



Focus

The EUI and the Constitutional Reform of the European Union

European citizens might soon get a Constitution or rather a proxy, a treaty instituting a Constitution which, however, would only be revised in the future by unanimity. This ambiguity might be seen as a serious flaw, and indeed is one. Those who see the glass as half empty will think so. Others who consider the glass as half full will remind us of the permanent features of the EU: compromise, uncertainty, ambiguity, unfinished state of affairs are part of the Union's genetic code. Formally, European citizens will not yet have a fully fleshed constitution. Substantially, they already have one (even if most citizens ignore it) and the most recent progress brought by the Convention will improve procedures, institutions, division of powers, fundamental rights and the overall clarity and transparency of the social contract.

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However, at this stage of the constitution-making process, many options are still open: what kind of amendments, deletions, additions will be introduced by the Intergovernmental Conference? What will the attitude of European citizens be if and when invited to approve a document still perceived – in spite of the tremendous political improvement brought forward by the convention – as a matter for the élite?

The EUI has been, from the beginning of the process, an active academic observer, analyst and participant. Its involvement started in 1984 when Alfiero Spinelli asked the Institute's academics to discuss his forward-looking and ambitious project. In 1994, the Schuman Centre organised a debate on the Herman project with the main political actors involved in that European Parliament initiative.



Inaugural session of the European Convention 28 February 2002 (from left to right) Giuliano Amato, Vice-Chairman, Valéry Giscard d'Estaing, Chairman, Jean-Luc Dehaene, Vice-Chairman, before the official opening of the Convention

After this second failure of the European Parliament as initiator and author of a fully fleshed draft of a Constitution, the EUI was invited to embark on a more modest and low key initiative. In 1996, after several months of intensive work involving Claus-Dieter Ehlermann as co-ordinator and Armin von Bogdandy as rapporteur (Renaud Dehousse, Eduardo García de Enterría, Jean-Victor Louis, Yves Mény, Francis Snyder and Giuseppe Tesaro members of the Working Group), the Schuman Cen-

tre presented the European Parliament with a so-called “A Unified and Simplified Model of the European Community Treaties and the Treaty on European Union in Just One Treaty”. The cumbersome and contorted title of the project is telling of the times. In 1996, it would have been foolish and counterproductive to pronounce what Philippe Schmitter



Hervé Bribosia, Yves Mény, Romano Prodi and Michel Barnier on the occasion of the presentation of the report “A Basic Treaty for the European Union” on 15 May 2000 in Brussels

ter¹ calls the “F Word” – in his case Federalism, in our case ... Constitution.

Three years later, on the basis of this preliminary research, a new study was requested by the *Commission institutionnelle* of the European Parliament in order “to envisage possible options for bringing the European treaties, through the next step of institutional reform, closer to the shape of a European constitution”. The process was going one step further and was more ambitious: not yet a constitution, but something of the kind. This time the team was led by Giuliano Amato (then recently appointed professor in the Law Department) and Hervé Bribosia (a former EUI researcher) was acting as rapporteur.²

At the time, some governments were insisting that the future (and it was said last) treaty supposed to deal with the famous “leftovers” of the Amsterdam Treaty before the Union's enlargement should focus on a narrowly defined agenda. Other Governments (very few) and the Commission were anxious to give more scope to the future CIG. At the request of the Commission, a “Groupe des Sages” chaired by Jean-Luc Dehaene made a few suggestions in a last attempt to broaden the CIG agenda. In spite of its very moderate and modest suggestions, very few were taken up. However, the Commission was able to take up one recommendation related to the consolidation and simplification of the treaties to be realised by the EUI in the light of its previous studies.

The Robert Schuman Centre was again asked to deepen and improve its previous proposals in January

2000. A preliminary report was presented in March, and two final reports concerning the Reorganisation of the Treaties and the procedures of Treaties revision were submitted in May and July 2000 respectively.

This time the composition of the team was slightly changed, but the same spirit was animating the group. As Giuliano Amato had been called back to politics (he had been appointed Minister for Administrative Reforms) the new team was chaired by Claus-Dieter Ehlermann and myself. Hervé Bribosia was more involved than ever as a dedicated rapporteur³. The report was warmly welcomed, but the Commission failed to convince the Member States to broaden their limited ambitions. They were convinced – in particular the French Presidency – that a more limited agenda would enhance the success of the Intergovernmental Conference. We all know the sequences of the story, the rather poor results reached in Nice and the consolation prize of the final declaration: some further goals should be taken up again, and in particular the consolidation and the simplification of the Treaties should be an objective for the near future.

At that stage, the problem was no longer an academic one, but a political one. The academics could return to their favourite occupation: analysing, debating, arguing, and criticising the formidable work that the Convention was engaged in under the combined leadership of Valéry Giscard d'Estaing, Giuliano Amato and Jean-Luc Dehaene.

During all this period an impressive production of works on problems of governance, institutions, constitution has been developed by researchers and professors of the Institute. A selected list of works is attached in this special issue. It is not just a testimony of past achievements; it is also an invitation to debate and to look forward. There is still a lot to say, to write and to comment!

YVES MÉNY

¹ Philippe Schmitter, ‘Democracy in Europe and Europe's Democratization in Making Sense of the European Union’, *Journal of Democracy*, Vol. 14, No. 4, October 2003 p. 71 - 85

² The members were Stefano Bartolini, Renaud Dehousse, Bruno de Witte, Luis Díez-Picazo, Claus-Dieter Ehlermann, Yves Mény, Christoph Schmid, Philippe Schmitter, Armin von Bogdandy, Joseph H. H. Weiler.

³ The group was composed of Grainne de Burca, Alan Dashwood, Renaud Dehousse, Bruno de Witte, Luis Díez-Picazo, Jean-Victor Louis, Francis Snyder, Antonio Tizzano, Armin von Bogdandy and Jacques Ziller

The European Forum 2003-04 “Constitutionalism in Europe”

at the Robert Schuman Centre for Advanced Studies at the EUI

This year's Forum on “Constitutionalism in Europe” could hardly have been more timely. Indeed, given the move towards constitutionalization of the European Union (EU) and the effects of the emergence of an EU ‘documentary’ constitution (portended in the Convention on the Future of Europe and the Draft Constitutional Treaty) on the one hand and EU enlargement on the other, one is tempted to say that it is a case of the right time and certainly, given the Robert Schuman Centre’s distinctive multi-disciplinary profile, the right place.

In my role as research fellow and scientific co-ordinator, I have been privileged to witness a veritable microcosm of intellectual activity which has been generated by the Forum seminars. The participation of the wider research community from across the Departments of the EUI has also meant that the Forum has greatly benefitted from a large and exceptionally qualified pool of multi-disciplinary researchers which it has at its disposal annually. Indeed, it has been able to draw from a research community which is unique to the extent that it is multi-national, multi-lingual and multi-disciplinary. This level of diversity has underpinned many of the discussions which have taken place both during and in response to the Forum seminars.

Thus, for example, the seminars which have taken place during the first term under the aegis of the theme *The Idea and the Dynamics of the European Constitution: Historical and Theoretical Perspectives* have highlighted the degree to which the notions of constitutionalism and constitution-making are used in a variety of ways in the European Union, which is a consequence of the diverse nature of the legal systems and cultures of the Member States, to be further enriched by enlargement. It has been interesting to observe the extent to which many of the observations which have been made during the Forum seminars concerning the *sui generis* nature of Constitutionalism in Europe arise in practice, both at the level of policy-making (a case in point is the current Intergovernmental Conference (IGC)), and in the various spheres of law and modes of governance across the Union.

The EUI and the Robert Schuman Centre in particular provide considerable opportunities for Forum members to interact with European policy makers. Thus, talks by participants of the Convention on the Future of Europe, notably Sir John Kerr, Sir Neil



Miriam Aziz

MacCormick and Hervé Bribosia have offered unique insights from a number of spheres within the Convention.

Moreover, a number of parallel activities, such as, for example, the workshop organised by Professor Wojciech Sadurski on *Implications of Enlargement for the Rule of Law and Constitutionalism in Post-Communist Legal Orders* (November 28/29, 2003), a workshop organised by Susan Millns (Marie Curie Fellow/RSCAS) and myself on *Values in the Constitution of Europe* (December 12/13, 2003) and a conference organised by Professor Michael Keating on *Nations, Minorities and European Integration* (May 7/8, 2004) have provided a number of contexts within which Forum discussions can be disseminated to and informed by the wider international academic community.

The part of the Forum seminar series scheduled to take place in the first half of 2004 will focus on specific policy fields under the respective themes of *Rights and Citizenship in an Enlarging Europe* and *Regional and Cultural Diversity*. Seminars will address inter alia EU citizenship, the notion of equality in the European Constitution, vertical and horizontal decentralization, minority rights in the EU and linguistic diversity. The Forum thus seeks to achieve its aim of contributing to discussion both within and outwith academe of issues of European constitutionalism.

MIRIAM AZIZ

Research Fellow and Scientific Co-Ordinator of the European Forum, “Constitutionalism in Europe”

A Few Impressions of a *rédacteur* in the European Convention Secretariat

It has been a unique experience, and a great privilege to have been at the heart of the Convention process, as one of the ten or so draftsmen ('*rédacteur*' in French) in the Secretariat of the European Convention which paved the way for the Constitution for Europe.

The whole story started for me at the RSCAS where I twice acted as a rapporteur to draft reports commissioned by the European Parliament and the European Commission on how to simplify and constitutionalize the treaties. Later, I was hired by the European Commission in view of the forthcoming Convention, from which I was seconded a few months later to the Secretariat of the Convention. Valéry Giscard d'Estaing (VGE), the president of the Convention himself it seems took the final decision in choosing the draftsmen after individual interviews. No doubt my previous working experience with Giuliano Amato at the EUI had played in my favour.

One of the greatest satisfactions in the end was the working experience with some very competent and stimulating colleagues coming from the administration of the institutions and from some national diplomatic services. In spite of diverse origins and areas of expertise, and some conceptual divergences on the constitutional project, a real team spirit developed. This was mainly due to our General Secretary, Sir John Kerr, former head of the UK Foreign Office, who organised a real collective way of working.

Most background notes and draft articles, and any substantive documents to be circulated to the Praesidium and then to the Convention were prepared by one of us, and discussed in the group. The Convention method, whereby each stance had to be sustained by convincing arguments, applied to the group of draftsmen as well, although from time to time Sir John Kerr played his 'golden card', as he said. To be honest, it took some time for the Secretariat to find its full speed as a team. There were some mutual suspicion at first (in my case, being a Belgian, coming from academia and the Commission was not necessarily an advantage to be 'credible'), and it took some time for the General Secretary to free himself from some external influences and to rely fully on his team. The way he caught up in all matters (he had been out of EU business since the treaty of Maastricht) and eventually agreed to open up in the intellectual exchanges amongst us, was to leave a long-lasting impression, just as the way he managed the strategy of the whole enterprise. He was also assisted by a very efficient Italian woman, his deputy, in running the very demanding logistic of the Convention. The tasks of the Secretariat followed (or perhaps triggered) the rhythms of the Convention:

background and reflection notes during the listening phase, management of the working groups and circles of discussion during the study phase (including drafting the final reports under the direction of the chairman, who was always a member of the Praesidium), drafting the articles of the Constitution, their commentaries, and compiling and summing up thousands of amendments in the proposal phase.

From time to time, VGE organised private meetings in Brussels with the draftsmen where he could share his personal feelings about the state of play of the Convention and set out the following steps for its proceedings. This was also an opportunity for him to ask directly for our opinions on certain issues or to raise technical questions which revealed his sharp knowledge in some dossiers. Moreover, VGE used to choose himself the persons to accompany him in his many official visits to high political figures (all the present and future Member States have been visited by him, or by one of his vice-presidents), which would allow for a much freer discussion. He would then always have very specific questions to ask or messages to deliver. VGE also developed a close relationship with our spokesman, a German diplomat, who frequently acted as a go-between between the draftsmen and him.

Each of these meetings with VGE were memorable as he showed another aspect of himself, more intimate, and also revealed the relationship he had with his General Secretary. In spite of some appearances (e.g. the fact that they most of the time addressed each other in their own mother tongue), they had great respect towards one another, and got along very well after a while, notably as they had in common a great sense of humour, and actually a quite similar one: typical British understatement and irony on one side, false naivety and pince sans rire on the other. Their interaction, just as the interaction between them and the different personalities and political background of Giuliano Amato and Jean-Luc Dehaene, created a very positive and interesting dynamic accounting for the success of the Convention.

