Europe's Single and Powerful Amphibious Model

Tom EIJSBOUTS*

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* Professor of European Constitutional Law at the University of Amsterdam, Chair Jean Monnet. Editor in chief of the European Constitutional Law Journal. Fellow at the Robert Schuman Centre for Advanced Studies, European University Institute, Florence.
I. Introduction

One of the major challenges of the European Constitution for scholarship, and the leading ambition of the following piece, is to grasp into one single model the Union’s amphibious existence and nature. Article 1-443 perpetuates the Constitution as a treaty, to be modified by way of treaty. This keeps the Union firmly riveted into the sphere of public international law. At the same time the document has reality as a constitution. This roots the Union into its own constitutional law. The Union’s life consequently draws both on treaty law and on its own constitutional law. Legally this produces something close to a conflict of categories.

To bring these two sources of life and their legal form into a single coherent reading will require – and allow – more than to deal with the apparent contradiction of categories. It will go further and demonstrate the particular genius of this model and its innovative linkups between domestic and international law in general.

The following argument squarely denies the Union a sui generis character, cherished by much of its specialized scholarship. The problem with this is that it tends to make the Union unintelligible in traditional notions and concepts and in fact only plays into the hands of the experts and of bureaucracy. Secondly the argument refuses the facility of considering the Union as now an intergovernmental, then a supranational system, as in part confederal and in part federal, depending on focus, context or expediency. This is too easy an escape. The Union is both intergovernmental and supranational overall, it escapes the duality, nay, turns this into solid synthetic structure. It must be seen in a single model encompassing its international and domestic characters.

This contribution identifies two channels between the worlds of public international law and that of domestic constitutional law, as established and employed by the Union’s institutions and procedures. They are historical facts or dates (II); the Member States (IV). Inevitably in passing it will have to deal in its own way with the treaty/constitution question (III).

II. Historical Dates: Moments of Meeting

When a novice in international scholarship at Geneva’s IHEI, the present author had the privilege of being taught history by the late Jacques Freymond, its director. His opening seminar started with him putting before us the question: «what is an historical date? (qu’est-ce qu’une date historique)» It allowed each of the twenty or so young participants to make some statement for the sake of personal introduction. None of the answers deserves to go on record, least of all my own (which I have forgotten), but the question has remained alive with me ever since. Here’s my answer. Let us take the date of 29 October 2004.
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An historical date is produced by the meeting of two distinct historical continuities, together producing a discontinuity. Rome, 29 October 2004, was first the stage and the date set for the signature of the Constitutional Treaty. This line went back, let us say, to 12 May 2000, Joschka Fischer’s Humboldt speech. Second, behind the scenes of the formal ceremony, the Capitol Hill venue of European leaders turned into a king size test of strength. It was a showdown over host Berlusconi’s Commission candidate Rocco Buttiglione. Two days before on his account the new Commission college had all but been refused by the European Parliament (the vote was not taken) and Buttiglione had become the heart of a full grown political crisis. This line of events went back to the European Parliament’s elections of June 2004.

At the end of the ceremonial day in Rome, Berlusconi had to concede to his colleagues and withdraw his candidate, clearing the way to a solution of the conflict. The matter is amply discussed in the Barroso-issue of the European Constitutional Law Review'. In the report in EuConst it is shown how this one event brought a meeting between form (the very papery European Constitution) and matter: the political life the document is there to support. In fact, the clash on Capitol Hill was the culmination point of a political drama starting some four months earlier from the European elections, in which all the Union’s political institutions were involved. On top of this, the European political groups managed to give full expression to their ideological differences and turn the drama into a contest for representation. Buttiglione’s drama was not just an action directed against his person. It became a matter of principle, an answer to the question: do we want a conservative like him, freely calling homosexuality a sin, to be in control of justice and liberties?

The European Parliament’s right wing had made the man into its champion and had pitched a battle over him and his principles with the left (including the centre’s liberals). The Left won, allowing their victory to carry a message: «No conservative revolution here in Europe». The message acquired extra profile when a few days later the US people re-elected president Bush on the opposite ticket, not much different from Buttiglione’s.

Qu’est ce qu’une date historique? The same date of 29 October 2004 came, however, also to symbolize another meeting, presently deserving attention. It is that linking up the Union’s pristine political life with the several spheres of politics in the Member States. The significance of Barroso’s perfect drama as an exhibit of political life in the Union has been pointed out. What is interesting is how the drama was or became rooted inside some Member States’ domestic politics. Italy is the best case in point. Mr Buttiglione’s candidacy, which sparked the crisis, had been produced by Italy’s home political vicissitudes. Once the man had made a magnum size problem for himself and others, it was not just the European Parlia-

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See this and other authors’ contributions on the Barroso drama in the European Constitutional Law Review 2005 (EuConst), n°2.
ment’s Right which blocked its solution. More importantly the structure of Italy’s governmental coalition of the day prevented an easy way out. It took all the authority the European leaders could muster in Rome to unblock the Italian political impasse. The problem was compounded by the Dutch presidency’s incapacity to smooth the way to a solution and drop its Commission candidate Neelie Kroes, this in turn due to the structure and inhibitions of the Dutch coalition in power2.

