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Reihe Politikwissenschaft

Political Science Series

What's in a Convention?

Process and substance in the project of European constitution-building

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Founded in 1963 by two prominent Austrians living in exile – the sociologist Paul F. Lazarsfeld and the economist Oskar Morgenstern – with the financial support from the Ford Foundation, the Austrian Federal Ministry of Education, and the City of Vienna, the Institute for Advanced Studies (IHS) is the first institution for postgraduate education and research in economics and the social sciences in Austria. The **Political Science Series** presents research done at the Department of Political Science and aims to share "work in progress" before formal publication. It includes papers by the Department's teaching and research staff, visiting professors, graduate students, visiting fellows, and invited participants in seminars, workshops, and conferences. As usual, authors bear full responsibility for the content of their contributions.

Das Institut für Höhere Studien (IHS) wurde im Jahr 1963 von zwei prominenten Exilösterreichern – dem Soziologen Paul F. Lazarsfeld und dem Ökonomen Oskar Morgenstern – mit Hilfe der Ford-Stiftung, des Österreichischen Bundesministeriums für Unterricht und der Stadt Wien gegründet und ist somit die erste nachuniversitäre Lehr- und Forschungsstätte für die Sozial- und Wirtschafts-wissenschaften in Österreich. Die **Reihe Politikwissenschaft** bietet Einblick in die Forschungsarbeit der Abteilung für Politikwissenschaft und verfolgt das Ziel, abteilungsinterne Diskussionsbeiträge einer breiteren fachinternen Öffentlichkeit zugänglich zu machen. Die inhaltliche Verantwortung für die veröffentlichten Beiträge liegt bei den Autoren und Autorinnen. Gastbeiträge werden als solche gekennzeichnet.

Abstract

The paper studies aspects of the process and substance of the deliberations of the Convention on the Future of the Union, against the backdrop of the longer term development of a Constitution for the European Union. It examines some of the issues which have arisen over the course of the longer term debate about European constitutionalism, including the normative basis of a putative Constitution for the EU. In the main part of the paper, the primary objective is to elaborate in more detail the ways in which the Convention's work was structured by the complex procedural and substantive heritage of the Union's constitutional *acquis*. It focuses on the Convention as an addition to an already complex and multi-facetted constitution-building process, and looks at some of the principles which it has proposed to bring into the constitutional architecture, such as the explicit articulation of the supremacy principle. It concludes that at times the fit between the 'old' and the 'new' in the constitutional process and substance developed by the Convention is far from satisfactory.

Zusammenfassung

Der Beitrag beschäftigt sich vor dem Hintergrund der Entwicklung einer europäischen Verfassung mit inhaltlichen und prozeduralen Aspekten der Verhandlungen innerhalb des Konvents zur Zukunft der Europäischen Union. Er untersucht einige der Themen zum europäischem Konstitutionalismus, die im Laufe der Debatte angesprochen wurden. Dies betrifft die normative Basis einer mutmasslichen Verfassung für die EU. Im Hauptteil des Beitrags besteht das hauptsächliche Interesse darin, die Art und Weise, in der die Arbeit des Konvents durch das komplexe prozedurale und substanzielle Erbe des konstitutionellen acquis der Union strukturiert worden ist, detailliert aufzuzeigen. Er konzentriert sich auf den Konvent als ein zusätzliches Mittel in einem bereits komplexen und facettenreichen verfassungsbildenden Prozess, und er analysiert einige der Prinzipien, deren Eingang in die Verfassungsarchitektur versprochen worden war, wie beispielsweise die explizite Nennung des Superioritätsprinzips. Der Text schließt mit der Erkenntnis, dass die Übereinstimmung zwischen "Altem" und "Neuem" im Verfassungsprozess und seinem vom Konvent entwickelten Inhalt längst nicht zufriedenstellend ist.

Keywords

Convention; European constitution; constitutionalism; acquis communautaire; constitutional principles

Schlagwörter

Konvent; Europäische Verfassung; Konstitutionalismus; aquis communautaire; Verfassungsprinzipien

General note on content

The opinions expressed in this paper are those of the author and not necessarily those of the IHS Department of Political Science.

Notes

This is a lightly updated version of a paper published under the same title in J. Shaw, P. Magnette, L. Hoffmann and A. Vergés Bausili, *The Convention on the Future of the Union: Working Towards an EU Constitution*, London: Federal Trust/Kogan Page, 2003.

Jo Shaw was visiting Professor at the Department of Political Science of the Institute for Advanced Studies from May 22 to 28, 2003

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1. Introduction

Even before its creation was formally announced in December 2001 at the Laeken European Council meeting, very substantial expectations were invested in the Convention on the Future of the Union by many observers of the European integration process. Perhaps it could finally address the yawning legitimacy gap that appears to have opened up in European public affairs since the time of the Treaty of Maastricht, leading to a widespread alienation between the activities of the European institutions and those whom they are meant – like any public bodies – to serve, that is, the citizens and residents of the Member States. Of course, bridging the legitimacy gap was only one of the ideas motivating those responsible for establishing the Convention. It was additionally supposed to engage discussion amongst a wider range of elites on questions of reform than had hitherto been achieved in the context of intergovernmental conferences ('IGCs') and to deal with a number of intractable problems, especially those related to institutional reform in the context of enlargement, the solution of which had eluded the negotiators in the IGCs of 1996–97 and 2000.

While it was never likely to be a panacea for all the (real and imagined) evils of the European Union ('EU' or 'Union'), the Convention quickly began to engage, with an intensity never before seen in a European institution, with practical questions about the establishment of a formal constitutional foundation for the EU. The Laeken mandate for the Convention contained in fact little direct focus on the constitutional question, but provided instead a general analysis of the 'state' of the European integration process and the challenges it faces, harked back in particular to the four issues (competences, status of the Charter of Fundamental Rights, simplification of the treaties and the role of national parliaments) articulated in the Declaration No. 23 on the Future of the Union appended to the Treaty of Nice in December 2000, and set out many questions – some fifty-six – which it saw as underpinning the diagnosis. What the Laeken Declaration also provided – for the first time ever in a document endorsed by all the Heads of State and Government of the EU's Member States – was a specific reference to the 'C' word, in a passage contemplating a trajectory 'Towards a Constitution for European citizens'. The discussion in the text is specifically linked to the question of simplification and reorganisation, changes which are assumed to be linked in turn to the goal of transparency. The Declaration then asks:

'whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between the Member States and the Union?'

These issues and more preoccupied the Convention's work. In certain respects, its work was the logical continuation of previous efforts to articulate a formal constitutional framework for the European integration process, efforts to which the European Parliament in particular has contributed in a very substantial way, especially through its 1984 Draft Treaty on European Union. To that extent, it is hardly surprising that the Laeken Declaration was not always treated as an authoritative source of inspiration and legitimacy for the Convention, since the Convention has projected itself as having an even wider and grander vision which is not restricted by the already wide-ranging analysis offered by Laeken. As Andrew Duff, ELDR MEP and member of the Convention, rather dramatically declared in a mid-Convention interview, 'Nobody reads the Laeken Declaration any longer'.[1]

A different sort of bigger picture is offered in this paper. By no means has the Convention operated against the background of a constitutional *tabula rasa* in relation to either the process of constitution-building or the substantive constitutional choices which it is making. The Treaties and indeed the Union's own Charter of Fundamental Rights proclaimed in declaratory form in 2000 were not the only sources of constitutional *acquis* which the Convention had to grapple with in developing the text which its President presented to the European Council in Thessaloniki in late June 2003. Constitution-building in the EU since the inception of the first treaties has comprised a set of complex interactions and tensions between the Treaty texts and other formal institutional documents, on the one hand, and their interpretation by key actors, notably the Court of Justice, but also the national courts, and the other non-judicial EU institutions, on the other. This has been characterised as a distinction between the 'formal' and 'real' constitutions of the EU (de Búrca, 1999).

These interactions and tensions map onto both the procedural and substantive dimensions of the Convention's work. For example, in relation to procedural questions such as 'how, when and where does constitutional development of the EU take place?', it is clear that constitutional development occurs in a number of overlapping forums, such as Intergovernmental Conferences, national ratification processes for new treaties (which have included some key national constitutional court judgments[2]), and subsequent interpretations and applications of the treaties by the Court of Justice and other institutional actors. The question which this paper considers is how the Convention has added to the process of the development of the *acquis* through its working methods and through the management of the process by key actors such as President Giscard d'Estaing. In relation to the substantive content of the current European constitutional framework, the general principles of law articulated by the Court of Justice via its jurisdiction founded on Article 220 of the Treaty establishing the European Community ('EC') are often as important as the specific treaty

1 Duff 2003.

2 Most famously the German Federal Constitutional Court on the Treaty of Maastricht and the German constitution: *Brunner* [1994] 1 CMLR 57.

texts, although the Court did announce in the 1986 case of *Les Verts*[3] that the EC Treaty can be characterised as the Community's constitutional charter.[4] Furthermore, there are many key texts of a political nature, such as the Charter of Rights, a number of interinstitutional agreements on matters such as the budget or the operation of the legislative procedure, as well as legislation of a quasi-constitutional character such as the rules on the electoral procedure for the European Parliament, which are not contained in the formal text of the treaties, but which one might very well expect to be encapsulated somewhere in a formal constitutional structure, perhaps in an annex or protocol, if not indeed (as will be the case with the Charter) in the main body of the Constitution itself. Overall, the Court's so-called 'constitutionalisation' of the original Treaty of Rome to incorporate federal legal features such as the supremacy of European Community ('EC') law over national law, the penetration of EC law into the national legal orders, and the existence of various mechanisms, notably direct effect, whereby individuals have been able to enforce their EC law rights in national courts against Member States, represents more of an elaboration of constitutional principles based on a reading of the 'spirit' of the original treaties than it does a direct derivation from the texts as agreed by the High Contracting Parties either in 1957 or subsequently. This paper looks at the use of this *acquis* in the context of the development of the text of a Constitutional Treaty.

