ARTICLES

The European Constitution: Notes on the National Meeting of German Public Law Assistants

By Daniel Thym[*]

A. Introduction

Each academic culture has its own customs and rituals. In German public law, the annual meeting of public law professors is much more than a conference. Together with their Swiss and Austrian counterparts, German public law professors have met annually since 1922 (with the exception of 1932-48) to discuss contributions carefully prepared and presented by selective speakers, which are meticulously analyzed by their audience. Failure in the eyes of colleagues may ruin an academic career, although participants report that the traditional rigidity has been eased in recent years.[1] Given the prestige and exclusivity of the meeting, it is not surprising that it was copied by Germany's university assistants in public law, who under the German university system often have to wait until the end of their thirties to step out from the shadow of their "academic fathers" and obtain professional independence as professors in their own right. Thus, "young" German public law assistants – in partnership with their Austrian and Swiss counterparts – have also been meeting regularly over the past 45 years to debate various topics of public law and position themselves within the aspiring next generation of public lawyers; and the 2005 meeting in the Westphalian city of Bielefeld signals that the debate on German public law will indeed be enriched by some promising new scholars.

The topic of this year's debate deserves attention beyond the domestic professional circles in German-speaking universities. On 9 – 12 March 2005, the public law assistants assembled to discuss "The European Constitution – Constitutions in Europe". The choice of topic needs no further explanation after the signing of the Treaty establishing a Constitution for Europe on 29 October 2004 in Rome

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[1] The proceedings are closed to outsiders; the reports and minutes of the discussion are published in the series VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER VVDStRL. More information on the association is available online at http://www.uni-wuerzburg.de/dreier/staatsrechtslehrer.

(hereafter: ConstEU). The recent signing meant that the individual contributions did not focus on the nitty-gritty of Treaty articles, concentrating instead on general lines of development and underlying theoretical themes (arguably a very German approach). Surprisingly, many issues which, in recent years, have dominated the debate on European constitutionalism were neither featured prominently in the papers given nor in the numerous oral interventions during the long – and fruitful – discussion of 45 minutes that followed each presentation. In particular, the various specificities of European constitutionalism (which Joseph H.H. Weiler, one of the most popular academic references in Bielefeld, has summed up in the concise formula of "Europe's constitutional *Sonderweg*"[2]) were not much disputed. The issue of legal interaction of public authority at different levels of government in a system of multilevel constitutionalism,[3] like the question of whether Europe is structurally ripe for the adoption of a constitution,[4] seemed to trouble the next generation of German public lawyers as much as their predecessors. They may have simply learned to live with the inherent dichotomies of European integration, which were already being discussed when they started their studies of law in the 1990s.

B. European Identity

The question of European identity was among the most heated topics of debate, with three divergent positions taken by Stefan Haack (Leipzig), Michael Dröge (Frankfurt/Main) and Nico Krisch (Oxford), and alternative views being voiced in the discussion. The classical perspective of the European nation state was presented by Haack, whose paper on "Europe's dual finality" acknowledged the achievements of the European Constitution in reforming the institutional balance. Questions of institutional design were not the heart of the matter for Haack, who was more concerned with the "political identity" of Europe's citizens, who may have different private identities and political loyalties towards their local community, region, state or continent. However, each citizen may ultimately develop only one "exclusive feeling of belongingness" which supercedes other

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[2] Joseph H.H. Weiler, *In Defence of the Status Quo: Europe's Constitutional* Sonderweg, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7 (JOSEPH H.H. WEILER/MARLENE WIND EDS. 2003).

[3] See for example Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, 36 COMMON MARKET LAW REVIEW (CML REV.) 703 (1999) who uses the term 'multilevel constitutionalism' to describe in English his concept of *Verfassungsverbund* presented at the 2000 meeting of the "senior" public lawyers in Leipzig, published as Ingolf Pernice, *Europäisches und nationales Verfassungsrecht*, 60 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER (VVDStRL) 148, 163-86 (2001). On the interaction of the different layers of government, see also FRANZ MAYER, KOMPETENZÜBERSCHREITUNG UND LETZTENTSCHEIDUNG (2000).