The Praesidium meetings were held in rather restricted sessions as VGE considered it as a political forum where all the members should speak as freely and personally as possible. Later on, one legal adviser per member was admitted into the room as the drafting of articles started. The restriction also applied to the Convention Secretariat at first, the General Secretary himself sitting in the room but not at the Praesidium table. This changed rapidly, as he became a crucial actor in running, without ever chairing, the workings of the Praesidium, be it only due to the ever-growing



workload. As for the draftsmen, their presence was requested only when they were in charge of the matter dealt with. But the rule became quite flexible, especially in the end when things went so quickly and everybody had to keep in touch with all the issues and with the global picture.

A lot could be said about the workings of the Praesidium and possible improvements. In spite of the restricted sessions, it took some time for its members to gain each other's trust, and secrecy of its working proved to be difficult. One good example is the so-called 'skeleton' of the Constitution: the first time it was shown and discussed in the Praesidium, only a limited number of numbered copies was handed in and then taken back. The debates on the first articles regarding the division of competencies were long and inconclusive (partly due the Commission's diverging approach on the matter). In the last months, consensus was more and more difficult to reach and tensions were frequent. The last two or three meetings, by contrast, were very fruitful in getting things done, as the presidency of the Praesidium was less scrupulous about paying attention to the minority view...

Some of the difficulties encountered in the Praesidium can be explained by intensive working rhythms, amounting to a full-time job in the last months, and the technical expertise required. Another problem, regarding the Convention, concerned the lack of 'representativeness' of the members of the Praesidium as regards the components they were supposed to represent (national governments, national parliaments, European Commission, European Parliament). It was quite remarkable, for example, to note that the conventionnel who often spoke in the name of the national parliaments' component was not one of the two sitting in the Praesidium. Likewise, the Commission's representatives were not fully at ease when the Commission released by surprise a fully-fledged draft constitution, consolidating all the treaties, called 'Penelope'. And how can we deny that the three members supposed to represent the governments were at times representing rather their own views? Moreover, some Member States were 'represented' neither in the Praesidium, nor in the Secretariat, which accounts for their reluctance now to endorse the outcome of the Convention in the inter-governmental conference.

At the outset VGE tended to downplay the 'representativeness' of the members of the Convention, and to rely more on their personal conscience, in order to avoid over-rigid mandates of negotiation. This is why the conventionnels were seated, not in their compo-

nents, but in alphabetical order. In the end game, however, notably regarding the institutional compromise, the components proved indispensable in reaching a consensus, especially that of the national parliaments, as much as the transnational political parties.

Nonetheless, the Convention was good machinery for making people meet, talk, and think twice on issues related to the purpose and the future of the EU. The process included fully for the first time the new Member States. Furthermore, the Convention has delivered a product which was not at all expected at the outset, and indeed opposed by some, i.e. one single treaty consolidating and replacing all the existing treaties, starting with a constitutional part followed by the charter of fundamental rights. In that respect, the EUI reports on the reorganisation of the treaties have been influential as they have demonstrated the feasibility of such undertaking, and paved the way for it. The simplification of the treaties also includes an attempt to lay own categories and principles regarding the division of competences between the EU and its Member States. The rationalisation of procedures and instruments, for which Giuliano Amato has played a major role, has been underpinned by a revolutionary approach (for international organisation at least), consisting in defining the legal acts according to the decision-making procedures, and thus their authors, rather than just their legal effects, making thereby a direct link with the legitimacy of the Union action.

All that will be preserved by the ongoing inter-governmental conference. At the moment of writing, the technical group of the IGC is still very busy tidying up the Constitution and going through all the protocols, accession treaties and declarations in order to retain and consolidate the provisions of enduring relevance so that all the existing treaties can eventually be abrogated and replaced by the Constitution. The same can not be said for the more substantive outcome of the Convention, in particular the 'institutional compromise' which might have been better and more convincing, had the Convention method been fully applied to those sensitive issues. But the forthcoming compromise in the IGC, going back to the Nice Treaty or even the Amsterdam arrangements is unlikely to be better...

Will another Convention ever be convened to devise a true and rational political system at EU level, or more specifically to revise the treaty amendment procedure itself? Although the Constitution will allow for another Convention, I have my doubts that 25 or more governments would make such an 'unconscious' leap once again, unless the national parliaments, if acting collectively, wake up to their enormous potential in the constitution-making of the Union, probably more than in the legislative process as provided for in the Constitution.

HERVÉ BRIBOSIA

EU-Constitution: What happened to competencies?

I.

The convention's reshape of the EU is more than basic principles. It redesigns and redefines the EU in order to adapt it to the new needs of the 21st century, for instance to the institutional and political necessities of an EU with soon 25 and more Member States. After the defeat of intergovernmental diplomatic conferences to modernise the EU, the convention method succeeded to produce a text that makes the EU more flexible, more democratic and more transparent for the citizen.

The enlarged EU will also need to concentrate more on the core issues. With 25 Member States, the EU becomes even more diverse. It needs to leave more "marge de manoeuvre" to the Member States. Regional and local particularities can best be respected on the lower level. The EU should not seek for a say in every issue. The convention was called to deliver solutions to these problems. So, what happened to EU-competencies ?

There has been a considerable widening of competencies in the young history of the EU. The aim was to have a set of common rules to promote economic development and welfare which creates stability and social security. Now, the EU has, economically and partly politically, well developed. It does not need more competencies just for the sake of being stabilized. Otherwise, the EU will be overburdened and will lose its capacity to act and to react. Any additional as well as the existing competencies of the EU should pass the test of a clear added value as compared to national or regional action. Where we have made the experience that European regulation is not necessary, we should relocate it to the appropriate level.

II.

The draft of the constitution does not fully achieve this ambitious goal. In some areas, the EU competencies are even enlarged unnecessarily. The big merit of the draft, though, is the proclamation of the principles for the attribution of competencies accompanied by procedural safeguards. They help to reduce tendencies of centralisation and thus contribute to reduce euro-scepticism. However, we were not courageous enough to retransfer competencies to national levels where the EU-umbrella has not proven any added value.

For the first time, the competencies of the EU are summed up in a special chapter. The principle of conferral, according to which the EU can only act in

areas where there is an explicit competency, has been given constitutional rank. The scope of the competencies in detail is defined in part III of the constitutional treaty. Unfortunately, it remains widely unchanged. Here, we even find superfluous extensions in areas such as the co-ordination of the economic, social and employment policies. The necessary streamlining of the articles for the common market or the areas of social, regional and environmental policies has regrettably not been made.

The principle of subsidiarity, although unchanged in its core definition, now includes the regional and local dimension. Article 5 protects the national identity, the self-government of regions and local authorities as well as the autonomy of the churches.

The chapter on competencies lists three categories of



Joachim Wuermeling

competencies: exclusive competencies, areas of shared competencies and areas of supporting, coordinating or complementary action. This does not automatically contribute to a better separation of competencies, but it helps to show where the EU's focus of activities is. In this context, I would like to stress that the scope of these competencies is not defined through the lists of the areas of the three competencies. It is only to be found within the competencies set out in part III of the constitutional treaty. For reasons of clarity, it would have been preferable, though, to have all these provisions united in the first part.

Now it is made clear that important areas such as the common market or agriculture are among the shared competencies and not the exclusive ones. From the perspective of a Member State organised in a federal way, such as Germany for example, core competencies of their regional structures are listed among the "complementary actions". Also, the wording stresses that here we find ourselves outside the scope of competencies of the EU, since they are described as merely "actions". Legally binding acts of the EU in these areas may not entail harmonisation of Member States' laws or regulations. Even using the flexibility clause (the former Article 308), this cannot be circumvented.

Contrasting to the actual texts, the new draft contains various very clearly formulated guidelines on competencies. They endorse the principle of conferral. Thus, competencies not explicitly transferred to the EU, remain within the remit of the Member States.

Until now, the general political aims of the EU have served as a basis for EU action. We need a better separation of political objectives on the one side and the provisions that confer competencies on the other. The border line has been drawn in the draft in the sense that these objectives shall be only pursued "depending on the extent to which the relevant competencies are attributed to the Union".

Another success is that the Convention resisted to the temptation of establishing the principle of open coordination in the draft. Such an open coordination would have been possible also outside the areas of the EU's competencies. This would have completely undermined the principle of conferral.

But the best order of competencies remains a fragment without the necessary safeguards to assure its respect. This is why the CDU/CSU was advocating the case for the implementation of procedural safeguards for the respect of the competencies. Ideally, they should have included the right of action before the ECJ for national parliaments, the Committee of Regions and the national regions with legislative power on grounds of violation of the separation of competencies. Due to the structural differences between the Member States, some are centralist others federal, it was impossible to reach an agreement for the national regions. Compared to the actual situation, we have made a big step forward in granting the right for action to the national parliaments and the Committee of Regions. This, however, is limited to the grounds of violation of the principle of subsidiarity. Indirectly, this includes the question of competencies since any action in accordance with the principle of subsidiarity would also need to be within the remit of the EU's competencies.

Another new idea of the Convention is the introduction of the objection on grounds of subsidiarity for national parliaments at the beginning of the legislative procedure. Once the Commission has made a legislative proposal, national parliaments have the possibility to object the proposal for violation of the principle of subsidiarity. This is the first time national parliaments see themselves formally integrated in the EU's legislative procedure. But although this objection cannot stop the legislative procedure, it has nevertheless a considerable political effect. The right to take action before the ECJ once the legislative act is passed can reinforce the political weight of this procedure.

Apart from procedural safeguards and subsidiarity, which help to contain the uncontrolled widening of competencies, the flexibility clause of ex Article 308 merits particular attention. Initially designed to enable the proper development of the EU in areas that by accident have not been fully covered by a specific competence, it growingly opened the door to uncontrollable Community action. The Convention did not want to abandon this flexibility tool. Ideally, any piece of legislation based on ex Article 308 should be only of a limited term of application until a regular correspondent provision has been created to close this "competence-whole". The results of the Convention have been less consequent. Its scope of application has even been enlarged beyond the area of the Common Market. On the other hand, the use of the flexibility clause would need unanimity among soon 25 Member States and the approval of the European Parliament. This ensures, that the flexibility clause is used only where a EU action is needed.

III.

Reviewing the competencies and a better concentration on the EU's core activities, together with clearer provisions would be a big step forward. There is a better separation of competencies in the Convention's draft. Regrettably, though, there has not been real progress made in the various specific provisions on competencies. Nevertheless, the Convention's draft constitutional treaty explains better, who does what in the EU. With the new categories of competencies, the legislative structure becomes more transparent. Now we hope that the Intergovernmental Conference does not reshape the Convention's proposal and we would have to ask ourselves again: What happened to competencies ?

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(LL.M EUI 1989)

Le regard de deux professeurs de l'IUE sur la Convention européenne et le projet de Constitution

Préface de GIULIANO AMATO (Vice-Président de la Convention) au livre de JACQUES ZILLER *La nuova Costituzione europea*, Bologna, Il Mulino, 2003, collezione Universale paperbacks, 176 p. version française à paraître: *La nouvelle Constitution européenne*, Paris, La Découverte, 2003, collection Repères, 128 p.

Jacques Ziller a une grande qualité, parmi d'autres. C'est un grand connaisseur du droit constitutionnel et des systèmes politiques, mais il ne s'enferme pas pour autant dans le langage des experts, si rebutant pour le non-spécialiste. Au contraire, il sait écrire pour tout le monde, dans une langue claire, simple et captivante. La qualité de son travail ne se limite pas à la langue, elle s'étend à l'architecture, qui simplifie ce sur quoi il écrit, en met en lumière les lignes porteuses et permet donc à chacun de ne pas se perdre dans les méandres des détails techniques, qui font trop souvent les délices des juristes.