In sum, the main objective of this paper is to elaborate in more detail the ways in which the Convention's work was structured by the complex procedural and substantive heritage of the Union's constitutional *acquis*. Procedural perspectives on the Convention have focused on the ways in which the Convention has supplemented the existing constitutionalisation processes of the European Union, for example, by adding an additional 'pre-contractual' phase to the process whereby Member States already agree upon changes to the international treaties which remain the formal construct of European integration[5] and by introducing the notion of consensus amongst elites as the basis for 'agreeing' a new constitutional settlement.[6] At the very least, the constitutional dialogues which shape the EU have been immeasurably enriched by the complex constellations of interest intermediation which the Convention comprised in its plenary debates, working groups, and discussion circles, and in its draft texts and amendments.[7] Less positive commendation from the point of view of transparency can be given, of course, to the private discussion circles and separate

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3 Case 294/86 *Parti Ecologiste 'Les Verts'* v. *Parliament* [1986] ECR 1339. It repeated the point in Opinion 1/91 *Draft Agreement on a European Economic Area (EEA)* [1991] ECR I-6079. It is sometimes remarked upon that the Court has not repeated this point since the European Union famously ran aground on the sands of the legitimacy question, in the wake of the Maastricht ratification debacle.

4 Some commentators caution that since the inception of the EU – i.e. the entry into force of the Treaty of Maastricht in 1993 – the Court of Justice has avoided 'constitutional' language, and has certainly not characterised the overall 'pillar framework' introduced by the Treaty on European Union as the EU's constitutional charter, as it did for the EC Treaty in *Les Verts*.

5 De Witte, 2002.

6 See generally Closa, 2003; Hoffmann, 2003; Hoffmann and Vergés Bausili, 2003.

7 Shaw, 2003.

delegation meetings which dominated the last four weeks of the Convention's programme. The plenary became more or less marginalised in that context. Furthermore, in more or less open ways, the Convention and its members remained in constant dialogue with external interests, such as national parliaments, other European institutions, civil society and even academia. The Convention experience has offered as a minimum a suggestion of the promise of deliberation, and perhaps a great deal more than that. In the future, it is arguable that the renewed and indeed repeated application of the Convention method for treaty/constitutional amendment processes, as per Article IV-6 of the Constitution,[8] could lead to a comprehensive redesign of the constitutional amendment process and the eventual abandonment of traditional international law methods of treaty amendment. But that would be to assume a constitutional revolution which lies some way in the future. In the shorter term, it is not possible to envisage a great deal of change as the Convention declined to include a change in the Constitution to the existing condition that all amendments require unanimity in the Intergovernmental Conference and ratification by all Member States before entry into force. The detailed analysis of the process in this paper is limited, in Section 3, to one specific and narrow question concerning the emergence of a distinctive Convention *acquis* and the question of how this sits with the wider Union *acquis* in the constitutional sphere.[9]

Shifting the focus to substantive questions (Section 4), the paper shows that the Convention has begun to force political actors at the national and European levels to confront more directly than ever before some key questions about what European constitutionalism already is, especially in legal terms. To what extent do they wish the realities of European constitutionalism (such as the principle of the supremacy of EU law) to remain hidden from public view in the future as in many respects they have done hitherto? And can the delicate balance of the national and the supranational dimensions of European integration (not to mention the subnational and international inputs which it experiences) survive the sometimes harsh scrutiny to which it is now being subjected within the confines of the Convention process?

To set the scene for this discussion, the next section provides a preliminary sketch and synopsis of the evolution of the EU constitutional framework from the inception of the first treaties until the present time. The objective of this section is to show that notwithstanding the late arrival of the European Council and many of the Member State governments at the 'constitutional party', the idea of analysing European integration in constitutionalist terms has been well-established for decades. While the practice has been particularly common amongst lawyers, it has also extended to both students and practitioners of politics.[10] At the

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8 See CONV 802/03, 12 June 2003, *Draft Constitution, Volume II*.

9 On the role of the *acquis communautaire* in relation to the governance of the EU see Wiener, 1998.

10 E.g. Kohler-Koch, 1999; Church and Phinnemore, 2002: 15; Fischer, 2000.

same time, however, the constitutional question remains highly contested in relation to the innumerable sub-questions which it encapsulates, including the very purpose and scope of a constitution for an entity such as the EU which is not formally a state in the Westphalian sense, albeit that it wields many instruments and undertakes many tasks of a state-like nature. On the contrary, it operates in some sort of ambiguous liminal space between states and international organisations according to the conventional definitions of national and international law, and it is widely regarded as deserving of analysis above all as a *sui generis* entity which cannot easily be assimilated to other known forms of political organisation. Above all, however, the very ethic of European constitutionalism remains contested.

A central premise of this paper is that whatever happens with the Convention, it is important to develop principled reference points for viewing both the evolution of the Convention process and the substantive outcomes which the Convention adopts. Elsewhere I have argued for the importance of a critical assessment of the Convention process, in the light of principles of responsible and inclusive constitutionalism.[11] This paper has a separate but related objective to link the tensions which frame the procedural dimension of the Convention to some of the key elements of its substantive debate. With that objective in mind, the paper looks explicitly at the constitutional *acquis* as the background to the constitution-building process, as well as contributing to reflection upon the novelty and *sui generis* nature of the Convention process. That paradox of the rootedness of the Convention's discussions in the constitutional *acquis* at the same time as it proposes sometimes innovative solutions to apparently intractable problems will remain, in my view, one of the most enduring features of the Convention experience.

2. A brief history and synopsis of constitution-building in the European Union

The current 'constitutional' debate in the European Union is not a dramatic departure in the development of the 'ever closer union', but a continuation of longstanding debates in many academic and some media, opinion-former and political circles about the finality of European integration. Posing the question in constitutional terms is hardly new. The German Government official report attached to the text of the Treaty of Paris establishing the European Coal and Steel Community, which went before the *Bundestag* in 1951 described the system to be established as 'a European model of a constitutional type'.[12] Yet it took nearly fifty years for the term 'constitution' to reach the collective intergovernmental discourse of what is now the European Union in the form of the Laeken Declaration, and

11 Shaw, 2003.
12 Ophuls, 1966.

even then it does not acquire a capital 'C' – although it has done so frequently in the context of the Convention's deliberations.

On the long road to Laeken and the Convention, as already mentioned in the introduction, the Court of Justice has made an unrivalled contribution to the reconstruction of the discourse of European integration in juristic terms as a proto-constitutionalist discourse. Although not originally articulated in terms of a formal constitutional framework, the Court's proposition that the European Communities constitutes a 'new legal order for the benefit of which states have limited their sovereignty rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'[13] makes it clear that any state which accedes to the European Union is joining something quite different to the United Nations or even the Council of Europe. Indeed, the Court made that very same point in explicit terms: 'The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is *more than an agreement which merely creates mutual obligations between the contracting States*.'[14] Even so, whatever one makes of the Court's case law on the relationship between what is now widely known as EU law and national law, on the development of the Community's, and later, the Union's own competences and of concepts such as implied powers or the preemption of national legislative competence, on the development of fundamental rights as general principles of EU law, and most recently on the construction of citizenship rights based on the principle of non-discrimination on grounds of nationality, this still remains a relatively fractured constitutional system. It is important not to overstate either the completeness or the coherence of the European Union's current constitutional framework.[15] There are aspects of the existing constitutional law which have escaped logical explanation, such as the operation of the pillar system, which are not well understood, such as the system governing the attribution, exercise and control of competences, or which are generally accepted not to be working particularly well, such as the concept of subsidiarity.[16] Moreover, it is important not to confuse the proposition that the EU has a constitutional framework (probably best designated with small 'c' and small 'f') with the debate about whether Europe *ought* to have a Constitution, with a capital 'C'.

Despite the fears that the institution of the wider, looser European Union by the Treaty of Maastricht would lead to a dilution of the constitutional element of the previous European Communities, because of the intergovernmentalist character of the so-called second and third pillars, in fact there has generally been an acceleration in the turn to constitutionalism

13 Case 26/62 *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] ECR 1 at p 12. See also Case 6/64 *Costa* v. *ENEL* [1964] ECR 585.

14 *Van Gend en Loos*, p 12; emphasis added.

15 See generally on this Shaw, 2000a, Chapter 5.

16 See Weatherill, 2003.

and normative discourse since Maastricht.[17] One reason has obviously been the attempt to counteract perceived public disillusionment with the European integration project by offering the idea of a constitution for the European Union, both as an actually existing framework and as a future project for development, as one way of guaranteeing government subject to the rule of law and respect for individual rights against majoritarian tyranny. It is also increasingly widely accepted that it is possible to conceive of the European Union – despite the diversity of legal arrangements which it encapsulates – as a single constitutional framework, with a single legal order. Amongst the most important factors linking right across the Union's system are the common principles and values, especially those contained in Article 6(1) of the Treaty on European Union (liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law).[18] It is no surprise that the debate over values and principles has been central to the Convention's discussion of what constitutes the foundational framework for the European Union.

