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The European Union
An Ongoing Process of Integration
2004 T.M.C. Asser Press
pp. 87-95

THE MEMBER STATES UNDER THE CONSTITUTION: PRELIMINARY INVESTIGATIONS

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1. THE MESSAGE

The Draft European Constitutional Treaty sends a message loud and clear about the Member States' future in the European Union. It appears in Article IV-7. This key provision, essentially maintaining the mechanism of Article 48 EU, leaves the Member States fully in charge of future amendment or revision. The message is that the Member States are not on the way to being phased out, let alone eclipsed, by the Union's evolution. *The Member States are here to stay and to hold centre stage.*

As disturbing as it is simple, this message will be the subject of the following pages. It raises a number of desperate, seemingly rhetorical questions. Is this the end of supranationalism and the community method? Is it the final blow to the illusion of Europe as a political entity? Finally, is it not blatantly inconsistent with the very idea of an EU *constitution*?

This last incongruity provides the most convenient launching pad for the present discussion. There seems, indeed, to be a sheer contradiction between the title of the document ('Constitution') and its Article IV-7, which leaves amendment in the founders' hands. There is nothing wrong, to be sure, with the instrument itself having the character of a treaty and being called a 'Treaty establishing a Constitution for Europe'. Many national constitutions, notably that of the United States, have been created by means of a treaty and still bear that character (cf., Art. VII of the US Constitution). No, the problem lies with the *continued* predominance of the original contracting parties in its further existence and evolution. According to classical constitutional wisdom, a real constitution, once created, takes further amendment out of the founders' hands, assigning this task to the institutions it has called forth. The *'constituant'* is replaced, in the words of France's revolutionary priest and constitutional authority, Emmanuel Joseph Sieyès, by the *'constitué'* (cf., Art. V of the US Constitution and Art. 79 of the German Basic Law). This is

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what defines the creation of a new State and sets off its constitution from a treaty, which is amended (and can be terminated) by the original constituant(s) – hence the contradiction.

Contradiction is a logical category, however; the life of the law, as life in general, is not a matter of logic (cf., Holmes). In this paper, the paradox will be turned into an urge to rethink some of the European Union's fundamentals. It will send us into uncharted but promising constitutional territory. First, this paper seeks to address the above-mentioned incongruity. Then, it will recast the Member States into a new capacity, namely, that of an EU institution. Finally, it will open up further perspectives on this line of thought. These perspectives are much wider than the present author expected at the outset, and they can therefore only be hinted at. Let it be seen as a tribute to Fred Kellermann's style of life and action that all this should be attempted by using somewhat unorthodox forms of legal and practical thinking.

2. AUTONOMY

How square and conclusive is the contradiction between the instrument's title of 'Constitution' and its Article IV-7, which leaves amendment in the hands of the founders? A constitution is a document formally expressing political autonomy for a body politic. Its amendment by external powers is a formal denial of such autonomy. Autonomy consequently is the key quality to be discussed. It is the flexible version of that quality of a political community which in legal discourse has settled under the term of sovereignty and has fossilized into conceptual intransigence. This is one good reason, among others, why we prefer using the older concept of autonomy. Like sovereignty, political autonomy is not a strictly legal quality, but it lends itself well to legal expression and discussion

Autonomy for a community is best expressed by a legal rule that simply takes evolutionary powers away from the original creators. But this is by no means the only way of expressing it, let alone a full condition. The European Union itself is a case in point. It has long been established that the European Communities enjoy appreciable autonomy in relation to their Member States. This autonomy was expressed, if not created, by the Court of Justice in its early case law and has been developed by way of further case law and practice. It is embodied in doctrinal chapters that are the stock of every textbook on EU law. In *Costa-ENEL*, the Court stated that the Community's legal order was entitled to its constitutional autonomy. In *Les Verts*, the same Court later ventured into qualifying the EC Treaty as a 'constitutional charter.'

Now one need not rely on such self-enhancing qualifications, even if they come from law courts. Autonomy is not created by its expression in ECJ judgments.

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What seems more conclusive is that the Member States themselves have not only acquiesced in this evolution but that they have furthered it. They have gone along with the Court's logic of supremacy, direct effect, and so forth. They have learnt to appreciate these doctrines even more than the celebrated European citizens have (who as yet remain to be enchanted). Even if most of the Member States stick to the formality of their own sovereignties individually, they know that, in the context of the Union, its relevance is mostly negative and consequently limited. They have learnt to appreciate the enhanced (if complicated) capacity for action obtained through the use of sovereign powers pooled and wielded by the EU institutions.

