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CONSTITUTIONAL SEDIMENTATION

On dit souvent que le temps ne respecte pas les entreprises tentées sans lui

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At the time of its conclusion the EEC Treaty was held by some experts to be opaque and unworkable. There was ambiguity in its central concept of the 'Common Market'.¹ When the Single Act came it was disqualified as the worst imaginable piece of drafting.² The Maastricht Treaty in its turn would be dismissed as incoherent and destructive tinkering.³

It was a matter of time before the EEC Treaty turned into a monument of clarity, with the Common Market its conceptual masterpiece.⁴ Likewise the Single Act in due course acquired the status of a marvel of precision.⁵ Human intelligence is slow to understand events if these take the form of documents. This is good; the time it takes will add to the document's authority.⁶ Thus given time the Union Treaty too will one day be praised by lawyers as a constitutional gem. The question is only whether time will be given. A rapid succession of modifications will prevent a docu-

1. Deniau, J.F. *L'Europe interdite*, Paris 1977, at p. 67: '...il ne pouvait y avoir accord que sur une ambiguïté ou un malentendu'. Deniau was one of the French government's key civil servants involved in the negotiations. For the divergence, see Küsters, H.J. *Fondements de la Communauté Economique Européenne* Luxembourg, 1990, pp. 358-359.
2. Pescatore, P. 'Some critical remarks on the "Single European Act".' *CMLRev.* 24 (1987), pp. 9-18; at p. 15.
3. Curtin, D. 'The constitutional structure of the Union: A Europe of bits and pieces' *CMLRev.* 30 (1993), pp. 17-70; at 67.
4. VerLoren van Themaat, P. 'Some Preliminary Observations on the Intergovernmental Conferences: The Relations between the Concepts of a Common Market, a Monetary Union, an Economic Union, a Political Union and Sovereignty' *CMLRev.* 28 (1991) pp. 291-318. According to Pescatore (*op. cit.*): the Single Act marks 'a sharp contrast with the original Treaty known for its sober end precise legal wording'.
5. The Single Act was praised by Jacques Delors as 'precise, which was not the case with the Maastricht treaty'. Quoted by Grant, J. *Delors. Inside the House that Jacques Built*. London, 1994. At page 75.
6. As Blaise Pascal observed about laws in general: 'he who is not used to contemplate the miracles of human imagination, will marvel at how just a century's time can bestow on them their magnificence and esteem' (*Pensées*, 294-60 - this author's translation).

ment from coming to rest.

In the following remarks the idea is to draw attention to some elements of time involved in constitutional matters and to some misunderstandings which may arise from overlooking it. This is not a simple exercise, since time has many appearances. Modesty is in order but it need not bring one to drop the subject altogether.⁷ Temporal elements of law are a standard subject of legal and constitutional doctrine.⁸ In Community politics the discourse of 'irreversibility' and the practice of deadlines are established instruments. The present piece however is not one of legal doctrine nor of practical politics but a venture into some unconventional paths. Its ambition is not to arrive at compelling conclusions but to foster discovery.

I. THE LAW'S DELAY

As a part of its fisheries policy the Community yearly allots catch quotas to different Member States. In the 1980's Spanish companies began to buy British registered vessels in order to serve themselves from the British quota. In response the British Parliament passed an Act confining the quality of a 'British ship' to vessels owned dominantly by British citizens, thus ostracizing tens of vessels.⁹ The Spanish contested this rule up to the House of Lords for conflict with Community law (freedom of establishment notably); the Lords referred the matter to the EC Court in Luxembourg. In the meantime the Spanish wanted an injunction to prevent being put out of business while waiting for the EC Court's ruling. The British government sought protection against this action under the Crown Proceedings Act of 1947 which established that no injunctions may be awarded in proceedings against the Crown. This request likewise found its way to Luxembourg and its judgment was to become known as *Factortame II*. It is a significant case. P. Craig considers the judgment and its aftermath as the culmination in a chain of cases concerned with sovereignty and the United Kingdom's membership of the EC.¹⁰

One way in which the case involves British constitutional standards is the following. Interim measures are court actions which are in a sense out of bounds of the law. In the way that the soccer goalie is restricted in his powers outside of his territory (no hands), the British judge may order injunctions against local and lower authorities only, not against the Crown nor against Parliament. There is a clear line involved and the restrictions answers the balance between politics and law in the protection of private interests.