[4] Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUROPEAN LAW JOURNAL (ELJ) 282 (1995).

political identities and loyalties, as these may not be not based on the same "status of complete and unconditional loyalty and independence".[5] Haack is not willing to challenge or modify this classic notion of political identity (or sovereignty) in the light of developments in Europe after WWII. Although this is currently not the case, sovereignty may at some point shift from the Member States to the European Union but it will never be shared or split permanently; as this would contradict the quasi-natural orientation of ultimate loyalty towards one independent and sovereign political entity. Needless to say, his postulation of the citizens' willingness to bear sacrifice and defeat to prevent the break-up of the political community provoked heated criticism in the debate, during which Haack refused to qualify himself as a representative of the controversial Schmittian school of German state theory, which surfaced a couple of times during interventions at the conference.

Michael Dröge (Frankfurt/Main) also chose a traditional (albeit different) starting-point by identifying the argument on "European identity" as a placeholder of the quest for meta-legal preconditions of constitutionalism.[6] In contrast to Haack, his methodological approach was rather "modern", and while undoubtedly it was influenced by the weighty deliberations of Armin von Bogdandy at the 2002 meeting of "senior" public lawyers,[7] it also had an additional focus on *Kulturverfassungsrecht* (cultural constitutional law), a concept propagated by Peter Häberle.[8] According to Dröge, the (collective) *cultural identities* of Europe's citizens as individuals, nationals and Europeans complement their *political identity* as subjects to and ultimate source of legitimacy of public authority at the various levels of governance – with the latter currently being activated in the national referenda on the European Constitution, which may, reflexively, contribute to the strengthening of the European dimension of political identity. This plurality of identities, symbolically encapsulated in the European Union's new motto "unity in diversity", entails the relativity of European identity "in the making". This dynamic and sectoral understanding of European identity may not satisfy those in search of a definite answer. However, Dröge might be right to conclude that "Europe is not what used to be, but what its citizens make out of it."

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[5] Haack's thesis 6, published beforehand at http://www.assistententagung.de.

[6] On various occasions, Dröge explicitly aligned himself with the writing of Dieter Grimm (note 4) in this respect.

[7] See for his paper on "European and national identity: integration through constitutional law" Armin von Bogdandy, *Europäische und nationale Identität: Integration durch Verfassungsrecht?*, 62 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER (VVDStRL) 156-193 (2003); of course, we will have to wait for Dröge's written version to identify the exact degree of influence.

[8] See PETER HÄBERLE, VERFASSUNGSLEHRE ALS KULTURWISSENSCHAFT (2ND ED. 1998); for more, see Hoffmann,, *Häberle and the World of the Constitutional State*, 4 GERMAN LAW JOURNAL 61-69 (2003).

The existence of a constitution does, in the general understanding of the term, presuppose a certain density of public authority at the level of government under analysis, following by and large the pattern of modern constitutionalism developed with the French revolution (in a unitary state) and the establishment of the United States (as a federal state). Against this background, the European Constitutional Treaty is – as Nico Krisch (Oxford, formerly New York and Heidelberg) argues – indeed a "nostalgic" project trying to transplant the pattern of Western constitutionalism to the European Union, struggling to safeguard its achievements in the age of globalization. To Krisch's merit, he reminds his German colleagues that political and social theory in the Anglo-Saxon community calls into question the very foundations upon which this transplant of constitutionalism from the nation state to the European Union rests: he highlights the emerging "polycentricity" of modern societies, in which various levels and institutions of public and private governance are non-hierarchically and often asymmetrically interwoven.