This explains that there is, as a matter of fact, *autonomy of action* for the Union's institutions. What is more important and more difficult to grasp is that there has also proved to be, as a matter of fact, *autonomy of evolution* for the Union. The Member States individually have very often been overruled or outwitted by the circumstances and by each other, not to mention forces such as historical necessity, into accepting a new structure for the Union which, had they been asked individually, they would have rejected out of hand. There is no need to give many examples, as they abound. Most famous is the majority decision forced on the 1985 Milan European Council by Italian Prime-Minister Bettino Craxi to start negotiations leading to the Single Act, in which Margaret Thatcher was simply outvoted. This did not prevent the Single Act from quickly materializing and being a success, and from being exploited mostly by the same Mrs Thatcher and her successors.

The question now is how to reconcile this actual autonomy of evolution with standard constitutional logic, which rules out the former in a situation where the founders have a monopoly on revision. To begin answering this question it helps pointing out that every real constitutional structure has not one but three different sources. Next to constitutional legislation (leading to formal constitutions, basic laws, etc.), there is first constitutional *case law*. Much of present-day constitutional structure in countries is made up of case law. Students of constitutional law in the United States get little but case law to read, and thus it is in many countries. And thus it is in the study of EU law.

Apart from constitutional legislation and case law, the third and least studied source of constitutional structure and, notably, *evolution*, is the category of rules referred to as 'constitutional practice'. This source-category covers rules that arise not out of legally prescribed legislative or judicial procedure but out of the crude settlement of political conflicts or political expediency in practice. In the United Kingdom, such rules are often called 'conventions', in other countries 'unwritten constitutional law'. Their legal character is undecided, however, which is not a problem as they are neither created nor applied by judicial institutions. Not only their creation but also their evolution is attended to by political practice. In the

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United Kingdom, as in the Netherlands and other countries, crucial and fundamental parts of the constitutional structure – first of all the 'confidence principle' premising a cabinet's life on support by a parliamentary majority – are conventional in nature. They have been created and are both tested and enforced not in court but in day-to-day political life. In fact, they are the best and most subtle feelers of the constitution into the realities of situation and evolution.

If constitutional structure has three distinct sources, its evolution also proceeds not through just one but through three different channels. This is the simple and sufficient reason for arguing that autonomy of constitutional origin and evolution does not absolutely require formal autonomy of statutory constitutional amendment. True, we like to see a constitution as not only a structure but also as the *moment* or rather the *act* of constituting a new political body. Such a 'constitutional moment' is best and most clearly furnished by the formal adoption of a binding constitutional document transferring power from outside to inside the system. But autonomy may also come into being and evolve through case law and practice. In such cases, the temporal element of passage is more difficult to grasp, and this is what we now need to do. Lacking a clear constitutional moment, or constitutional turn, ambiguity will persist regarding the status of the political body in question. In *temporal* terms (ambiguity is a mere *logical* category), we will find that there is a situation of *suspense*. Suspense (from *sus-pendere*, to hang up) is literally a situation in which the conditions or elements for a new structure are being generated and brought into circulation, but are prevented from falling into place, like solvables in a solvent. This is the present constitutional situation of the European Union with which scholars are having such a hard time: there has been constitutional justice for decades; constitutional practice for almost as long (notably in the form of intergovernmental and interinstitutional political deals); there are constitutional elements of government and representation; and there is a constitutional discourse. All these elements are waiting for a snap of the fingers or a decisive moment to land (crystallize, precipitate) into objective reality.

The Constitutional Treaty's adoption might, but need not, provide this landing. Such has become the European integration's addiction to its state of suspense that we should not be surprised to find it extended in a significant measure *even beyond* the eventual formal Constitution's adoption.

This condition of prolonged suspense requires a sophisticated treatment of the temporal aspects involved in the Union's constitutional turn. What you are now going to read is not rhetorical alchemy but normal thinking practice applied to a theoretical problem. First, we need to acknowledge at this moment that it is possible and increasingly probable that the Union will somehow and sometime take a constitutional turn and that this will involve many of the above-mentioned elements which have already been brought into circulation or suspense. These will then settle into an unambiguous, objective structure. This allows us to qualify

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those elements as constitutional from the point in time of their origin (*ex tunc*). Examples of such elements are *statutory*, such as the motion of censure (Art. 201 EC), *judicial*, such as direct effect, and *conventional*, such as the Luxembourg compromise, the Ioannina Compromise and various interinstitutional agreements.