The EC Court chose to disrespect the British constitutional standard and overrule it by its own constitutional logic, reasoning:

7. In his valedictory lecture Richard Lauwaars pointed to the quality of good timing needed to conduct negotiations successfully. Lauwaars, R.H. *Constitutionele erosie*. Groningen, 1994, pp. 23-24.
8. In the context of Community law see. e.g. Heukels, T. *Intertemporales Gemeinschaftsrecht. Rückwirkung, Sofortwirkung und Rechtsschutz in der Rechtsprechung des Gerichtshofes der Europäischen Gemeinschaften* Baden Baden, 1990. Lauwaars, R.H. The temporal Effect of a Declaration of Invalidity' in Schermers, H.G. a.o. (ad.) *Article 177 EEC: Experiences and Problems*, Amsterdam, 1987, pp. 313-316.
9. The Merchant Shipping Act of 1988.
10. Craig, P.P. 'Sovereignty of the United Kingdom Parliament after Factortame' in *Yearbook of European Law 11* (1992), pp. 221-255, at 221.

'that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of judgment to be given on the existence of the rights claimed under Community law. It follows (emphasis added) *that a court which in those circumstances would grant interim relief if it were not for a rule of national law is obliged to set aside that rule.*'¹¹

In a note to the judgment Richard Lauwaars criticized the fact that the EC court uses its own standards of 'direct effect' and 'priority' of EC law as a basis for extending the mandate of the municipal judge. A court of law, he argues, does not derive its mandate from the law but from the state. 'By itself the quality of direct effect ...creates no judicial competency'.¹² This comment highlights the way in which the EC Court relegates a constitutional matter as this one, involving a time lapse, wholly to the domain of law, purging it of any outside, non legal, ingredient.

In doing so the court follows Advocate General Tesauro's opinion and especially his remarkable argument on the *function* of law:

'Interim protection has precisely that objective purpose, namely to ensure that the time needed to establish the existence of the right does not in the end have the effect of irremediably depriving the right of substance, by eliminating any possibility of exercising it, in brief, the purpose of interim protection is *to achieve that fundamental objective of every legal system, the effectiveness of judicial protection* (emphasis added).'¹³

The philosophy involved deserves to be made explicit. I do not claim to know exactly what is the 'fundamental objective' of any legal order, that seems a vast though interesting subject. It may be something like 'contributing to a just and free, efficient and peaceful society'. But I suppose it is not, in isolation and in the absolute, 'the effectiveness of judicial protection'. By refusing to consider the time element as in some way prior to law and by annexing the judge's mandate to the realm of law, the Advocate General and the Court expressed a particular view of their own mission and of the law's function, amid other agents of order and structure. It is the view monopolizing European constitutional development by legal thinking and legal logic. Logic at the expense of time; law at the expense of politics.

It is no wonder that the power of the (municipal) courts to override national legislation on the authority of EC law was a sensitive matter especially in the UK as it seemed to be an invasion of the constitutional principle of Parliament's sovereignty. When the case came back to the House of Lords to be decided in the light of the EC Court's ruling the Lords nevertheless fully accepted this. Interim relief had to be made available, they held, against the Crown as a matter of Community law. The injunction was granted.¹⁴ Interestingly the Lords did not follow the phi-

11. 19 June 1990, case 213/89 R. v. *Secretary of State for Transport, ex parte Factortame Ltd.* ECR 1990, I-2433-2475, para. 21 at p. 2474.

12. SEW 1991, p. 480. Translation by the present author.

13. ECR 1990, I-2456, para. 18.

osophy behind the ruling, i.e., that it was entirely a matter of law and legal logic. Instead they chose to interpose a key *political* element. They reasoned that Parliament itself had voluntarily accepted the limitation of its sovereignty implied in the supremacy of EC law when it enacted the European Communities Act of 1972.

