A CONSTITUTION FOR AN ENLARGED EUROPE*

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I. THE ROAD TOWARDS THE UNITY OF EUROPE

On the 20th of June 2003, Valéry Giscard d’Estaing, the former president of France, submitted a draft treaty establishing a constitution for Europe to the European Council in Thessaloniki, Greece. He did that in his capacity as president of the Convention on the Future of Europe. The European Council is a body formed by the heads of the states and governments of the fifteen members of the European Union. The European Council must be distinguished from another European Union institution, the Council of the Union, made up of the ministers of the member governments, and from the Council of Europe, a different international organization composed of all the European countries. The European Council or “Summit” has no definitive powers under the Treaty of the European Union, but it has a leading role of initiative: “[it] shall provide the Union with the necessary impetus for its development and shall define the general political guidelines there of.”¹ At its meeting in Laeken, near Brussels, Belgium, on the 14th and 15th of December 2001, it called for a “European Convention on the future of Europe.”² Thus, one and half years later, the president of that Convention, Giscard d’Estaing, reported back to the European Council on the final results of the Convention.

The Thessaloniki Summit welcomed the document submitted by d’Estaing and announced further steps to be taken. In early October 2003, a conclave of representatives of the governments and of the convention, took place in Rome, thus opening the Intergovernmental Conference (IGC). By the 1st of May

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2004, a draft Constitutional Treaty should have been approved by the IGC and the new treaty should be submitted for the signatures and ratification of all the members of the Union, old and new, that is, of twenty-five member states.

The model for the constitutional convention was the Philadelphia Convention that drafted the federal Constitution of the United States in 1787. The Europeans, nevertheless, are more familiar with another convention, the French Convention of 1791-1797 that drafted the first French Republican Constitution in 1792. The French Convention has some disquieting connotations, as it was under that convention that France was ruled by Robespierre and his infamous Committee of Public Health. For the Europeans, the word "convention" doesn't have the idyllic connotations of the Philadelphia Convention, the "Founding Fathers" and the Freedom Hall, but rather it reminds us of the guillotine and the executions of thousands of citizens, including King Louis and his wife Marie Antoinette (the "Terror"). Europeans are nostalgic, however, of their revolutionary history, and, at a time of peaceful, bourgeois evolution, the recall of the revolutionary past has been seized upon to try to inject some nerve into the rather sedate but also unappealing process of the European Union integration. Several member governments will try to inject further drama in the follow-up to the Convention by asking their peoples to vote in referenda on the new treaty.

The Convention and the referenda to approve the new treaty are, thus, attempts to mobilize European public opinion in support of the process of the unification of Europe. The indifference of the European citizens towards politics is particularly strong in the area of European integration. The citizens tend to view European unification as something alien to their daily lives. Only occasionally do they identify with the slow and rather technocratic process of integration which is being conducted in Brussels. The last time ordinary citizens felt directly involved in the European integration process was in 1999 when a common currency was adopted by twelve of the fifteen member countries. Otherwise, Europe doesn't generate relevant news for the Europeans, who are usually more concerned by world news, such as the terrorist attacks against the United States in 2001, or the war in Iraq, than by the less morbid continental European news. Although great progress has been achieved during the last fifty years in the process of European integration, the Europeans keep living within their narrow national borders, and are only awoken to world events by news of international reach, often through the international political role played by the United States as a world actor.

The convention to draft a European Constitution had two recent precedents: the Rome "assises" of members of the European Parliament and of the national
parliaments in 1990, in preparation of the 1992 Treaty of Maastricht, and the convention that drafted the Charter of Human Rights endorsed by the European Council at Nice, France, in December 2000. The Human Rights Conference called itself a convention although the governments had set it as a sheer consultative body. The Convention on the Future of Europe was called to life by the governments with that same name. In principle, however, it was not clear that it would become a "constitutional convention." In the first place, the Laeken Summit declaration limited itself to ask the Convention to answer a number of questions concerning the process of European unification. One of the questions concerned the possibility of adopting a "constitutional text." The Convention promptly seized upon this suggestion to concentrate itself in drafting a constitutional treaty, a "Constitution for Europe." In fact, however, the European Convention was not a constituent body. The real constitutional convention is the IGC starting in the fall of 2004 in Rome. Nevertheless, the general assumption is that the Convention's work has been positive, and that the IGC has had its work cut out for it by the text submitted by the Convention, when it should have only introduced some minor amendments.

The European Union hasn't been sparing in the adoption of constitutional treaties. The original treaties setting up the European Communities in 1951 and 1957 were amended on several occasions to allow for changes in the structure of the Community and for its enlargement with new members. In 1986, a new constitutional document was approved, the Single European Act. The Act has been followed by three treaties on the European Union: the 1992 Maastricht Treaty, the 1997 Amsterdam Treaty, and the 2000 Nice Treaty.

One of the reasons for this bountiful treaty work has been the continuous process of enlargement. The original Community Treaties of 1951 and 1957 were drafted for an organization made up of six member states. The European Communities were then called "the Little Europe," as opposed to the much larger idea of a Europe made up of some thirty or forty states. Since 1973, however, the Communities experienced four enlargements, more than doubling its membership, first with Denmark, Britain, and Ireland, then with Greece in 1979, with Portugal and Spain in 1986, and, finally with Austria, Finland, and Sweden in 1995. Each new enlargement has entailed a reform of the institutions to provide room for the new members. Each enlargement has also brought pressure to make the entire system swifter and better adapted to carry out the new tasks required to attain the final stages of the Union of Europe.

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There is no clear blueprint for the further development of European integration. In fact, there are different points of view on the final outcome of this process. For some member governments (Britain and Scandinavia), Europe has gone as far as it should ever go, and the present intergovernmental structure should be basically maintained in the future. The majority of the member governments appear intent, however, to go further down the road of integration until something similar to the present U.S. federal system is achieved. Thus, each step ahead is preceded by protracted discussions.