Ce sont là les caractéristique du travail que l'auteur a consacré à la Convention et à la Constitution que celle-ci a proposé. C'est pourquoi il a rendu un service d'une valeur inestimable à la Constitution et à la Convention, et je tiens à exprimer d'emblée ma gratitude. La Convention était née pour donner un souffle démocratique à une Europe à laquelle manquait de plus en plus l'oxygène produit par le rapport constant entre les citoyens et les institutions. Ce que nous avons fait pour simplifier les instruments et les procédures, pour clarifier les responsabilités, pour créer des voies de communication plus ouvertes pour les parlements nationaux et pour les organisations de citoyens avait pour objectif premier un tel résultat. Mais la Convention elle-même est née dans cette Europe inaccessible, et elle a fait son possible pour combler le fossé, grâce à la transparence et à la publicité de ses travaux, grâce aussi aux contacts qu'elle a établis avec tant de parties de la « société civile ». Malgré cela, non seulement beaucoup d'Européens ignorent jusqu'à l'existence de la Convention européenne, mais tant de ceux qui en ont entendu parler savent fort peu du contenu et du sens de ce qu'elle a fait. A vrai dire, rien ne pouvait mieux nous aider que des travaux comme celui de Jacques Ziller, que beaucoup liront de la première à la dernière page (ce qui n'est pas le cas de tous les livres). J'espère qu'il servira de modèle à tous ceux, pas seulement dans la presse, mais aussi dans les autres mé-

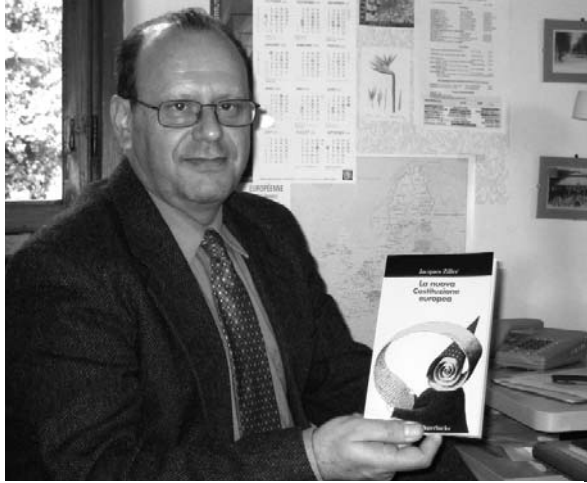
dias, qui contribueront dans les prochains mois à expliquer aux Européens ce qui va changer pour eux. Les pages qui suivent contiennent les réponses à toutes les interrogations et curiosités que peuvent susciter la Convention et le texte qu'elle a produit. Il y a donc tout sur « la manière dont ça s'est passé » : les précédents, la composition, l'organisation interne, le déroulement des travaux, les appartenances politiques des Conventionnels, les caractéristiques et qualités du Secrétariat, le portrait de ceux qui ont joué un rôle particulier, jusqu'aux trois cavaliers solitaires de l'antieuropéisme, le danois Bonde, le français Abitbol et le britannique Heathcoat-Amory. Et il y a tout sur « ce qui a été fait » : ici aussi les précédents, le passage de la simplification des traités à la rédaction d'un texte nommé Constitution, les chapitres et thèmes de celle-ci, les problèmes rencontrés pour chacun d'eux, les objections principales concernant l'un ou l'autre, et les résultats obtenus. De plus – et c'est là un enrichissement considérable – le texte est accompagné dans chaque partie de tableaux qui permettent de visualiser les termes essen-



Giuliano Amato

tiels du thème évoqué : pour traiter du calcul de la majorité sur la base du nombre des Etats et de leurs habitants, un tableau donne les chiffres de la population et donc du poids qu'aura chaque Etat ; pour évoquer la Charte des droits fondamentaux, un tableau compare ceux qu'elle garantit à ceux dont jouissent les Américains sur la base de la Constitution des Etats-Unis ; pour parler des « formations » du Conseil des ministres, un tableau indique celles-ci une à une. Et lorsque sont évoquées les langues officielles du texte, il n'y a pas seulement la liste des vingt et une langues, mais aussi une comparaison de quelques passages clés dans les langues des quatre

plus grands pays (allemand, anglais, français et italien) qui met en évidence les différences entre les versions linguistiques, pas toujours de simples nuances. En clair, il y a là tant d'informations que je suis sûr que le livre sera utile non seulement aux non-spécialistes, mais aussi aux experts, qui trouveront ici tout ce qu'ils n'osent pas demander et que souvent ils ne savent pas.



Jacques Ziller

Les résultats sont présentés dans un esprit qui exalte le potentiel constitutionnel et qui pourtant en apprécie la complexité avec un grand réalisme. L'auteur rend compte de mes doléances : le texte est masculin (un traité) alors que je l'aurais voulu féminin (une Constitution). Mais il conclut avec justesse que la nature encore internationaliste des procédures de révision (qui m'ont conduit à parler d'un traité) n'exclut pas que le texte réussisse à être vécu commun une Constitution, du fait de son contenu. Ce contenu est en fait organisé, comme le remarque l'auteur, selon les canons des constitutions qui ont suivi la Révolution française : reconnaissance des droits des citoyens, organisation des rapports entre gouvernants et gouvernés, garanties réciproques des droits et pouvoirs. Et l'incorporation de la Charte des droits fondamentaux – au-delà des pénibles compromis imposés par les Anglais en échange de leur acceptation – est l'un des acquis « spectaculaires » de la Convention.

Pour le reste, l'auteur se rallie – à raison, je crois – à l'appréciation finale du Président Giscard d'Estaing : « imparfaite, mais inespérée ». Il connaît bien l'histoire de l'Europe, combien de tabous maintenus lors des occasions précédentes ont été bousculés par la Convention, et il apprécie donc mieux – mais, sobrement – les changements, que ceux qui avaient des objectifs particuliers et souvent très ambitieux. C'est avec les précédents, dit-il, qu'il faut comparer les résultats, et non avec les attentes de chacun. Qui plus est, il était rien moins que garanti d'arriver à un texte normatif clés en main, sur la base d'un mandat qui parlait de « recommandations ». Certes, un peu plus de majorité qualifiée n'aurait pas fait de mal. Et l'au-

teur regrette l'absence de la loi organique dans les sources de l'Europe future, une véritable lacune selon lui. De plus quelques innovations restent de nature ouverte : que deviendra le nouveau Président du Conseil européen, plutôt un Président de la République à l'italienne ou plutôt à la française ? Les appréciations de l'auteur donnent une réponse à ce type d'interrogations. La Convention s'était ouverte sous un harcèlement de questions toujours présentes, mais sans réponse univoque et certaine : l'Europe sera-t-elle fédérale ou confédérale ? L'Europe confiée à la Convention doit-elle être celle des pays qui en font partie, ou doit-elle s'élargir encore ? La Convention n'a pas répondu à ces questions, et l'auteur indique qu'elle a bien fait de ne pas y répondre.

Ce que nous avons écrit est une Constitution pour un « ensemble ouvert » : ouvert aux frontières, ouvert aux formes institutionnelles qui pourront prendre corps à l'avenir sur la base de ses propositions. Même les Constitutions révolutionnaires – comme on s'en rend compte après des années – ne sont pas une rupture totale par rapport au passé et ne décrivent pas dans les détails l'histoire à venir. La nôtre n'est certainement pas une Constitution révolutionnaire, d'autant plus que nous ne savons même pas s'il s'agit d'une vraie Constitution. Vivons-la et utilisons-la pour ce que nous pourrions en tirer, nous tous, pour construire les prochains chapitres de l'histoire européenne. C'est pour cela que le livre de Jacques Ziller est si utile. Il en aidera tant parmi nous à commencer à bien connaître cette nouvelle Constitution.

GIULIANO AMATO,
Vice-Président de la
Convention européenne 2002-2003

Constitutionalism in Europe in the Era of the Draft Treaty Establishing a Constitution for Europe

The most striking element in the title of the Draft Treaty is the coupling of the concept of treaty with that of constitution. It signals the futility of the traditional attempt to define the EU in 'either/or' terms: international organisation v. State. Not any more conceived of as a liability, the EU's constant 'sui-genericity' is constructively recognised as its most constitutive characteristic. This opens the way to a definition of the EU for its own sake. That is precisely one of the aims of a constitution. Indeed, a constitution assumes a constitutive function according to the political community to which it relates. It symbolises the heart of this political community. It is the bearer of the mythos and the logos of the political community, i.e.: the collective imaginary and the rational political arrangement to which it gives birth. In so doing, the Constitution crystallises the dialectic between authority and freedom with regard to power. Hence, a constitution is usually described as presenting two basic features: the soul of a political community (its most fundamental values) and its body (its political architecture). The latter covers two dimensions: a horizontal one, i.e. the overall institutional design and the principles presiding over the relationship between political organs, and a vertical one, i.e. the legal status of the members of the political community and their relation to that community: the limits of their action and the extent of their protection.

Hence it seems that the EU has been granted a heart, a soul and a body. However, it is generally accepted that its blood is far from new. If the Constitution for Europe was formally shaped into a treaty, it is precisely because it is in keeping with the general pattern of a long chain of European treaties. This gives rise to two opposite positions: the persistent characterisation of the EU as a mere international organisation based on a treaty on the one hand, and the description of the EU riding on 'constitutionalising' waves on the other. Nevertheless, the Draft Treaty possesses an original feature that distinguishes it from its predecessors: it aims to clarify, simplify and adapt the European acquis. In this trend, Neil Walker describes the passage from European treaties to a Constitution for Europe as a "constitutional moment". Again, no choice has to be made between these interpretations. Each sheds a specific explanatory light on different aspects of this Constitution. One places more emphasis on continuity and evolution, the other, on novelty and, in a way, revolution. Furthermore, it is far too early to assess which version will prevail in European historiography. But why a constitution?



Karine Caunes

Apart from giving the EU's 'sui-genericity' its due, it expresses the recognition of the EU as a key actor on the European political chessboard. Indeed, the search for legitimacy that pervades the EU's constitutionalisation answers the following question: how a "coming together" of democracies could be anything else other than a democracy itself without betraying the very foundation of democracy? However, this does not imply expanding the scope of the EU's political power. Quite the contrary, some perceive the Constitution as an attempt to set the EU's boundaries and thus protect the Member States from any encroachment from the EU. That is why it must be asked whether the Draft Treaty carries a notion of a democratic constitution.

First, a written democratic constitution enters into force thanks to the action of the constituent power(s) representing the will of the people(s). The European Constitution is formally framed within a treaty which, as such, will have to be voted and ratified unanimously by the Member States empowered by their respective people. Hence, a treaty seems to be an appropriate democratic instrument. Furthermore, as pointed out by Jacques Ziller, the Draft Treaty was elaborated by the European Convention, which was of an extremely diverse and complex composition.

Secondly, from a material perspective, in order to be democratic, the European Constitution has to include the most fundamental 'European' values and to provide a guarantee against misuses and abuses of power. First, according to Article 2 of the Draft Treaty: "The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination".

Hence the axiological condition seems to be fulfilled. However, some authors have tried to find other values, not only common but also exclusively European. The grounds, efficaciousness and usefulness of this thought process are doubtful. Must European values and European identity be formulated in strategic terms, according to international power relations? Do we want to risk the creation of a European nationalism? Would it not be contrary to the ideal of peace at the basis of the European project? Is it possible to found a 'thick' European identity on thin common values? Indeed, values are so general that their actual application gives rise to competing interpretations and very different solutions.

Secondly, if the EU's institutional scheme does not reflect an institutional division following the traditional path of the separation of functions, it does organise the separation of power by the distinct representation of the different interests at stake. In this way, it also reflects the diverse political powers in different ways according to the function concerned. Hence, for example, in the legislative process, the Council of Ministers is supposed to represent the Member States' interests, the Commission, the so-called 'Community' interests, the European and national Parliaments, the peoples' interests. The same pattern could be used to analyse the principle of distinction between the different types of European legal acts. This also seems to apply to the Executive power. The proposal of a 'double hatted' EU Presidency (the President of the Commission and the President of the Council) is in accordance with this analytical approach. A final example could also be taken from the taxonomy of competences laid down in the Draft Treaty. Each time, a subtle equilibrium of powers is organised according to the sensitivity of the subject matter as is the case for the use of either the Community or the intergovernmental method. Furthermore, the inclusion of the Charter of fundamental rights of the Union "addressed to the Institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law" (Article II-51) constitutes another guarantee against potential abuses of power by the EU. Moreover, the Charter aims also to protect European citizens (Article I-8 and Title I-VI). However, if this is a democratic constitution, is it really the constitution of the EU? In fact, together the EU and the Member States are not forming a bi-dimensional polity as asserted by 'muti-level constitutionalism' but a tri-dimensional one reflecting the heterarchical relationship prevailing between them.

A bi-dimensional description would imply the institutionalisation of a tense hierarchical relationship. It would imply for example a choice between the absolute (the ECJ's) or the relative (national courts') interpretation of the primacy of EU law, both possible under the Draft Treaty (Article I-10.1) as shown by Paul Craig or a choice between the delegation of the exercise of some attributes of sovereignty by the Mem-

ber States to the EU or a definitive transfer of supreme authority namely sovereignty to the EU.

