National Constitutional Concepts in the New Constitution for Europe

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Precedents in European Union member states for the negative referenda in France and The Netherlands on the Constitution for Europe. Evolution of the investiture of the Commission: parallel with France under Third and Fourth Republic. Double headed executive (President of the European Council and President of the Commission) and 'double hats' (Union Minister for Foreign Affairs) in line of the European constitutional tradition. The unborn 'Legislative Council' and its Austrian and German counterparts. The aborted 'Congress of the Peoples of Europe': forum for 'State of the Union' speech, not an electoral body. Protection of minority rights in the Constitution for Europe due to insistence of the Hungarian government; foreign to the dominant Western constitutional concepts. Representative democracy and the formal concept of law: European Laws and Framework Laws as 'Acts of Parliament'. Strict limits on the possibility to delegate legislation: German, Italian, French roots. European Laws and Regulations: unachieved hierarchy and French precedent. Judiciary as a relative minor branch of government as in the British and French traditions. No German *Verfassungsbeschwerde* or Spanish *recurso de amparo*, but probably more annulment procedures and preliminary questions on legality and constitutionality than before. Parallels with German federal concepts: Union Law *über Alles*; no rigid *Kompetenzkatolog* and joint competences; distribution of competences not limited to law-making. More than lip service to decentralisation. Constitutional ping-pong and intertwined constitutionalism: *territories d'outre- mer* and outermost regions.

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Part Two
National Constitutional Concepts Which Have Made their Way Into the Constitution for Europe[1]

Constitutional referendum, the missing link

After publication of the first part of this essay, French and Dutch referenda on the ratification of the Treaty of Rome establishing a Constitution for Europe of 29 October 2004 have had a negative outcome. On 29 May 2005, 54,67% of 'expressed' votes in France were negative, with a turnout of 69,37%.[2] On 2 June in the Netherlands 61,6% voted no, with a turnout of 62,8%. In national constitutional law, the one precedent that comes immediately to mind is the French referendum of 5 May 1946 on the draft Constitution, which had been adopted by the majority of the *Assemblée Constituante* on 15 April. The electorate voted against the proposed Constitution by a majority of 52,82% of the expressed votes, with a turnout of 79,20%.[3] The *Assemblée Constituante* had been elected after the referendum of 21 October 1945, where 96,37% of the electorate had voted in favour of the abolition of the Constitution of the Third Republic. After the failed referendum of 5 May, a second *Assemblée Constituante* was elected on 2 June,[4] which adopted an amended version of the draft Constitution that in turn was submitted to referendum on 13 October. This amended text was approved by a majority of 53,24% with a turnout of 67,20%.[5] The precedent is undoubtedly relevant for the French referendum of 2005, as it appears that an important number of supporters of the no-vote had this kind of scenario in mind (the so-called *plan B*) and thought that a rejection by France would lead to the negotiation of amendments

[1] Part one of this essay has been published in the previous issue of this review: Jacques Ziller, 'National Constitutional Concepts in the New Constitution for Europe', *EuConst* (2005) p. 247. The original paper, produced in the framework of collective research, has been published in Spanish: 'La función de los conceptos constitucionales de los Estados miembros en la nueva constitución para Europa', in Marta Cartabia, Bruno de Witte and Pablo Pérez Tremps (eds.), Itzíar Gómez Fernández (coord.), *Constitución Europea y Constituciones Nacionales* (Valencia, Tirant Lo Blanch, 2005) p. 27. An Italian version has also been published in *Quaderni Costituzionali* (2005) p. 67-110: 'Il ruolo dei concetti costituzionali degli stati membri nella nuova costituzione per l'Europa'.

[2] In France only the 'suffrages exprimés', i.e., the votes in favour or against, are taken into account in order to establish the percentage; white votes are counted in the same way as invalid votes.

[3] The Communist and Socialist parties supported the draft Constitution, while the Christian democratic Mouvement Républicain Populaire (MRP) and General De Gaulle invited to vote no.

[4] The composition of the second *Assemblée Constitutante* was approximately the same as that of the first one (roughly 1/3 for each of the three bigger forces quoted *supra* n. 3, but the MRP had more seats than previously and gained the biggest number of votes.

[5] General De Gaulle opposed the amended text as well, but this time it was supported not only by the Communist and Socialist parties, but also by the MRP.

to the Constitutional Treaty. These supporters had simply forgotten that there had been nothing comparable to the referendum of 21 October 1945: the Treaties establishing the European Community and the European Union had not been voted down previously to the adoption of a new Constitution.

Two precedents are even more directly relevant to the question of amending the European Communities and Union Treaties: the case of Denmark with the ratification of the Maastricht Treaty and of Ireland with the ratification of the Nice Treaty.[6] In Denmark, 50,7% of the voters refused the ratification of the Maastricht Treaty on 2 June 1992, with a turnout of 82,9%. However, on 18 May 1993, 56,7% of the voters approved this ratification, with a turnout of 86,5%. The second question submitted to the Danish voters was slightly different from the first: they were asked to approve not only the ratification of the Maastricht Treaty, but also a Declaration of the Danish government, which prevailed itself immediately of the opt-out clause that was foreseen in one of the protocols to the Treaty (the protocol itself was unchanged) and a so-called 'Decision of the Heads of State and Government, Meeting within the European Council, Concerning Certain Problems Raised By Denmark' which had been adopted at the Edinburgh summit of 12 December 1992. This decision gave the impression that some new exemptions had been given to Denmark, while it was only stating again what was already in the Maastricht Treaty and its protocols.[7]

In Ireland 53,9% of no votes, with a turnout of 34,8%, forbade the ratification of the Nice Treaty on 7 June 2001. On 19 October 2002, with 62,89% of favourable votes and a turnout of 49,47%, Article 29.4.7 of the Constitution of Ireland was approved, authorising the ratification of the Nice Treaty, together with Articles 29.4.8 and 29.4.9, which limited the possibilities of Ireland joining the other member states in new developments of the common defence policy. As in the case of Denmark ten years earlier, no change at all was made either to the proposed Treaty or to its protocols. This time around the European Council did not even reiterate the trick of the Edinburgh 'Decision'.[8]

These three precedents are very useful in order to set the legal boundaries of scenarios for the ratification of the Treaty of 29 October 2004 by the end of 2007. They are however not by any means helpful precedents for a pan-European referendum for the adoption of a European constitution, or for its amendments, as members of the Convention have suggested.