There is no distinctly legal element in the interconnections between levels, European and Member State, of political life, here indicated. To qualify for legal relevance they need to be forced into the format of relationships between orders of law: the international and the domestic. This is useful, however, not just for the sake of showing their relevance in a legal debate; it enlists legal thinking to provide a compact logic allowing to grasp the situation.

Seen in a legal light, things appear to be in a way turned upside down. The domestic legal order involved is not that of the Member States. It is that of the Union: a constitutional order in its own right. The international legal order, on the other hand, is the level at which the Member States operate each with its individual political vicissitudes.

The European Union in this single historical drama consequently features in two capacities at once: as a constitutional system and as an organization of public international law. It is the facts of the drama which, in their intricacy, provide the unbreakable connection between the Union’s two existences, between its constitutional and its international legal status. And, consequently, it is the facts which bridge the divide between the two departments of public law kept apart for hundreds of years: public international law and constitutional law. While in legal logic the spheres are distinct, in reality they are not. They are bound up by the facts.

Many questions now pop up. How can an international agency apply power of convergence to the different home political spheres? How can the Union contract spheres as distinct as those of public international law and constitutional law? Part of the answer is given by the above: it is by binding the two together in a single historical set of fact. Which begs the question: how does it manage to enlist history for its purposes?

The answer does not need to be given directly nor exhaustively. Let us see if it helps to address the notorious question of legal doctrine concerning the traditional difference, or divide, between treaty and constitution. It is a divide made acute by the Union’s Constitutional Treaty.

III. Treaty and Constitution

There is no doubt that the Constitutional Treaty is and remains a treaty. Every trace of a binding involvement in the revision procedure for any constituë has been kept out of the document. Even mere approval for the European Parliament is lacking! Article IV-443 involves a Convention, but only in a non binding capacity. Consequently it is the Member States which do the modifying, under double unanimity. Other contributions to this book, notably that of Bruno de Witte, are clear enough about this. A document can hardly be more of a treaty than this one, its product hardly more of a classical international organization than the Union. In fact the double locked revision process makes it look like a nineteenth century conference system!

Does this disqualify the document as a constitution? Twice no. Not necessarily, that is, not in general. And not at all in this particular case. Not necessarily, for the analytical reason that the form chosen for anything can never be fully conclusive of its own status in reality. This would bring it in conflict with the Law of Gödel, for one thing". A treaty, yes, absolutely. But hence no constitution? Normally yes, but not necessarily.

Not at all, moreover, in this particular case. This is a constitution. Of course we are not deluded by the document’s name «constitution». This means nothing. Neither are we impressed by the fact that the document features human rights, separated powers and a catalogue of limited competences. The world counts tens of State constitutions boasting all these features but in fact only cloaking suspicious unconstitutional regimes. Such formalities mean nothing either. To know whether a document claiming to be a constitution really is one, it is necessary to judge not just the text but the reality it controls and shapes. If the document actually controls the life of a political community, featuring authority and representation, freedoms and responsibilities, a community essentially geared to determining its own fate, then it qualifies as a real constitution6.

Is this the case of the Union and its Constitutional Treaty? Is the Union a political community, involving authority and subjects and determining its own fate? The answer can be no other than, to some extent, yes.

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3 Gödel’s Law, developed in the sphere of logic and mathematics but whose relevance is more general, reads that no system of thought or of logic (and of life) is master of its own condition.

4 From Aristotle to Machiavelli the Constitution was not identified with a document so called but with the political life (Machiavelli in Discorsi: «uno vivere politico») it regulated. Only later, after the establishment of the monopoly of the State over both domestic and international law, the analytical distinction between treaty and constitution was established, creating both the fact and the illusion of a sharp divide between the two, and of defining a constitution as against a treaty.
There are two foundations in reality for this judgement. The first is that the Union is taking its fate in its own hands. From the point in time where its integrity came under threat, around the time of the Berlin Wall coming down (9 November 1989), it has increasingly got its act together. The rigidissimo requirement of double unanimity has not prevented the Treaties' modification in linear acceleration as an anticipation of and response to the revolution: 1986, 1992 (Maastricht, 6 years), 1997 (Amsterdam, 5 years), 2001 (Nice, 4 years), 2004 (Rome, 3 years), ushering in the Constitution.

Can we then qualify the Union Constitution as a real constitution? To the extent indicated, yes. Now this does not mean that the Constitutional Treaty is a fully blown constitutional document, and the Union a fully fledged constitutional system. To say this would be nonsense. But it suffices to hold and to show that there is some constitutional quality to both the document and its reality. Which will take care of the logical impasse of the document being a mere treaty.

The second foundation is that there is, as a matter of fact, a beginning of real political life in the Union, involving authority and representation. It is thin, but no less certain. The historical facts converging on 29 October 2004, discussed above, testify to the reality of political life, including authority (in the European Council, putting away one of its members, Berlusconi) and representation (in the European Parliament, expression the European public's aversion to having justice and liberty in the hands of an arch conservative).