This means that we may *already* adopt a reading of the situation that draws to some extent on this possible or probable reality. In a way, this reality may be considered as already existing, insofar as that, at some later point in time, it may turn out with hindsight already to have existed presently (May 2004) and before.

Insofar as this is so, and always subject to this proviso, we are now in a position to redefine that element in the structure that concerns the Member States and to proceed with the business at hand, which is to recast the Member States, jointly, as an institution of the Union.

3. THE MEMBER STATES JOINTLY

As has now been demonstrated, the hypothesis of an existing European constitutional situation is *not* affected by the fact that the Member States are still posing as *'Herren der Verträge'*. The opposite then becomes envisageable. If and insofar as there is a Constitution, and the Member States wish to be in charge of its modification, constitutional logic reverses steam, putting these same Member States in charge and allowing them to be recast as an EU institution empowered under the Treaties.

Indeed, the power of treaty making and amendment is the most formidable power in the life and function of European Union. Treaty making and amendment create both the basic substantive norms valid throughout the Union and the legal bases for the latter's further action. This power is being applied with increasing frequency and success. Between 1986 and 2004, there has been a linear acceleration in the rhythm of Treaty creation and modification (1986, 1992, 1997, 2001 and 2004). There is no denying that the institution wielding this power should be paramount over the others on the Union power map. Officially that institution is mentioned nowhere in the present Treaty nor in the Constitutional Treaty. It is not the Council, nor the Commission, nor the Parliament. It is not even the European Council, nor any combination of the former. The agent is, in fact, the Member States acting in concord, under double check of unanimity (Art. 236 EC and later Art. 48 EU).

Under purely institutional logic, this would lead to the same impasse or contradiction as before, only from the other side. The fact that the most important power in a system does not lie with its institutions is, again, a denial of the system's constitutional status. This is no news. The news is that, obversely, constitutional status for the system will tend to draw this powerful agency inside.

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In other words, if we adopt the idea, real or hypothetical or somewhere in between, of some constitutional quality for the Union, then the Member States may be *read into* the Union's constitutional structure. Such a reading becomes all the more compelling as these Member States stick to their amendment monopoly with greater determination.

This modest logical realism is confirmed by standard historical constitutionalism. Historically, outside powers have often been key players inside constitutional polities. There have been times when kings considered themselves above their constitutions. By force and by law, however, such kings have gradually been drawn inside and under their own constitutions. This is the force of the great evolution from which the European constitutional tradition was built. To be real and not a mere sham, any constitution must contain the key holders of power. It need not include or control them fully. There will always be residues of power that are uncontained. But the constitution has no business leaving them out altogether, save to lose the right to its very title.

The 'Member States Jointly', as we may call the institution, has become or is becoming an institution through a combined and successive set of circumstances, both legal and political. The principal legal circumstance is the existence and repeated implementation of Articles 236 and 237 EC Treaty and their successor provisions, Articles 48 and 49 EU. These provisions have consolidated the Member States into a compound, forcing them to act as a single body for revision of the EU Treaties and the accession of new Member States. This extremely rigid legal procedure was meant originally as a guard against light-hearted change. It turned into an asset for dynamism when, at the end of the Cold War and the 'return of history', combined with the accession urge of newly independent European States, it actually became imperative to adapt and modify the Treaties with increasing frequency. This is how the *political circumstance*, the second ingredient, arose. Necessity repeatedly drove the Member States together into their compound, consolidating them together into a distinct element of political reality.

The Union has always been a dynamic entity. For a long time, between 1950 and 1990, when treaty amendment was difficult, it was mostly judicial and bureaucratic activism that took care of this potential. In 1974, purely as a result of political practice, the European Council was created. However, these channels became insufficient in 1989 after the fall of the Berlin Wall when, from being a heavy constraint on modification and accession, as they were intended, Articles 48 and 49 turned into a legal power crucial to the Union's subsistence in Europe's demanding and turbulent reality. At this time, it was patently obvious that neither the European Parliament nor the other EC institutions had the capacity to master this situation. In fact, the only institution with such capacity proved to be the European Council, representing the Member States in an existential fashion and

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as a political compound. This is how the Member States themselves could legitimately begin to understand the need to and possibility of remaining in charge for the time being. And this is why it is essential for the other parties involved to draw these Member States inside the EU structure, like in the case of the European Council.

The first step on the way to submission is definition.

4. DEFINITION

We are not arguing that the Member States will or need to be swallowed whole, together or apart, into the Union's Constitution. That would obviously be nonsense. The only thing that constitutional logic indicates, in combination with the Member States sticking to their treaty-making power, is that these Member States should not be left wholly outside. Hence it is necessary and realistic to devise some limited capacity and some modest format for them to be understood, apart from their many other capacities, as a Union institution.