[6] *See* Jacques Ziller, 'La ratification des traités européens après des référendums négatifs: que nous disent les précédents danois et irlandais?', *Rivista Italiana di Diritto Pubblico Comunitario* (2005) p. 341.

[7] *See* also the article of Helle Krunke in this issue of *EuConst*.

[8] *See* also the article of Cathryn Costello in this issue of *EuConst.*

The best-known precedent for adopting a Constitution applying to a number of (sovereign) states is that of the 1787 Constitution of the United States of America. As with the 2004 Constitution for Europe, decisions on the approval of the proposed text were made on separate dates and with different procedures in the relevant twelve states. There is however another much more relevant precedent, that of the German Basic Law.[9] The Basic Law, which had been approved on 8 May 1949 by the Parliamentary Council representing the parliaments of the *Länder* under American, English and French occupation, was accepted by the military governors of these three zones on 12 May and subsequently submitted for ratification to the parliaments of the *Länder*. The parliament of Bavaria voted against the Basic Law on 20 May 1949, by 101 votes against 63, because it wanted more power for the *Länder*. However, by a quasi-unanimous decision (only one negative vote) it also decided, on the same date, that the Basic Law would nevertheless be applicable to Bavaria if, on the whole, two thirds of the *Länder* were to ratify it. As a matter of fact, all the other *Länder* on 20 May approved the Basic Law, which was proclaimed by the Parliamentary Council on 23 May and entered into force on 24 May 1949, creating the Federal Republic of Germany. In this case, as in the case of the United States of America, there was no ratification based on state referenda, let alone on a nation-wide referendum. In Germany it was not even possible to hold such a nation-wide referendum because the Eastern part of Germany was under Soviet occupation.[10] Article 146 of the Basic Law however seemed to call for such a referendum once the division of Germany was over: 'The present Basic Law will cease being in force on the day in which a Constitution adopted by a free decision of the German People will enter into force'.[11] In 1990, Article 146 was amended by the Unification Treaty, which added the words 'which applies to the entire German people after Germany has recovered its unity and freedom' after 'the present Basic Law'. Chancellor Kohl quickly abandoned the idea of a referendum and it seems admitted nowadays that the call for a referendum contained in Article 146 will not be answered.

Maybe some of the collaborators of President Prodi who prepared the 'Penelope' project,[12] which suggested that the Constitution could enter into force upon majority ratification, knew about the German precedent, and it is quite clear that they knew about the American one. But most of the members of the Convention's Praesidium and all the government representatives refused to depart from the

[9] *See* also Part I of this essay in Ziller, *supra* n. 1, at p. 264-265.

[10] The Soviet Union opposed the project of the Basic Law.

[11] On Art. 146 of the Basic Law, which is usually quoted as the only possibility for a nation wide referendum in Germany *see* Monica Bonini, *Il potere costituente del popolo Tedesco – Riunificazione della Germania e integrazione europea* (Milan, Giuffrè 2001) p. 149.

[12] *Etude de faisabilité. Contribution à un avant-projet de Constitution de l'Union Européenne*, *see* Part I of this essay in Ziller, *supra* n. 1, at p. 261.

system by which the European Constitution would need unanimous ratification by all member states in order to enter into force (and even to be amended). In the light of the Danish and Irish referenda of 1992-1993 and 2001-2002, more attention than to the American precedent should be given to the Bavarian precedent in 1949: it gives direction for approval of a European Constitution, be it the Treaty of 29 October 2004 or another text.

As already mentioned in part I, this essay takes the Constitution for Europe and the European Convention's work as a starting point in order to find out how concepts that stem from national constitutional law have found their way into this new common European text. It is by no means comprehensive and its first ambition is to help fostering research on the topics which are touched upon.[13]

Not that unfamiliar: member states' institutions as models for the institutional setting of the constitution for Europe

At the beginning of the 21st century, the trend towards assimilation between representative democracy, majoritarian democracy and the Westminster model of democracy (i.e., majoritarian parliamentary democracy with regular regime changes from government to opposition) 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 Constitution for Europe or whether the European Union cannot be other than a consociational democracy – if any – certainly goes beyond the scope of the present essay. Four 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 into the final text of the Constitution for Europe and others have not.

Who's afraid of the Parliament: Investiture in Practice and in Constitutional texts – Since the 1991 Intergovernmental Conference, a lot of attention has been given

[13] Ziller, *supra* n. 1. In the framework of the 'After 2004' project, in which context this essay was originally written, another paper has also examined the theme of 'The Influence of National Constitutional Law on European Union Law: The Emergence of a European Parliamentary Model'. *See* Stefania Ninatti, 'La formula parlamentaria europea. Desde sus origines hasta el Tratado constitucional', in Cartabia, De Witte and Perez-Tremps, *supra* n. 1, at p. 87. For the Italian version: Stefania Ninatti, 'La formula parlamentare europea dagli esordi al trattato costituzionale', *Rivista Italiana di Diritto Pubblico Comunitario* (2004) p. 1395. This paper also provides an important field for further research in European constitutional law and should not be left aside by young scholars looking for interesting research topics. *See* also the website of the *After 2004: The Integration of the European Constitutional Treaty into the National Constitutions*: <www.uc3m.es/uc3m/inst/MGP/NCR/portada.htm> (original versions and English translations).

to the wording of the Treaty provisions relating to the appointment of the Commission and its President in as far as it is submitted to approval by the European Parliament. This rings bells for any constitutional lawyer familiar with the continental European experiences in parliamentary democracy. Drafters of constitutional texts have been constantly trying to invent better mechanisms to ensure a right balance between democratic accountability and the strength of the incoming executive (and its leader). In a parallel way, members of parliaments have constantly tried to invent ways to by-pass these constitutional provisions, with the active help or the passive complicity of those who are supposed to monitor the application of those rules – especially the chairmen of the relevant houses of Parliament.