'If the supremacy within the European Community of Community law over the national law of the Member States was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community'¹⁵

Everything the EC Court takes the liberty to do (concerning Britain) derives from this Act of Parliament and the EC Court's boldness to arrogate British judicial mandates is not to be blamed on this nor on the British courts but on Parliament itself.¹⁶

This view is incongruent with the EC Court's constitutional logic that EC law represents an irreversible development away from the basics of international law and the members are no longer the treaties' masters. Is the incongruence fatal? It probably would be, if immediate, non-temporal logic were decisive, as is held by Tesouro. But it need not be. One may be reminded of Hamlet's words (from the 'to be or not to be' monologue):

'For who would bear the whips and scorns of time
Th'oppressor's wrong, the proud man's contumely,
The pangs of disprized love, *the law's delay*...'¹⁷

and realize that excluding time from the work of law, however painful the delay, may be self defeating. Respect for time and its delay will bring the law to interact and integrate with worlds of logic and reason different from its own. Thus, concerning our subject, it may allow a *common* constitutional doctrine between community and municipal lawyers and their courts to develop.

II. A REASONABLE TIME

At the end of March 1994, a quarrel between the Union's members was settled concerning the new blocking minority in EC voting following the Union's en-

14. *Factortame Ltd v. Secretary of State for Transport* [1991] 1 All ER 70, 111, 118 (see Craig, *op. cit.* note 110).

15. *Factortame*, note 14, 107-8.

16. Loss of sovereignty to the EC is consequently only temporary and can be undone by later Parliaments, either by withdrawing from the Union or by stating expressly that certain national norms are meant to be in disagreement with Community rules. The temporal limitation is the only and fundamental qualification of Parliament's sovereignty. See Hartley, T.C. *The Foundations of European Community Law* Oxford, 1994 (3), pp. 263-4; he maintains that the position is the same in most of the other member states. '...Community law applies, not by virtue of its own inherent validity, but by reason of rules of national law'.

17. 3.1.72-74 (emphasis added). An American Law and Literature scholar, D.J. Kornstein, contends that *delay* is essential in Shakespeare's idea of law. He claims it even announces the very idea of the rule of law (in Hamlet: the delay from immediate vengeance). *Kill all the Lawyers? Shakespeare's Legal Appeal*, Princeton 1994, pp. 92 and 94.

largement (Article 148(2) EC). With the old total of 76 votes, 23 put up a block; on the other hand 54 affirmative votes would carry the vote. The calculus holds a number of constitutional guarantees. It prevents a coalition of the large members from outvoting the minors (the large members total 48 votes) and, second, requires a mere twosome of the five large members, supported by only one minor member, to block action.

In view of the accession of four new members and to account for the extra votes the calculus was adapted so as to maintain the blocking minority at 30 per cent: 27 out of 90 votes. But this ran into British and Spanish objections. Considering the blocking potential of this article to be its core function, these two members demanded that the block remain at 23 (of 90) instead of being enlarged to 27. The conflict was solved by way of the 'Pangalos compromise' reached in the Greek city of Ioannina at the end of March in 1994. This reads:

'If Members of the Council representing a total of 23 to 26 votes indicate their intention to oppose the adoption by the Council of a Decision by qualified majority, the Council will do all in its power to reach, within a reasonable time....a satisfactory solution that could be adopted by at least 68 votes...'¹⁸

This compromise was consequently affixed to the accession treaties by way of a Declaration by the Member States and one by the applicant countries.

The agreement may be appreciated in different ways, both as to substance and as to form. As to substance, at first sight it is simply one more temporary concession to the ever dallying British (it is supposed to lose effect with the next revision of the treaties). It also may be seen as an end to the reign of arithmetics in stretching Article 148(2) EC to fit the next enlargement.¹⁹ A closer look reveals strong similarities with the famous Luxembourg compromise of 1966 in which the French obtained a no go for the envisaged majority voting. This compromise also required 'a reasonable period' of extra effort to obtain wider (in this case full) agreement. This also was anathema to Community orthodoxy.

It is possible to find grace with both these formulas by looking at the time element they involve. The intended and practical effect of both compromises was the same: to gain time and restore room for negotiation. In a remarkable article by Colliard it is explained why negotiation should remain vital and central in running the Community. It is to bring in *politics*. In international affairs politics is not what it is in domestic affairs. It is not voting, it is negotiations. They provide the only way to wind up and overcome sectoral and limited (bureaucratic) concerns and find a veritably *general* agreement. There is no way to conceive of an international constitution without allowing a dominant role to plain negotiation.²⁰ If consequently a plea for *time* is held and granted it is not necessarily nor only to be seen as a concession made to the feet draggers. It could be understood as a plea to bring in politics and overcome bureaucracy.