However, and with respect to European constitutionalism, I do not share his conclusion that the classical organization of public authority, enshrined in the concept of constitutionalism, should be overcome in this complex picture of multi-level governance. In my view, Krisch builds up an ideal vision of a classical (statal) constitutionalism in the light of which the European Constitution necessarily fails for being "superficial". He is certainly right that the European Constitution does not establish or confirm European primary law as "the effective and all-embracing source of public authority". The European Constitution does indeed fall short of its historic models (which, under the influence of European law, have long ceased to exercise these functions in the EU Member States). The written version might shed more light on the question how exactly he positions himself vis-à-vis the various academic authors who have shown in recent years that (European) constitutionalism beyond the state is arguably a viable option with a sound theoretical basis.[9] Likewise, the findings of modern liberal theory, summarized so elegantly by Krisch with the term "polycentricity" (which was repeatedly taken up

[9] See among many Miguel Poiares Maduro, *Europe and the Constitution: What if this Is as Good as It Gets?*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE, 74-102 (JOSEPH H.H. WEILER/MARLENE WIND EDS. 2003), Paul Craig, *Constitutions, Constitutionalism, and the European Union*, 7 EUROPEAN LAW JOURNAL 125-150 (2001), Ingolf Pernice (note 3), 155-163 and my contribution: Daniel Thym, *European Constitutional Theory and the Post-Nice Process*, in THE TREATY OF NICE, ENLARGEMENT AND CONSTITUTIONAL REFORM 147-180 (MADS ANDENAS/JOHN USHER EDS. 2003). Of course, the written version of Krisch's contribution, which is not available yet, might shed more light on this question.

during the conference), should certainly be paid more attention by (German) public law discourse.[10]

C. Symbolism

One means of enhancing European identity is the promulgation of its "brand" through common symbols. Lawyers may usually not pay much attention to symbols and constitutional rules on them, since their "hard" legal content is naturally limited; however, the work of other academic disciplines shows that historic tradition and collective identity may at least to some extent be reinforced, shaped and possibly even invented through the establishment of common myths and symbols.[11] In the light of the prior identification of the paucity of European identity, Daniel Krausnick (Erlangen-Nürnberg) complemented the picture with his analysis of European symbols enshrined in the future Article I-8 ConstEU. Among the symbols enlisted there, the European "star-banner" with "twelve golden stars on a blue background" is certainly the most widely renowned symbol of European integration, even if it was taken over by the EU institutions from its cousin in Strasbourg, the Council of Europe, only recently (in historic terms).[12] The Union's new anthem, the "Ode to Joy" from Beethoven's Ninth Symphony,[13] on the contrary, is arguably played too widely in order to be associated closely with the European Union.[14] Also, the choice of the European currency as a "symbol of the Union" may surprise traditionalists, but the often repeated – and probably overestimated – hope that the euro will forge the European citizens together explains its elevation.

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[10] See, in this respect, also his contribution "American hegemony and the liberal revolution in international law": Nico Krisch, *Amerikanische Hegemonie und liberale Revolution im Völkerrecht*, 43 DER STAAT 267-297 (2004).

[11] See the influential collection of essays in ERIC HOBSBAWN/TERENCE RANGER (EDS.): THE INVENTION OF TRADITION (1983).

[12] In case one is in need of a graphic or digitalized reproduction of the European flag, possibly in combination with emotional settings such as children playing on the beach, one does not need to search long: the European Commission is happy to provide them free of charge at http://www.europa.eu.int/abc/symbols/emblem/index_de.htm.

[13] http://www.lvbeethoven.com/Oeuvres/Music_OdeToJoy.html.

[14] Art. I-8 ConstEU states that the anthem "shall be based" on this piece of music, which made Krausnick consider whether the Union's anthem is an instrumental version (probably the correct answer) or comprises also the lyrics, and if so whether only the original German language version shall be the authentic version (which would conflict with the Union's motto...).

"Europe day" on 9 May has been "celebrated" throughout the Union for some years in memory of Robert Schuman's declaration on coal and steel co-operation in 1950, although most citizens of the Union are probably unaware of its existence. In that respect, the new constitutional status of "Europe day" may not change much – and the opportunity to reach the hearts of Europe's working masses by establishing a Europe-wide holiday was not seized by the Convention. Eventually, the fifth symbol enlisted in the future Constitution, the Union's motto "united in diversity", is the only real innovation, which – as Krausnick rightly points out – is a deliberate choice to counter the fears of a European "super-state" with a subtle delimitation from the US coat of arms and its motto *e pluribus unum*. However, Krausnick's most controversially discussed thesis did not relate to the Union's official symbols, but was instead concerned with the question of whether the elaboration and eventual adoption of the "Constitution for Europe" was in itself a symbol capable of reminding the citizens of their European identity. The European Constitution may therefore contribute to the enhancement of European identity, thereby adding substance to its societal basis as a self-fulfilling prophecy (or symbolising its failure in the case of non-ratification) – a thesis shared by Krausnick and the author of this essay.[15]