French parliamentary history demonstrates how important the moment of the *investiture* of the executive is. Under the Third Republic, the figure of *President du Conseil*, which was not mentioned in the Constitutional texts, emerged from the first serious conflict between the head of state and parliament (crisis of 16 May).[14] While the constitutional provisions[15] remained unchanged and in law the members of government were still chosen and appointed by the President, in political practice the governments only started exercising their powers after a vote of confidence by the *Chambre des Députés*, and resigned immediately if they did not get such confidence. This practice was codified and specified by Article 45 of the Constitution of 27 October 1946. The President of the Republic, after the usual consultations (*consultations d'usage*) nominated the President of the Council of Ministers who had to submit his programme and the policy of his cabinet to the *Assemblée nationale*. Once he had been given the confidence of the Assembly (*investi de la confiance de l'Assemblée*) – hence the expression of *investiture* for the process of approval of the cabinet by Parliament) he was constitutionally free to pick his ministers and form his cabinet. In practice, however, the *Présidents du Conseil* who had been *investis* returned to the *Assemblée nationale* once they had constituted their government in order to get a second vote of approval. This practice of *double investiture* was heavily criticised by doctrine as infringing the constitutional provision and giving too much power to the members of parliament. However, as France did not have a bi-partisan system, the political class used all possibilities given by proportional representation to multiply parties and only the communist and socialist parties had a strong voting discipline; it would have been totally unrealistic to try and lead a government that would not have been given confidence beforehand. This reality was recognised by the constitutional reform of 30 November 1954 which modified Article 45. From then on, the President of the Council who

[14] *See* Ziller, *supra* n. 1, at p. 254-255 (n. 9).

[15] Loi du 24 février 1875 relative à l'organisation du Sénat; Loi du 25 février 1875 relative à l'organisation des pouvoirs publics; Loi du 16 juillet 1875 sur les rapports des pouvoirs publics.

had been nominated only went for a vote once he had completed the list of his cabinet.

In the meantime, other new European constitutions had introduced varying possibilities for the appointment of the government. The German Basic Law of 1949 introduced a strong head of government, the federal Chancellor, who according to Article 63 is being elected by the federal parliament (*Bundestag*), a system which is very close to the French system of 1946. It works since its introduction due to the fact that the German political parties underwent an evolution towards stability, which the French only experienced after the end of the Fourth Republic. The Italian Constitution of 1947, on the contrary, has a very weak President of the Council of Ministers, and it is thus the entire government which, according to its Article 94, needs a vote of confidence of each of the houses of parliament.

The evolution of the investiture in the Third and Fourth French Republic resembles the evolution of the procedure of appointment of the European Commission. From the Treaty of Maastricht to the Constitution for Europe and the 'Barroso Drama' of autumn 2004, the European Union has known a similar evolution of attempts of regulating and/or codifying a procedure, which at the end of the day depends very much upon the configuration of political parties and their discipline as France witnessed from 16 May 1877 to 30 November 1954.[16]

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 Constitution for Europe: the permanent President of the European Council and the Union Minister for Foreign Affairs. According to these criticisms the new institutional setting would be a permanent source of litigation, due to the competition of both new figures with the President of the European Commission and with one another. Furthermore, the 'double hat' of the Union Minister for Foreign Affairs would be a more than bizarre system, full of contradictions and potential conflicts of interest. From the perspective of national constitutional concepts, this criticism is 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 mostly a workable solution, and that competition between both heads was rather easy to channel. In Europe, mono-headed executives are usually linked to authori-

[16] On the 'Barroso Drama' *see* the articles in *EuConst* (2005), p. 153 ff., and especially W.T. Eijsbouts, 'Campidoglio, Rome – 29 October 2004: How the Form Was Brought to Matter', p. 155.

tarian 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 1958, which is only 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, that is a system of representative democracy. Traditional monarchical hereditary transmission of power is not deemed to be compatible with democracy. The difficulties of the *cohabitation* between François Mitterrand and Jacques Chirac in 1986-1988, and to a much lesser extent between Chirac and Lionel Jospin in 1997-2002, are contrasted by the smooth collaboration between Mitterrand and Edouard Balladur in 1993-1995.

The Constitution for Europe 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 as a system in which the head of state monitors the government. There is nothing of the kind in the relationship between the President of the European Council and the President of the Commission, who have no institutional means to impede directly each other's work.

The European constitutional tradition also has a very widespread experience of 'double hats', or *dédoublement fonctionnel* in the terms of the French international legal scholar Georges Scelle.[17] 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. Conversely 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 a 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 European Union foreign relations of the Presidents of the European Council and of the Commission as well as the

[17] Georges Scelle, 'Le phénomène juridique du dédoublement fonctionnel', in *Rechtsfragen der internationalen Organisation, Festschrift für Hans Wehberg* (Frankfurt am Main 1956) p. 324-342. Scelle (1878-1961) was one of France's most famous specialists of International Public Law. Two of his books deserve special attention from the point of view of European integration: *L'Union européenne*, written together with B. Mirkine-Guetzévitch (Paris, Delagrave 1931) and *Le fédéralisme européen et ses difficultés politiques* (Nancy, Centre européen universitaire 1952).