Not all commentators who argue that the EU already has a constitutional framework necessarily agree that this would be 'improved' as a result of the Convention's intervention. Notably, Joseph Weiler focuses on the risk that a constitution in a formal sense – especially if there were some attempt to depart from the international law basis of the current arrangement and to assert that the EU could be legitimated via popular participation at the present stage of its development – would upset the delicate constitutional balance based on 'tolerance' which he identifies as the basis for the EU at the present stage. He argues that[19]

'constitutional actors in the Member States accept the European constitutional discipline not because, as a matter of legal doctrine, as is the case in the federal state, they are subordinate to a higher sovereignty and authority attaching to norms validated by the federal people, the constitutional demos*. They accept it as an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe to a norm which is the aggregate expression of other wills, other political identities, other political communities.'*

The resistance to the allures of the formal constitution makes Weiler, it would seem, something close to a constitutional absolutist or purist, restricting the ascription of 'true constitution' to a limited range of incidents of 'polity-hood' which satisfy certain conditions of process and substance generally associated most readily with states. In other words, states have an inbuilt advantage in terms of their need for, and receptiveness of, formal constitutional frameworks which link political power to a constitutional *demos*, or *pouvoir constituant*. This is the field of legitimacy claims in which the European Union continues to

17 Bellamy and Castiglione, 2002. This has not extended, as noted above n.4, to the Court of Justice.
18 Von Bogdandy, 2000.
19 Weiler, 2002: 568.

struggle, notwithstanding the institution of concepts such as European citizenship, or the establishment of a system of direct elections to the European Parliament and the investiture of greater powers in that directly elected body.

Even for those convinced by the argument that a certain degree of constitutional formalism can offer legitimacy gains to a struggling European Union, in both the shorter and the longer terms, the complex history of constitution-building in the EU sketched here counsels against hasty conclusions about the impact of the Convention in relation to issues of either process or substance. Yet the tenor of President Giscard d'Estaing's first speech to the opening session of the Convention on 28 February 2002 set out very clearly his belief in the constitutive power and capacity of the Convention. Mentioning the word 'constitution' three times, he then concluded with a powerful attempt to preempt much debate by declaring the aim of the Convention thus:[20]

'The Laeken Declaration leaves the Convention free to choose between submitting options or making a single recommendation. It would be contrary to the logic of our approach to choose now. However, there is no doubt that, in the eyes of the public, our recommendation would carry considerable weight and authority if we could manage to achieve broad consensus on a single proposal which we could all present. If we were to reach consensus on this point, we would thus open the way towards a Constitution for Europe. In order to avoid any disagreement over semantics, let us agree now to call it: a "constitutional treaty for Europe".' (emphasis in the original)

It is difficult to imagine a more effective presentation of the historical opportunity which Giscard saw the Convention as presenting – an opportunity which he might have seen in a certain sense as being for himself as an individual, but which he effectively portrayed to the new Convention as a collective opportunity. This sense of opportunity in turn spoke eloquently to the federalist majority amongst the Convention members, and so the endeavour has become Giscard's main 'gift' to the Convention, which means that despite subsequent tensions, his leadership still retains a substantial element of goodwill amongst the ordinary Convention members. Even so, at the conclusion of the Convention's deliberations in June 2003 but before the beginning of the Intergovernmental Conference which must follow in order to give formal effect to any new Treaty, it remained impossible to predict whether the Convention would succeed in pre-empting the IGC in any substantial respect. There has been undoubtedly some clear indicators dating back to the very beginning of the Convention's work that it might well have a (surprisingly powerful) capacity to lock in the Member States and to constrain their freedom of action in the IGC. This has partly been because the Convention itself has become, in certain ways, more like an IGC, especially as the Member States began to take it more seriously and in many cases changed

20 Giscard d'Estaing, 2002: 11.

their national representatives bringing in a number of key Foreign Ministers such as Joschka Fischer of Germany and Dominique de Villepin of France. Perhaps more crucially, in terms of the acceptability and legitimacy of any constitutional settlement coming out of this process, there is no strong evidence that the involvement of a wider range of elite actors in constitutional debate is necessarily going to facilitate the process of securing acceptance and therefore ratification by referendum or parliamentary assent *within* the Member States, *after* the IGC.[21] Moreover, a Convention charged most obviously with the task of overcoming long-standing blockages to reform of the 'old' European Community institutions and with simplifying the mind-boggling complexities of the European Union's architectural structure has found how often these are themselves hedged around by the Court of Justice's constitutionalising endeavours, in relation to issues such as rights, competences, the effects of EU law, and 'interinstitutional balance'. A 'simple' commonsense prescription of constitutional fundamentals and of principles of legitimate political leadership was always likely to elude the grasp of the Convention members, however long they laboured. The proposition which this paper pursues is that unravelling the blend of the old and the new in the process and substance of the Convention's work is a necessary precondition to making an assessment of its contribution to working towards a European Constitution. This approach is in line with my earlier argument not to develop *a priori* assumptions about whether the Convention is 'good' or 'bad' for the EU's development as a legitimate and effective polity.[22]

3. The procedural dimension of Convention-watching: the 'building' of the Convention '*acquis*'

When Convention-watching, it is commonplace to point out that the Convention is clearly more open, more transparent and more inclusive than an IGC, that it 'decides' by 'consensus' and does not incorporate a set of formal veto arrangements, and that it involves a wider range of elites, giving an institutionalised voice to the European Parliament and to national parliaments in the process. These are points which are in some sense both otiose and banal, given that the Convention is a very different beast to the IGC both in terms of purpose and composition.

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21 The involvement of a large number of Convention members concerned about precisely this question in terms of the acceptability of their own work in the initiative to persuade governments to hold a 'single' referendum on the European constitution in 2004 may have the capacity to change perceptions in this field, especially if it gains support amongst political elites at national level, and thus a coalition of national and European level elites is created. On the referendum initiative see CONV 658/03, 31 March 2003, Referendum on the European Constitution. This is an issue which is supported by euro-sceptics and federalists alike, albeit for different reasons. Further information on these initiatives and ideas can be found on the website of the Initiative and Referendum Institute Europe (http://www.iri-europe.org/). For information about ratification processes in the Member States see http://eucon.europa2004.it/Watch_Q12.htm. In the UK it is almost inconceivable that a referendum will be held, although there has been substantial political and media controversy about this question.

22 Shaw, 2003.

In fact, formal constitution-building in the European Union is a complex, multi-staged process, already involving an ever increasing range of actors.[23] While the first significant set of amendments to the EEC Treaty – the Single European Act of 1986 – might have occurred away from the glare of all but the most Euro-focussed publicity, subsequent cases of Treaty amendment, although often not front-page affairs, have attracted much more substantial media coverage, not least because of the referendum affairs in Denmark (Maastricht) and Ireland (Nice). As things stand, the Convention adds a further 'pre-contractual' stage to the process; it does not – and cannot, at least until the rules of the game are themselves formally changed by Treaty amendment – formally pre-empt or replace the Intergovernmental Conference as the site within which formal commitments are made between the Member States. The latter remain the legal 'Masters of the Treaty'. On the other hand, so far as the Member States were required by the Convention to engage in the endeavour to find compromise and consensus positions on key questions about the missions, functions, values and operating procedures and practices of the European Union which have historically been fudged or swept to the sidelines as posing insoluble problems, they did so in a very different framework to that of an intergovernmental conference. In part, they reacted to that by seeking to make the Convention more like an IGC, as more and more states nominated foreign ministers or other cabinet rank ministers to be their representatives on the Convention. On the other hand, the change in the environment partially enabled the Convention – and the Member States in particular – to break away from certain taboos which have constrained the latters' behaviour within IGCs when discussing historical blocking points such as institutional reform and the question of the future of the institutional system designed in the 1950s for a 'Community' of Six, rather than a twenty-first century 'Union' of twenty-five plus. One clearly important innovation, for example, which created a very different feel to the Convention as compared to the IGC was the presence of national opposition parties through the medium of national parliamentary representatives and European parliamentary representatives, sitting in the same debating chamber and round the same negotiating table as national governmental representatives. This in some respects broke down the sense of the unitary 'national' interest as represented by national governments which had often stifled the development of intergovernmental negotiations and ensured that they have predictably remained bargaining rather than deliberation scenarios. Indeed, this change seemed to offer the promise of deliberation – if not yet quite the reality, or so the consensus of reports from professional Convention-watchers generally has seemed to indicate.[24]

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23 Closa, 2003.

24 Attempts to capture more of this promise of deliberation are evident in mid-stream changes to how the Convention works introduced by the Praesidium, such as the innovation of more frequent plenary meetings, the reduction in speaking time, and the decision to allow spontaneous interventions through the raising of 'blue cards', all designed to reduce the tendency of plenary to be a sequence of 'soap-box' speeches: see 'Convention faces change of philosophy test', www.euobserver.com, 27 February 2003.

One particularly important dimension of the Convention process has contributed directly to the linking of questions of process and substance. This was the question of how the Convention should proceed, especially in the context of its 'endgame' involving the discussion, amendment and agreement of specific treaty provisions, towards putative agreement upon a Constitutional Treaty. It remains premature to enter final remarks on how this endgame should be understood. As a preliminary step, we can ask some questions about how we know about the endgame. Can we, for example, find out its details by looking at the Convention's website?