One of the few topics of the constitutional debate that grasped the thoughts of "ordinary" citizens during the European Convention and the Intergovernmental Conference was the dispute on the *invocatio dei*, which is infamously hidden behind translation variations on the "spiritual" and/or "religious" heritage of Europe in the preamble of the Charter of Fundamental Rights and continues to feature as the *ouverture* of the second part of the Constitution, while the Constitution's "real" first preamble now refers to Europe's "religious inheritance" in all linguistic versions.[16] Of course, the legal consequences of preambular lyrics are limited; and the literary quality of the different texts may be questioned. But given the popular resonance, it was very helpful that Hedwig Kopetz (Graz/Austria) shed light on the legal role of preambles in the European constitution and beyond, particularly in light of the European idiosyncrasy of two different preambles introducing the first and the second part of the Constitution. The Constitution's second preamble is also the place where the most famous European Treaty citation of Europe's "ever closer union" has survived the constitutional process unchanged, while the first preamble

[15] But see the heavy critique of Europe's iconography by Ulrich Haltern, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination*, 9 EUROPEAN LAW JOURNAL 14, 30 (2003).

[16] The preamble of the Charter of Fundamental Rights states in French, English and most other linguistic versions that Europe is conscious of its "*spiritual* and moral heritage" or "patrimoine *spirituel* et moral", while – amongst others – the German and the Polish version include a direct reference to religion when mentioning Europe's "*geistig-religiösen* und sittlichen Erbe" or "*duchowo-religijnego* i moralnego dziedzictwa".

now refers to the decision of European citizens to forge a common destiny "united ever more closely".[17]

D. Evolution and Interpretation of the European Constitution

The remainder of this review takes up the theoretical focus of the Bielefeld conference, which explains its late focus on two of the most interesting papers, those by Jürgen Bast and Philipp Dann from the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. Both authors combine theoretical reasoning with specific considerations on the evolution and interpretation of European constitutional law. More specifically, Bast identifies the potential of the Constitutional Treaty in presenting the Union as a single actor and entity through the abolition of the opaque pillar structure and the formulation of common principles in the first part of the constitution. However, a closer look at the specific policy provisions in part 3 of the Constitution reveals various specificities that sit in striking contrast to the ambition of constitutional unity. In particular, the Common Foreign and Security Policy (including defence), economic policy co-ordination, monetary union, competition policy and – to a lesser extent – justice and home affairs preserve a sector-specific institutional layout differing from the "ordinary legislative procedure" as the orthodoxy of the "community method" (Articles I-34, III-396 ConstEU). They are illustrative of the continued complexity of the Constitutional Treaty which is furthered by 36 protocols attached to the Constitution and the continued asymmetry (or asyncronicity) of European integration through the non-participation of some Member States in specific policy areas.[18]

Bast rightly concludes that constitutional lawyers have to accept the "constitutional compromises" at the basis of sector-specific institutional rules. In particular, the principles laid down in part 1 of the Constitution are normatively of no greater value or hierarchically supreme to the specific regimes in part 3. The original idea of splitting European primary law into two parts with different legal statuses and the introduction of a facilitated amendment procedure for the second part was

[17] It should be noted that the reference to the "common destiny" of the European citizens is no innovation of the Constitution, but did already feature in the Treaty establishing the European Coal and Steal Community of 18 April 1950, the legal "birth certificate" of European integration, which expired in July 2002 and stated in its preamble that it was resolved "to lay the foundations for institutions which will give direction to a *destiny henceforward shared*."