Conversely, the incommensurability of these competing positions reflecting different standpoints and thus, a plurality of final interpretative powers (Kompetenz-Kompetenz), expresses and ensures a true European constitutional pluralism, i.e. a plurality of loci of supreme authority. Hence, competing views enjoying equal authority and status regarding the nature of the relationship between the EU and the Member States become complementary. Like the principle of subsidiarity, the supplementary nature of EU citizenship to Member States citizenship is but one example of the overall European architecture. Based on "multiple co-existing demoi" as pointed out by Joseph Weiler, it doesn't prevent the existence of a European consciousness as demonstrated by the European Social Fora. Thus, from these dialogic interactions among constitutional units, organised through the principle of coordination or 'true' federalism according to Daniel Elazar, arises a third dimension which, by its very existence, performs the function of expressing and protecting this pluralist political architecture.

Following a Kelsenian analysis, the European constitution embodies both the EU's Constitution relating to the EU *sensu stricto* and the "Constitution for Europe" or Constitution of the EU *sensu largo* relating to EU/Member States relationship (Article I-5).

A last tricky question remains: what of sovereignty? Since the existence of the principle of the separation of powers, there is a distinction between the essence of sovereignty which is indivisible and the attributes of sovereignty (competences) whose exercise is divisible. In the European context, this exercise is divided between the EU and the Member States. The essence of sovereignty lies with its 'natural' owner in a democracy (which is each constitutional unit): the European peoples. Taken together, the essence and attributes of sovereignty reflect a general map of power. Hence, sovereignty is usually seen as supreme authority. As Michel Troper argues, two meanings have to be distinguished: supreme as having no superior, and supreme as being superior to the others. Here, the peculiarity of constitutional pluralism expresses itself. Each constitutional unit considers itself as the master of its kingdom according to its own norms and thus, as superior to the others. This is the basis of constitutional pluralism. Meanwhile, from the third global perspective, they are all masters of their kingdom, i.e. have no superior, but none of them is superior to the others.

As a conclusion, the ongoing process of constitutionalisation reflects both the *mythos*: unity in diversity and the *logos*: constitutional pluralism of the European polity... a pluralist State?

KARINE CAUNES
Researcher (LAW)

Pandora's Box is Open Can we manage?

Europe is undertaking so many efforts at once. The Convention process is the most visible among them, at least for lawyers. On the 10th of July 2003, after only 16 Months of deliberations, with the Draft Treaty Establishing a Constitution for Europe, the Convention had completed its work. The elaboration of the four Parts comprising 465 Articles and five Protocols – and the consensus on them – are, in themselves, very significant achievements. But the fortune of the Draft Convention is far from sure.



Christian Joerges

Will it be adopted *telle quelle* under the Italian Presidency or later? What will be the outcome of referenda be? Should the Convention, if it survives its ratification stage, be understood as a constitution or rather as a charter? This question also relates to Eastern enlargement, Europe's second project of historical dimensions. And it is only through a charter, argues Pierre Rosanvallon, that Europe can hope to organise its diversity and inscribe itself into an open space., argues Pierre Rosanvallon.

The legal, political, economic, social and cultural dimensions of enlargement are the most pressing among Europe's new challenges, but they are not the only ones. The search for a new constitutional legitimacy implies that Europe has to address its notorious "social deficit". According to Part I of Article 3 (3) of the Convention, the Union shall work for a "social market economy". What does this commitment entail? Is it at all conceivable that the European social model can be realized with the means provided for in Chapters II and III of Part III?

A democratized, enlarged and social Europe – this description of the present European agenda is still far from complete. One project of enormous proportions which the wider public and the constitutional debate has so far hardly noticed is the preparation of

a pan-European code of private law. This idea was first promoted in two resolutions of the European Parliament back in 1989 and 1994. It was then taken up in a much more moderate version by the Commission in its Action Plan of 12 February 2003, and it will be the object of the one and only private law network of excellence to be financed under the 6th Framework Programme. What a project! France's Code civil which the *grande nation* has always perceived of as a legacy of its Great Revolution; Germany's *Bürgerliches Gesetzbuch* which Germany venerates as a lasting memorial of its *Rechtswissenschaft's* contribution to Germany's unification; the common law of England and Wales, which forms nothing less than a cornerstone of Britain's constitutional architecture – are all of these (and many more!) distinct traditions to merge into a *ius commune privatum*?

"L'essentiel est invisible pour les yeux", observes Antoine de Saint Exupéry's *Petit Prince*. His *monitum* was a signal of trust and hope. What is hidden behind our institutionalised communality, however, is, to a large degree, unpleasant and frightening. The European integration project was designed in the early 50s as a response to Europe's "darker past": the heritage of nationalism and dictatorship, the cruelties of the Holocaust and the war had to be overcome once and for all. The novelty and the challenges of the present "constitutional moment" are bound to initiate new debates on Europe's *finalité* and identity. This will imply a new "politicization" of the integration project. How well are we protected by the successes of the European integration project against a resurfacing of Europe's darker legacy? OR How well do the successes of the European integration project protect us against the resurfacing of Europe's darker legacy? Will it be at all be possible to discipline the politics of memory within our societies and do away with the instrumentalization of our pasts? Much would be achieved if both the importance of this issue for the constitutionalisation of Europe and the risks of playing around with traumatic historical memories were, at least, understood. There have been many alarming signals: The Italian President invites his critic Martin Schulz, Member of the Party of European Socialists, to act as a concentration camp 'Kapò' in a film. Herr Martin Hohmann, Member of the German Bundestag, delivers a skin-crawling anti-semitic speech on Germany's *Tag der deutschen Einheit*. A German initiative for a memorial on all the people expelled from their *Heimat* provokes deep anxieties in Poland. According to the Eurobarometer carried out in the second week of October, the majority of citizens in all Member

States (with the exception of Italy) believe that Israel presents a unparalleled threat to peace in the world.

All of these incidents have had their aftermath. Martin Schulz, the Social Democrat from Germany, experiences the solidarity of his fellow parliamentarians and his party places him at the head of its list for the upcoming European elections. Martin Hohmann will be excluded from his party and will have to give up his mandate. The Presidents of Germany and Poland, in a carefully prepared communication, have appealed to the readiness for reconciliation and have sought mediation at a European level. The President of the European Commission has assured the world that the Eurobarometer survey will have no impact on the Commission's policies.

“L'essentiel est invisible pour les yeux”. There is a more hopeful side to the *Petit Prince's* message. What is not so visible, because it seems so unexciting and trivial, is the performance of the European machinery, the innumerable, small and not so small, indicators of good European governance. Europe is in-

involved in so many segments of our societies. It is instigating countless innovative projects. It is not building up a *demos* but has, nevertheless, established a European public. Should Europe have put more trust in the legitimacy that its handling of our daily affairs can generate? This choice is no longer open. The great projects are under way. The expectations they raise are high. What about disappointments in the event of failures? There is a risk that the complicated European machinery, the pragmatic and incremental daily integration business, will be affected by disappointment about Europe's higher politics. For this very reason, it is all the more important to understand the reasons why European matters are so hard to grasp in full: why they cannot be simplified, and why those who demand or promise this are not to be given credence, and, finally, why it is actually worthwhile to continue working on the less visible.

CHRISTIAN JOERGES
Law Department

In memoriam Paolo Donati

Paolo Donati was an unusual student. He had to be convinced of the worth of writing a dissertation, and I was sure that he would produce an excellent one. But he always had the feeling he was not up to the standards he set himself, also fearing that academic work might alienate him from real life. So he was driven between academia and professional work. Yet he produced an excellent dissertation, and subsequently turned to professional work.

Before he came to the EUI, he had been part of a group of researchers put together by Alberto Melucci in Milan, working on environmental movements in Italy. Paolo did not confine himself to the analysis of environmental protest; he continually questioned its relevance to shaping environmental policy. His dissertation has become an example of crossing the divide between environmental politics and environmental policy, this being enabled by theoretical imagination and methodological rigour.

His particular skills were methodological. He had big plans to give to his favourite field of discourse analysis a robust technical and epistemological basis. He wrote on these things in recent years while continuing his professional work, using these methodological competences.

Working with Paolo as a doctoral student as well as a research collaborator at the EUI, I got to know his particular personal charm and seriousness. He was an excellent debater, but not only that. He played soccer with my little son when he came to our home. He was simply a great person.

We lost him. Paolo died on November 11 in a traffic accident.

Klaus Eder

The Draft Treaty Establishing a Constitution for Europe A Citizens’ Perspective and an Alternative

It was hardly a case of flawed analysis. The December 2001 Laeken Declaration by the highest political leaders of fifteen European peoples was clear enough to all those they represent: “Within the Union, the European institutions must be brought closer to its citizens. Citizens undoubtedly support the Union’s broad aims, but they do not always see a connection between those goals and the Union’s everyday action. They want the European Union to be less unwieldy and rigid and, above all, more efficient and open. (...) [T]hey feel that deals are all too often cut out of their sight and they want better democratic scrutiny (...)”

To act upon these observations, the European peoples’ highest representatives decided to convene a Convention. By way of simplifying and reorganising the current four Treaties its task would be to draft the European Union the most fundamental and symbolic of texts in any political setting, a “Constitution for European Citizens”. The set-up of the Convention was taken over from a recent experiment in European close-to-the-citizens politics, a heavy-weight body of national and European politicians that drafted an EU catalogue of fundamental rights. The frequent reference by the Constitutional Convention’s Chairman to the famous drafting of the US Constitution, in Philadelphia, suggested a self-understanding of history-making in progress. The message was clear: this was not to be seen as yet another negotiation only slightly modifying the Treaties.

Therefore, from a citizens’ perspective, the resulting Draft should be looked at with the Laeken Declaration’s intentions of making Europe simpler and more democratic in mind. It should also be judged in the light of a random reader’s association of added importance when coming across a term like “Constitution”. All the more so since the top Conventioneers often clearly played on this type of association, thereby using it as a legitimisation of their own activities.

Given this, I believe the conclusion is as straightforward as it is disturbing: the Constitutional Draft is a particularly poor piece. By reading this text a European citizen will not easily understand what the Union originates from, what it is for, what it therefore does and how it does it.

Indeed, the Draft appears to be too light by just about any measure of Constitution-making. It is too long, longer than any national constitution of the fu-



John Morijn

ture twenty-five European states. The double-edged sword so wisely designed for close-to-the-citizens Constitution-making, that of simplification/reorganisation, only hesitatingly cuts at the reorganisation side. It is very far from simple, with its set-up in four parts (the first part of which is an incomplete Constitution (it should, for example, have included part four), the second part a catalogue of fundamental rights that should either be the first part of the Constitution, or – preferably, as it is too long for that purpose – only be referred to in the Constitution and then left to exist in parallel to the European Constitution as a European Union Bill of Rights with its own textual logic, and the third part a treaty text with mostly constitutive, not constitutional provisions). On top of that it is entirely unclear what has come of the initial concerns for enhanced openness and closer democratic scrutiny. And which citizen is to understand the (confusingly renumbered re)numbering of the articles?

The Charter of Fundamental Rights was accompanied by a document explaining to insiders the meaning of its provisions, the “Explanations”. This unusual expert clarification to a layman’s clarification was needed to facilitate a political compromise over citizen-tailored simpler language. (These Explanations are given constitutional status in the Draft, clearly reversing the previous compromise). This Constitutional Draft seems to need both an expert and a layman’s clarification. It bears every sign of the usual and exclusive bargaining by and for states. And although there are quite a few important im-

Preamble to the People's Constitution for the European Union

THE EUROPEAN NATIONS have overcome their past enmities and formed a Union in which they will affront the future together in friendship and peace.

This Union is characterised by a rich diversity of peoples and cultures, that are nonetheless united in recognising certain fundamental values: the inviolability of human dignity, equality among Man and the sovereignty of the people.

In the past the European people's sovereignty has been exercised and monopolised by sovereign European states. Today's reality is that the importance of shared interests of European people often outweighs the importance of the continuing exclusive relationship between national citizens and their national state. Therefore on the territory of the Union the most fundamental concern should be at which level of government, national or European, the people's sovereignty is most effectively and beneficially exercised.

Within the Union the people's sovereignty is exercised by representatives the people elects to govern in its name and interest. They oblige themselves to do so in accordance with the will of the majority, but with respect for each and every minority, within the limits set out by this Constitution.

It is the pride of Europe to be the native ground of democracy and democratic principles. Over the centuries these principles have all too often been denied, causing indescribable human suffering. Still the noblehearted have always continued fighting for democracy and justice, laying thereby the foundation of today's and tomorrow's Europe. The longing for the rule of law and the sacrifices of the brave in establishing constitutional structures have proved stronger than the forces wanting to deprive the people of its rights.

But the citizens of Europe are never to take their democratic attainments for granted. Now, as ever, it is their duty to remain vigilant and assure themselves that their leaders have as their sole objective the creation of a better Europe for all its citizens and to contribute to making this a safer and more peaceful world for all.