In fact, within just a few months of the Convention's establishment, there was already an overwhelming body of written material on the Convention website. This effectively precluded the casual visitor to the site from gaining anything more than a very superficial review of what the Convention was and did from the very brief and relatively uninformative introductory materials which the website provided.[25] The website did not explain for the general user how and why the Convention was in fact working towards a new Constitutional Treaty, making reference briefly to some of the questions in the Laeken Declaration, but omitting any form of articulation of how the Convention agenda and approach shifted in its early months into the constitutional register.[26] Clicking on 'Draft Constitutional Treaty' on the website merely brought up the highly impenetrable skeleton put forward by the Praesidium in October 2002,[27] the rafts of draft articles which have followed since January 2003, and the multitudes of amendments put forward by Convention members.[28] These were followed, as the texts were gradually put together, by successive Praesidium re-drafts, such that by the end of the hectic few final weeks it would only have been clear to a close observer of the events and of changes on the website exactly what was the final text of the four parts of the Constitutional Treaty 'approved' in Plenary on 13 June 2003.[29] That is the negative side of the Convention and its website, which was quickly turned into a tool which would be useful only to those staying very close to the Convention debate. The positive side of the website lies in that very same mass of material which is impenetrable to the casual visitor, but which can in fact reveal to those who have followed the process from the beginning much of the complexity and richness of the constitution-building process, and the different elements of which it is composed.

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25 http://european-convention.eu.int/.

26 Those with a more casual or occasional interest should turn to websites such as the Federal Trust EU Constitution Project (www.fedtrust.co.uk/eu_constitution) which observe the Convention from the outside.

27 CONV 369/02 of 28 October 2002.

28 See http://european-convention.eu.int/amendemTrait.asp?lang=EN.

29 The most important documents were CONV 797/1/03 REV 1, *Text of Part I and Part II of the Constitution*, 12 June 2003 and CONV 802/03, above n.8. The latter document was not finalised on 13 June 2003, as the Praesidium hoped to hold further meetings in early July 2003 to scrutinise and consider amendments in the specific areas of CFSP and JHA so far as these are covered by the detailed provisions of Part III.

This process has involved the creation and deployment for developmental purposes of the Convention's own *acquis*,[30] based on deliberations in working groups and plenary, the prefatory, summative and drafting work of the Secretariat including the preparation of working documents and questionnaires, reports, summaries of meetings and draft articles, and the discussions and resolutions of the Praesidium. Not all of these processes and outcomes are equally public. Notably the Praesidium always deliberated behind closed doors, and notwithstanding objections,[31] did not produce minutes of its meetings. Working Group meetings, furthermore, were generally not open to public observation, whereas plenary meetings were not only public and televised (and fully linguistically accessible because of simultaneous interpretation), but were also recorded *verbatim* in transcripts on the European Parliament website, presently in the original language, but ultimately to be made available in all official languages.

The analysis of Secretariat documentation – much of which was passed via the Praesidium for approval and adopted as Praesidium documentation, perhaps after amendment – is perhaps the most illuminating exercise in excavating the emergence of the Convention's *acquis*. The Secretariat provided, *inter alia*, the bridge between the Convention and some of the most effective institutional players in the EU, namely the secretariats and legal services of the Council and the Commission, which have an unparalleled expertise in understanding the present state of EU law as well as a background as repeat players in IGCs over the years. The Convention Secretariat played an essential role in setting out the richness and variety of the EU's existing constitutional *acquis* by preparing and issuing documentation notes on issues such as the present system of competence distribution and allocation, the legal instruments of the EU, the nature of the open method of coordination, the state of play in external action and justice and home affairs, the role of national parliaments and the institutions of the EU, and on the regional and local dimension of EU governance. While largely descriptive, these papers have had the capacity also to shape debate because of their effective command of the current status quo. Allied to this, the Secretariat more directly shaped debate by preparing papers on questions such as the possibilities of simplification as envisaged by the Declaration on the Future of the Union and the Laeken Declaration.[32] In that sense, the Secretariat contributed directly to innovation as well as to explaining the relevance of the EU's constitutional *acquis* to the Convention's own work. Inevitably, of

30 A term used by Convention Vice-Chairman Jean-Luc Dehaene, as quoted in Crum, 2003.

31 Objections have come notably from Convention members in political factions which are not represented in the Praesidium, such as the Green/EFA working collaboration on the Convention and the GUE/NGL group. It is understood that in May 2003 the Praesidium decided that after the conclusion of the Convention's work, its documents should be made publicly available via the website.

32 See CONV 250/02 Simplification of the Treaties and Drawing up of a Constitutional Treaty, 10 September 2002. It is unsurprising that the Secretariat has expertise on the specific question of simplification, because amongst its members is Hervé Bribosia, whose previous work included acting as Rapporteur on the European University Institute's much quoted pre-Nice project on simplification of the treaties, which was sponsored by the European Commission: Robert Schuman Centre, 2000. For commentary, see Feus, 2001.

course, the Secretariat provided the background expertise for the preparation of crucial documents such as the mandates of the working groups and (in almost all cases) the working group draft reports, under the political control of the Praesidium and the Chairs of the respective working groups who were in turn drawn from the Praesidium. Likewise, the Secretariat provided substantial input for crucial documents such as the October skeleton for a new Constitutional Treaty[33] and the subsequent tranches of draft articles and successive redrafts.[34] Interestingly it is not entirely clear to what extent there have been other, even less visible, influences (perhaps from the team personally assisting Giscard) upon some of those drafts. A good example is the idea of dual citizenship which is not a derivation from the existing treaties, which mysteriously appeared in the skeleton published in October 2002,[35] but which disappeared from the February 2003 draft of Articles 1-16 in favour of a return to the text of the existing EC/EU Treaties.[36] What has been clear has been the Secretariat's role in preparing reports on reactions to the draft articles and beginning the task of collating the huge number of amendments proposed, especially to Articles 1–16, a daunting exercise in the management of information and many competing initiatives.

That comment leads directly to the final aspect of process which needs to be highlighted in this section of the paper, namely the management of the whole process of constitution-building. When the Member States agreed, in the Laeken Declaration, to the establishment of the Convention, one of the 'checks' which they placed upon its capacity to produce unintended, and perhaps unwanted, outcomes was the nomination of ex-French president Giscard d'Estaing to chair the Convention, bearing in mind that he was a man known to have a capacity for strong leadership, a reputation for independence, but perhaps most crucially a proven background of support for a view of European integration which preserved a strong role for the states.[37] Doubtless many were surprised when Giscard so quickly seized the opportunity to make his distinctive mark by expressing his immediate preference for the option of producing a single report from the Convention, not a series of options, a report which would take the form of a Constitutional Treaty. Moreover, Giscard showed himself to be markedly undeterred by the complexity problem – namely that the choice for a Constitutional Treaty itself begged the question of 'fit' and coherence with what needs to be carried over from the old Treaties in terms of institutional provisions, legal bases, and policy frameworks, and what needs to be decided new from scratch.[38] To that end, he instituted the

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33 See n.27 above.

34 These documents are too many to list separately. For guidance on how the separate tranches of articles built up into the final conclusions of the Convention see http://www.fedtrust.co.uk/constit_draftconsttreaty.htm.

35 CONV 369/02, n.27 above, Article 5.

36 CONV 528/03, 16 February 2003 (Articles 1–16), Article 7.

37 See, for example, his advocacy of a cautious approach to enlargement, in the post-euro era: Giscard d'Estaing and Schmidt, 2000.

38 It could be argued, indeed, that Giscard kept the members of the Convention busy with the constitution-building aspects of its work in order to distract them from spending sixteen months discussing (falling out over?) the revisions to the institutional set-up inherited from the Treaty of Rome and tinkered with repeatedly in successive treaties, which were always going to be the most intractable problems facing the Convention

group of legal experts from the European Union institutions, which has been charged with leading the way towards the drafting of Part Two of the Constitutional Treaty.[39] Indeed, one could surmise that the impact and effect of Giscard within the Convention and its work could be said to be one of the unintended and unexpected consequences of the process, rather than one of the checking factors serving the interests of Member States, presumed at the outset to be unwilling to countenance too dramatic a shift from the status quo.

Giscard showed himself to be simultaneously both controlling and flexible in relation to the process of compiling the Treaty. Control stemmed above all from the insistence on issuing separate tranches of articles as these were approved by the Praesidium. This made it more difficult for those Convention members who were not on the Praesidium and who therefore had relatively little sense of the overall enterprise to address their comments to what they anticipated might be the final structure of the Constitutional Treaty, other than by relying on the original framework issued in October 2002. Furthermore, to the considerable disadvantage of national parliamentary members of the Convention who found it particularly difficult to fulfil their mandate to stay in touch with the views of their constituencies, very short deadlines were consistently given for submitting amendments and reactions to each fresh tranche of draft articles.