Each new integration treaty is the result of lengthy negotiations between governments. There is no guarantee that once the treaties have been signed by all member states, they will be accepted by public opinion in each member state. The Norwegian people have already twice rejected entry into the Union: in 1973, when Britain, Denmark and Ireland became members, and in 1995, when Austria, Finland and Sweden joined the Union. The Irish first rejected the Single Act of 1986, and it only accepted it one year later after some opting-outs were negotiated by the then twelve member states for Ireland. The Danish people rejected the Treaty of Maastricht of 1992, and again, only accepted it after negotiating some opting-outs. Both the Danish and the Swedish peoples have rejected integrating their currencies into the Euro. The British government of Tony Blair hasn’t even dared to call a referendum on the Euro after seven years in power for fear of losing it, notwithstanding its continuous electoral promises. Some governments have managed to adopt through referenda some of the Union treaties. France held a successful referendum in 1993 for the approval of the Treaty of Maastricht. The new enlargement with ten member states of eastern and central Europe and the Mediterranean has been supported by referenda in each candidate state (with the sole exception of Cyprus) that ended with successful outcomes. The treaty that may be approved by the IGC may still be in danger through the holding of referenda in some of the old and new member states.

Thus, what George Washington, Alexander Hamilton, Thomas Jefferson, and the other fathers of the U.S. Constitution achieved in 1787 with the federal constitution only four years after the independence of the thirteen colonies is still far from being reached in Europe more than fifty years after the European Coal and Steel Treaty of 1951 (ECST).

II. PRINCIPLES

As I am now speaking to you, the IGC is barely beginning its work. Movable coalitions of member states are negotiating common positions to have
their different points of view and national interests taken into consideration. At this stage, it is difficult to foresee which particular negotiating positions will prevail. This is why I will refer myself to the text adopted by the Convention as if it was a final text. I will refer to particular negotiating positions of member states when they have been clearly stated, but without daring to forecast whether particular positions will prevail over the text already approved by the Convention.

The draft constitution begins with a classical citation: the famous definition of democracy given by Pericles in his oration dedicated to the Athenians who fell during the first year of the Peloponnesian war: "Our Constitution . . . is called a democracy because power is in the hands not of a minority but of the greatest number" (Thucydides, II, 37). This initial reference to a Greek source has a double. First, it purports to show that the foundations of the European Union are deeply rooted in history, in a civilisation dating back to the year 500 B.C. Thus, the preamble of the draft is full of references to this millennial heritage and to "the values underlying humanism: equality of persons, freedom, respect for reason" (Preamble, 2d paragraph).

Paragraph 3 of the preamble refers also to "the cultural, religious and humanist inheritance," the "central role of the human person and his or her inviolable and inalienable rights, and respect for law." Paragraph 4 refers to a "path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived." Paragraph 4 also refers to Europe as "a continent open to culture, learning and social progress," wishing "to deepen the democratic and transparent nature of its public life and to strive for peace, justice and solidarity throughout the world." The reason for the efforts to forge a common destiny is the need to transcend their ancient divisions, rooted in different national history and identities (Par. 5). "United in its diversity" is the slogan for a Union embarking in a great project as "a special area of human hope" (Par. 6).


5 Id. pmbl. para. 2.
6 Id. pmbl. para. 3.
7 Id., para. 4.
8 Id.
9 Id., para. 5.
10 Id., para. 6.
11 Id.
In a previous draft, there was a detailed reference to the variegated contributions of Europe to human culture, from Greek philosophy to the Enlightenment. This paragraph led to a counterproposal to refer to Christianism as a fundamental value of the Union. The struggle is not over yet. The Pope and some member governments (mainly, Poland and Spain) have asked for the inclusion of references to God and the Christian faith in the new treaty in the IGC.

The second connotation of the Thucydides text is the explicit defense of democracy as a basic principle of the constitution. References to the democratic principles are contained in other paragraphs of the preamble: equality of persons and freedom (Par. 2)\(^\text{12}\) and the deepening of the democratic and transparent nature of its public life (Par. 4).\(^\text{13}\) Article 2 gives a definition of the Union's values in terms of the democratic principles: "The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination."\(^\text{14}\)

These references to the democratic principles are not idle. They have to do with the recent history of Europe, and the tremendous sufferings imposed upon our peoples by authoritarian regimes, both fascist and Communist. The original Communities of six member states were built under the shadow of the fascist experiences of the 1930s and 1940s and with the ominous presence of Stalinism in central Europe. This will explain why one of the basic institutions of the original Communities was the Parliamentary Assembly, made up of the representatives of the peoples of Europe.

In 1961, the European Parliament adopted the "Birkelbach Report," which barred entry into the Union, and even the status of associated membership, to non-democratic States. The application by the government of General Franco in 1962 for a status of association for Spain was left in the freezer until the death of the General and the demise of his regime. The association agreements with Greece and Turkey were frozen during the 1960s as a consequence of the military coups staged in both countries. Greece could only be accepted as a member of the European Communities in 1979, when democracy was restored. Turkey is still waiting for the green light due to the imperfections of its representative government. Portugal, like Spain, had to attain democracy

\(^{12}\) Preamble, supra note 6, para. 2.
\(^{13}\) Id. para. 4.
\(^{14}\) Draft Treaty, supra note 4, pt. I, art. 2.
before entering the European Union, together with Spain, in 1986. The Europe Council followed the Parliament’s “Birkelbach doctrine” by stating at a meeting in Copenhagen the democratic criteria required to enter the Union, the “Copenhagen criteria.” The entry of any candidate country in the Union is always preceded by a report by the European Parliament on the fulfillment by the candidate country of the requirements of representative democracy: free elections, separation of powers, and respect for human rights.

The Treaty on European Union of 1992 (the Maastricht Treaty) sets out clearly the need for member states to respect the democratic rules of government. Member states may now be suspended from their rights of membership in the Union in case of systematic violations of human rights.