18. OJ 1994 C 105/1. When Norway turned out not to join, the Decision was amended so as to bring the block to 26: OJ 1995 C1/1.

19. Cf Lauwaars, R.H. *Constitutionele erosie* Groningen, 1994, p.34 and the literature quoted there.

20. Colliard, C.A. 'L'irréductible diplomatique' in *Mélanges offerts à Pierre-Henri Teitgen*, Paris 1984, pp. 109-126; at 125 especially.

As to *form* there are likewise points of difference and of interest concerning the compromise. Its publication in the C-series of the Official Journal indicates that the Community bureaucracy refuses to consider the Council decision as a binding document. The same applies for the subsequent declarations affixing the text to the accession treaty. This is expressed in a separate statement of the Commission: '[the Conference declaration] is a political declaration which commits, in good faith, the 12 Member States to act according to it.'²¹

Is this an attempt to come to terms with such decisions? If so it is a poor one. It rather looks as if the Community constitutional system tries to immunize itself from foreign elements. From a more wordly point of view there is no doubt that this particular compromise embodies an agreement and is binding under international law.²² How can an agreement between members which is binding under international law be not binding under Community law? It is significant because the decision is one of the fast growing number of more or less unruly actions of the Union Council whose legal status under Community law is unclear and consequently comes to depend on international law at large.²³ This may be all right for international law but is no answer for the Union. Status questions concerning government acts are constitutional questions of the first order. As long as these are not drawn forcibly into the Union constitutional system to be worked out there, the latter, while gaining an increasing internal coherence and logic, distances itself from the outside world and from events at large.²⁴

III. A TEMPORAL DEVICE

In his valedictory lecture of 5 July 1994 entitled 'Constitutional erosion' Richard Lauwaars held that the European Council's position and powers are an encroachment of the European institutional structure and therefore damaging to the constitution. The European Council is the body of the member countries' political leaders. It is to be distinguished from the Union Council (of Ministers), convening lower ranking specialist cabinet members. Lauwaars explained how gradually, from its inception in 1974, the European Council has drained the Community institutions, most notably the European Parliament, of its authority. The latter, while obtaining an increase in its *legal* powers with each treaty revision, actually lost what *political* power it could have gained. Parliament recently got the Accession treaties forced down its throat by sheer member state pressure.²⁵

21. See *Bull. EU* 3-1994, p. 65 for the Commission statement.

22. See Lauwaars, *Constitutionele erosie* p. 20. Generally: Klabbers, Jan 'Informal instruments before the European Court of Justice' *CMLRev.* 1994, pp. 997-1023.

23. See Klabbers, *op. cit.* (previous note), Wellens and Borchard 'Soft Law in European Community Law' 14 *ELRev* (1989), p. 267. See Asser Instituut Colloquium 24 (1994) *Diversiteit van de Besluitvorming van de Europese Unie* (Diversity of Union Decision Making) The Hague, 1995.

24. It is no final solution to simply lower the threshold and accord legal status to any form of agreement or agreed practice irrespective of form, as would seem the solution adopted by the EC Court according to Klabbers (*op. cit.*). The good thing of this approach is that informal documents are submitted to law. The bad thing is that they are accorded full legal authority regardless of their political status. It amounts to giving a bonus to legislation by the bureaucracy.

25. Lauwaars, *Constitutionele erosie*, *op. cit.*, especially p. 10.

CONSTITUTIONAL SEDIMENTATION

I now need to venture a few remarks on the *concept* of a constitution in general terms, applicable both internationally and on the municipal plane, to be able to show that the above evolution is not necessarily or merely erosive. If one sees a constitution as purely the embodiment and warden of the rule of law and of representative democracy, Richard Lauwaars' conclusion is as ineluctable as it is pessimistic. One may on the other hand conceive of a constitution more modestly, as set of rules channelling different and conflicting ambitions within a given society into a common and commanding institutional structure, as does e.g. Raymond Aron.²⁶ This seems to be a less ambitious concept, more appropriate to the world of international relations and organization. In this view the European Council instead of being propelled outside or above the Union constitution (in statu nascendi), is brought to settle in the heart of it.

There is no doubt that the European Council is presently the most powerful body in the Union structure. Its action is crucial to the Union. The European revolutions of the last decade, among the most powerful events in Europe imaginable short of war, could not have been digested by the Union without this institution. If its position does pose a constitutional challenge this should not be answered by nostalgia nor by a perfectionist search for new models with a systematic clarity mirroring modern state constitutions. Instead of isolating the European Council into the status of a *corpus alienum* we may see it as the heart of the Union's constitutional future.