There is also evidence from plenary debates that Giscard effectively controlled some of the most influential voices on the Convention – that is, those who were on the Praesidium and who were therefore privy to the early drafts of Treaty articles and to the Praesidium's own discussions about the direction the new Constitutional Treaty should take – by using some form of cabinet collective responsibility to muzzle those who have argued their case for a different view, but who have lost out, in the Praesidium's private meetings. Thus, at least up to the point when the Praesidium appeared to assert its authority in relation to the question of institutions,[40] there was no question of Praesidium debates being replayed in public in the plenary. Those who had lost the debate in the Praesidium could not bring the same amendments before the plenary. The Commission, with its numerically small representation (both full members are also members of the Praesidium), was particularly affected by the adoption of this approach since only its alternate members, who are not politicians of stature but rather senior officials, were left unfettered by the application of such a doctrine of collective responsibility. This effectively turned around what might have been thought to be a

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and the ones least likely to be solved by the application of the deliberative aspects of the Convention-method. In fact, of course, there were many discussions of the institutional questions – but they were largely kept off the official agendas of the Working Groups, Discussion Circles and Plenary meetings. This was doubtless not an accident.

39 CONV 529/03 of 6 February 2003 Remit of the group of experts nominated by the Legal Services. The group's work very substantially influenced the provisions of Part III of the Treaty when it was first issued: CONV 725/03, 27 May 2003.

40 See the original draft on institutions, Title IV of Part I, CONV 691/03, 23 April 2003.

coup for the Commission, namely to have both of its full members on the Praesidium, and turned it into a double-edged sword in terms of plenary debates.

Furthermore, control manifested itself in Giscard's own summaries of plenary debates at the conclusion of individual Convention sessions, in his presentations from time to time of the next steps which the Convention should take to advance its mandate, and in summaries of plenary meetings and working group meetings drawn up by the Secretariat (which doubtless received political approval before they were published). These latter summaries did not always receive unanimous support from 'embedded' Convention watchers as faithfully representing the debate. From time to time, the latter would have seen a particular point receiving very strong support from individual Convention members, where the meeting summary represented this as merely involving 'a number of Convention members'. However, there is nothing surprising in this, as the role of the minute taker in a meeting has since time immemorial offered the opportunity to control the agenda as well as to present the outcomes of deliberations in a particular light.

As to flexibility, this was demonstrated by the willingness to countenance the creation of new sub-groups of Convention members to deal with problems and issues as they have arisen, whether the Working Group on Social Europe which was set up right at the end of the Working Group phase in response to a bottom-up movement of Convention members, or the discussion circles on specific matters such as the Court of Justice,[41] budgetary matters and latterly the question of taxation. It is also evident from Giscard's responsiveness to changing political contexts, such as his willingness to 'pull' the periodic report which he had hitherto delivered to each European Council meeting, when faced with the risk of being almost completely squeezed out of the agenda at the Spring 2003 European Council in the wake of the UN Security Council debacle and the launch of the US/UK military action in Iraq. At the same time, it became clear that this 'loss of face' was being immediately counterbalanced by close collaboration with the Greek Presidency to implement a plan for the European Council to meet specifically to deal with Convention matters on 30 June 2003, although that plan eventually came to naught, and more specifically to place the Convention on the agenda of the European Council meeting in Athens in April 2003, which had been convened for the specific purpose of signing the Accession Treaties.

What was particularly clear throughout the whole process was that there remained a signal lack of clarity about what the final product would look like. Literally hundreds of amendments

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41 The approach to the Court of Justice taken in the Convention could be – and doubtless will be – severely criticised for its failure to take seriously fundamental questions about judicial architecture and judicial resources. So far as the Court – institutionally – is affected by the changes proposed in the draft Constitutional Treaty, this comprises tinkering at the margins. On the other hand, it is conceivable that the changes – if and when instrumentalised in a new Treaty entering into force upon ratification – could lead to additional demands upon the Court, especially in relation to fundamental rights, following the incorporation of the Charter of Fundamental Rights into the Constitution, as Part II.

were proposed by ordinary Convention members to each set of draft provisions put forward by the Praesidium, and only a proportion of these could be discussed at each plenary meeting. Thereafter, the Praesidium would 'think again', but the mass of Convention members were left largely in the dark as to what this might involve. Furthermore, the release of the draft provisions on the institutions was delayed to such an extent – they finally appeared to a great furore on 23 April 2003 – that it was hard to say how the whole product could be seen as positioned on the traditional intergovernmental/supranational continuum, which is so often measured in terms of certain key questions about institutional powers and interinstitutional relationships. This tended to fuel the conspiracy theorists who suggested that the final proposed Constitutional Treaty would magically appear in large measure from Giscard's back pocket, or indeed from his top hat, in the manner of the magician's proverbial rabbit, although in the event that fear was largely unfounded. However, a number of changes to the provisions introduced in the last hectic days and hours of the Convention did not appear to have come in any meaningful way out of the Convention's deliberations, such as the principle of 'citizens' initiatives', tacked onto Article I-46 on the principle of participatory democracy. Furthermore, some of those involved in the Convention regularly expressed displeasure at finding what they believed to be unwarranted departures in the articles issued by the Praesidium from what *they* perceived to be the 'results' of the Convention's work so far, embodied in its plenary discussions and its working group reports especially.[42] But so much was said within the Convention, with so many different meanings and purposes, that gleaning a *single* consensus from these expressions of view was inevitably a judgemental exercise. To that extent, one person's consensus is another's dissensus, as the contested summaries of Convention meetings made clear. For the purposes of the argument in this paper what is most important is that lack of clarity about the overall output can lead to competing and contesting positions being advanced about the extent to which the final product will or will not be innovatory compared to the current state of European constitutional law. For example, Jean-Luc Dehaene, Vice-President of the Convention, called it 'evolution not revolution',[43] stressing that there will be much that is familiar to *cognoscenti* of the existing Treaties in whatever is eventually proposed by the Convention. UK Government representative Peter Hain called it a 'tidying up' exercise. Usefully, for observers of the Convention, the reports on the separate tranches of articles and key Working Group Reports which were produced in quick succession in Spring 2003 by the UK House of Lords Select Committee on the European Union[44] stressed in each case 'what was new' and 'what was old', and above all what was omitted in the new text from what was old, such as the

42 E.g. Hain, 2003; see also the interventions by Alain Lamassoure and others at the discussion of the Report of Working Group on Complementary Competences at the plenary of 7–8 November 2002.

43 Dehaene, 2003: 6.

44 See the numerous reports available at http://www.parliament.the-stationery-office.co.uk/pa/ld/ldeucom.htm.

reference to 'ever closer union amongst the peoples of Europe' which did not appear in the Praesidium's draft of Articles 1–16 of the draft Constitutional Treaty.[45]

It is this focus on the new/old combination of constitutional *acquis* refracted into the new Constitutional Treaty via the prism of the Convention's deliberations, and the creation of the sense of an autonomous Convention *acquis*, which leads from the focus on the Convention as process into a final reflection in this paper upon questions of constitutional substance. This is the last step in this paper's endeavour to provide a close description of how the Convention is simultaneously both rooted in the 'old' constitutional framework of the EU, as well as constantly toying with innovations and new ideas. This section will concentrate upon just a small number of substantive issues which taxed the Convention, namely the treatment of fundamental rights in the Constitutional Treaty, the issues of sovereignty and supremacy in relations between EU law and national law and between the EU and the Member States, and the questions of competence division and exercise.

4. The substantive dimension of Convention-watching: working towards a European Constitution?

Rights; supremacy/sovereignty; competences. These are three key issues which underpin the most sensitive normative aspects of the draft Constitutional Treaty agreed upon by the Convention in June 2003. They are issues which go to the heart of the question: what is the European Union and what functions ought it to serve? I shall examine each in turn, the point being less to critique the approach taken by the Convention itself, but rather to show how the Convention had to face up to the delicate task of blending innovation and *acquis*, especially in so far as it could not (or should not) ignore the considerable extent to which the EU as it stands, at least as a proto-constitutional order, is a judicial creation. They also go to the heart of the fear that a formal constitutional settlement risks disturbing the delicate balance which underpins the current constitutional framework.[46]

It is hard to imagine a modern liberal polity with constitutional pretensions without some form of (binding) bill of rights as a definitive statement of social and civic values (as opposed to *ad hoc* protection of fundamental rights via the more elastic concept of general principles of law which is the status quo under EU law at present).[47] How should the Constitutional Treaty

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45 CONV 528/03, n.34 above. The term 'ever closer union' originated in the Preamble to the EEC Treaty, and was taken up in Article 1 of the Treaty on European Union.

46 See the discussion of Joseph Weiler's position at n.19 above.

47 This does not appear to be the view of the UK Government, as demonstrated by its response to the 6th Report of the House of Lords Select Committee on the European Union, Session 2002–2003, which considered *The Future Status of the EU Charter of Fundamental Rights*. In response to the Committee's comment that 'any new constitution for the Union should be accompanied by a bill of rights', the Government responded that it

take up this challenge? In that context, what should be done with the pre-existing but currently non-binding Charter of Fundamental Rights for the EU?