The accession to power in Austria of the “Liberal Party” (FPÖ) of Jörg Haider rang all the alarms. Here was a party that had been expelled from the Liberal International for its rightist leanings, led by a man that exposed publicly his anti-Jewish and other xenophobic feelings and that praised the infamous figure of Adolph Hitler. Until then, the ultra-right parties had been held at arm’s length from reaching power in central governments. The French moderate right paid dearly for reaching local pacts with Le Pen’s Front National. Agreements with the Communist parties were only possible in France, Portugal, and Italy, when those parties broke with the Stalinist hard-line and compromised with the democratic system.

The formation of a coalition between the moderate, pro-European Social-Christian Party of Wolfgang Schüssel and the extreme-rightist FPÖ went against the rules of the game of the democratic party-system in Europe. There was a strong reaction all over Europe against this coalition. Most member governments of the European Union decided at first to impose some form of diplomatic boycott against the new, unholy coalition, cutting down on bilateral relations with Austria, and even refusing to appear in the “family photo” of Council meetings with the members of the Austrian government. But as far as there were no “repeated violations” of fundamental freedoms, the Union did not have any legal basis to adopt sanctions against a member government that could be considered a threat to democracy.

The Belgian government attempted to put a remedy to such a situation. As a consequence of its lobbying, a new Article 7 was introduced in the Treaty of Nice of the year 2000. The new Article 7 provided for the suspension of the
rights of membership in case of a "clear risk of a serious violation" of the democratic principles recognised by Article 6.

So far, this article has not yet been put in practice, notwithstanding the fact that the Haider party is still ruling in coalition in Austria. There is also the participation of the Fortuyn right-wing Party in the Dutch Government, and of the xenophobic "Lega Nord" of Bossi and the neo-fascist party of Fini in the coalition government of Berlusconi in Italy. The distasteful jokes by Berlusconi himself about Nazi concentration camps and his tactless remarks about the supposed benevolence of the Mussolini regime have caused an uproar against the Italian right-wing leader, but no governmental or European Union official has dared to call for the application of Article 7 of the Treaty of Nice, notwithstanding the fact that the Italian Prime Minister has also put pressure on the judges in his country, thus threatening one of the fundamental pillars of democracy, the separation of powers.

Thus, the old skeletons of European history are getting out of the closet once more. This explains the decision of the members of the Convention to put the democratic principles at the forefront of the new constitution. References to the democratic values in the preamble and Article 2 are not idle, and they are further strengthened by other references in the treaty to principles which are essential to the orderly functioning of the democratic system. Thus, Article 3, paragraph 2 refers, within the Union's goals, to the creation of "an area of freedom, security and justice." Article 7 commits the Union to recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II of this Constitution. The charter itself includes a series of rights that are essential for democracy, such as the freedom of expression and information (Art. II-11), and the freedom of association (Art. II-12), with a special protection for political parties.

Title VI of Part One of the Constitution (Articles 44 to 51) refers to "the Democratic Life of the Union." This Title lacks unity. It draws together a set of principles and procedures intended to stress the democratic character of the Union. Thus, Article 44 refers to "the principle of democratic equality,"

17 Id. pt. I, art. 7, para. 1.
18 Id. pt. II, art. 11.
19 Id. pt. II, art. 12.
20 Id. pt. I, tit. VI.
which is understood as the right of all citizens to "receive equal attention from the Union's Institutions." 21

The principle of "representative democracy" 22 (Article 45) makes reference to the legitimacy of the Union's institutions through parliamentary bodies, either directly (European Parliament) or indirectly (the national governments making up the European Council and the Council of Ministers are responsible to national parliaments "elected by their citizens"). 23

Article 45, paragraph 3, gives a more general definition of democracy: "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly as possible and as closely as possible to the citizens." 24 Finally, political parties are recognised as an important part of the European Union's democracy. There is a recognition of political parties at the "European level," because they "contribute to forming European political awareness and to expressing the will of Union citizens." 25

The principle of "participatory democracy" 26 referred to in Article 46, has nothing to do with democracy as this term is generally understood. It refers to the dialogue between the institutions with citizens and representative institutions. 27 The euphemism given to the official recognition of the lobbies, which play an important role in the Union, is "dialogue with representative associations and civil society"; 28 it includes a right of initiative by citizens on legislative matters, which requires one million signatures. (Article 46, par. 4) 29 This dialogue with "civil society" includes the "social partners" (labor unions and business) and the dialogue with churches and lay organizations. (Article 51) 30 The principle of transparency inspires the proceedings of the Union institutions, so that their work is conducted as openly as possible. The European Parliament is bound to "meet in public," and the Council of Ministers should act the same way when acting as a legislative body. (Article 49, par. 2) 31 The access of ordinary citizens to documents is guaranteed. (Art.

21 Id. pt. I, art. 44.
22 Id. pt. I, art. 45.
23 Id.
24 Id. pt. I, art. 45, para. 3.
25 Id. pt. I, art. 45, para. 4.
26 Id. pt. I, art. 46.
27 Id.
28 Id. pt. I, art. 46, para. 2.
29 Id. pt. I, art. 46, para. 4.
30 Id. pt. I, art. 51.
31 Id. pt. I, art. 49, para. 2.
Finally, the ombudsman elected by Parliament "shall receive, investigate and report on complaints about maladministration within the Union Institutions, bodies or agencies." (Article 48)

In this rather miscellaneous title, there is a reference to the protection of personal data as a counterweight to the broad transparency of the working of the institutions. The Union is open to all European states which respect its values and are committed to promoting them together. (Article 1-1, par. 2) The acceptance and respect of the democratic values stated in Article 1-2 is required to become a member of the Union and to remain in it (Part One, Title IX, Article I-57). When there is "a clear risk of a serious breach by a Member State of these values," that particular member state may be suspended of the rights of membership. (Article I-58)

III. THE GOALS

The state is an all-encompassing organization. It can deal with all aspects of social life, from the family to the large social and economic organizations. Intergovernmental organizations, by contrast, are finalist organizations. They are established to achieve some common goals of the member states. They are only entitled to carry out the tasks assigned to them by their members. Article I-1 says that the member states confer on the Union "competencies to attain objectives they have in common."