Minister for Foreign Affairs is also a very classical concept in constitutional law. As a matter of fact, heads of state and Ministers for 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 between the Constitution for Europe and national constitutions, but the formal similarity remains striking.

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 Intergovernmental Conference at Riva del Garda in September 2003 indicated that there was a consensus amongst the 25 Ministers for Foreign Affairs in order to suppress the 'Legislative and General Affairs Council' as proposed in Article 23 of the Convention's draft. Hardly any explanation was given of the arguments against such an 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 for Foreign Affairs, were afraid of the innovation and mainly of the fact that the Ministers of European Affairs would thus gain a very heavy weight in national governments, there seems to have been no serious discussion before the decision was made. As indicated by vice-president Amato, the most obvious difference between an Intergovernmental Conference and the Convention was that, in an Intergovernmental Conference, nobody is asked to give reasons because the sovereigns are speaking, while in the Convention the necessity to persuade leads to an explanation for every proposal. From the point of view of national constitutional concepts, the informal meeting of Riva del Garda 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. Equally, its permission is necessary in order to give emergency legislative power to the federal government, according to the procedure of legislative emergency of Article 81 Basic Law, which has never been used. Interestingly, 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). While the Convention's draft left the possibility open for each member state to have up to three ministers sitting in the Legislative Council, two of which might change according to the matter discussed, the composition of the delegations to the *Bundesrat* does not normally change during the corresponding legislature of the relevant *Land*.

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 were 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 suspicion of Giscard d'Estaing, who was seen as paragon of French aspirations to *grandeur* and whose initiatives were thus perceived as ways to serve the governments of 'big' member states, and especially his own.

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 Union is suffering since long. His model was the United States tradition of the President's yearly speech 'on the State of the Union', as he repeatedly put it. Giscard proposed a common meeting of the European Parliament and delegations of the National Parliaments, on the model of COSAC, the Conference of the Community and European Affairs Committees of Parliaments of the European Union. He did not propose a common meeting of the European Parliament and the Legislative and General Affairs Council, corresponding to the common session of the United States 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 to, or even

start as, the institution that would elect the President of the European Council. The precedents are European: Germany (Federal Assembly – *Bundesversammlung*), Italy (the members of parliament with the addition of 3 delegates for each region) and in France from 1958 to 1962 (with a specific electoral assembly appointed by local councils). In those three countries (in France until the introduction of the direct election of the president in 1962), a compromise has been found between a direct or even semi-direct election (as in the United States) on one side, and a mere election by parliament on the other, in order to give a broader basis to the president's mandate, and hence a bigger legitimacy which would allow him to exercise his function as a moral authority. In the three cases mentioned here, 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.

Beyond the Charter: a Member States' Legal Concept in the Protection and Promotion of European Citizens' Rights

The influence of national constitutional concepts on the European Union Charter of fundamental rights was channelled somewhat differently from that of the concepts which are discussed so far, due to the codification task of the 'Herzog Convention' in 2000. The European Convention and the Intergovernmental Conference only made minor changes to the Nice Charter. The reference to the Praesidiums' explanations in the Preamble and in Article 52 of the Charter (Article II-112 Constitution for Europe) will be discussed later in this essay under the heading of vertical delimitation of powers. There were also some reformulations in order to adapt the Charter to the Constitution.[18] The 'Herzog Convention' has mainly codified rights which existed already in European texts: the European Communities and Union Treaties, the European Convention of Human Rights, the European Community Social Charter and the Council of Europe's Social Charter, as well as Community derived legislation and jurisprudence. Furthermore, 'the explanations prepared under the authority of the Praesidium of the

[18] E.g., the mention of 'organisms' alongside the 'institutions and organs' in Arts. II-101 (right to good administration) and II-102 (access to documents). Furthermore, the experts and translators used the opportunity of the final work on the Constitution for Europe, during the summer 2003, in order to eliminate errors of translation from the 2000 Charter: for instance, the German and Italian version of Art. II-101 differ from Art. 41 of the Charter, as they mention the right of 'every person' (*jede Person, ogni persona*), as was already the case of the French and English versions, while the German version of the Charter attributed the right to 'every human being' (*jeder Mensch*) and the Italian version to 'any individual' (*ogni individuo*).

Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention', are not only an official comment to the 2000 Charter, they have been above all written in order to help lawyers in practice as well as in academia to understand the origin of the principles which it has codified. Only a few of these explanations refer to national constitutional traditions or national constitutions: Article 10 on freedom of thought, conscience and religion, Article 14 on the right to education, Article 17 on the right to property, Article 20 on equality before the law and Article 49 on the principles of legality and proportionality of criminal offences and penalties. One of the explanations explicitly refers to only 'some constitutions': Article 37 on the right to environment. A quick look to the explanations suffices to convince the reader that there is no attempt at exhaustiveness. The first draft of these explanations originates from the secretariat of the Convention.[19] It is therefore more than plausible that they reflect the discussions in the Herzog Convention: when they refer to national constitutions, it is because the members of the Convention made explicit references of the kind during the debates.

One concept which is related to citizens' rights however finds its expression in part I of the Constitution for Europe, not in the Charter, because it is the result of discussions in the Intergovernmental Conference and of the enlargement to Central and Eastern European Countries: the Protection of Minorities.

Protection of minorities, other than through the principle of non-discrimination, is foreign to the dominant constitutional concepts in Western Europe, mainly because of the inherent tension between recognising minorities' rights on the one hand, and guaranteeing individual freedom and equality on the other. The French Revolutionary tradition is a paragon of this fear. The consequence is that protection of minorities has long been more a concept of public international 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 had been made by its members (from central Europe as well as from northern Europe – including Scotland) in this direction. The protection of minorities was deemed to

[19] I.e., members of the legal service of the Council.

be mainly a competence for pan-European institutions like the Council of Europe.