[18] On this aspect of European integration and its incorporation in the overall framework of European constitutionalism *see* DANIEL THYM, UNGLEICHZEITIGKEIT UND EUROPÄISCHES VERFASSUNGSRECHT (2004) – online information at http://www.thym.de/daniel/ungleichzeitigkeit.

deliberately abandoned by the Convention.[19] Nonetheless, the identification of an "ordinary legislative procedure" in the Constitution creates a political momentum in favour of the application of this procedure in all policy areas which, as Bast notes, lays the burden of proof against the application of the Community method with those who oppose its extension. As a "reflexive constitution" (Bast) the European Constitution therefore provides the template for its own reform. Of course, certain policy sectors such as foreign policy, the co-ordination of macro-economic policies or the administration of the single currency are structurally different from the establishment of a single market, whose approximation of laws was crucial for the ripening of the Community method. The decisive battle over the institutional design of policy areas which do not (yet) fall under the legislative procedure will – in the framework of Europe's "reflexive constitution" – therefore be fought over the argument as to whether the non-application of the Community method is based on objective and structural distinctions.

Dann chose a topic which lies behind any legal reasoning, but is too often neglected by lawyers: the methodology of European constitutional law. While most writing on this issue focuses on the (not always clear) methodology of the European Court of Justice, Dann deliberately stepped back and considered the issue more generally, including the perspective of academia, practitioners and other members of the "open society of interpreters".[20] One general remark at the outset was particularly important, since it challenged the rationale of common methodology. At first sight, it appears obvious that a common set of rules, here the European Constitution, should be accompanied by a common methodology for its interpretation. But we should always be aware that a common methodology entails a unifying momentum – which may not always be welcome by everyone, given the heterogeneity of Europe. At the same time, Europe's diversity underlines the importance of Dann's reflection on methodology, since a common approach is better established at the national level, where it usually exists even in the absence of conscious reflection as the result of the uniform socialization of lawyers in education and practice.

More specifically, Dann had a closer look at the building-blocks of a trans-European methodology with regard to interpretation, comparison and systematization. Among the manifold lines of arguments, the multilingual character of European law, the importance of teleological interpretation in a legal

[19] See the original proposal in a study mandated by the European Commission: Robert Schuman Centre for Advanced Legal Studies at the European University Institute, Draft Basic Treaty of the European Union (2000).

[20] See Peter Häberle, *Die offene Gesellschaft der Verfassungsinterpreten* (1975), in PETER HÄBERLE, VERFASSUNG ALS ÖFFENTLICHER PROZESS 155 (3RD ED. 1998).

order established to lead to an "ever closer union" and the necessity of extending comparative analysis beyond the wording to the legal, political, social and economic context ("contextualization") deserve particular attention – with space unfortunately precluding a more detailed discussion of Dann's different findings. The challenge to integrate interdisciplinarity into the analysis of European law "in context" was underlined by the paper of Tina Kempin (Zürich/Switzerland) on the economic aspects of federalism in Europe. She presented the concept of Functional, Overlapping, Competing Jurisdiction or FOCJ, which tries to optimize the allocation of resources by establishing functional schemes of co-operation on a spontaneous and voluntary basis for the achievement of certain common objectives, such as the common construction and management of an airport, roads, collective garbage-management or the provision of other public services. Unfortunately, it remained unclear the degree to which her otherwise interesting presentation related to the European Constitution.

E. Human Rights' Protection

The effective protection of human rights is probably among the most valuable contributions of German jurisprudence and academia to the construction of the European legal order. The famous *Solange*-cases of the German *Bundesverfassungsgericht* (Federal Constitutional Court)[21] undoubtedly played an important part in the development of the European Court of Justice's (ECJ) case law on the integration of human rights into the European legal order.

Indeed, the integration of the Charter of Fundamental Rights (CFR) into the European Constitution – initiated during the German Presidency in the first half of 1999 –as its legally binding part 2 brings the development of EU human rights full circle.[22] Unfortunately (or fortunately for those who welcome the "modernity" of the CFR, particularly in the areas of bio-ethics and administrative rights under Articles II-63(2) and II-101-2 ConstEU), the CFR does not resolve the debate on human rights protection in Europe. Stefan Lorenzmaier (Augsburg) correctly notes that the past debate on the gap in human rights protection resulting from alleged deficiencies at the EU level gives way to a potential overlap between the CFR, adjudicated by the ECJ in Luxembourg, and the European Convention on Human

[21] Decision of 29 May 1974, Case BvL 52/71 *Solange I*, 37 BVerfGE 271 (for a English translation see 540 *Common Market Law Reports* [1974]) and Decision of 22 October 1986, Case 2 BvR 197/83 *Solange II*, 73 BVerfGE 339.