These objectives are defined in Article I-3 of the draft constitution. The first goal of the European Union is "to promote peace, its values and the well-being of its peoples" (paragraph 1). A reference to the values of the Union had already been made in the previous section. The well-being of the peoples of Europe will be referred to later on, in the context of the policies of the Union.

We should now consider peace as a main goal for the Union. Like the reference to "democracy," the word "peace" is not merely rhetoric. It has a

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32 Id. pt. I, art. 49, para. 4.
33 Id. pt. I, art. 48.
34 Id. pt. I, art. 50.
35 Id. pt. I, art. 1.
36 Id. pt. I, art. 57.
37 Id. pt. I, art. 58.
38 Id. pt. I, art. 1.
39 Id. pt. I, art. 3, para. 1.
40 Id. pt. I, art. 2.
deep meaning in the present stage of development of European integration. The first two paragraphs of the preamble of the Treaty Instituting the European Coal and Steel Community (ECST) referred to the peaceful purposes of the European Union.\(^4\)

Paragraph 2 of the preamble of the ECST referred to the contribution of the member states to actions leading to peace,\(^2\) and paragraph 5 to the need to put an end to the lengthy "bloody conflicts" between the peoples of Europe.\(^4\)

The main purpose of the ECST was to put an end to those divisions. The last paragraph of the preamble stated the resolution of member states to defend "peace and freedom." The three original treaties committed the European institutions to maintain "adequate relations" with the UN and its bodies.\(^4\)

The Single European Act of 1986 refers both to the defense of democratic values\(^4\) and to the need to develop a common foreign and security policy in order to contribute jointly to the maintenance of peace and security within the framework of the United Nations.\(^6\) The 2000 Nice Treaty also refers to the peace goal.\(^7\)

Paragraph 4 of Article 3 of the Draft Treaty is in line with the texts already quoted:

In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter.\(^8\)

The third basic goal of the Union, besides peace and the defense of democratic values, is to promote "the well-being of its peoples."\(^49\) The concept of "well-
being” is rather vague. Paragraphs 2 and 3 of Article 3 attempt, however, to define some areas where the well-being of the peoples of Europe can be achieved through cooperation within the Union.

Paragraph 2 refers to two aspects of the joint cooperation designed to improve the quality of life within Europe: “an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted.” The goal of the single market was enshrined in the original Community treaties. It was further defined by the Single European Act of 1986 and the subsequent European Union treaties. The areas of freedom, peace, and security were first referred to as a goal in the 1992 Maastricht Treaty, and further developed by the 1997 Amsterdam Treaty and the 2000 Nice Treaty, as well as by some of the European summits, like the Tampere and Seville councils.

Paragraph 3 of Article 3 of the Draft Treaty covers a wide spectrum of measures to achieve the well-being of the peoples of Europe:

- a sustainable development based on balanced economic growth;
- a social market economy, highly competitive and aiming at full employment and social progress;
- a high level of protection and improvement of the quality of the environment;
- the promotion of scientific and technological advance;
- to combat social exclusion and discrimination;
- to promote social justice and protection, the equality between women and men, solidarity between generations and the protection of children’s rights;
- to promote economic, social and territorial cohesion, and solidarity among Member States;
- to respect the existing cultural and linguistic diversity;
- to ensure that Europe’s cultural heritage is safeguarded and enhanced.

This is a highly ambitious program to be carried out by a Union of limited powers where the states retain most of their powers. Thus, the last paragraph of Article 3 introduces a sober reminder of the limits imposed upon the Union by the lack of sufficient competences and means: “These objectives shall be

50 Id. pt. I, art. 3, para. 2.
51 Id. pt. I, art. 3, para. 3.
pursued by appropriate means, depending on the extent to which the relevant competences are attributed to the Union in this Constitution."

IV. THE STATES AND THE INSTITUTIONS: POWERS AND COMPETENCES

The U.S. Constitution created a "state" in the legal sense of this term, albeit in the form of a federation, as opposed to the previously existing confederation of thirteen independent states. The draft constitution of the European Union doesn't establish a state in the sense of a sovereign political organization. It is still an international organization that depends for its survival on the free will and the individual political aims of the other member states.

There is a sound sociological reason for the caution with which the Convention handled the issues of sovereignty and the respect for the rights of the states. To begin with, the thirteen colonies of 1776 that constituted the United States of America in 1787 had a common English background, notwithstanding their religious differences (Catholic Maryland or Quaker Pennsylvania, for instance) or their country of origin (the Germans in New Jersey or the Dutch in New York, for instance). The long Revolutionary War against the common British enemy helped them to go ahead with the idea of achieving a "melting pot" of cultures and peoples.

The European States, on the contrary, have spent centuries fighting each other, and have always been unable to join forces against a common enemy. Europe has been living for almost two millennia in perpetual war. Religious, ethnic, and linguistic differences had cemented the animosities between the states of Europe when the first efforts to unite them were undertaken in the middle of the twentieth century. Paragraph 4 of the preamble states that the peoples of Europe are "proud of their own national identities and history," and paragraph 5 says that Europe is "united in its diversity." The U.S. Constitution starts with the sociological assumption that the thirteen States form "a people": "We, the People of the United States." We have seen, by contrast, that Article 3 of the draft European Constitution refers to the well-being of "the peoples" of the Union. Article I-1, speaks of "the will of the citizens and States of Europe to build a common future" (emphasis added).

52 Id. pt. I, art. 3, para. 5.
53 Preamble, supra note 6, para. 4.
54 Id. para. 5.
55 US. CONST. pmbl.
57 Id. pt. I, art. 1, para. 1.
There is no general devolution of powers from the States to the Union but a transfer by the member states to the Union of some "competences to attain objectives they have in common," although these competences will be exercised "in the Community way," i.e., through the institutions of the Union and not through international conferences of the member states. Otherwise, "the Union shall co-ordinate the politics by which the Member States aim to achieve these objectives." This coordinating role of the Union has no counterpart in the U.S. Constitution, where the federal institutions (the president, Congress, and, eventually, the federal courts of justice) have powers clearly conferred upon them, although under the proviso that all powers not conferred to the federation shall remain in the hands of the states or of the people.