Given the United Kingdom's signal awkwardness in the context of the drafting of the Charter during the course of 2000, and its double insistence on both the inclusion of certain 'horizontal' clauses which would limit the scope and effect of the Charter if it were legally binding and the apparently unconditional rejection of the possibility of the Charter as drafted ever being adopted as a legally binding instrument, the position taken by the UK in the course of the deliberations of the Working Group on the legal status of the Charter was widely thought of as an important breakthrough.[48] While insisting again on the further strengthening of the horizontal clauses, the UK did not dissent from a 'consensus' view that the Charter ought to be incorporated as legally binding into the Constitutional Treaty, a view which was widely shared in plenary debates on this question. In the event, that was the approach adopted by the Convention.[49] Far from settling all the relevant issues, however, the effect of this changed political determination on the part of a previously dissenting Member State was to open more questions than it answered, and indeed not all of the questions can be answered just by looking at the texts finally approved by the Convention in June 2003.[50]

A first line of enquiry concerned the nature of the invocation of the Charter as a legally binding part of the new constitutional framework. Was it best to incorporate the Charter 'by reference', while leaving it in a separate document indirectly given legal force? Or should it be incorporated as an integral and explicit part of the text of the Constitutional Treaty? Once the latter solution was adopted, a further question arose: where in the Constitutional Treaty did it belong? At the beginning, before the general principles of the Union itself are articulated? Somewhere in the middle of Part I of the Constitutional Treaty, which sets out the constitutional framework of the Union? In a separate Part II or Part III of the Treaty, where its separateness would not break up the flow of the rest of the constitutional text? Or in an Annex or Protocol to the Constitutional Treaty, where it risked looking somehow downgraded in relation to the rest of the constitutional documentation. One factor was very important to the location debate. While the Charter was drafted on an 'as if' presumption, which reflected an intention to draft a text which was capable of being given legal force without further alteration, it was also drafted on the assumption that it was a separate text to the Union treaties. Thus its final provisions or horizontal clauses not only contained the infamous attempts to ensure that the Charter could not be interpreted as extending the

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'does not accept that any new constitution has to have a bill of rights', preferring instead – it would appear – the 'respectable argument' that the status quo system of fundamental rights protection was sufficient (House of Lords Select Committee on the European Union, 27th Report, Session 2002–2003). In the end, the UK did not or perhaps could not prevent the Charter being formally included in the Constitution approved by the Convention, although that does not finally settle the question, given that the matter is now before the IGC.

48 Final Report of the Working Group, CONV 354/02, 22 October 2002.

49 See CONV 726/03, 26 June 2003, *Draft of Part II with comments.*

50 See generally de Búrca, 2003; Brand, 2003; Vranes, 2003.

scope of Union competence and that its effects *vis-à-vis* the Member States would be limited (see especially Article 51 of the Charter as currently drafted[51]), but also provisions which protected the integrity of legal fundamental rights protection under national law, Union law and international law, for the benefit of individuals (see especially Article 53). Once the Convention resolved to incorporate the Charter as part of the Constitutional Treaty largely unamended, so that the problem of overlap would be bound to continue with the other provisions of the Constitution, then it needed certainly to address the issues which framed the intentions of those who drafted the Charter of Rights before it decided upon the question of location.

However, even after settling upon the inclusion of the Charter as Part II of the draft Constitution, there remain some key questions about the relationship between the Charter and other sources of fundamental rights. The distinctive character of the Union's hitherto judge-led system of enforcement of fundamental rights, which has been based on Article 220 EC ('the Court shall ensure that the law is observed') and Article 6(2) TEU (which is effectively a codification of Court case law, although it refers only to the ECHR amongst international human rights instruments), has been its dynamic and fluid character. This included the possibility that the Court could refer to a substantial variety of possible sources of 'Community fundamental rights', including national constitutional traditions and different international law instruments, including but not confined to the European Convention on Human Rights and Fundamental Freedoms ('ECHR'). It has frequently referred to other fundamental rights sources such as the International Covenant of Civil and Political Rights and the European Social Charter in its case law. That *acquis* is to be carried forward into the post-Constitution era, as the Charter will not become an *exclusive* source of the Union's fundamental rights, although the privileged position of the ECHR will continue for a number of reasons. First, the reference to the ECHR is preserved in Article I–7(3), which effectively perpetuates the old Article 6(2) TEU. In the longer term, the Court of Justice may have to consider any possible dissonances between the legal force of the Charter of *Fundamental Rights* and the continuing recognition of fundamental rights as *general principles of law* within the EU legal order (Article I–7(3)). Second, the text of Article 52(3) of the Charter is unchanged and this requires the meaning and scope of Charter rights which correspond to rights guaranteed by the ECHR to be 'the same as those laid down by the' ECHR. Finally, considerable complexity regarding the legal structures of rights protection in the future, should the Union succeed in the project promised in Article I–7(2) that it 'shall seek' accession to the ECHR. This is a proposal long supported by the influential House of Lords Select Committee on the European Union, amongst other voices.[52]

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51 OJ 2000 C364/1.

52 This was the view taken by the HL Selection Committee in its report on the Charter: *EU Charter of Fundamental Rights*, 8th Report, 1999–2000, HL Paper 67. It repeats the view in a more recent report: *The Future Status of the EU Charter of Fundamental Rights*, 6th Report, 2002–2003, HL Paper 48.

Finally, there is the sticky question of the content of the Charter and its relationship to the rest of EU law. There are substantial areas of overlap between the Charter and other provisions of EU law that have been included in the Constitution, whether in Part I on general principles and constitutional structure, or in Part III on policies. Adjustment of the two sets of provisions to each other, or at least cross-reference, could have assisted the project of ensuring harmony of interpretation, but fell foul, in essence, of the desire not to disturb the text of the Charter.[53] Article 52(2) of the Charter already recognises the overlap issue, by requiring that rights recognised by the Charter which are based on EU law are exercised in accordance with the conditions of the EU treaties, and this provision was picked up again in Article II–52(2) of the Constitution. This seems to suggest that two sets of provisions could co-exist comfortably. Even so, there is likely to be a substantial task for the Court of Justice to determine the scope and effects of rights provisions especially where there is overlap between the Charter and the other sections of the Constitution. Its task here will be to create synergies between the wider and already embedded *acquis* which it has developed in concordance with the existing treaties, and the *acquis* of the Convention and the new constitutional settlement. In a trenchant critique of problems raised by the juxtaposition of the Charter and the rest of the Constitution, Erich Vranes argues that 'existing doubts are reinforced as to whether the much-discussed "Convention method" really allows an appropriate treatment of fundamental, albeit technically intricate problems.' As he remarks, 'it may be comparatively easy to formulate the substantive fundamental rights provisions of a fundamental rights catalogue, as these necessarily consist of "open", i.e.indeterminate legal notions which have to be concretized on a case by case basis in years of jurisprudence. However, it is arguably disproportionately more difficult to embed such a catalogue into the multilevel EU and national legal orders and their interlinked fundamental rights systems – the results of which are particularly disputed and which are also interlaced with other European and international human rights instruments – in a manner which does not only avoid new but satisfactorily resolves future legal problems ex ante'.[54]

The EU is a post-national polity, suspended between national polities and international regimes. The challenges of ensuring legitimate and effective governance will necessarily give rise to some difficult questions about how to articulate both the longstanding (judicial) principle of the supremacy of the law of the EU and the gradual consequential transformation of the traditionally singular sovereignty of Westphalian states into the shared sovereignty of a multi-level governance structure. The question arose as to how each of these judicial principles should be reflected in the Constitutional Treaty. For the UK, it was logical to object to the expression used in Article 1 of the Praesidium's first draft of the Treaty to the effect that 'this Constitution establishes the Union',[55] since the clear derivation from the

53 De Búrca, 2003: 29 *et seq*.
54 Vranes, 2003: 15.
55 CONV 528/03, n.34 above.

international law nature of the Union is that the Member States *establish the Union* and that the powers of the Union *flow from* the Member States, so that the Constitution has only a derived and not an original status. The language of the Praesidium's draft subtly crosses the bridge between regime and polity, and challenges concepts of Westphalian sovereignty. The explicit reference to the primacy of EU law in Article 9(1) of the Praesidium's first draft also riled the UK. However, the statement that 'the Constitution, and law adopted by the Union Institutions in exercising competences conferred on it by the Constitution, shall have primacy over the law of the Member States' is – as many commented in the plenary debate on 5 March 2003 – quite unexceptionable in view of the position under EU law as it stands. Take the Court's statement in 1964, in *Costa* v. *ENEL* that

'The transfer by the States from their domestic legal systems to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.'[56]

Quite apart from what that statement asserts about the nature of what was then 'Community law', one of the most controversial statements concerned the so-called 'permanent' limitation of sovereign rights. We will return to this in a moment. Staying with the supremacy question, for the moment, it is still worth considering whether or not it is indeed quite unproblematic to insert a supremacy clause into the Constitution, on the grounds of the fact that this is already a facet of the Union's constitutional order[57]. What the insertion could signal would be an important step towards the merging of the 'judicial constitution' and the formal legal constitution being worked on by the Convention. It could be said that this is in the spirit of Article 6(2) TEU, referred to above, which codifies some aspects of the Court's case law on fundamental rights. Pursuing the analogy with Article 6(2) TEU, however, it is equally clear that this simple provision does not refer in full to the complex case law in which, for example, the Court has addressed the question of the extent to which Member States are bound by the Union's fundamental rights guarantees when they are acting in some way in implementation of, or within the scope of, EU law. One thing is for sure, that case law does not speak with a single voice, and what is more, its interpretation is highly controversial amongst legal academics. It is interesting to note that partly to preserve the integrity of EU law as a system, the Council Legal Service was heavily involved during the negotiations of the Fundamental Rights Charter in 2000 in seeking to bridge the gap between the Court's case law and the text of the Charter itself, including its restrictive horizontal clauses. This was achieved through the drafting of the 'explanations' published alongside the Charter in