The citizens of Europe are called upon continuously to verify this; they do not only have the right to elect their representatives, but they also have the duty to control them, to keep reminding them of their responsibilities and in the most extreme case to free themselves of them.

provements, such as the new simplification of the most important legal instruments (laws and framework laws), I think that on the whole the many complicated compromises make a complete mockery of the simplification/reorganisation logic that was to facilitate a design of a Europe understandable to European citizens.

The picture is clear. Quite simply, when it really came down to it, European citizens' interests were the least of concerns. As a result, in line with Louis XIV's famous statement "L'État, C'est MOI", the fifteen peoples' representatives are now hammering out the last details of their new deal: "L'Union, C'est NOUS". And although in 2000 a set of mostly already binding human rights was puzzlingly condensed into a Charter 'as if' it would be capable of having binding force, one day, this 2003 Draft Constitution is intended to be adopted as binding. Citizens' interests would have been served better by a reverse scenario.

But it is easy to criticise. Therefore I was happy to join a project by Oscar and Merien ten Houten, a writer and an internet-entrepreneur from The Netherlands, to draft an alternative European Constitution: the People's Constitution for the European Union (PCEU). On the presumption that this must be possible when aiming at drafting a Constitution, the purpose was to design a text understandable to everybody, readable, and sufficiently concise. It wants to educate and inform people about the state-of-the-art in their Europe, without going into too much detail. At the same time it attempts to answer some of the basic ever-returning questions in European Constitution-making (Q: reference to Catholicism?; A: No, because it is covered by the reference to human rights, more specifically the freedom of religion – Q: reference to Federalism?; A: is superfluous, as every informed observer knows the EU in many respects is already that, etc.). The intention was always to start from the simple standpoint of what we think would best serve the interests of Eu-

ropean citizens. But the most important aim was to stir up a discussion. As we never intended to impose our views in any way, we opened an online discussion-platform (<http://www.pceu.org/forum/index.php?lang=uk>). By now the text of the Alternative is available in 5 European languages.

To give some basic idea of the Alternative, the PCEU starts with a clear vision of what the Union originates from and what it exists for (see box). It leaves most substantial provisions intact since untouched (see provision on legal status and scope), but abolishes many unnecessary formal complications (such as the pillar-structure). The European Council, Council of Ministers and European Commission are merged into a “European Government”. The powers of the European Parliament are substantially widened. European citizens, following the draft’s logic that every single one of them has (to develop) both a national and a European loyalty, will be able directly to elect their preferred europarlamentarian irrespective of the candidates’ Union nationality. Apart from that European citizens are continuously involved in shaping their Europe by way of popular referendums on important issues. A European Senate, consisting of national representatives, is also set up. We create only one legislative procedure that can lead to just two results: laws or framework laws. And the intended legal status and scope is evident from the last sentence of the concluding observation of the PCEU: “This Constitution is the renewed and highest legal basis of the Union. Primary Union law not replaced by it and secondary Union legislation currently in force shall be understood and interpreted in light of this Constitution.”

Bringing the European Union “home” to those on behalf of whom it exists will require a radical break with the ways in which today’s Union was brought about. The PCEU was drafted as an agenda for discussion, a modest starting-point to address basic questions that European citizens can understand (and, judging from the many enthusiastic reactions to the Alternative, deeply care about). Of course the PCEU would simplify the current set-up enormously, but if agreement is impossible on substantial changes that would make the EU simpler and more democratic, then apparently Europe is not ready for a Constitution. And in that case it should not pretend to have one.

Criticism of ongoing (re)defining projects in the European setting is often felt as criticism of the (very existence of the) European idea(l) itself. This is an often unfair assumption, that paradoxically constitutes a grave underestimation of the considerable (and, I think, largely irreversible) achievements the European project has brought about for every European citizen. The PCEU intends to show that taking seriously the talk about a citizens’ Europe would have to lead to substantially different results – a Union of very different ways and design – and sets out to initiate a discussion with regard to this. It is paramount to start this discussion soon, as referring to a democratic enlarged Union close to its citizens only to continue on the same old route will eventually inevitably strand. That would be in nobody’s interest.

JOHN MORIJN
Researcher (Law, first year)

European Forum and Department of Law workshop

On 28 - 29 November the workshop ‘Implications of Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders’ took place at the Institute.

It was co-organised by Wojciech Sadurski (EUI), Adam Czarnota and Martin Krygier (both from University of New South Wales, Sydney) and the Italian Representation of the European Union in Rome.

The “coming together” of the two parts of Europe can be seen, as far as constitutionalism and the rule of law are concerned, from two different perspectives:

- (a) will the enlargement of Europe erode the consensus built around “common European traditions” if the traditions of the CEE (and, in particular, their constitutional practice so far) turn out incompatible with those of the Western half of the continent?
- (b) will both the prospect and the reality of enlargement affect the approach to, and the implementation

of, the ideals of constitutionalism, human rights and the rule of law among the candidates and the new Member States?

This workshop is concerned mainly with the latter question. It investigates the multiple effects, both positive and negative, of the very prospect of accession, and of the likely first years after accession, upon the understanding of constitutionalism, the rule of law and human rights both among the main legal-political actors (judges, politicians, MPs, journalists) and among the general public in the accession states (both those who join in the first round, such as Poland, Hungary and Slovenia, and also those for whom the prospect of accession is a long-term perspective).

Papers of the workshop may be found at: <http://www.iue.it/LAW/Events/WSWorkshop-Nov2003.shtml>

The Sapir Report: An Agenda for a Growing Europe

Achieving and sustaining growth in the European economy is an absolute necessity - easy to say but hard to deliver, and increasingly hard in the face of global pressures and intense international competition. In spring 2002 Romano Prodi, President of the European Commission, turned to a group of independent experts for advice on how to get the European economy back on track. So there we were, six economists, among them Giuseppe Bertola, then chair of the Economics Department at EUI, and one political scientist - me -, with André Sapir, of the Université Libre de Bruxelles, as Chairman of the group. What a challenge!

The Sapir Group followed the model of the Padoa-Schioppa Group and its 1987 Report on Efficiency, Stability and Equity, in a critical moment between the decision to complete the single European market and the designing of the blueprint for economic and monetary union. Our job was to draw from the best of current economic analysis a thorough assessment of where the obstacles to growth lie, against the backcloth of new challenges, such as enlargement of the EU, the demographic profile of Europe, and the impact of globalisation. We were asked to relate these to the 'economic system' and governance of the Union and to make recommendations for future policies and reforms.

The conclusions of our deliberations were presented to Romano Prodi in July 2003, (http://europa.eu.int/comm/dgs/policy_advisers/), and will be published in English by Oxford University Press and in several other language editions. Our main message is the critical importance and urgency of setting the European economy on to a positive growth trajectory - failure to do this would compromise other economic objectives and put at risk the political ambitions and public acceptability of the Union. We welcomed the stability already achieved by the single currency, but argued that this needed to be complemented by

policies which would encourage rather than cramp growth. This needs some adjustment and strengthening of collective macro-economic policies - the economic side of EMU. But the more important efforts need to be put into a range of micro-economic policies, with stronger incentives for



growth-encouraging actions. Our priorities here were rather clear:

- more and better quality investment in human capital, especially higher education, and in R&D, because of the necessity to act at the innovation frontier;
- more scope to facilitate market entry by new entrepreneurs and especially those operating in new technological sectors;
- adapting the labour market to these objectives, but against a backcloth of rapidly ageing populations, hence encouraging labour movement between sectors, between countries, AND from legal migration; and
- continued work to deliver the single market which remains damagingly incomplete, especially in financial services; and
- give priority, notably in EU funding programmes, to helping the new and poorer member states to converge.

How should these policies be achieved? We argue in the report that the inherited economic system of the Union - in spite of its many achievements - contains some serious obstacles to growth-inducing policies. Not only do policies need

to change, but their governance needs to be improved in order to develop and to deliver appropriate policies. Here our messages are as follows:

- sharpen up the macro-economic policy process, with more pressure on member governments to deliver their side of the EMU bargain;
- stick at the Lisbon strategy, but with more focused and less diffuse targets;
- press member governments to take more ownership of the strategy, with the Union acting as a facilitator for country-level reforms;
- develop genuinely independent European agencies to deliver function-specific policies, both for regulation (competition, food safety etc.) and for funding (scientific research);
- encourage the development of steered networks and partnerships of national regulatory bodies, keeping close to market developments; and
- reform the EU budget to focus its limited resources on incentives for economic dynamism, including convergence by the new members.

These messages are tough and require radical reforms of policy content and governance. Not surprisingly therefore the Sapir Report has generated a good deal of political controversy. But the issues and stakes are such that some fierce argument is indeed necessary to produce good results.

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Minority Rights in Europe: A New Policy Push from Central and Eastern Europe?

The EU's eastward enlargement in 2004 will transform the interaction between the political, economic and legal orders of the old and new Member States. With regard to the Central and East European countries (CEECs) the emphasis will fully shift to 'capacity' issues concerning the implementation of the acquis and the sustainability of the norms and rules adopted over the last decade. The post-enlargement context will also confront the old Member States with some of their own internal dilemmas regarding norms and policies. The issue of minority rights is one of the best illustrations of these post-enlargement challenges for the EU. Two interrelated pressures for change have underpinned the re-emergence of a rights agenda for minority protection in Europe: the collapse of communism and the EU's eastward enlargement. The idea of a 'return to Europe' ranked high on the post-Communist political agenda in CEE, demonstrating a commitment to European norms and practices. The perceived need to promote stability, peace and democracy in the region saw the scope and visibility of organizations like the OSCE and the Council of Europe increase, and their norms on minority rights were translated into the 'Copenhagen criteria' for EU membership in 1993.

The first of the four Copenhagen conditions explicitly includes a reference to 'respect for and protection for minorities'. Inside the current EU, however, minority rights are much less prominent. Article 6(1) of the Treaty on the European Union (1997) defines the common principles of the European Union as 'liberty, democracy, respect for human rights and fundamental freedoms and the rule of law'. The wording is identical with the first Copenhagen criterion – with one important exception: the reference to minorities. Article 49 further highlights this lacuna by specifically referring to Article 6(1) as among the conditions for EU membership.

During enlargement, the minority 'condition' faced at least three compliance problems in the CEECs. Firstly, it lacked a clear foundation in EU law and concise benchmarks. The practices of the current Member States vary widely, ranging from elaborate constitutional and legal means for minority protection and political participation to constitutional unitarism and outright denial that national minorities exist. Secondly, minority rights were not an internal EU priority. Thirdly, the concept of what constitutes a 'national minority' and minority rights are deeply disputed in international politics and law.

The Commission's annual Regular Reports, following on from the Opinions of 1997, have been the EU's key instrument to monitor and evaluate the

candidate countries' progress towards accession. The Reports, characterised by 'ad hocism', have focused on two minority groups in particular: the Russo-phone minorities in Estonia and Latvia, and the Roma in Bulgaria, the Czech Republic, Hungary, Romania and Slovakia. This emphasis suggests that the EU is more concerned about its external relations with its most powerful neighbour and main energy supplier – Russia – and soft security migration issues than with minority protection as a norm per se. The emphasis has been on the adoption of formal measures rather than the reality of policy implementation. The Reports track the adoption and amendment of constitutional provisions and laws on citizenship, naturalization procedures, language and electoral rights, the establishment of different bodies managing minority issues and the launch of government programmes to address the needs of specific minorities. In the case of the Roma, the lack of progress and policy implementation is openly acknowledged by the Commission. This recognition is in itself indicative of the limitations of the EU's monitoring mechanism, as it illustrates the lack of a correlation between the Reports and a tangible improvement in minority protection.

EU conditionality is not clearly temporally correlated with the emergence of new political strategies and laws on minority protection in CEE. For example, Hungary's 'Law on the Rights of National and Ethnic Minorities' granted collective rights and cultural autonomy to thirteen recognized minorities as early as 1993. In Slovenia the law of October 1994 on 'Self-Governing National Communities' created territorial autonomies and a guaranteed seat in the national parliament for the 'autochthonous' Italian and Hungarian minorities. The Hungarian case illustrates best how the domestic political will in favour of minority protection is critically shaped by national interests, namely the concern for the sizeable Hungarian minorities located in neighbouring countries (Slovakia, Romania, Serbia, Ukraine). In the case of Hungary, the EU ultimately acted as one of the brakes on overly extensive rights for co-nationals abroad, as embodied in the controversial Hungarian Status Law.