[22] On the *solange*-jurisprudence, the Charter and the ECHR Daniel Thym, *Charter of Fundamental Rights: Competition or Consistency of Human Rights Protection in Europe?*, XI FINNISH YEARBOOK OF INTERNATIONAL LAW 11-36 (2002).

Rights (ECHR), to which 46 European nations are state parties and which is interpreted by the European Court of Human Rights in Strasbourg.

However, it is in my view not necessary to have recourse to Article 31(3)(c) of the VIENNA CONVENTION ON THE LAW OF TREATIES[23] (to which the ECJ usually does not refer for the interpretation of EU primary law) in order to establish an obligation of due co-operation between the different European human rights tribunals. The combination of Articles II-113, II-112(3) ConstEU, plus the reference to the ECHR and the relevant case-law of the Strasbourg court in the explanatory notes of the Presidium,[24] arguably establish the same obligation of due respect postulated by Lorenzmaier. Potential discrepancies will of course be limited further, when the European Union accedes to the ECHR as foreseen in Article I-9(2) ConstEU. In the final paper, Matthias Köngeter (Frankfurt/Oder) gave an intelligent and detailed overview of the legal problems in national and international law associated with this accession. One aspect is of particular interest against the background of the recent judgement of the *Bundesverfassungsgericht* on the possible non-respect for the ECHR in case of conflict with supreme German human rights.[25] Whenever the EU Member States are bound by EU law while "implementing Union law" (Article II-111(1) ConstEU), the ECHR enjoys supremacy over national law as an "integral part of the European legal order".[26] In this case, the ECHR benefits from the general non-application of German fundamental rights to EU law under the *Solange*-jurisprudence of the *Bundesverfassungsgericht*.

F. Outlook: European Perspectives?

The surprising consequence of the European Unions' accession to the ECHR on the latter's legal effect in the German legal order (as presented above), shows that there are many fascinating aspects of European constitutional law left to discover for the next generation of German public lawyers in future. Unfortunately, it will take some years before the German public law assistants return to the issue of the European Constitution at their annual meetings (if the Constitution ever enters into force). In 2006, they will instead convene in Vienna to discuss the interaction of

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[23] http://www.un.org/law/ilc/texts/treaties.htm.

[24] These Articles "provide guidance" for the interpretation of the CFR according to the preamble of the Constitution's part 2 and Art. 112(7) ConstEU.

[25] See *Bundesverfassungsgericht*, Judgement of 14 October 2004, Case 2 BvR 1481/04 – for the decision in German and English, go to: http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104 .html; it has also been published in NEUE JURISTISCHE WOCHENSCHRIFT 3407 (2004).

[26] On the integration of international law in the EC/EU legal order see ECJ, Case 181/73, *Haegeman*, 1974 ECR 449.

"law and medicine", whose equal importance is beyond doubt. The prospect of a European Constitution might be an impetus to consider new and additional fora for the academic exchange of the new generation of public lawyers beyond the German-speaking world. Despite the differences in the national university systems, which entail a limited parallelism and comparability of academic careers, young European public lawyers might be encouraged to come together in a similar setting. They could learn from the experience of existing fora, such as the International Workshop for Young Scholars (WISH) whose fourth call for papers is open until the end of May 2005.[27] The quality of the contributions presented in this review, the perfect organization by the assistants of Bielefeld University and the involvement of the discussants argue that an attempt to establish a European meeting would be worth the effort.

[27] The WISH is co-organized for Ph.D. candidates and young academics who have obtained their Ph.D. recently by the European Law Journal, the University Aix-Marseille III and the Colleague of Europe at Natolin in Aix-en-Provence. For its 2005 call for papers see http://pro.wanadoo.fr/ceric/colloques/RIJC/call2005.doc.