56 Case 6/64 above n.13 at p 594.

57 See the cautionary comments in Dougan, 2003: 5–6.

October 2000.[58] These explanations referred to the Court's existing case law on the effects of the Union's fundamental rights *vis-à-vis* the Member States as a *statement of the present law*, and the importance of these explanations has been buttressed by an amendment to the Preamble to the Charter of Fundamental Rights as it has been incorporated in Part II of the draft Constitution, to the effect that 'the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter.' What emerges from this saga about fundamental rights and the Court's case law so far as concerns the question of the 'codification' of the principle of supremacy is, of course, that codification or consolidation[59] of the 'judicial constitution' will never be entirely unproblematic. Dougan's analysis makes clear that problems will arise in the case of supremacy,[60] just as Vranes has done likewise in relation to fundamental rights.[61]

One area of debate is the precise meaning of the supremacy principle, whether as general principle of hierarchy or as specific conflicts-resolution tool. That point is not insuperable, if one accepts that any constitutional provision on supremacy would in turn require substantial judicial elaboration over a period of time, and into that elaboration would be built in the different macro- and micro-level functions of the existing principle and associated legal doctrine, with the Court of Justice drawing upon the rich judicial *acquis* since *Van Gend en Loos* and *Costa* v. *ENEL* and perhaps adapting it to the changed circumstances generated by the Convention and the IGC. Furthermore, the argument that to include the supremacy principle is to draw attention to a facet of EU law best left hidden and visible only to legal experts and other elites is constitutionally disreputable. On the other hand, there have been problems with the apparent generality of the principle as set out in the version of Article 9(1) included in the first draft of Articles 1–16 of the Constitution, in so far as it does indeed purport to apply to the whole of the Union as a single legal edifice, including the old second and third pillars. Even if the Union becomes a single legal entity, the now 'subterranean pillars'[62] will continue to have legal and political effects, especially in terms of the differing types of competences given to the institutions and the varying effects of the instruments in relation to different areas of Union activity. A distinction will continue to be drawn between 'first pillar' matters, to which the principle of supremacy is currently limited, perhaps now joined by the third pillar, if the developing trend towards 'communitarisation' of all aspects of

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58 Note from the Praesidium, Draft Charter of Fundamental Rights of the European Union, *Text of the Explanations of the complete text of the Charter as set out in CHARTE 4487/00, CONVENT 50,* CHARTE 4473/00, CONVENT 49, 11 October 2000 (http://www.europarl.eu.int/charter/convent49_en.htm).

59 Consolidation is the term used by the House of Lords Select Committee on the European Union in a report on Articles 1–16: *The Future of Europe: Constitutional Treaty – Draft Articles 1–16*, 9th Report, 2002–2003, HL Paper 61, p 17.

60 Dougan, 2003.

61 Vranes, 2003.

62 The disappearance of the Maastricht pillars 'underground' is an expressive point made by Kalypso Nicolaïdes in a presentation to the Federal Trust/UACES Study Group on the Convention, 7 March 2003, European Parliament Offices, Queen Anne's Gate, London.

justice and home affairs policy continues, and the area of Common Foreign and Security Policy. A principle of supremacy drawn from the case law of the Court of Justice on the EC Treaty might be thought simply inappropriate to this latter field of Union activity. Above all, though, the inclusion of the supremacy principle – like the reference to the foundational nature of the Constitution in the Praesidium's draft of Article 1 – draws attention to the possibility that the Union is bridging the gap between regime and polity. The formal assertion of supremacy in this way heightens the tension between the EU legal order and the national legal orders by reinforcing the fact that in many respects, as things stand at present, the various systems make incommensurable claims, especially about so-called 'competence-competence' (the power to determine the legitimate scope of competence), and that serious conflicts are generally avoided by judicial interpretation of these incommensurable claims, not by the intractable pursuit of fundamentally incompatible principles such as the supremacy of EU law or the sovereignty of the Member States under international law. To assert as much in the Constitution may be to scratch at the evident sensibilities of many national constitutional courts, many of which prefer to rationalise the supremacy of EU law by reference to their own constitutional systems rather than the logic supplied by the Court of Justice, not to mention public opinion in a number of Member States. Of course, that may be the intended effect, but there is no doubt that crossing that particular rubicon will still require something akin to a constitutional revolution in Europe and in the Member States. In the event, in intermediate versions of Title I of Part I of the Constitution put before the Praesidium the supremacy principle was not included at all in the section on competences, but was slated for inclusion as part of a provision which subsequently became Article I-5 in the final version, on relations between the Member States and the Union.[63] This contains the so-called loyalty principle, a version of what is presently set out in Article 10 of the EC Treaty, which is as far as the Treaty texts currently in force go towards formally recognising the supremacy of EU law.[64] However, by the time a full draft of Part I went back to the Plenary at the end of May 2003, the supremacy principle was (back) in – although with some renumbering resulting from changes in earlier articles it now appears as Article I-10.[65] The Praesidium 'explanations' were terse in the extreme on this question: 'The reference to the principle of primacy has been accepted, as it is a basic principle of the Union legal system which has to be laid down in the Constitution.'[66] This is unlikely to be the end of the story for the principle of supremacy.

Returning to the question of the 'permanent' effects of joining the EU, the reference to 'permanent limitation' in *Costa* v. *ENEL* seemed to some to suggest that a Member State could not secede from the EC/EU – a point flatly contradicted in 1981 when Greenland seceded (as part of the untangling of its relations with Denmark). One way in which the old

63 See Praesidium document dated May 19 2003.
64 See Shaw, 2000a: 297 *et seq*.
65 CONV 724/03, 26 May 2003, *Draft Constitution Volume I, Revised Text of Part One*.
66 CONV 724/03, above n.65 at p 64.

will blend with the new in interesting ways in the 'new' Union concerns the inclusion of a secession or voluntary withdrawal clause.[67] The approach taken in the Constitution (Article I–59) seems to imply a slightly different emphasis to the position elaborated for Canada and the case of (potential) Quebec secession by the Canadian Supreme Court.[68] The Court introduced a clear duty on the part of all concerned to negotiate in good faith should a majority of the people of Quebec decide that they wished to secede from the Canadian federation. Article I–59 of the Constitutional Treaty is premised on the 'decision to withdraw', which is a unilateral act taken in accordance with the constitutional requirements of each Member State. Thereafter, the assumption is withdrawal will indeed occur, with the Union negotiating and concluding an agreement for withdrawal based on guidelines drawn up by the European Council, and the seceding Member State is excluded from the discussions in the Council and the European Council on the withdrawal agreement. Withdrawal can also take effect automatically after notification of the decision to withdraw, notwithstanding the absence of an agreement, unless the European Council decides otherwise. The framework thus assumes an immediate reinstitution of the arm's length relationship between members and non-members, a point buttressed by the insistence in Article I–59(4) that a state having once withdrawn must apply to rejoin via the normal route laid down in Article I–57. There is to be no halfway house associate membership or automatic right to rejoin. This aspect of the provision is tougher in the final version than in the original draft.[69] Interestingly, in contrast to Canada, where much important constitutional doctrine, such as on the twin principles of constitutionalism and democracy, has been judicially elaborated in the context of the whole issue of Quebec's potential secession and ongoing 'difference' from the rest of Canada, there has been no judicial interventions thus far on this issue.[70]

Turning, finally, to the issue of competences, it is widely thought – wrongly, quite probably – that there has been an unstoppable 'competence creep' in which the EU and its institutions have gradually encroached upon the (protected, sovereign) spheres of the Member States.[71] Even if the argument is largely wrongheaded, and is based on a perverted view of the politics of law-making in the EU context as a politics of winners and losers,[72] one of the greatest challenges for the Convention concerned how it should react to the argument bearing in mind that the existing system governing competence attribution, exercise and control is hardly a paragon of clarity in the EU and could certainly benefit from an overhaul. However, once the choice was made for some sort of systematisation of types of

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67 Draft Article 46, included in CONV 648/03, above n.34.

68 *Reference by the Governor in Council, pursuant to s 53 of the Supreme Court Act, concerning the secession of Quebec from Canada* [1998] 2 SCR 217.

69 CONV 648/03, 2 April 2003, Article 46.

70 For argument about the potential applicability of this approach to constitutional flexibility in the EU, see Shaw, 2000b.

71 See, in contrast, the much more sophisticated diagnosis of the 'problem' of the competence system offered in Section 1 of Vergés Bausili, 2003.

72 See Weatherill, 2003: 46.

competence and areas of competence, there could be little assistance from the Court's case law. Notwithstanding its usage of the terms exclusive and shared competence in the external relations sphere, the way in which the Court has approached the question has simply not been rationalised in terms of *types* or *categories* of competence. On the contrary, it *has* used the principle of attribution, which has unsurprisingly been preserved in Article I–9(2). Attribution has been widely used by the Court as the basis for establishing and testing the limits of competence by examining the scope and context of *each individual legal basis* to ensure that measures adopted on that basis correspond not only to the specific terms of that legal basis, but also to the wider *ethos* of EU law. That was the clear implication of the Court's rather contested judgment in the *Tobacco Advertising Directive Case*,[73] in which it declared in quite trenchant terms the outer limits of EU competence in respect of the regulation of cross-border advertising of tobacco products, both in relation to the regulation of the internal market and also in relation to the question of the protection of public health. Indeed, in terms of the existence of competence, attribution is the only general principle that can be found in the Treaties as they are presently drafted, along with a vast number of legal bases, some of which are more carefully delineated than others, and of which Article 308 EC giving an implied power to regulate matters falling within the scope of the objectives of the Treaty is the most controversial. In addition, the Court has also evolved additional judicial principles such as the preemption of national legislative competence in certain circumstances and the doctrine of implied powers to buttress the attribution principle from the point of view of the efficacy of EU governance. Other principles, such as subsidiarity and proportionality, govern only the *exercise* of competence.