Once admitted as an institution, the Member States need to have their nature and action defined. In comparison to other institutions, the Member States are subject to few constraints of a logical or temporal character. When acting to amend the Treaties, they are largely free as regards both the form and the substance of their action. When acting to select justices or other functionaries for the Union, or to adopt the Union's own resources decision, they are under the Treaties' logical and temporal constraints. When acting fully outside the Treaties, the Member States are mostly under mere factual constraints of solidarity.

The first question to be solved is of a formal nature: can there exist any EU institutions other than those expressly defined and empowered in the Treaties (or Constitution)? To answer this question one needs to look into the term 'institution'.

The word 'institution' can be used either in a definite and restrictive sense or in an open and general sense. In the restrictive sense, EU institutions are only those explicitly given that name and status by the Constitutional Treaty. This is presently the case with the original EC institutions as mentioned in Article 7 EC. In a *general* sense, institutions are those bodies or collectivities that are to a relevant extent actually defined by the organization and its life and that wield actual powers under its charter or other basic rules of constitutional practice. In the Union context, bodies like Coreper and the famous regulatory committees serve as examples of institutions that created themselves, so to speak, and only subsequently entered the system's formal set-up.

The most powerful example of such an institution created outside the Treaty is, of course, the European Council, which created itself in 1974. It is useful to consider this example more closely.

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To define the European Council's constitutional position on the EU power map, the present Treaties do not suffice. One needs to take the general legal and political life and structure of the organization as a basis of reference and analysis. The European Council is crucially instrumental in the process of EU legislation and even treaty making. This role is absent from the Treaties and all but absent from the Constitutional Treaty. Now one may stick to the fiction that the European Council plays no real role, and indeed its actions are mostly not legally binding. However, it is realistic to consider the European Council an institution of European Union, in a general sense, both in relation to the word 'institution' and in relation to the word 'European Union' (comprising the Communities). In fact, it made sense to consider the European Council an institution of the Community (in the singular, general sense) as of its foundation in 1974, even though it had no formal powers at all under the Community Treaties. Its role in EC treaty making was the same as it became in the European Union.

The European Council's evolution points towards two useful and possible amplifications of the concept of 'institution' beyond the internal legal definition. The first is to stretch the legal definition beyond the institution's internal charter. The second is to stretch the institutional definition beyond legal analysis. It is thus with legal persons in general: part of their functional system is defined outside of their organizational charter, by general contextual legal and other rules and facts.

It remains to take the step from the European Council to the 'Member States Jointly'. A similar exercise that, in the face of rearguard action, has established the former institution legally and doctrinally for the Union is now in order for the Member States. At this point, however, the present author (who went through a similar exercise for the European Council five years ago) must avow that this is beyond the scope of the present contribution. An article on this topic will be published in the first volume of *European Constitutional Law Review* of 2005.

5. CONCLUSION, RELATIVISM AND PERSPECTIVES

The basic argument made in this paper is that it is feasible and even intelligent to incorporate the Member States into the Union's institutional framework. Far from conflicting with the Union's constitutional status, as it would appear to do at first sight, this inclusion might constitute the Constitution's greatest single novelty. The *possibility* arises from the admission that there are and have been other ways for the Union to acquire essential autonomy and constitutional status than through the express surrender by the founders of their treaty-making power. Once this is admitted, it can be understood how treaty making and other key powers held and exercised by the Member States jointly are part of the Union's autonomous existence, released from the Member States individually. The following step is to define the Member States jointly as a Union institution.

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This initial investigation goes no further than this and merely opens up perspectives for inquiry and discovery. To conclude, let us look at some of these promises or perspectives. First, this investigation enables us to escape from the sterile opposition between the mutually exclusive conceptions of the Union as either an intergovernmental or a supranational body, by showing that it is possible to account for the full involvement of the Member States in the Union while allowing for the latter's original and constitutional evolution.

Second, this reading provides the constitutional stamp of approval for the Union's description as a 'federation of States' by Jacques Delors, a term that is often treated as desperately hybrid.

Third, on a practical level, it signals hope for other EU institutions so far blatantly excluded from the key power of amendment, notably the European Parliament. Once the Member States have worked their way into becoming an EU institution, i.e. a *constitué*, wielding the power of constitutional amendment, this power will have become a Union power. The ability to carve out a share of this immense and crucial power has thus moved within the reach of other institutions, notably the European Parliament. It need not be a matter of formal constitutional revision. Practice is preferable.