In general, it is easier to trace the EU's impact on specific laws or regulations. The adoption of Slovakia's language law of July 1999, for example, is closely linked to the EU accession process as reflected in the Regular Reports. The Slovak language law allows the use of minority languages in local public administration subject to a minority population threshold of 20 per cent in a given area. The changes to the cit-



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izenship and naturalization provisions in Estonia and Latvia, in particular, demonstrate that the EU's policy leverage to comply with European and international standards has been anchored elsewhere, namely in the recommendations of the OSCE and the Council of Europe. The impact of the EU on minority rights in CEE is difficult to disentangle and has often been overshadowed by strong domestic political interests. One of the main achievements of the EU in the area of minority protection is that it has made the objective of 'minority protection' an integral part of 'EU speak' in CEE.

Despite the link between the EU's eastward enlargement and the ongoing constitution-making process at European level, minority rights did not emerge as a prominent issue during the Convention on the Future of Europe. The resulting Draft Constitutional Treaty is void of any mention of minorities. The values and principles stipulated in the preamble, Part I and the preamble and the text of the Charter of Fundamental Rights at best provide indirect avenues for minority rights protection. Article 2 of the Draft Constitutional Treaty conceals the inherent contradiction between the EU's internal values and its conditions for membership somewhat 'better' than its predecessor (Article 6 TEU), as the wording no longer copies the language of the first Copenhagen criterion. It now reads: 'The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination'. The preamble to the Charter of Fundamental Rights, now Part 2 of the Draft Constitutional Treaty, clearly captures a related inherent tension when referring to the Union's respect for the 'diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States'. As the IGC continues to discuss and amend the Convention's Draft, Hungary has taken the lead in a last-minute attempt to enshrine explicit minority rights in the final text. Hun-

gary's proposal has triggered an instant negative response from the Slovak and Latvian governments, which face the challenge of accommodating a sizeable Hungarian and Russian-speaking minority respectively.

It is too early to tell what the outcome of the interaction between West and East European models of minority protection will be in the post-enlargement period. Rather than reinforcing the distinction between new and old Member States, the issue of minority rights cuts across geographical and historical boundaries. Two major scenarios are feasible: on the one hand a form of 'reverse conditionality', emanating from the new Member States, could infuse the EU with a new commitment to minority rights; on the other hand, a new tacit policy consensus on inaction in the area of minority protection may emerge within an enlarged EU. For the time being, a combination of both scenarios appears to be the most likely outcome: minority rights will make for one of several issue dimensions for coalition-building across old and new Member States. As long as the EU remains committed to further enlargement – to include Bulgaria, Romania, Turkey and possibly Croatia and other South-East European states – 'respect for minority protection' will remain an integral part of the rhetoric of accession. Though unlikely to become an internal EU policy priority, this momentum may suffice to promote awareness and best practice inside the EU and bolster the profile of related instruments, most importantly the Council of Europe's Framework Convention for the Protection of National Minorities and its monitoring mechanism. Moreover, the current process of constitutionalization at European level seems to be widening the scope of the European Court of Justice, the European Court of Human Rights and the European Parliament for reviewing minority issues within the framework of human and fundamental rights. Any meaningful definition of constitutionalism has to combine practical and normative dimensions, whether as regards institutional design or the 'credo' which informs politics and law. The process of EU eastward enlargement has undoubtedly enshrined minority rights in this wider definition of European constitutionalism.

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Neil MacCormick's Two Hats

Law as institutional fact, sovereignty as institutional fiction

On 28 October 2003, Professor Sir Neil MacCormick MEP visited the European University Institute and delivered a lecture entitled 'Institutional Theory and the Conventional Constitution'.

Famous in legal scholarship for assuming the mantle of Hartian legal positivism, and more recently for developing the idea of 'post-sovereignty' and legal pluralism in the 'European Commonwealth', MacCormick has been Member of the European Parliament representing Scotland since 1999 and has recently been engaged as alternate member (Greens/European Free Alliance) of the 'Constitutional Convention' on the Future of Europe.

This dramatic transformation from legal theorist to party politician is only an appearance; Neil MacCormick has been involved in politics as a member of the Scottish National Party for many years, as well as being Regius Professor of Public Law and the Law of Nature and Nations at the University of Edinburgh since 1972.

The combination of legal scholar and politician is a path seldom trodden; it provides an interesting and quite unique test case for the transferability of theory into practice, especially as his direct participation in the European political sphere emerges with his development of the idea of a plurality of institutional normative orders in 'Questioning Sovereignty: Law, State and Nation in the European Commonwealth' (1999).

Given the political energy and currency which has been invested in the 'Constitutional Convention' and its obvious topicality at the Institute, it was unsurprising that MacCormick focused on the aspects of the latter. In an entertaining and instructive presentation, MacCormick took us through his understanding and vision of European Union, a vision which appeared at the same time moderately ambitious yet strongly conventional. He listed with enthusiasm and vigour some of the concrete proposals and piece-meal institutional changes which might be wrought as a result of the Constitutional Convention: for example, transparent law-making through constitutional clarification, more effective parliamentary supervision, and a full-time Presidency of the European Council.

Yet he largely skirted the conceptual debates on the 'big questions' of European integration – related to the existence or not of a European demos, society, or identity - making his vision appear not radical but pragmatic, promoting steps of incremental polity-reformation in conformity with general liberal princi-

ples such as the rule of law and the separation of powers. This gave him the somewhat incongruous impression of being a genuine enthusiast of the project of European Integration, yet in the manner of an Anglo-Saxon pragmatist - a far cry from the federalist visions of a Giscard d'Estaing or a Joschka Fisher. The absence of any conceptual analysis of popular



Neil MacCormick

sovereignty or national self-determination within the EU - clearly central to his rejection of imposed state-sovereignty (the case of Union between England and Scotland) - enabled his enunciation of these appeals for the institutionalisation of new European normative order to appear founded in common-sense and almost effortless, in marked contrast to the often strained and complex argumentations presented by Europhile (and Eurosceptic) scholars on the Continent.

His key-word to symbolise this moderately ambitious vision was that of 'suigenericity', thereby avoiding the traps fallen into by sceptics and federalists alike in terms of assumptions of unity or monism in institutional and social order, and enabling him to reject the idea that constitution necessarily equals state. Whilst labelling the EU as 'suigeneric' begs the important question of popular sovereignty and collective identity, it also resonates oddly with the idea of law as institutional normative order - the central tenet of his reformulated version of legal positivism, and the springboard from which he leapt into the proposals for constitutional reform.

Law as institutional normative order is advantageous, we are told, in that it enables us to make sense of non-state law (to which legal pluralists have drawn our attention since the turn of the last century) in terms of a plurality of internal perspectives. Of course, law as institutional normative order is only

advantageous to the extent that we think that the 'laws' of non-state institutions should have normative force. Certainly we can argue that they do have force, but the extent to which they do is deeply controversial- it cannot be settled by conceptual fiat.

There seems to be something hidden in the agenda of law as institutional fact, which makes it almost ideological in its concealing of the institution as a normative institution. Why, if only a 'fact', should we consider it normative at all? MacCormick has argued that norms are often more capable of decisive actual determination than are facts. Using the example of murder, he shows that we can be much more certain that murder is wrong than that x committed murder at such and such a time and place.

There is clearly no analogy in the field of the political, which might be defined as a struggle over the general definition of 'the ought', especially as it is encapsulated in constitutional form. Superficially, nothing in the agenda of legal positivism necessarily conceals this. Famous reformers and positivists (think of Jeremy Bentham) have argued that law should be clearly discernible for the precise reason that it can then be criticised and eventually amended or repealed. And there is nothing amiss with a legal positivist contributing to the political debate that plays a part in the future shaping of law – if his arguments are accepted politically, then he has contributed to changing the law; if not, he would not reject the new law as 'law', but would generally- speaking consider it to be valid. The finality of the law and the autonomy of legal argumentation sound almost trivial and uncontroversial, until we consider the move that is made in constitutional terms; terms which potentially alter the fundamental lines of sovereignty itself.

In the latter case, the proposals are not just about changing a substantive provision here or there, but about the bases and forms of legal reasoning and political argumentation and, where entrenchment is an issue, about the possibility of revision. If legal order is perceived to be heterarchical rather than hierarchical, the idea of reform all- the- way- up (or all- the- way- along) poses few conceptual difficulties for the legal positivist. When we move to constitutions, however, there is a more obvious but perhaps much deeper problem: the constitution effects a representation of social order within the polity that both presupposes and creates a political unity. It is not therefore enough simply to transfer a positivistic conception of the 'people' to the constitutional arena.

Aside from the constitution being a symbol rich in the democratic legitimation of a polity, the representation effected by a constitution not only opens up new paths, but closes old ones. The question then becomes one of continuity or discontinuity, a problem that the idea of law as institutional normative

order is ill-equipped to conceptualise. For MacCormick, and others like him, a European constitution should not be seen as a discontinuity. But if law - and especially constitutional law - is nothing more (or less) than institutional normative order as fact, there are no tools with which to see it as anything other than a continuity. What is it then that the constitution represents, which was not represented before? If nothing, then the act of institutionalising new forms of normative order becomes akin to a tautology.

To put the point bluntly, the idea of institutional normative order is one rich in platitudes when it comes to analysing why 'this' rather than 'that' normative order. Armed with the positivists tool-kit, we can thus explain well why, for example, 'The Charter of Rights' should be clear, simple, and precise, but not why it should be at all. Similarly, the central debate concerning the role of the constitution in European integration and a closer union among the peoples of Europe is by-passed by assuming it all to be a question of institutional fact, thereby suggesting that the second- order question (why have a constitution at all?) is already answered. The legal positivist requires a stronger theory of legitimacy if he is to avoid the conflation of law and constitutional law; a constitution works as more than merely a device for clarifying a legal-institutional status quo.

These difficulties should not disguise the fact that Neil MacCormick's work has contributed immeasurably to enlivening the somewhat stale state of analytical jurisprudence in the Anglo-Saxon world. His insistence on taking seriously the multiple layers of legal authority in a 'post-sovereign' world and his focus on the plurality of internal points of view, missing in Hart (and arguably Kelsen before him), has considerably changed the jurisprudential landscape. His questioning of state sovereignty from this perspective has opened the door to a far richer debate concerning the relationship between state law and other manifestations of sovereignty exemplified by popular sovereignty and national self-determination on the one hand, and the European Commonwealth on the other; a door that, sadly, relatively few others in the tradition of analytic jurisprudence seem to have followed him through. Nevertheless, in sticking so rigidly to the positivistic mantra of law as institutional fact it seems difficult, even impossible, to clarify conceptually the new types of normative, sovereignist and social claims that are being made with regard to the emerging non-state constitutional layers within and without the 'European Commonwealth', and which as an enthusiast of the European project MacCormick would perhaps do well to consider in greater detail with regard to the European constitution.

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Rethinking Community Competence in the Field of Media Ownership

A brief survey of the media in the various Member States might lead one to conclude that, in terms of access to information, Europeans have 'never had it so good'. Digital stations now supplement traditional analogue television and radio services, terrestrial stations compete with cable and satellite services, while individual access to the information cornucopia of the World Wide Web is rapidly expanding. These developments bring into question the continuing need for media ownership controls of the type found in many Member States. Though some States principally rely on competition law to control excessive media concentrations, many Member States have introduced complex rules which, *inter alia*, prohibit certain organizations (political, religious etc.) from owning particular media interests; impose ownership limits in specific media sectors; and limit the accumulation of interests across two or more media sectors. The principal rationale put forward for these restrictions is a democratic one, namely, that for citizens to play a meaningful and active role in the political process they require access to varied information and opinions from a diversity of sources. The reflection by the media of diverse views and opinions is also considered to have cultural benefits: facilitating integration in multicultural societies and helping to preserve and promote cultural diversity. Although fragmentation in media ownership clearly offers no guarantee that the media will in fact provide such diverse information, the risk of bias or restricted coverage is likely to increase where media ownership is concentrated in a few private hands. Ownership controls tend, therefore, to be just one element within a broader regulatory scheme, and are frequently complemented by specific content requirements and the provision of financial support for small media outlets or public service broadcasters.

The argument for relaxation of ownership controls based on the impact of new technology is, however, far from clear-cut, and it is important to examine what is actually happening on the ground. There may indeed be a greater diversity of media services and goods from which to choose, but increasingly these are owned by a limited number of 'multimedia multinational' companies. Small, independent companies are likely to struggle in this environment, particularly where there is market integration in the fields of production and transmission. These developments were recognized by the Parliamentary Assembly of the Council of Europe in January of this year, which noted that media concentration was 'a serious problem across the continent' and that in certain central and eastern European countries a very small number of companies were in control of the printed press.¹ In order to address this issue properly we also need to

know how different people use the various media. Consolidation among the press and broadcasting sectors may, for example, seem less troubling if alternative sources of information are available on the Internet. If, however, these sources are fragmented or difficult to locate and individuals primarily rely on one or two main sites sourced from the same broadcast/press companies, then the democratic and cultural interests identified above may indeed be compromised. Financial constraints can also severely reduce the choices open to many people.