The original draft provisions on categories of competence prepared by the Praesidium were exceptionally inelegantly drafted.[74] Drafting style is a resolvable difficulty, and the final versions (Title III of Part I) are a considerable improvement, and also contain a more reasonable resolution of the division between exclusive and shared competence, especially in relation to the internal market. It remains a lingering difficulty, however, that the attempt to introduce a 'categories' approach drawn from the experience of other (national) federations does not appear to fit well with the existing approach to competences which constitutes the *acquis communautaire* in this area. One can anticipate, therefore, that a move in this direction could precipitate considerable uncertainty as the institutions, and especially the Court, adjust to the new approach, assuming the Constitution is adopted by the IGC and ratified at national level in due course.

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73 Case C-376/98 *Germany* v. *Council and Parliament* [2000] ECR I-8419.

74 See CONV 528/03, above n.36.

5. Conclusions

This paper has offered a close examination of some key aspects of the emergent 'new' European Constitution, or draft Constitutional Treaty, via a focus on the questions of process and substance which shaped the work of the Convention on the Future of the Union. The paper had a set of very modest objectives, namely to link debates about the Convention process to the substance of constitution-building and to show the influence of both the old Union *acquis* and the new mixed *acquis* of the Convention itself on the shaping of an anticipated new constitutional settlement for the EU. It has not been an attempt to provide an interim assessment of the results of the Convention, in terms of either process or substance. It is clear that in some cases the fit between the two is quite unsatisfactory, and this will generate legal and perhaps political uncertainty for a substantial period of time. Above all, in this context, simplification – that old mantra – can by no means be guaranteed. Throughout, the Convention's work has undoubtedly provoked quite strong reactions, ranging from fierce optimism to rather depressed pessimism, even amongst those who share the view that constitutionalism can *and should*, if pursued effectively as a set of premises about legitimate rule, offer some sort of legitimacy surplus to the presently much maligned EU. Balance is clearly a key issue: balancing the interests of the various constituencies with a stake in the Convention to ensure maximum acceptability of its final product; balancing growing scepticism amongst publics about political institutions with the evident sense of goodwill towards European institutions frequently charted in Euro-barometer polls which indicates that Europe ought to be given a decent chance to establish itself; finally, and perhaps most crucially, balancing the new and the old in the Constitution, and re-engaging with one of the oldest conundrums of legitimacy, namely balancing the responsiveness of institutions including guarantees of participation, with the need for effective governance and leadership in an ever more uncertain world.

Bibliography

Bellamy, Richard and Castiglione, Dario (2002), 'Legitimizing the Euro-'Polity' and its 'Regime': The Normative Turn in EU Studies', *European Journal of Political Theory*, 2/1, pp 7–34.

Brand, Michiel (2003), 'Towards the Definitive Status of the Charter of Fundamental Rights of the European Union: Political Document or Legally Binding Text?'*German Law Journal* 4/4, pp 395–409, www.germanlawjournal.com.

Church, Clive and Phinnemore, David (2002), *The Penguin Guide to the European Treaties*, London: Penguin Books.

Closa, Carlos (2003), 'Improving EU Constitutional Politics? A Preliminary Assessment of the Convention', *Constitutionalism Web-Papers*, ConWEB, 2003/1, http://les1.man.ac.uk/conweb.

Crum, Ben (2003), 'Twoards Finality: A Preliminary Assessment of the Achievements of the European Convention', ARENA Working Paper WP 03/4, www.arena.uio.no.

De Búrca, Gráinne (1999), 'The Institutional Development of the EU: A Constitutional Analysis', in P. Craig and G. de Búrca, *The Evolution of EU Law*, Oxford: Oxford University Press, pp 55–81.

De Búrca, Gráinne (2003), 'Fundamental Rights and Citizenship', in de Witte (2003), pp 11–44.

De Witte, Bruno (2002), 'The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process', in Paul Beaumont, Carole Lyons and Neil Walker (eds.), *Convergence and Divergence in European Public Law*, Oxford: Hart Publishing, pp 39–57.

De Witte, Bruno (ed.) (2003), *Ten Reflections on the Constitutional Treaty for Europe*, Robert Schuman Centre for Advanced Studies (European University Institute): San Domenico di Fiesole, e-book, www.iue.it/rscac.

Dehaene, Jean-Luc (2003), 'Towards a Constitutional Treaty for the European Union', Speech to Kings College London, Centre for European Law, 11 February.

Dougan, Michael (2003), 'Some Comments on the Praesidium's "Draft Treaty Establishing a Constitution for Europe"', Federal Trust Online Constitutionalism Essay, No. 7, March 2003, www.fedtrust.co.uk/eu_constitution.

Duff, Andrew (2003), 'The Convention: approaching the endgame', Interview with Giovanni Grevi, *Challenge Europe*, www.theepc.be, 6 March.

Feus, Kim (ed) (2001), *A Simplified Treaty for the European Union?*, London: The Federal Trust/Kogan Page.

Fischer, Joschka (2000), *From Confederation to Federation – Thoughts on the Finality of European Integration*, Speech given at the Humboldt University zu Berlin, Germany, 12 May.

Giscard d'Estaing, Valéry (2002), 'Introductory Speech to the Convention on the Future of Europe', SN 1565/02, Brussels, 26 February (delivered 28 February).

Giscard d'Estaing, Valéry and Schmidt, Helmut (2000), 'Time to Slow Down and Consolidate Around "Euro-Europe"', *International Herald Tribune*, 11 April.

Hain, Peter (2003), 'The Future of Europe: A Union of Sovereign States', Speech, Adjournment Debate, Westminster Hall, London, 20 March.

Hoffmann, Lars (2003), 'The Convention on the Future of Europe: Thoughts on the Convention-Model', in Shaw *et al*, 2003, pp 73–94.

Hoffmann, Lars and Vergés Bausili, Anna (2003), 'The reform of Treaty revision procedures: the Convention on the Future of Europe', in Tanja Börzel and Rachel Cichowski (eds.), *State of the European Union, Volume 6: Law, Politics and Society*, Oxford: Oxford University Press, pp 127–146.

Kohler-Koch, Beate (1999), 'A Constitution for Europe?', Working Paper of the Mannheim Centre for European Social Research, 8/1999.

Ophuls, Carl Friedrich (1966), 'Zur ideengeschichtlichen Herkunft der Gemeinschaftsverfassung', in E. von Caemmerer, H.-J. Schlochauer and E. Steindorff (eds.), *Probleme des Europäischen Rechts*, Festschrift für Walter Hallstein zu seinem 65. Geburtstag, Frankfurt-am-Main: Vittorio Klostermann.

Robert Schuman Centre for Advanced Studies (European University Institute, Florence) (2000), *A Basic Treaty for the European Union. A Study of the Reorganization of the Treaties* (study co-ordinated by Y. Mény and C.-D. Ehlermann), May 2000. (http://europa.eu.int/comm/archives/igc2000/offdoc/discussiondocs)

Shaw, Jo (2000a), *Law of the European Union*, London: Palgrave, 3rd Edition.

Shaw, Jo (2000b), 'Relating Constitutionalism and flexibility in the EU', in Gráinne de Búrca and Joanne Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?*, Oxford: Hart Publishing, pp 337–358.

Shaw, Jo (2003), 'Process, Responsibility and Inclusion in EU Constitutionalism', *European Law Journal* 9/1, pp 45–68.

Shaw, Jo, Magnette, Paul, Hoffmann, Lars and Vergés Bausili, Anna, *The Convention on the Future of the Union: Working Towards an EU Constitution*, London: Federal Trust/Kogan Page, 2003.

Vergés Bausili, Anna (2003), 'Rethinking the methods of dividing and exercising powers in the EU: Reforming Subsidiarity, National Parliaments and Legitimacy', in Shaw *et al*, 2003, pp 95–122.

Von Bogdandy, Armin (2000), 'The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty', *Columbia Journal of European Law*, 6/1, pp 27–54.

Vranes, Erich (2003), 'The Final Clauses of the Charter of Fundamental Rights – Stumbling Blocks for the First and Second Convention', *European Integration OnLine Papers*, 2003–007, http://eiop.or.at/eiop/texte/2003-007a.htm.

Weatherill, Stephen (2003), 'Competences', in de Witte (2003).

Weiler, Joseph (2001), 'Federalism with Constitutionalism: Europe's *Sonderweg*', in Kalyspo Nicolaïdes and Robert Howse (eds.), *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union*, Oxford: Oxford University Press, pp 54–70.

Weiler, Joseph (2002), 'A Constitution for Europe? Some Hard Choices', *Journal of Common Market Studies*, 40/4, pp 563–580.

Wiener, Antje (1998), 'The Embedded Acquis Communautaire: Transmission Belt and Prism of New Governance', *European Law Journal* 4/3, pp 294–315.

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