Article I-5 refers to the "relations between the Union and the Member States." It draws the logical legal consequences of the survival of the states as independent political entities:

The Union shall respect the national identities of the member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security.

The only limitation to the broad powers of the States within the Union is "the principle of loyal cooperation" between the Union and the member states. Under this principle "the Union and the member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution." The member states "shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the objectives set out in the Constitution."
Article I-9, par. 1 confirms this principle of "conferral": "The limits of Union competences are governed by the principle of conferral." There are, however, two further restrictions to the powers of the Union, even when those powers have been expressly devolved to the Union. The first limitation is found in the principle of "subsidiarity." The Maastricht Treaty had given a fuzzy definition of subsidiarity. Article 3b of the Maastricht Treaty stated:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

The word subsidiarity, heartily defended by the former Conservative British Prime Minister, John Major, had been coined by the Roman Catholic Church (Pope Leo XIII) for the purpose of giving some recognition to the federalists, who were considered, in the Nineteenth Century, as dangerous revolutionaries, especially after the serious disturbances that they caused in Spain during the First Republic in 1873. It is generally defined as a commitment to rule the citizens at the lowest possible level. That is, if the people's needs can be covered by city or county authorities, there is no need to call for a higher authority to take care of them.

In the European Union, subsidiarity has been understood as a means to put a brake to the growth of Community legislation that developed as a consequence of the completion of the single market required by the Single Act of 1986. The Commission, chaired by Jacques Delors, then announced the adoption of some 300 legislative measures to achieve the single market before the end of 1992. Although the Commission later scrapped some of the measures, and the legislative process took longer than had been originally foreseen, public opinion and the legislative bodies were taken aback by this sudden sprouting of Community legislation in areas considered until then as strictly pertaining to domestic jurisdiction.

Article 1 of the 1997 Amsterdam Treaty gives a rather general reference to subsidiarity when it says that decisions will be taken as openly and as closely

65 Id. pt. 1, art. 9, para. 1.
66 MAASTRICHT TREATY, supra note 1.
67 Id. art. 3b.
as possible to the citizens. But when the EEC Treaty defines subsidiarity, in its Article 5, second paragraph, it repeats the same convoluted definition of the term. This ambiguous definition of subsidiarity has passed, almost unscathed, to the draft constitution. The new Article I-9 in its third paragraph, only adds the possibility that "the intended action cannot be achieved by the Member States, either at central level or at regional and local level," thus incorporating one of the objections to the current definition of subsidiarity, where the existence of composite states within the Union appears to be forgotten.

The draft constitution, which aims to strengthen the role of Union, reinforces the role of subsidiarity, and this is rather paradoxical. A protocol on the application of the principles of subsidiarity and proportionality is attached to the draft constitution, and national parliaments are given a role in the compliance of EU institutions with this principle. The protocol on subsidiarity and proportionality forces the Commission, the Parliament, and the Council to inform national parliaments on proposals and positions on legislative texts. Objections by one-third of the votes allocated to national parliaments will oblige the Commission to reconsider the usefulness of a particular proposal. The European Court of Justice is given a special jurisdiction on claims based on subsidiarity. The Committee of Regions may also appeal to the Court of Justice in cases of non-compliance with its recommendations.

The third limitation imposed upon the European institutions is proportionality. This principle, rooted in the German Federal Constitution (Grundgesetz or fundamental law) of 1949, was developed by the European Court of Justice from an early stage. It was also incorporated in the 1992 Maastricht Treaty. Paragraph 4 of Article I-9 says that under this principle, "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution." The Protocol on subsidiarity also refers to proportionality. The possibility of challenges by national parliaments is limited to infringements to the principle of subsidiarity.

70 Draft Treaty, supra note 4, pt. I, art. 9.
71 Id. pt. I, art. 9, para. 1.
72 Id. pt. I, art. 9, para. 4.
The 1992 Maastricht Treaty distinguished three “pillars” for the distribution of powers between the member governments and the European institutions. The first pillar was formed by the existing European Communities, now reunited in a single “European Community.” The Coal and Steel Treaty expired in 2001, fifty years after the entry in force of the Treaty of Paris, and is no longer valid. The Euratom Treaty is still in force, but it plays a minor role due to the slow progress of the Union in the field of nuclear energy. The Community pillar is based on the so-called “Community method.” Decisions are adopted by Community institutions within the limits that have been described before.

The other two pillars of the Maastricht Treaty referred to the common foreign and security policy (second pillar) and to police and judicial cooperation (third pillar). Decisions by the Union in areas covered by the second and third pillars are not subject to the Community method. These are matters for intergovernmental cooperation. Decisions are adopted by the Council of Ministers with some assistance from the Commission and consultation of the Parliament. Special arrangements are needed to cover the costs of the operations under these two pillars.

Nevertheless, the Community’s dynamics have undermined the attempts to separate the intergovernmental pillars from the first pillar. In the first place, Community institutions, including the Council, charge their administrative costs in this area to the Community budget. Second, the Council may decide, by unanimity, to charge the operational costs to the Community budget, with the exception of military and defense expenditures. Third, the Maastricht Treaty foresaw the possibility of moving into the first pillars some matters under the second and the third pillars. Finally, the door was left open for possible “reinforced cooperations” between some members of the Union in areas pertaining to the second and third pillars. There was already an example of reinforced cooperation in the Schengen Agreement on free transit of borders (now, thirteen of the member states, plus Iceland and Norway). After 1995, the Euro was set up on the basis of some kind of reinforced cooperation between some member states (now twelve out of the fifteen member states).

The common foreign and security policy has proved to be quite resilient to communitarisation. The governments have been reluctant to transfer their fundamental powers on the conduct of international affairs and defense to a shaky intergovernmental organization. Thus, little progress has been achieved in this area until now. The split among the members of the Union caused by the Iraq crisis is evidence thereof. By contrast, both European public opinion and the national governments appear to be ready to transfer powers to
supranational authorities in the areas of police and judicial cooperation (the third pillar). The concern for security in a Union without international frontiers seems to have pushed member governments to put their act together in this area.

