of the Subsidiarity Working Group of the Convention. The new institutional mechanism is well illustrated in the Union's new

"flexibility clause" (Article 16 of the preliminary draft Treaty): It will oblidge the Commission to draw national parliaments' attention to proposals made under the article. Those developments represent, according to Sean Van Raepenbusch (Liège, Legal Secretary at the ECJ), concrete progress in the right direction.

Efficiency and legitimacy were the forth thematic stop on the journey. Renaud Dehousse (IEP, Paris) weighted the options and impulses towards a bicameral parliamentary system in the EC and recommended the creation of a specific legal base for independent agencies. A comparative analysis of co-operative federalism was undertaken by Christoph Vedder (Augsburg). The author presented some of the characteristic features of US and German federalism before identifying signs of co-operative federalism in the EC/EU (e.g. mandatory co-operation in economic policies, conventions according to Article 34(2) TEU and voluntary self co-operation through international agreements amongst the Member States). "Centralised or decentralised judicial protection?" was the question discussed by Takis Tridimas (Southampton, College of Europe). The issue is tricky indeed: In a number of ways, national courts act like Community courts; yet their relative "procedural autonomy" on the one hand, and the exclusive competence of the ECJ in relation to reviewing Community secondary law on the other, introduces various tensions in their relationship. In what ways can one optimize judicial protection of the individual against secondary Community law? One option would be to widen the *locus standi* before the ECJ. This centralized solution will, however, run against diverse national traditions as regards the legitimate scope and function of judicial review (and will open the flood-gates for the European judiciary). A mature federal organization may instead opt for a decentralized judicial system, embracing judicial relativity and diversity.

"A flexible constitution" and "The 'external dimension': A need for a special regime" were the thematic arches for the two last sections of the conference. Dominik Hanf – Professor at the College of Europe and organizer of the conference – set out the conceptual landscape of flexibility in the (present and future) constitution and identified three main modes of differentiation in opt-outs, enhanced cooperation within the Treaty framework– a form of differentiation that has become available since the Treaty of Amsterdam; and finally, international cooperation outside the EC's institutional framework. Particularly interesting were his suggestions for a reform of the enhanced cooperation mechanism. Erwan Lannon (Ghent) chose another aspect of the flexibility debate and investigated "alternatives to full membership", i.e. different types of formalized relations of the EC/EU to neighbouring states, and explored the possibilities of "constitutionalising" those different forms of association.

The topic of the Community's external dimension was elaborated by Inge Govaere (Ghent, College of Europe) who extracted constitutional "lessons" from the history of the EC's external relations policy. Five such lessons were singled out: the Union possesses a *three*-layered legal system, the Community legal order must be safeguarded, respect for the *acquis communautaire* should be ensured, the pillar structure ought to be abolished; and, finally, it should not be forgotten that the Member States themselves are often the greatest enemies of the Community's external policy. Constitutional lessons from the CFSP and the ESDP (soon to be CSDP) – or better the failure of both – were offered by Dieter Mahncke (College of Europe). Hardly anybody celebrated Europe's fractionism over the Iraq crisis as an expression of flexibility. The majority of Europeans will have viewed it as evidence of the very lack of a *common* foreign and security policy of the European Union. The European Convention could have tried to remedy the absence of "communitarian" elements in the two intergovernmental fields. The creation of a EU Foreign Affairs Minister (Joschka Fischer?) represents a step in the right direction. The overcomplexity of the draft Constitutional Treaty's provisions in the area of CFSP, however, as well as the persistently dominant role played by the Member States make one wonder if the constitutional lessons of the past have really been taken on board by the European Convention.

It was this sombre note of scepticism towards the Convention's results that also shaped the global conclusions of the conference. The presentations and discussions had revealed only few areas in which the Convention-method has achieved real and concrete progress. Whether this makes Europe's Constitutional Convention a missed opportunity is difficult to decide and needs to be assessed according to its success with Europe's citizenry and Europe's states. The Convention's sense of *realpolitk* might in fact be a key in gaining Member State acceptance for the draft Constitutional Treaty. Yet, substantive concessions towards the intergovernmental players will necessarily take away any remaining hopes of Europe's Convention to be a true "constitutional assembly" and endorse its status as an external "working group" of the European Council.