Clearly to draw the European Council into the core of the Union's constitutional structure is upsetting.²⁷ The Community structure was well developed and broken in. The Union structure is new, immature and unclear and just like the Union itself, the European Council has a poorly articulated legal position. This Council issues its decrees in the form of non-binding 'presidency's conclusions'. Yet these consequently exert overriding and indispensable political pressure on the legal institutions. The European Council itself finalizes such important treaty revisions as the Single Act and the Maastricht Treaty, endowing these with its authority.

The challenge would be to constitutionalize the European Council, i.e., simultaneously to acknowledge its power and merit, to call it to account and to start thinking of loose models somehow fitting the present amorphous situation.

As to its accountability, this is obviously embryonic. But it is not absent. Prelegal constitutional elements are present in the rhythm of its convening once every six months under full publicity. These meetings create their own dynamic: they are always 'gloriously uncertain' as Delors is quoted to have said.²⁸ In other words, they do what Union Council (of Ministers) meetings and Commission meetings fail to do, which is to focus attention and create news. Precisely because of their rhythm, and of their event-like character, these meetings are, if anything, a clear departure

26. Aron, R. *Leçons sur l'histoire* Paris 1989, p. 557: 'Qu'est-ce qu'une constitution politique, sinon l'ensemble des règles telles qu'elles doivent résoudre les conflits des groupes et les rivalités des personnes?'

27. Even the *Proposal for a European Constitution* by the European Constitutional Group, London 1993, while according to the European Council the 'highest political authority in the Union' (p.6), is mainly concerned with the old institutional balance, i.e., between the Council and the Commission.

28. *The Financial Times*, 26 June, 1989.

29. See Werts, J. *The European Council* Amsterdam - London, 1992, passim.

from standard diplomatic practice.²⁹

Surely, the weight of the meetings and of their decisions is not yet fully grasped by the participants let alone the public, but that is a matter of time and of hard knocks. On Saturday 18 November 1989, a week after the Berlin Wall came down, President Mitterand convened a special session of the European Council. Dutch PM Lubbers is quoted to have called this 'a gastronomic summit' and 'a waste of my Saturday'.³⁰ In the Edinburgh meeting of 1992 the Dutch PM and his finance minister unthinkingly agreed to a modification of the Community's financial resources system which turned Holland into the heaviest net contributor of the system and which was approved by the Dutch Parliament with much dismay at the end of 1995.³¹

In a limited way the institution, the European Council, contributes to the Union being a system established in the temporal world of events rather than in that of its own logic and in the discourse of irreversibility. A constitution is not a system of logic and transparency. It is a response to future events, as stressed in a lucid piece by political theorist Robert Orr: 'A constitution is a temporal device – it is itself an event – made to regulate the sequences of legal and political events'.³²

The Union is far from being a system exercising the full capacity of action of a government. In fact it is a system that primarily *reduces* the individual action capacity of its members. It is to an important extent a system of diplomacy, as could be observed in the Yugoslavian drama, where the Union was, if seen in the customary light, a symbol of impotence. The overriding objective of its action was self centred and anguished. Conditioned by the two World wars, this action was aimed to prevent differences among the members about the war in the Balkans from getting out of control. Nascent, however, is the element of politics, of acting into the open, in an unpredictable environment by way of actions whose results are not foreseeable. It is a system of politics in which the participants are increasingly bound by the time limits they are setting, by the agreements they have arrived at and by the authority of unpredictable circumstances. Surely this is not the rule of law nor is it democracy. It is beginning of European politics and politics is, as Bernard Crick aptly writes in his modern classic on the subject, 'both historically and logically prior to democracy'.³³ The European Council is the answer to a clear *political* deficiency in the European set up. Thinking only of democratic (or judicial) deficits in this context will make one overlook this.³⁴

The European Council is a proto-presidential body for the Union.³⁵

30. See Werts, J. *op. cit.* pp. 211 and 212.

31. The Edinburgh compromise was put down in a Union Council decision on 31 October, 1994, *OJ* 1994 L 193/13. Dutch Parliamentary debates (Lower House), see Proceedings 1995-1996 No.24 127.