The Amsterdam Treaty transferred to the first pillar the matters of visas, asylum, immigration, and other policies relating to the free movement of people (now under Part III, Title IV of the Nice Treaty, Articles 61 to 69). Later, the European Councils of Tampere (1999), Seville (2002) and Salonika (2003) pushed for the development of a common “area of freedom, security and justice” without internal frontiers. The member states have developed a common format of passports and a common policy on visas. They are now working on other developments, such as a simplified extradition system and a common immigration policy.

The Draft Treaty attempts to put an end to this cumbersome system of pillars. Article I-11 speaks of “categories of competence.” There are basically two categories of competence: the exclusive competences and the shared competences. “When the Constitution confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of acts adopted by the Union.”

When the competences are shared with the member states, “the Union and the Member States shall have the power to legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.”

There are several areas, however, which fall outside this simple distinction between exclusive and shared competences. The first such area concerns the economic and employment policies. Here, the Union shall have competence “to promote and coordinate” the policies of the member states. The Union may only adopt the “broad guidelines” of the economic policies, while the coordination within the Union is carried out by the member states

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73 NICE TREATY, supra note 15.
74 Draft Treaty, supra note 4, pt. I, art. 11.
75 Id.
76 Id. pt. I, art. 11, para. 1.
77 Id. pt. I, art. 11, para. 2.
78 Id. pt. I, art. 11, para. 3.
themselves.\textsuperscript{79} Specific provisions are applicable to those member states which have adopted the Euro.\textsuperscript{80}

In the area of employment, "the Union shall adopt measures to assure coordination of the employment policies of the member States, in particular by adopting guidelines for these policies."\textsuperscript{81} Additionally, "the Union may adopt initiatives to ensure coordination of Member States' social policies."\textsuperscript{82} Moreover, "The Union shall have competence to define and implement a common foreign and security policy."\textsuperscript{83} Finally, it is foreseen that the Union "in certain areas and in the conditions laid out in the Constitution . . . shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas."\textsuperscript{84}

The areas of exclusive competence of the Union are few in number:

- to establish the competition rules which are needed for the functioning of the internal market;
- the monetary policy, for the member states which have adopted the Euro;
- the common commercial policy;
- the customs union;
- the conservation of marine biological resources under the common fisheries policy;
- the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable the Union to exercise its competence internally, or affects an internal Union act.\textsuperscript{85}

There is no delimitation of shared competences, which are all the others mentioned in the draft constitution.\textsuperscript{86} The principal areas of shared competences are the following.

\textsuperscript{79} Id. pt. I, art. 14, para. 1.
\textsuperscript{80} Id. pt. I, art. 14, para. 2.
\textsuperscript{81} Id. pt. I, art. 14, para. 3.
\textsuperscript{82} Id. pt. I, art. 14, para. 4.
\textsuperscript{83} Id. pt. I, art. 11, para. 4.
\textsuperscript{84} Id. pt. I, art. 11, para. 5.
\textsuperscript{85} Id. pt. I, art. 12.
\textsuperscript{86} Id. pt. I, art. 13.
- the internal market;
- the area of freedom, security and justice;
- agriculture and fisheries, excluding the conservation of marine biological resources;
- transportation and trans-European networks;
- energy;
- the social policy, for aspects defined in Part III;
- the economic, social and territorial cohesion;
- the environment;
- consumer protection;
- common safety concerns in public health matters.

In the areas of research, technological development, and space, the Union shall have competence to carry out actions, in particular to define and implement programmes; however, the exercise of that competence may not result in Member States being prevented from exercising theirs.\textsuperscript{87}

In the areas of development cooperation and humanitarian aid, the Union shall have competence to take actions and conduct a common policy; however, the exercise of that competence may not result in Member States being prevented from exercising theirs.\textsuperscript{88} As for the supporting, coordination, or supplementary actions of the Union foreseen in Article I-11, Section 5, which exclude harmonization of the member states’ laws or regulations, they apply only to the following areas:

- industry;
- the protection and improvement of human health;
- education, vocational training, youth and sport;
- culture;
- civil protection.\textsuperscript{89}

Although this structure is simpler and easier to understand than the existing “three pillars” structure, it is still rather cumbersome. The draft constitution

\textsuperscript{87} Id. pt. I, art. 13, para. 3.
\textsuperscript{88} Id. pt. I, art. 13, para. 4.
\textsuperscript{89} Id. pt. I, art. 16, para. 2.
states two principles that are designed to smooth the functioning of the system. The first one is the principle of "loyal co-operation," which means the assistance of each other "in full mutual respect... in carrying out tasks which flow from the Constitution." The member states shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the objectives set out in the Constitution.

The second principle is enshrined in the "flexibility clause" of Article I-17. Under this clause,

[i]f action by the Union should prove necessary within the framework of the policies defined in Part III to attain the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures.

This Article basically reproduces an old article of the EECT (now under the number 308 of the EC Treaty) that allowed for modification of the powers of the Union through the unanimous decisions of the members of the Council. Now, however, an important proviso has been introduced, through a reference to the principle of subsidiarity, and its monitoring by the national parliaments (Article I-17, Section 2). Another important new restriction is the prohibition to carry out harmonization of member states' laws and regulations "in cases where the Constitution excludes such harmonisation" (Section 3).

V. LAWS AND STRUCTURES

Like any other intergovernmental organization lacking a constitutional power of its own, the European Union has no other powers than those conferred upon it by the member states. We have just seen how the system works, with a distribution of competences between the Union institutions and the national governments. Lacking an army, and lacking a police force at the

90 Id. pt. I, art. 5, para. 2.
91 Id.
92 Id. pt. I, art. 17, para. 1.
93 EC TREATY, supra note 69, art 308.
95 Id. pt. I, art. 17, para. 3.
Union level, the only way for the institutions to carry out their tasks is through legal means. The treaty of the Union is the legal document that the institutions may invoke to obtain from the States the means they need to perform their duties.