The inclusion by the Intergovernmental Conference of the protection of 'the rights of persons belonging to minorities' in Article I-2 of the Constitution for Europe is deemed to be mainly due to the insistence of the Hungarian government.[20] There seems to be a clear link with a constitutional concept embedded in 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 Constitution for Europe, it is worthwhile quoting Article 68 of the Hungarian Constitution, which might serve as guidance for discussion at Union 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.[21]

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 Union 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 that '[France's] organisation is decentralised'.[22] The majority view on this clause, and especially its interpreta-

[20] Although the intention might also be to protect minorities in the sphere of the European Union's external relations.

[21] English text on <www.kum.hu/Archivum/Torvenytar/law/const.htm>, consulted on 2/08/2004.

[22] Translations by the author.

tion 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.[23]

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 (Article II-82 of the Charter) and the protection of the equality between member states and the respect for their fundamental structures by Article I-5 Constitution for Europe is an open field for discussion and investigation.

European Checks and Balances: National Precedents in the Vertical Delimitation of Powers between European Union 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, like parliamentary or presidential/congressional systems, is based not so much upon a rigid separation between the three branches of government as upon a system of checks of balances to avoid 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 Intergovernmental Conference with a small variation. (The diversity of national traditions might also explain why hardly anything has been done to reinforce the Union judiciary.)

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 paramount function is law making. In the Constitution for

[23] In its decision of 15 June 1999, No. 99-412 DC, the *Conseil Constitutionnel* found the European Charter for Regional or Minority Languages contrary to the Constitution because it grants certain collective language rights.

Europe, as opposed to the former community system, the Council of Ministers' role in legislation remains fundamental, but, instead of being the main legislator submitted to parliamentary veto in the fields of co-decision, it is the Council who is now in the position of a vetoing power, as appears in the ordinary legislative procedure of Article III-396 Constitution for Europe. 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 systems of readings and of iterations between two houses are varied enough in Europe to provide models for the Union 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 knew at the European level, though they were simply going further down the way 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 Constitution for Europe takes over a formal concept of the European law, which is to be seen as a consequence of its system 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 to a contract, implementing the general norm. This is the concept present in the Treaty establishing the European Community, as indicated in Article 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 materiel*) does not really distinguish between *law* and *regulation*. In the same way, traditional Community law has two normative instruments of the same hierarchical level, directives and regulations. The first protocol on subsidiarity, which was adopted as an Annex to the Amsterdam Treaty, made a step in acknowledging the existence of 'legislative' acts amongst directives and regulations, to be distinguished from acts of implementation, in order to

foresee a more developed monitoring of subsidiarity for the first category. The protocol however did not provide for a definition, let alone for a list of these legislative acts.[24]

The formal concept of law (*loi au sens formel*) as opposed to the substantive concept, puts at the forefront the role of the elected parliament: when the French Constitution starts its Article 34 with 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 systems 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. As is well-known, the Convention has very quickly decided to take over the constitutional tradition in distinguishing between European laws and European framework laws on the one side, which are normally adopted by the European Parliament and Council of Ministers, and European regulations, which are adopted by the Council or the Commission, on the other hand.[25] True, there remained a number of important exceptions to the principle that European Laws are acts of parliament; the legal experts working for the Intergovernmental Conference have further extended these exceptions. This is probably because they have not fully thought through the implications of the relationship between law and regulation in a system without a strict hierarchy of sources. The matter will be addressed below in this paper.

The Constitution for Europe replicates a very important constitutional concept which has been developed profoundly by German constitutional law in reaction to excessive and dangerous use of delegated legislation. It is the concept of 'statutory reserve', *Gesetzesvorbehalt*, know in Italian as '*riserva di legge*', to be found in Article I-37(1) on European delegated regulations.[26] The concept, although bearing no specific name, is also clearly acknowledged by French constitutional law which puts extremely strict limits put to the use of *ordonnances* in Article 38 of the 1958 Constitution. Most other European constitutions, including the relevant British Acts on delegated legislation, also try and set limits to the use of delegation from parliament to government, with more or less success. There is little doubt that the European Court of Justice will be able to find precedents in

[24] *See* also the article of Sacha Prechal in this issue of *EuConst*.

[25] For those British readers who are not accustomed to the use of the words Law and Regulation in such a context and have a suspicion that this is yet another continental fancy, suffice it to point out that these expressions are currently used in United States constitutional law.

[26] The relevant part of Art. I-37(1) reads: 'The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the European laws and framework laws. The essential elements of an area shall be reserved for the European law or framework law and accordingly shall not be the subject of a delegation of power'.

the jurisprudence of national constitutional courts in implementing those limitations, accordingly to the core democratic content of the concept, as already demonstrated by its jurisprudence on 'legislative' acts – in the sense of the Amsterdam protocol.

A further formulation of the principle of *Gesetzesvorbehalt* is embedded in Article I-33(2) Constitution for Europe: '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 Community practice. It has however a deeper significance, which goes to the heart of the relationship between soft law and hard law. It clearly refers to one of the fashions of 'new governance' which it condemns, i.e., the tendency of Commission and Council to adopt non-binding instruments instead of those foreseen by the Treaty, which has some perverse effects, for instance lack of judicial review. Article I-33(2) also has 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 1950s, the *Conseil d'Etat* has repeatedly quashed or 'renamed' (*requalifié*) government documents – especially *circulaires* – which, although presented as non-binding, were changing the legal situation of their addressees. The same trend may be observed in most of the member states' administrative law jurisprudence, especially in British 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 Article III-270(3) in the procedure for harmonisation of legislation in the field of judicial co-operation in criminal matters, and the mention in Article 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 in parliamentary regimes, according to which the Head of State may ask Parliament to reconsider a vote.