All this, however, only increases the conceptual problem. How can a document be both treaty and constitution? How, more intriguingly, can there be political life at two connected levels at once? Let us proceed to discuss, after the facts, an interesting institutional link up between the levels of international and of domestic/constitutional law.

IV. States: «dédoublement constitutionnel»

The Member States of the Union are an interesting set. In the present Union as in international agency they hold prominence not only as the Treaties' (and the agency's) Masters, but also as its dominant institution. And there is no change to this in the Constitutional document. The Member States not only dominate treaty making and revision (art. I-443) i.e. the making of all fundamental substantive rules, they also control accession and financial contributions to the Union (art. I-54 and I-58 respectively). In any reasonable reading of this situation, they should be seen as a controlling institution of the Union. The formal objection that they are not on the formal list of Union institutions (art. I-19) is not conclusive. Neither was the European Council on the list from 1969 (origin) to 1974 (formal auto-creation) and to 1986 (first mentioning in the Single Act). Surely with hindsight, no one will deny that the European Council was an Union (EEC, EC) institution. No good being deluded by legal formalities.
Under international law there is no problem for Member States to be seen as an organ or an institution of any agency they have created, even if unlisted. It changes little to things as a matter of fact. The veil behind which they operate in the organization is thin anyway. In many international agencies the Member States are almost directly in control as a matter of fact, whatever the institutional fashioning.

It is different, however, under European Union constitutional law. In a constitutional reading of the EU it is simply compelling to include the Member States as an institution. This is because to leave the organization’s dominant authority out of the document would turn this document constitutionally into a sham. Hence constitutionally the Member States must, as a matter of practice, be read into in the list of European Union institutions.

This is not a mere formality; it expresses a change of their stature and even nature. The veil behind which the Member States have got caught under the constitution is different from the one under public international law. First the constitution binds the Member States together in a more compelling way. They become subject, together, to the Constitution’s rhythm and internal dynamic. For the Union there is no better illustration than the way the Member States have been forced, in spite of the increase in their number and of the inhibitions of double unanimity, to ever more frequent changes of their founding Treaties between 1986 and 2004. This has turned them into an institution deserving a name for itself. Let us call them The Member States Jointly (hereinafter MSJ).

Secondly, this subjects the MSJ to a controlling institutional framework which they do not fully dominate but of which they are one element among (and in a way on par with) others. In the Union as a constitutional community, as is also shown by the facts under Chapter I, the Member States are institutionally opposed by the European Parliament. In the Barroso drama the Parliament managed to put on record a neat political triumph over the Member States. This means that there is an institutional axis opposing the governmental to the popular element directly.

At least equal weight in framing the Member States constitutionally is pulled by the European Council, the Union’s governing body. Other than the European Parliament, this does not oppose or counterbalance the Member States Jointly; it rather directs their actions. It is the European Council which, in the Union, holds the executive responsibility: it initiates, directs, solves crises. Part of its work is to take the political decisions of principle which are then to be implemented by the Member States Jointly: the conclusion of treaties, the initiation and political conclusion of accession procedures, the multi-annual deal concerning the Union’s financial resources. Without this directive institution of the European Council, the Member States under the Constitution would not be able to wield the effective authority that they do.

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5 C. Brohlman, The Institutional Veil in Public International Law, Oxford (Hart), forthcoming.
As an aside, is it necessary or useful in this way sharply to distinguish the European Council from the Member States acting together? Aren’t both colleges materially almost the same thing? The answer is that they can and need to be kept well apart. Formally it is not the European Council but the Member States who take the weighty decisions. The two institutions act at different moments and under different constraints. The European Council reached its agreement on the European Constitution on 18 July 2004. The Member States were then invited to implement that decision by signing the Treaty together on 29 October 2004, and further ratifying it each independently. The Member States include governments and populations. One strongly distinctive element between the two institutions is precisely the autonomy of the several popular elements in the Member States.

There is another great difference in the nature of their actions. The European Council can act swiftly, solve crises, boast leadership. The Member States Jointly lack such power of action. In the Union constitutional set up they are a sort of higher parliamentary body, to which decisions are put for approval.

There is no need nor possibility here to set out the full structure of the European Constitution in this fashion. Some main elements have been indicated. What counts in the present argument is the way in which the same college of Union Member States Jointly exists and functions in two worlds at once. First it is a key element of the Union as an organization of public international law. In that status it towers, unbound, over everything else, as the Treaties’ Masters. Secondly, it is a key institution of the Union’s constitutional structure. In that status it is part of a constitutional set up, bound to rhythm, structure and countervailing powers, but also substantively empowered by the Constitution.

Georges Scelle coined the notion of dédoublement fonctionnel for the way States exist both outside and inside the institutions they have created. The dédoublement we have been discussing here is immensely more powerful. It not only divides the collectivity of the Union Member States into two different institutions, but also provides for their contraction and for a contraction or coupling between the spheres of public international and constitutional law. It deserves the name dédoublement constitutionnel.