To begin with, "the Union shall have legal personality." The three original communities enjoyed a "legal personality," which allowed them to hire civil servants, to sign contracts, to receive and send ambassadors, and to carry out financial cooperation. Article 281 of the existing EC Treaty (but also Article 282) recognizes the legal personality of "the Community," but the Union, as such, did not enjoy that legal personality. Now, the Draft Treaty dispels any ambiguities in this respect. The EC will be replaced by the EU, and there will be no duplicity of legal personalities.

Article I-10, on "Union Law," also dispels any ambiguities about the ranking of the European Union law in reference to the national laws of the member states: "The Constitution, and law adopted by the Union’s Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States." A corollary of the supremacy of the law of the European Union over the national laws of the member states is the duty of the governments to "take all appropriate measures, general or particular, to ensure fulfilment of the obligations flowing from the Constitution or resulting from the Union Institutions' acts."

As a consequence of the erasure of the former distinctions between the three "Communities" and a "European Union" with three pillars, the new Union "shall be served by a single institutional framework" (Article I-18, section 1). Needless to say, "[e]ach institution shall act within the limits of the powers conferred on it in the Constitution, and in conformity with the procedures and conditions set out in it." As a counterpart to the principle of "loyal cooperation" between the Union and the member states, "[t]he Institutions shall practice full mutual cooperation" (emphasis added).

The basic institutional setup is complex, as is everything else in the European Union. Article I-18, Section 2 mentions five institutions:
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the European Parliament,
the European Council,
the Council of Ministers,
the European Commission, and
the Court of Justice.  

This arrangement is, of course, more complex than the traditional division of three institutions representing the three powers: legislative (Congress), executive (president), and judiciary (the Supreme Court).

The role of the European Court of Justice may be compared to that of the Supreme Court of the United States. The Commission is roughly equivalent to the president and the cabinet. Congress could be analogized to the Parliament and the Council of Ministers as the two legislative chambers of the Union. The European Parliament would be the equivalent of the U.S. House of Representatives, and the Council of Ministers is comparable to the U.S. Senate. But the separation of powers becomes blurred when we take into account the fact that the Council of Ministers is also an executive body, competing in this respect with the Commission, and that the European Council is a highly political, representative body, with a president that shall "ensure the external representation of the Union on issues concerning its common foreign and security policy," thus competing with the president of the Commission. There are more inconsistencies. For instance, the Foreign Minister is a vice-president of the Commission, but he shall carry out the common foreign policy "as mandated by the Council of Ministers" although he will be bound by the Commission's procedures.

Besides these five basic "institutions," there are "other institutions and bodies" (heading of Chapter II in Title IV of Part One): the European Central Bank, the Court of Auditors, the Committee of the Regions, and the Economic and Social Committee, as well as advisory bodies. Of course, each of these bodies and institutions may set up "auxiliary" bodies, such as the committees set up by Parliament, the Council of Ministers and the two advisory committees, and the agencies established by the Commission in order to carry out its executive responsibilities.

104 Id. pt. I, art. 18, para. 2.
105 Id. pt. I, art. 21, para. 2.
106 Id. pt. I, art. 27.
107 Id. pt. I, tit. IV, ch. II.
The Union acts through legal provisions comparable to the acts of the national states. Under the existing EC Treaty, the names of the legal acts are rather quaint: regulations, directives, resolutions, and advisory opinions (Article 249 of the 2000 EC Treaty). The draft constitution attempts to adapt the legal terms to the current names given to legal acts in the member States: laws, framework laws, decisions, recommendations, and opinions. There is a rough correspondence between the new terminology and the existing legal acts.

The draft constitution strengthens the lawmaking powers of Parliament. While, until now, most important European legislation didn’t always require the participation of Parliament, now, as a general rule, European laws (the former “regulations”) and European framework laws (the “former directives”) shall be adopted jointly, “on the basis of proposals from the Commission, jointly by the European Parliament and the Council of Ministers. If the two Institutions cannot reach agreement on an act, it shall not be adopted.”

There is also the possibility, however, that laws and framework laws are adopted by one of the two institutions with the “participation” of the other.

A group of member states may also have the initiative to introduce laws. The Parliament, on the other hand, doesn’t have such a right of initiative, contrary to the existing constitutional traditions.

VI. THE POLICIES OF THE UNION

All through this lecture, I have mentioned the fact that the European Union is not a state. As a result, it can only carry out the functions that the member states have assigned to it. Part three of the draft constitution refers to the policies of the Union.

A basic principle applicable to all the policies of the Union is the principle of non-discrimination between citizens of the different member states. Discrimination on the basis of sex, race, ethnic origin, religious belief, physical
handicaps, age, or sexual leaning is also forbidden.\textsuperscript{114} Special attention is
given to the principle of equality between men and women.\textsuperscript{115}

The principle of non-discrimination by reason of nationality doesn't prevent
the maintenance of some measures to control the flow of people across the
internal frontiers of the Union, as well as special requirements for non-
nationals in the areas of social security and public medical care.\textsuperscript{116} There are
also some restrictions on the right to vote in national elections, which, in
principle, are only open to citizens of the respective member states.\textsuperscript{117}

The core policy of the European Union is the setting up of an internal
market, which is defined as a space without internal frontiers where the free
flow of goods, people, services, and money is guaranteed. Around this core
policy, we find other supporting policies, such as an economic and monetary
policy, and policies in the areas of labour and social welfare, regional aids,
farming, fishing, environment, consumer protection, transportation, utilities,
research, and energy. There are also some provisions on the control of the
external frontiers, right of asylum, immigration and police, and judicial
cooperation. The Union is also entitled to coordinate and assist the member
states in areas of public health, industry, culture, education, professional
training, youth, sport, civil protection, and administrative cooperation.