Last, 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 Article I-47 Constitution for Europe is linked to constitutional concepts. Though they are generally speaking more developed in Switzerland and in the United States, these kinds of tools of semi-direct democracy are also present in the constitutional law of some member states,[27] where they are gaining ground. The caution put

[27] V. Cuesta, 'Designing the first transnational citizens' initiative', in D. Martinelli & B. Kaufmann (eds.), *The European Constitution – Bringing in the People* (Amsterdam, Initiative & Referendum Institute Europe; Bern, Presence Suisse 2004), p. 30; V. Cuesta, 'Six The Future of

around the mere formulation of the popular initiative may be compared to the caution put into member states' constitutional provisions 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.

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 Community law, it would demonstrate the inappropriateness of trying to import the law/regulation divide from constitutional into Community law. From the point of view of a traditional constitutional Kelsenian perception of the sources of law, the system would not be logical 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 in national constitutional law, although most members of the European Convention, apart from a few specialised academics, 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. 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 Article 34, and of government on the other side, which includes all the rest. As a consequence, Article 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 dangerous aspects of this system were soon tackled 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

the European Citizen Initiative', in B. Kaufmann & M.D. Waters (eds.), *Direct Democracy Europe* (Durham, Carolina Academic Press 2004), p. 133.

ex-post judicial review. The *Conseil Constitutionnel* started to interpret Article 34 as allowing Parliament to act in fields not mentioned therein, and the *Conseil d'Etat* maintained a very strict control on the prohibition for the government to act in the fields of Article 34 if it did not find a clear mandate in a law passed by Parliament.

The protection of the Council against European Parliament action in matters where it does not have powers, according to part III of the Constitution for Europe, is extremely strong due to the allocation of powers between the Union institutions. Probably therefore this Constitution does not need a procedure which gives protection against parliament, as do the procedures contained in the Articles 37 and 41 of the French Constitution. This being said, the similarities between the *règlements autonomes* and the new European regulations are quite strong. It is therefore probable that the European Court of Justice will closely look at the French case when it comes to addressing the issue of possible hierarchical conflicts between European laws and European regulations.

The Unachieved Judiciary: a Traditional European Court of Justice? – In a way that is completely opposed to the United States 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. This is probably one of the grounds of the preference for the Kelsenian model of a separate court specialised in constitutional review as opposed to the United States type system of constitutional review by all courts.

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 the concept of the judiciary 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 of an '*autorité judiciaire*'. The courts, though genuinely independent, are divided amongst at least four different sets of jurisdic-

tions: *ordinaire, administrative, constitutionnelle, politique.*[28] In most other European countries, Constitutions which are more modern include all courts in the single judiciary even if they are divided into different branches, with the exception of the Constitution of the Netherlands: its Article 112 mentions the existence of 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 after World War II of the so-called administrative tribunals, which are not courts.

The Constitution for Europe's concept of the judiciary seems therefore far closer to the traditional concepts of France, the Netherlands and the United Kingdom than, for instance, to that of the Belgian Constitution, which clearly puts the judicial power (*pouvoir judiciaire*) on the same footing with the Legislative and Executive Powers in its title III, or the Spanish Constitution, in its Title VI '*El poder judicial*'. During the Convention, the old European traditions have seemingly converged with the dominant ideas within the European Court of Justice, that its most necessary reforms had already been achieved with the Treaty of Nice anyway. A very noticeable feature of the European Constitution is the lack of real progress towards a European judiciary.

The same combination of British and French traditions shows up in the fact that, while it was gaining wider competence under the Constitution for Europe with the abolition of the pillar-structure of the Maastricht Treaty, the European Court of Justice has still only a very limited role in reviewing the Union's action in external policy. The French theory of '*actes de gouvernement*' has 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 refusing to apply judicial review to the exercise of the royal prerogative – which includes not only foreign relations but also 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.

[28] When it comes to the latter category the 1958 Constitution distinguishes the *Haute Cour de Justice* (Arts. 67 and 68) and the *Cour de Justice de la République* (Arts. 68-1 and 68-2) which are exclusively competent to judge respectively the President of Republic (for high treason committed in the exercise of his function) and ministers (for crimes committed in the exercise of their functions).

The British tradition has clearly played a very important role in the Convention's choices, and as far as the absence of a strong judiciary is concerned it is at the roots of one of the most interesting paradoxes of the Constitution for Europe. 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 strengthened by the Intergovernmental Conference. Reading these explanations, one might very well come 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 they soon abandoned as not being 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 Pyrrhic 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 long standing tradition of creative interpretation. In its 1947 decision *d'Aillières*, the *Conseil d'Etat* for instance 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* acts.

This being said, comparing the Constitution for Europe with the most influent modern European constitutions underlines even more the absence of a specific Union remedy for the protection of fundamental rights, similar to the German *Verfassungsbeschwerde*, or the Spanish *recurso de amparo*. With the Constitution for Europe, the Union 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. It should change the statistical balance

between on the one hand actions in annulment and preliminary rulings on the legality of Community acts, and on the other preliminary rulings concerning the interpretation of EC law. Until now most if not all of the preliminary questions do not concern the legality of Community acts, but the conformity of national legislation with Community law. In the future, national courts might be prompted to ask far more often questions on the constitutionality of European Laws and on the legality of European 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' (Article 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 'legality' (*légalité*) means 'lawfulness' (*conformité au droit*), and not *conformité à la loi* (conformity to a statute).[29] More strikingly, even – in a comparative perspective – the EC and Constitution for Europe system rests mainly on indirect judicial review (*contrôle par voie d'exception*) – i.e., through proceedings against implementing measures brought before national courts or the Court of Justice. As a matter of fact 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.[30]

European federalism: national legal concepts in the horizontal delimitation of powers

A deeply rooted British 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 Intergovernmental Conference twelve years earlier. A pleasant paradox is that the Constitution for Europe therefore does not refer to a 'federal way' but to the 'community way', i.e., '*le mode communautaire*', which probably leaves less space for rolling back Union 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 Constitution for Europe and, in most cases, on the basis of the relevant member states' experiences.