These developments clearly pose complex regulatory questions for the Member States. But do they also necessitate action on the part of the European Community? Though it might be argued that control over media ownership is a matter best left to the Member States, particularly when one considers the very different press and broadcasting traditions, national governments, for a variety of political and industrial reasons, may be either unwilling to address this issue or may be actively engaged in deregulation. For this reason the European Parliament, from the mid-nineties onwards, has repeatedly called for Community intervention to safeguard media pluralism in Europe. In a resolution passed in September 2003, it reiterated a request that the Commission prepare a Green Paper on media concentrations, with a view, ultimately, to putting forward a draft directive on the subject.²

It is probable that the Parliament's resolution will have kindled in the Commission a not entirely pleasant feeling of *déjà vu*, in that for many years it was actively involved in drafting just such a directive. Though the Commission had a working document ready in 1997, the project was abandoned, in part because of divisions within the Commission itself, but also because of strong opposition from certain Member States that resented Community intervention in this politically sensitive area.³ Even the Parliament was unhappy with the internal-market basis for the Commission's proposal, which, in its view, improperly emphasized the economic rationale for Community action instead of more fundamental democratic and cultural reasons. It is, however, difficult to identify a Treaty basis on which a directive designed specifically to promote these latter objectives might be adopted. Some support might be gleaned from Article 151 EC, the culture article, though this specifically excludes any attempt to harmonize Member State legislation. The Legal Affairs Committee of the European Parliament has suggested that one might instead rely on what is now Article 308 EC, the 'stop-gap' article, on the basis that the promotion of pluralism is itself a legitimate Community objective. Article 308 EC is not

without its constraints, however, in that Council unanimity is required to pass any measure, and the influence of the Parliament is limited since it is afforded merely a right to be consulted. Despite the difficulties encountered in previous attempts to tackle this thorny issue, the Commission in its June 2003 Green Paper on Services of General Interest specifically sought views as to whether there was a need for Community action in relation to media pluralism.⁴

If the Community does decide to take action the challenge will be not only to learn from the prior impasse, but also to produce a directive which is more than merely symbolic. In this regard it may be noted that the scope and focus of any measure will be significantly affected by its legal base. If media pluralism is taken as the underlying objective, along the lines indicated by the European Parliament, then a wide range of interlinking issues can potentially be brought into play, such as the independence of public service broadcasters or the ethical standards of journalists. Given the difficulty of agreeing specific Community ownership limits uniformly applicable across the Member States, the Commission is likely to consider alternative regulatory approaches. One approach would be the adoption of a framework directive establishing general objectives, which it would be the responsibility of the Member States to realize, subject to monitoring and control at Community level. On the one hand, such a directive would offer Member States a degree of flexibility; on the other, contrary to initial appearances, it could ultimately prove a more demanding mechanism for the realization of media pluralism. Clearly, such an approach would not preclude the adoption of specific requirements in particular areas, for example in order to address the potential conflicts of interest which arise where an individual with media interests gains political office.

The recent petition to the European Parliament under Article 194 EC concerning concentration in the Italian audio-visual sector raises the issue of media pluralism in a rather different legal context, namely in relation to Article 7 of the Treaty on European Union ('TEU').⁵ This provision authorizes the Council (in relation to a duly referred matter and with the assent of the European Parliament) to determine that there is a 'clear risk of a serious breach' by a Member State of one or more of the principles set out in Article 6(1) TEU and, in the light of that finding, to 'address appropriate recommendations' to that State. The Article 6(1) principles include democracy and respect for human rights and fundamental freedoms. The pressure which can be exerted under Article 7 TEU on a particular State is of an essentially political nature, though in extreme cases of persistent breach the suspension of all or some of a Member State's Treaty rights is envisaged. The main thrust of the petition to the European Parliament is that the existing situation in the Italian media should be referred to the Council for evaluation under Article 7 TEU, on the basis that



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the degree of ownership concentration contravenes a fundamental value of the European Union, namely 'freedom and pluralism of the media'.

A particularly interesting aspect of the petition is the way in which it frames its concerns in terms of European citizenship, an approach that merits further consideration. It may, for example, be noted that under Article 19 of the EC Treaty European citizens enjoy rights to vote in European Parliament and municipal elections in Member States where they reside but do not have nationality. In order for citizens to be able to participate meaningfully in these elections they require access to varied information from diverse sources. Though political parties have an undoubted responsibility to inform citizens about their policies and programmes, many individuals rely heavily on domestic media to provide them with relevant information and opinions. Whether or not one has access to this information may ultimately affect one's willingness to vote. It is consequently arguable that a right to media pluralism, though not explicitly stated to be a citizenship right in the EC Treaty, is nevertheless implicit in the right of EU citizens to vote in European Parliament and municipal elections. The petition concerning the Italian media thus serves as a useful reminder that it is no longer possible to categorize media pluralism simply or primarily as a 'domestic' or 'economic' issue. Rather, it is an issue that is central to the democratic legitimacy of the European Union itself.

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¹ Parliamentary Assembly of the Council of Europe, Recommendation 1589 (2003) on Freedom of Expression in the Media in Europe, available at <http://assembly.coe.int/>

² European Parliament Resolution on Television Without Frontiers, P5_TA-PROV(2003)0381 at para. 41.

³ Harcourt, A. 'EU Media Ownership Regulation: Conflict Over the Definition of Alternatives' (1998) 36 *Journal of Common Market Studies* 369.

⁴ European Commission, Green Paper on Services of General Interest, COM(2003) 270 final at paras. 73-75.

⁵ Details of the petition and its sponsors can be obtained from <http://save-democracy.net/petition/index.html>.

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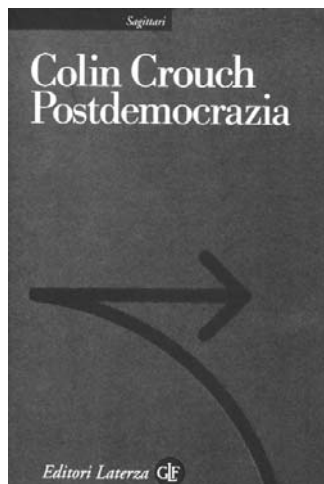
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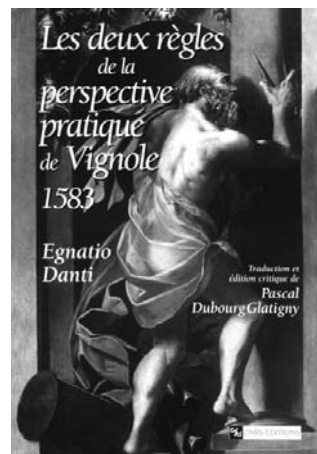
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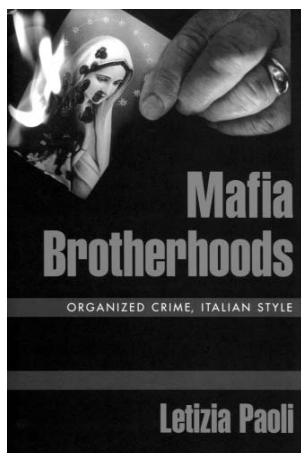
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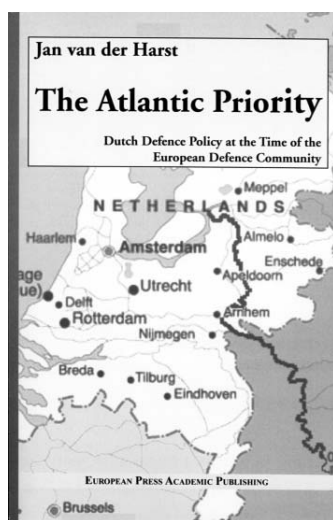
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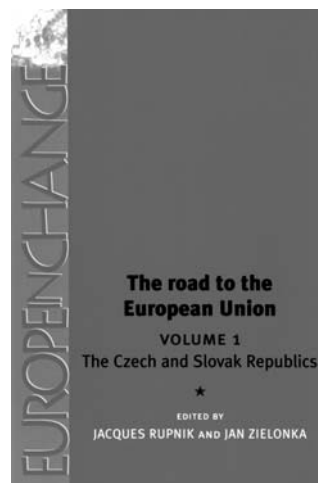
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RSCAS Mediterranean Programme
Sixth Mediterranean Social and Political Research Meeting
Florence, 16 - 20 March 2005

Call to Run a Workshop
deadline: 30 January 2004

Applications and Deadlines

The deadline for applications is:

30 January 2004

Applicants will be informed
about selection by:

end of April 2004

Applications should include:

Completed application form
Abstract of the proposed workshop
Description of the proposed workshop
Abstract of the paper(s)
of the prospective workshop director(s)
Curriculum vitae of the
prospective workshop director(s)

How to apply:

Guidance for writing proposals
is on the Meeting's web pages.

**Applications
should be addressed to:**

The Organiser of the
MSPR Meeting
preferably by e-mail to:
medmeet@iue.it
and exceptionally by fax to:
+39 055 4685 770
or by post to:

RSCAS - Mediterranean Programme
European University Institute
Via delle Fontanelle, 19
I-50016 San Domenico di Fiesole (FI) Italy
Tel: +39 055 4685 785

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Political Research Meetings receive generous support
from the
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(Tuscan Regional Government)

The Mediterranean Programme
has received financial support from:
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Compagnia di San Paolo
Eni S.p.A.
Ente Cassa di Risparmio di Firenze
Fondazione Monte dei Paschi di Siena
European Investment Bank

Scholars are warmly invited to send applications to run a workshop at the Sixth Mediterranean Social and Political Research Meeting, 16-20 March 2005.

Up to fifteen proposals will be selected by a Committee made up of members of the Mediterranean Programme Scientific Board and Staff.

Prospective applicants should read carefully in advance the essential information on the Meeting's web pages:

**[www.iue.it/RSCAS/Research/
Mediterranean/mspr2005/](http://www.iue.it/RSCAS/Research/Mediterranean/mspr2005/)**

Workshop Topics

The focus of the Mediterranean Programme of the Robert Schuman Centre for Advanced Studies is on the Middle East & North Africa and on the region's interactions with Europe.

Topics should relate to Socio-political Studies, Political Economy Studies, Migration Studies.

Workshop Directors

Each workshop will be run by two workshop directors who should complement each other in terms of academic and national backgrounds. See the web pages for full details of criteria and the role of workshop directors.

www.iue.it/RSCAS/Research/Mediterranean/mspr2005/

EUI Alumni Association

Executive Committee of the Alumni Association: FRANCISCO TORRES, President, ANNETTE BONGARDT, Vice-President, CARLO SPAGNOLO, Secretary, MILICA UVALIC, Treasurer, and AMY VERDUN, Member.

The EC is grateful to many alumni for their generous and enthusiastic mobilization and to the EUI Administration and staff (of many departments and in many different capacities) for their excellent cooperation throughout this year's numerous initiatives, as well as to some external institutions, such as the ECB and the EIB, for their support of our first conference.

Here follows a report of our activities:

1) *Accountability*: This EC has made every effort to be transparent and accountable both to the GA and, financially, to the EUI (monitoring all expenditures upon request by the current EC).

a. All GA and EC meetings (with all decisions taken) are available online together with an account of the most important activities.

b. For the first time the EC could not count on the profits of the shop, a most important source of revenues in the past, now reverting to the EUI. The EC received the EUI annual contribution (at €5000 slightly lower, in nominal terms, than the initial ten million Lire established more than fifteen years ago!), after approval by the October 2003 GA of the Treasurer's report (responsibility of the previous committee for 2002). In spite of the loss of almost half of its revenues and of the many activities undertaken in its first year (including outside services such as the design of an AA logo), the EC still forecasts a surplus for 2003.

2) *1st EUI Alumni Conference*: (see also p.)The proceedings of the conference, with 30 alumni contributing, 13 EUI professors chairing and discussing, two guests and more than twenty other alumni attending, are to be published in 2004.