VII. THE EXTERNAL RELATIONS

Each state is free to conduct its own foreign policy and its normal external
relations. Member states send and receive ambassadors, sign international
agreements, wage war, and declare peace on their own without even consulting
the other members of the Union. Thus, some member states have decided to
send troops to help the United States in Iraq (Britain, Italy, Spain), while others
(Belgium, France, Germany) have chosen to stay neutral. Britain and France
are permanent members of the UN Security Council, while other members of
the Union are now elective members (Germany and Spain). The Union, as
such, is not a member of the UN, and, for that matter, of most international
organizations. It is only a member of those organizations where it has received
delegated powers from the governments, such as the World Trade Organization
(WTO) or the Food and Agricultural Organization (FAO). But even there, it

\textsuperscript{114} \textit{Id.} pt. III, art. 8.
\textsuperscript{115} \textit{Id.} pt. III, art. 2.
\textsuperscript{116} \textit{Id.} pt. III, art. 9.
\textsuperscript{117} \textit{Id.} pt. III, art. 10.
might have to share responsibility with representatives of member states when there are areas of competence left in the hands of the states.

The Union sends and receives "permanent representatives," which, in fact, are ambassadors but enjoy a lower diplomatic rank than regular, inter-state ambassadors. It can also sign treaties with other states and international organizations whenever it enjoys material competences: trade, farming, fishing, transportation, foreign aid, or research, for instance.

The Union and the member states are in the process of developing a Common Foreign and Security Policy (CFSP).\textsuperscript{118} The CFSP isn't designed to replace the different national foreign policies, but rather caters to "the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions."\textsuperscript{119}

The responsibilities for the CFSP are shared by the European Council, which "shall identify the Union's strategic interest and determine the objectives of its Common Foreign and Security Policy,"\textsuperscript{120} and the Council of Ministers, which "shall frame this policy within the framework of the strategic guidelines established by the European Council."\textsuperscript{121} The CFSP shall be put into effect by the Minister of Foreign Affairs and by the member states, using national and Union resources.\textsuperscript{122} Member states are only bound to consult each other so that their actions may "converge."\textsuperscript{123} The European Parliament is only "consulted,"\textsuperscript{124} and the Commission has a limited supporting role.\textsuperscript{125}

As a part of the CFSP, the development of a Common Security and Defence Policy (CSDP) has been foreseen.\textsuperscript{126} So far, however, little progress has been achieved in this area. Some partial agreements have been concluded between some member states on areas such as military procurement (the "letter of intent," for instance) or common military missions (Macedonia, Congo).

A European Corps of different national military units has its headquarters in Strasbourg, France. Mr. Solana, in his triple capacity of Secretary General of the Western European Union (WEU), Secretary General of the Council of

\textsuperscript{118} Id. pt. I, art. 39.
\textsuperscript{119} Id. pt. I, art. 39, para. 1.
\textsuperscript{120} Id. pt. I, art. 39, para. 2.
\textsuperscript{121} Id.
\textsuperscript{122} Id. pt. I, art. 39, para. 4.
\textsuperscript{123} Id. pt. I, art. 39, para. 5.
\textsuperscript{124} Id. pt. I, art. 39, para. 6.
\textsuperscript{125} Id. pt. I, art. 39, para. 7.
\textsuperscript{126} Id. pt. I, art. 40.
Ministers of the Union, and High Representative for the CFSP, has brought the logistic organization of the WEU within the fold of the European Union. But progress in this area is slow and subject to sudden upheavals, as the recent Iraq crisis has shown. An attempt by some member governments (Belgium, France, Germany, and Luxembourg) to set up a permanent military structure (a "European Defence Union") with headquarters in Brussels, has encountered at first fierce resistance from other members of the Union which fear that such an arrangement will undermine NATO and the privileged military cooperation between Europe and the United States. More recently, those fears appear to have been allayed, and a European headquarters is now being contemplated, in close cooperation with NATO headquarters in Europe.

VIII. CONCLUSIONS

On the 4th of October, 2003, a conclave of representatives of the member governments and some European institutions (Commission, Parliament) took place in Rome. The conclave marked the beginning of the IGC that should write the final draft of the new treaty of the Union before the 1st of May, 2004. At this stage, it is difficult to foresee the outcome of this new IGC. The president of the Convention, Mr. Giscard d'Estaing, and the European Parliament have stated their preference for leaving the draft constitution basically unchanged, for fear of unravelling the whole work of the Convention. This was also the opinion of the heads of state and government of the three most important member states, Blair, Chirac, and Schroeder, when they met in Berlin on the 20th of September, 2003.

By contrast, the Commission and some members and candidate members are in favour of introducing fundamental changes, although for different reasons. The Commission and the smaller member states want a commissioner for each country. Poland and Spain are asking to keep the veto powers granted to them by the Nice Treaty. Some smaller states, such as Malta, would like to have more seats in Parliament. Poland and Spain are supporting the request by the Pope that a reference to God and Christendom is included in the constitution. Other states have some claims regarding the financing of the Union, neutrality, or foreign policy.

It is difficult to foresee at present what will happen at the Convention. In any case, there are two major hurdles to the further development of a strong and solid European Union: the requirement for unanimity to adopt decisions
on the financing of the Union and the implementation of the CSDP. Until, if ever, a decision is taken to allow decision-making by majority voting in those two areas, the Union will continue operating as a loose confederation of sovereign national states, somewhat reminiscent of the former Holy Roman Empire that for a thousand years, between Charlemagne and the emperors of Austria, attempted to maintain the unity of Europe without much effective results.

The European presidency of the Council of the Union was unable to reach a conclusion to the IGC before the end of 2003. The political events of 2004 (elections in Spain, Greece, Luxembourg, and Poland, elections to the European Parliament, appointment of a new Commission, and discussion of the future financial perspectives) will make it difficult to reach a consensus during the next few months. It is still hoped, however, that the Dutch presidency of the Council in the second half of 2004, will be able to clinch a deal, as it successfully did with the previous Treaties of Maastricht in 1992, and Amsterdam in 1997.

127 Id. pt. I, art. 53, para. 3.
128 Id. pt. I, art. 40.