[29] 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 *Gestezesmäßigkeit* – instead of *rechtmatigheid: Rechtsmäßigkeit* was indeed used in the German text.

[30] *See* J. Ziller, 'Le contrôle du pouvoir réglementaire en Europe', in *Actualité Juridique, Droit Administratif* (1999) p. 635.

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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. This consequence of the international liability of the state led to specific powers allowing federal organs to act in substitution of failing sub-central organs (Article 169). The principle of community loyalty was already embedded in Article 10 of the Treaty establishing the European Community; 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 peculiar mix in the final formulation of Article I-5 Constitution for Europe which, due to work on the Convention's text by experts who prepared the Intergovernmental Conference, puts together federal loyalty and respect of the member states seems to have no equivalent in national constitutional concepts.

The so-called Christophersen clause of Article I-5(1), second sentence states that 'It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security'. The reference to essential state functions looks like a member state's constitutional concept, though in a rather vague fashion. A developed comparative law research would probably help finding out if and how such a concept is being used by constitutional courts, by administrative courts and any other 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.[31] This, far more than the mention of 'essential conditions of the exercise of sovereignty' which appears usually in decisions on the European Communities and the European Union, helps writing down a list of essential state functions in the French context (which is nevertheless a difficult exercise). The context is however different: contrary to Article I-5 which may only serve as a

[31] This is a side effect of the discussions in France around the Treaty of Maastricht: by fear of European interference in France's relationship with its overseas territories (*territoires d'outre-mer*) – 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 these *territoires*, hence making their constitutional review by the *Conseil Constitutionnel* obligatory (Art. 61 of the 1958 Constitution).

complementary tool for the interpretation of Union law and cannot reverse the clauses of part III of the Constitution for Europe, the French concept allows for exceptions to the list of competences of the national Parliament, as set down in Article 34 of the French Constitution.

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*'. This clause stated that 'Empire laws have precedence over the laws of individual States, as long as they have not been expressly given a subsidiary significance'.[32] The clause was part of Article XIII which regulated the legislative power of the Empire. The wording of Article 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. Article 13, which was 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'.[33] The Basic Law of 1949 again changes focus: the relevant clause comes just after Article 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 in Part I of this essay, one of the main changes brought by the Intergovernmental Conference's experts to the Convention's text was to suppress Article 10, which came just after the article on the principles which apply to Union competences, in the relevant section of part I, i.e., Title III on Union competences. Article 10(2) was transferred into Article 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 Article 10(1), which contained the primacy clause, was moved to a new place: to Article 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

[32] Translation by the author: 'Reichsgesetze gehen den Gesetzen der Einzelstaaten for, insofern ihnen nicht ausdrücklich eine nur subsidiäre Geltung beigelegt ist'.

[33] Idem: 'Bestehen Zweifel oder Meinungsverschiedenheiten darüber, of eine landesrechtliche Vorschrift mit dem Reichsrecht vereinbar ist, so kann die zuständige Reichs- oder Landeszentralbehörde nach näherer Vorschrift eines Reichsgestzes die Entscheidung eines obersten Gerichtshofs des Reichs anrufen'.

writing it down in the European Constitution remains open to debate.[34] Comparing it to the German tradition however shows clearly how much the 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 Intergovernmental Conference that lay behind the rather superfluous 'Declaration' according to which Article I-6 'reflects' the jurisprudence of the Court of Justice, a meaningless statement in so far as the context of this jurisprudence is changed by the Constitution for Europe.

The New System of Competences of the New European Constitution – Even before the Convention started, strong demands were made for establishing a *Kompetenzkatalog* in order to separate rigidly the powers of the Union from those of member states. This had to prevent unforeseeable intrusions of Union institutions in the fields of central or sub-central governments. The loudest voice has been that of the German *Länder*: most of their representatives spoke as if the German Basic Law provides such a clear delimitation; only a few stated that they wanted to avoid the Union having the same mechanisms of intrusion as the Federal Republic of Germany, which they deemed of a centralising nature.

Although with nuances between the successive constitutional texts, German constitutional law never succumbed to the illusions of a 'layer-cake' type of delimitation of competences between the different levels of government. On the contrary, the notion of *Konkurrierende Gesetzgebung* has always been central in Germany: joint[35] legislative competences. 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 tautological statements in a system of separated competences like the Belgian or United States models. This is why the German federal model fits so well the Community type of functional competences and is being reproduced in Article I-12 Constitution for Europe. Community law doctrine had since long being using the German categories. The lists of competences are more detailed in the German Basic Law than in Part I of the Constitution for Europe, but this is obviously due to the fact that the legal

[34] The French *Conseil Constitutionnel* in its decision of 18 Nov. 2004 and the Spanish *Tribunal Constitucional* in its opinion of 13 Dec. did their best to avoid any interpretation of Art. I-6 which would have indicated there could be a conflict with national constitutions; *see* on these decisions the annotations by Camilo B. Schutte and Guy Carcassonne, *EuConst* (2005), respectively p. 281 & p. 293.

[35] I insist: 'joint' not 'competing' competences, as too often translated in Latin languages (e.g., compétences concurrentes).

bases within Part III constitute a far more detailed and comprehensive list.