32. 'The Time Motif in Machiavelli' in *Machiavelli and the Nature of Political Thought*, ed. M. Fleischer, New York, 1972, p. 191. Also see the present author's: 'Fortuna and the Constitution' in *Yearbook of European Studies* 8, Amsterdam, 1996.

33. Crick, B. *In Defense of Politics*, London, 1992 (4); at p. 24.

34. That Europe presently lacks a *political* rather than a *democratic* dimension is well argued by a.o. Jürgen Habermas. He takes issue with ideas that Europe is for the *calendars graecas* for lack of 'a people' with an 'identity'. What he feels is lacking is a public sphere. It is not established among people who are close, but among strangers. 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' *EL Journal* 1995(1), p. 303-307.

35. Why not allow that the Union, just like other presidential structures, has a split democratic legitimacy, part of which lies with the European Council?

As to the *models* to be used for the purposes of orientation, there are different options. One might think of the complex medieval constitutional structures, dependent on a plurality of sources of legitimacy on the one hand and on a system of *do ut des* (negotiation) on the other.³⁶ One also may look to the Union of Utrecht Treaty of 1579, an alliance between Dutch provinces which became the Union's constitutional charter and which allowed the Republic to become a world power. For its constitutional monstrosity, constitutional historian Van Caenegem likes the European Community to the German Empire (stretching between the Middle Ages and Napoleon):

'The German empire may have seemed a monster to lawyers trained in Roman and natural law, but it is not the only monster on the constitutional scene. What, for example, are we to make of the European Community? It presents oddities as baffling to us as those of Ancient-Regime Germany were to Pufendorf. Is the Community, which began as an economic and is developing into a political organization, a confederation, i.e. , a political association of sovereign states.... The normal organs of state – head, government, parliament – are not clearly visible or, in the case of the head of state, completely absent...'³⁷

The German constitution ultimately disappeared not for lack of clarity but when it was overtaken by events.

This brings us back to the rôle of law: how does this presentation of things account for the formidable rôle that law has played in European integration so far? Without disavowing the impressive build up of Community law, one may not fail to notice that a concomitant political build up has never taken place. For one thing, the law and its servants have not managed to raise political legitimacy for Community action in the way that was often expected. Also, as it has been observed by Joseph Weiler, there is a rift between the status of European law developed by the EC Court, as superior to the municipal law of the Member States, and the practical state of affairs in which the Community ranks below the sovereign members.³⁸ If one function of a constitution is to serve as a common framework in which not only different groups but also different expressions and forms of the same public interest are forced to agree, there clearly is quite a rift to bridge in the Union.

To conclude, the most accessible approach of European Constitutional questions is the modern constitutionalist one. It subjects actual developments to the test of some clear structure embodying high values. This approach holds high hopes both of the constitution as a guarantor of the rule of law and democracy, and of European integration as the promise of a better world. The constitution is to be a legal instrument meant to establish the realm of law. Its champions will often be unhappy with what is going on in the actual practice of European treaty making and legislation.

36. This would accord with recent ideas of a New Middle Ages (see Alain Minc, *Le Nouveau Moyen Age*, Paris 1994). For the models, see Caenegem, R.C. van- *An Historical Introduction to Western Constitutional law.* Cambridge 1995, notably pp. 43-53.

37. Van Caenegem, *op. cit.* 132, 133.

38. See Weiler, J. 'The Community System: the Dual Character of Supranationalism' in *Yearbook of European Law* 1981, pp. 267-306, at p. 292-3.

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There is another view of Europe and the constitution. It considers the constitution not as an ideal model of free human intercourse but, modestly, as an instrument to channel rivalries and conflict between members and groups of a given society in order to avoid clashes and allow growth. While considering that both Europe and constitutional rules are developing, it holds that the structuring of Europe is not a matter of logic and law only, but also of time and events. A constitution is a legal instrument, or at least one consisting of rules, not meant however to put law on a pedestal but to be a legal service to reality. In the way of the rules of a game it is meant to allow living forces to express themselves in a decent and creative way instead of in a destructive fashion. Europe and the constitution is just a matter of time. Not in the current historic sense of that expression, that is the normal or even inevitable outcome of present trends, but in the sense on time given, on opportunities taken or lost. The present part of the constitutionalist in this view is to discover such valuable elements and to put them to good use.