3) *New services* are already available for EUI alumni against an annual fee of €25 minimum (over 30 alumni have subscribed on the very first day)!

a. Alumni electronic card that allows access to the EUI Mensa and the Library and which may include price reductions in some Florentine shops and restaurants, free entrance to Florence museums and other facilities available to EUI researchers and staff – first lot to be sent to those who subscribed;

b. Permanent e-mail addresses (@iue.it) for all alumni who wish so – first lot already created;

c. Housing exchange. Alumni will provide relevant information and some advice to participants but actual transactions are to be left to private contracts.

d. EUI Online Community. After a long but very fruitful exchange of views between the EC and the EUI

Administration, President Yves Mény announced the launching of the new online community that will also include present and past staff, professors, as well as JM and other Fellows. Participation in the EUI Online Community is of course voluntary and separate from the AA and its services.

4) *New appointments*:

a. Two new EC members of the Executive Committee: Milica Uvalic and Amy Verdun have joined the EC of the AA with the approval by acclamation of the General Assembly. Milica was appointed Treasurer at the 4 October EC meeting.

b. Appointment of a Co-Treasurer: Brigitte Schwab, in her quality of co-founder of the Alumni Association, and after years as acting treasurer of the AA, was formally appointed Co-Treasurer of the AA with the unanimous approval of the last GA.

c. Valérie Coppini has, since Bobbie Rawle's departure from the EUI, been Acting Alumni Officer.

5) *The institution of an ALUMNI PRIZE*:

The Executive Committee of the Alumni Association has decided "to create an Alumni Association Award for the best interdisciplinary Ph.D. thesis on relevant European issues defended at the Institute, to be implemented ASAP, applying already to theses defended in 2003. For the selection, a commission (whose composition, possibly involving EUI alumni, will be decided in due course) will be set up. President Mény welcomed the idea of an AA Award, calling it a bridge between the past and the future of the EUI.

6) *Setting up of a working group on Statutes' reform*:

Appointment of a Subcommittee composed, on the part of the EC, by EC Vice President Annette Bongardt (chair) and Secretary Carlo Spagnolo, and open to any alumni wishing to participate, to present statute reform proposals to the EC. Achille Accolti Gil, Machteld Njisten and Chiara Zilioli have already indicated their interest in participating.

7) *National chapters*: Several informal local alumni chapters are already in place (see alumni chapter news on the web page and send us all your initiatives).

8) *New logo of the AA*: Please visit the alumni web site and see the new logo currently in use and a possible alternative. Give us your opinion.

Please keep in touch with us (alumni@iue.it) and with all of the Association's activities via its constantly updated web page (<http://www.iue.it/Alumni/>).

FRANCISCO TORRES

President of the EUI Alumni Association

1st EUI Alumni Conference on

EMU: Political, Economic, Legal and Historical Perspectives

Fiesole, 3 and 4 October 2003

Support: European Central Bank and European Investment Bank

3 October 2003 – morning

Opening: YVES MÉNY (EUI President)
 Keynote Speaker: PAUL DE GRAUWE (U. Leuven and RSC, EUI)

Session 1: Democracy and Governance in the Euro Area

Chair: HELEN WALLACE (RSC, EUI)

Politicizing EMU: the democratic deficit and the quest for a European citizenship status

Oliver Schmidtke (U. of Victoria)

EMU and EU Governance

FRANCISCO TORRES (U. Católica and Bank of Portugal)



Jürgen Krüger, Francisco Torres, Annette Bongardt, Yves Mény and Bernhard Winkler

Comments: STEFANO BARTOLINI (SPS, EUI); NEIL WALKER (LAW, EUI) SVETLOZAR ANDREEV (CSD, U. Westminster) and DAVID NATALI (SPS, EUI).

Authors' replies and general discussion.

Session 2: The ECB between Growth and Stability

Chair: COLIN CROUCH (SPS, EUI)

The ECB between Growth and Stability. Macroeconomic Challenges in the Euro-Era: between Job Creation, Economic Growth and Monetary Stability

SIMONA TALANI (Bath University and LSE)

The "Brussels Consensus" on Macroeconomic Stabilization Policies: A Critical Assessment

ROBERTO TAMBORINI (U. Trento)

Stability and Growth: the Role of Monetary Policy and Other Policy Actors in EMU

BERNHARD WINKLER (ECB)

The Past and Future of the Stability and Growth Pact

AMY VERDUN (U. of Victoria)

Comments: MARTIN RHODES (SPS/RSC, EUI); ELISABETTA CROCI ANGELINI (U. Macerata).
Authors' replies and general discussion.

3 October 2003 – afternoon

Session 3 Institutional and Legal Arrangements and the Euro

Chair: Bruno De Witte (LAW/RSC, EUI)

Common Currency and National Constitutions

ANNELI ALBI (U. of Kent)

The Convention's Impact on the Euro and the Union's Institutional Structure

CHIARA ZILIOLI (ECB)

Protection of the Euro and Hungarian National Currency Banknotes

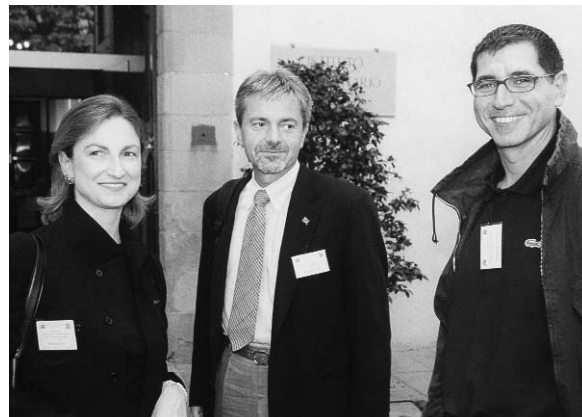
PÉTER MUNKÁCSI (HPO, Hungary)

The Role of Standards in Governing Financial Markets' Stability

MARIA CHIARA MALAGUTI (ECB and U. Lecce)

Comments: ALESSANDRA CHIRICO (EUI), ROSITA BOUTERSE (AMAJURIDICA), PEDRO MACHADO (ECB).

Authors' replies and general discussion



Barbara Curli, Renzo Daviddi and Pompeo Della Posta

General Assembly of the EUI Alumni Association – Theatre

Yves Mény addressed the Assembly. Francisco Torres reported on activities.

Alumni Conference Dinner: Loggia inferiore, Badia

Session 4: Economic and Financial Integration

Chair: RICK VAN DER PLOEG (ECO/RSC, EUI)

The New Economy and Economic Policy in the Eurozone

DARIO TOGATI (U. Torino)

Fundamentals, Portfolio Adjustments and Framing: What Can Explain the Behaviour of the Dollar/Euro Exchange Rate?

POMPEO DELLA POSTA (U. Pisa)

The transformation of Finance in Europe

ERIC PERÉE (EIB) and RIEN WAGENVOORT (EIB)

Exchange Rate Regimes in the Western Balkans and their Evolution towards EMU

MILICA UVALIC (U. Perugia) and RENZO DAVIDDI (European Commission)

EMU and the Accession Countries: Who Should Walk and Who Should Run

CHRISTINA MARIA LOLI (ECO, EUI)

Comments: GIANCARLO CORSETTI (ECO/RSC, EUI); ANNETTE BONGARDT (U. Aveiro), JENS HOIBERG-NIELSON (Carnegie Asset Management).

Authors' replies and general discussion.

Session 5: Looking back to European Monetary Integration: what Lessons can we draw?

Chair: ARFON REES (HEC/RSC, EUI)

European Monetary Cooperation in the BW Order (1947-58). Reflections on the Origins of Post-Cold War Tensions between the US and Europe

CARLO SPAGNOLO (U. Bari)

Monetary Regionalism in Historical Perspective: Early EEC Planning for Monetary Union

BARBARA CURLI (U. Calabria)



Annissa Lardjane, Amy Verdun, Susan Senior

Carte go leor – Ireland, the UK, the sterling area and EMU

MAURICE FITZGERALD (Loughborough U.)

The Euro as World Currency: Past Plans and Current Debates

HUBERT ZIMMERMANN (Cornell U.)

Comments: DAVID ANDREWS (RSC, EUI).

Authors' replies and general discussion.



Anne-Laurence Faroux, Oliver Schmidtke, Rosita Bouterse

Discussion Panel: EMU and EU Governance: the Challenges Ahead

Chair: MICHAEL ARTIS (ECO/RSC, EUI)

PHILIPPE SCHMITTER (SPS, EUI), GIANCARLO CORSETTI (ECO/RSC, EUI); JÜRGEN KRÜGER (European Commission).

General discussion and panel members' replies.

Concluding remarks and discussion of practical questions – paper revisions, publication, etc. – with all participants

FRANCISCO TORRES, AMY VERDUN and HUBERT ZIMMERMANN

For papers and publication of the conference proceedings (editors: FRANCISCO TORRES, AMY VERDUN, CHIARA ZILIOI and HUBERT ZIMMERMANN), please visit: <http://www.iue.it/Alumni/1stAnnual-Conf.shtml>

The proceedings are to be published in 2004, and may be presented at the next alumni weekend.

Prizes ...



Gerben Bakker

At the 5th European Historical Economics Society meeting held in Madrid in July the Gino Luzzato Prize was awarded to former EUI researcher Dr GERBEN BAKKER (HEC 1997-2001) for his thesis *Entertainment Industrialised. The Emergence of the International Film Industry, 1890-1940*. Another former researcher, LUCIANO AMARAL (HEC 1995-2003), was among the three finalists for his thesis *How a Country Catches up: Explaining Economic Growth in Portugal in the Post-War Period (1950s to 1973)*. The Gino Luzzato Prize is given every second year for the best doctoral dissertation in that period on topics relating to the economic history of Europe. Gerben

Bakker is currently Lecturer at Essex University Business School and Luciano Amaral lectures at the University of Lisbon.

Dr OLGA GIL (SPS) was awarded the Annual Prize of the Asociación Española de Ciencia Política (AECPA). For her book *Telecomunicaciones y Política en Estados Unidos y España (1875-2002): Construyendo Mercados*. This book is a substantially revised version of the PhD thesis, directed by Professors Colin Crouch and Jacint Jordana and defended at the EUI in November 2000.

Dr Gil is Invited Researcher, Centro de Estudios Avanzados en Ciencias Sociales, Fundación Juan March, Madrid



Luís de Sousa

Dr LUÍS DE SOUSA (SPS) was awarded the Gulbenkian Prize for young Portuguese researchers ('Programa Estímulo à Investigação').

Luís de Sousa received one of the two prizes in the Construction of the European Union section, with a proposal entitled 'O(s) Povo(s), O Parlamento e a Constituição: O Futuro da Representação Democrática na Nova Construção Política da União Europeia'.

Dr de Sousa is a Researcher at the CIES - Centro de Investigação e Estudos de Sociologia (ISCTE, Lisbon).

... and new Arrivals



Dr Susan Grattan (SPS) and Dr Daniele Caramani are happy to announce the birth of their daughter Elena May in New York on the 8th of June 2003



Dr Senada Selo Sabic (SPS) together with Haris and Emir are happy to announce the birth of Timur on 16 February 2003. Timur is Emir's new baby brother



Dr Hans-Joachim Knopf (SPS) and Gisela are happy to announce the birth of their third child Emily Susanna on 22 June 2003 in Konstanz

Visitors



Italian Minister Giuliano Urbani and Yves Mény

Italian Presidency Event *Meeting of European Ministers of Culture*

On Wednesday, 1 October, the Institute received 25 Ministers of Culture from current and future Member States of the European Union, hosted by the Italian Minister of Culture, On. Giuliano Urbani.

The Ministers were amongst the first to visit the refurbished second floor of the Institute Library .



Helmut Lütkepohl and Robert F. Engle

Seminar by 2003 Nobel Laureate Professor Robert F. Engle

On 14th November the Department of Economics welcomed Professor Robert F. Engle of Stern Business School-NYC, who had been awarded The Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel “for methods of analyzing economic time series with time-varying volatility (ARCH)”.

In a special seminar Professor Engle presented new results on modeling time-varying volatility under the title “Dynamic Conditional Correlations – Some New Results”.



The Ambassador of the Republic of Ireland, John Francis Cogan (second from the right) presents donation of Irish books

Book Donations

On Wednesday 19 November, the Irish Ambassador, John Francis Cogan presented a collection of books offered by the Irish Government to the EUI Library. The ceremony took place on the upper floor of the Library.

Earlier this year, the Institute Library also received an important gift from the Greek Government dedicated to extending the Greek collection.

In previous years several of the Member States had made equally generous gifts.

Library Renovation

The extensive renovation of the Institute Library at the Badia is making good progress. The top floor with its new spacious reading room has just been inaugurated (see next page).

The New Library



EUI Review

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Editors' Note

Views expressed in articles published reflect the opinions of individual authors and not those of the Institute.