German federalism, like United States 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 Tenth Amendment to the United States Constitution. The same is true for the last sentence of Article I-10(2) of the Constitution for Europe: 'Competences not conferred to the Union in the Constitution remain with the Member States'. As the French say '*ça va sans dire, mais ça va encore mieux en le disant*' (it goes without saying, but it goes even better when said).

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 19th century on the basis of pre-existing states that had 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. As a specialist of European administrative law, the author of the present article regrets 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 itself (*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 Constitution for Europe'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 ideas about this and at synthesising them.

Even the so-called open method of co-ordination has clear precedents in German practice through the very developed and refined mechanisms of co-operative federalism, which at times include federal institutions (for instance common deci-

sions of the federal and *Länder* governments),[36] 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 co-ordination.

More than Lip Service to Decentralisation – Article I-5 Constitution for Europe 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 United States model fully ignores local government for the simple reason that the setup and organisation thereof is a state competence. As the society of the United States has been largely built bottom up, from private parties and communities to local-government, from local-government to state, and from state to Union, the ignorance of local government in the Union's constitution makes little problem for the continuing existence of local freedoms. The German model is based upon deeply rooted local freedoms, pre-existing to 19th century reunification and federalism and even to democracy, and it puts a high constitutional value upon the protection of those freedoms against the State. 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 Union and Community 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 Constitution for Europe has made a step into the direction of the German model. The wording of both Article I-5 and the Protocol on the Application of the Principles of Subsidiarity and Proportionality are doing their best to avoid any interference of the European Union 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 Constitution for Europe, which on purpose uses exactly the wording of German constitutional law (*Grundsatz der komunalen Selbstverwaltung*) when referring to the local and regional self-government: '*einschließlich der regionalen und kommunalen Selbstverwaltung*'. A careful French wording would have preferred '*la libre administration des autorités régionales et locales*' – as the French equivalent of

[36] 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 öffentlichem Dienst in Westeuropa, USA, Jugoslawien und der EG* (Baden-Baden, Nomos 1981).

'*Kommunale Selbstverwaltung*' – instead of '*l'autonomie régionale et locale*'. The Italian language version is all right in this respect for lawyers, as it mentions '*autonomie 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 the context of the British constitutional setting, which under the Thatcher government has permitted one of the highest degrees of centralisation compatible with democracy.

From Constitutional Ping-Pong to Intertwined Constitutionalism – In way of conclusion, I would like to draw attention to one 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, as has been recalled in part I of this essay).

Article 227(2) of Treaty establishing the European Economic Community (EEC) made an explicit reference to the French constitutional category of *départements d'outre-mer* (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 European Court of Justice in the Hansen case.[37] While France had not made any observation in the procedure, which involved a question about the applicability of European Community 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. They stated that Article 227 EEC had to be interpreted '*en première ligne*' in the light of member state's constitutional law. The Hansen case is thus a forerunner of Article I-5 Constitution for Europe, which demands that the Union respects 'the national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government' of the member states.

The vocabulary of Article 227(3) EEC more indirectly also refers to French constitutional law in using the words (*Pays et*) *territoires d'outre-mer*, overseas countries and territories, for another category of territories, which are only associated to the European Communities and which included the French *territoires d'outre-mer*, the Dutch West-Indies and the Belgian and Italian colonies and United Nations mandates in Africa. A lot of these territories later became independent, and today it includes French, Dutch and British non-independent former colonies as well as Greenland which became autonomous within the Kingdom of Denmark.

With enlargement to Spain and Portugal, three other territories entered the Communities internal market with a legal status which was very similar to that of the French *départements d'outre-mer*, although based on the accession treaty: the

[37] ECJ 10 Oct. 1978, Case 148/77.

Canary Islands for Spain and the Azores and Madeira for Portugal. A declaration of the Maastricht Treaty and later a full rewriting of Article 227(2), now Article 299(2) of the Treaty establishing the European Community (EC), regulates the legal status of what Community practice and secondary legislation already called 'outermost regions' (*régions ultrapériphériques, regiones ultraperiféricas, regiões ultraperiféricas*) since 1988.

The notion and wording of 'outermost regions' has subsequently been taken up in French, Portuguese and Spanish legislation. Since the amendments on the French Constitution of March 2003, the exact wording of Article 299(2) EC is produced in its Article 73 when it refers to '*adaptations tenant aux caractéristiques et contraintes particulières de ces collectivités*'. In the same year, the Convention quite logically copied the content of Article 299 EC which it divides, again quite logically, into a general part on the territorial scope of application of the Constitution (Article IV-440(2) of the Constitution for Europe) and Article III-330 (III-424 of the Constitution for Europe). The latter Article is reproducing Article 299(2) EC, which mentions characteristics and constraints that are specific to these regions and mandates the Council to introduce special acts aimed at adapting the Treaty. Also, the French Constitution since the constitutional reform of 2003 for the first time names Guadeloupe, Guyana, Martinique and Reunion, instead of referring to *départements d'outre-mer* without enumerating them. During the Intergovernmental Conference the French proposed to do the same in the Articles III-424 and IV-440 of the Constitution for Europe, which now also state the names of the French *départements d'outre-mer*.

This constitutional ping-pong is further developed by an adjunction to the clauses on the territorial scope of the Constitution for Europe. Article IV-440(7) contains a small *passerelle,* which allows for a change of status from outermost region to a overseas country or territory and vice versa without 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 those of Portugal, Spain or the United Kingdom.

The case of outermost regions 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' (*Verfassungsverflechtung*; *intrecciamento costituzionale*) – an expression that I prefer to the more often used *multi-level constitutionalism,* because the latter alludes to a hierarchy between levels which is too simplistic to explain the concept of European constitutionalism and to take into account phenomena like the French and Dutch referendums of May and June. The purpose of this essay was to show how the European Convention has been giving due recognition to this intertwined constitutionalism through the construction and innovations of the Constitution for Europe.

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