

# The Sedimentary European Constitution – The Future of ‘Constitutionalisation’ without a Constitution

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## I. Introduction

In applying the metaphor of ‘sedimentation’ in the context of the European Constitution I have been inspired by a not dissimilar debate in the US context where about a decade ago two legal writers used the term “The Sedimentary Constitution” for the US Constitution.<sup>1</sup> This term reflected their understanding of the US Constitution as a “living constitution” that is interpreted as evolving to keep pace with current events. They put a lot of emphasis – as one might expect from legal scholars - on the role of judicial interpretation, especially that of the higher courts. I borrow this idea of a “living and sedimentary constitution” which I think is as applicable in the European context and certainly as we all recognise interpretation by the courts has always had a large role to play.

But I wish in addition to draw attention to the fact that what has been extremely important in the European context has been the manner in which the material constitution of the EU has evolved considerably over time as a result of the practices, both legal and institutional, by various institutions and actors. Now there is nothing extraordinary in this, treaties after all often contain only very bare indications of what must happen, or simply decree that a new institution or actor must be set up but not shape how flesh will over time be put on the bare bones. As a legal scientist I am not just interested in what is formally laid down in international treaty texts concerning the powers and tasks of the various institutions. I am also interested in getting a sense of what those institutions do in practice and how they become “living institutions”. What actually happens after the great formal bargains are made and the treaties are written?

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1 See further, *Friedman/S.Smith*, The Sedimentary Constitution, 147:1 *University of Pennsylvania Law Review* (1998), 1-90. See further, *Curtin*, Executive Power in the European Union. Law, Practices and Constitutionalism, 2008, forthcoming.

Amongst EU lawyers it was for many decades commonplace to only see the formal components of the institutions and in particular the legal texts governing their activities. It has only been in relatively recent years that a more sophisticated approach has taken into account more of the informal components of the institutions as well as what was termed the legal and institutional “practices” that are often neglected in analyzing the European Union.<sup>2</sup> This more inclusive approach may reveal as a matter of practice that various institutions develop their roles in a manner that is different to the strict and formal treaty based provisions.<sup>3</sup> Those interested in the normative and legal side of European integration processes ignore at their peril informal governance.<sup>4</sup>

## II. What is a Constitution?

The term ‘constitution’ can be conceptualised in many different ways in political and legal discourse.<sup>5</sup> One can refer to a constitution in an empirical sense, the way in which a polity such as the state or the EU for that matter is organized in fact. A second meaning is that of a material Constitution referring to the totality of fundamental legal norms that make up the legal order of the polity. This may be the result of judicial interpretation. A third meaning is in an instrumental sense, the written document or fundamental legal act which sets forth at least the principal constitutional legal norms. A fourth and final meaning combines the others but puts the emphasis on the manner of adoption of the written document, namely one that has been deliberated on by the people, either directly or through their representatives.

2 See *Jachtenfuchs/Kohler-Koch*, Governance and Institutional Development, in: *Wiener/Diez*, (eds.) *European Integration Theory: Past, Present and Future*, 2004, 97-115.

3 Thus for example, after the Treaty of Maastricht it transpired that legal and institutional practices by various institutions revealed more institutional unity across the spectrum of very different policy areas than the treaty provisions indicated. Moreover, the rigid distinction between the supranational and the inter-governmental “pillars” was more flexible and even unitary in terms of approach taken than a strict reading of the appropriate Treaty texts would indicate. See further for an analysis of this phenomenon, *Curtin/Dekker*, The EU as a ‘Layered’ International Organization: Institutional Unity in Disguise, in: *Craig/de Burca* (eds.), *The Evolution of EU Law*, 1999, 83-136.

4 See, in general terms, *Christiansen/Piattoni*, *Informal Governance in the European Union*, 2003.

5 I draw on the four possible meanings presented by *Snyder*, The unfinished constitution of the European Union: principles, processes and culture, in: *Weiler/Wind* (eds.) *European Constitutionalism beyond the State*, 2003, 55 (56). See too, *Weiler*, On the Power of the Word: Europe’s Constitutional Iconography, 3 *I-CON* (2005), 173-190.

The latter is often referred to as a political or democratic Constitution, a “big C” Constitution and is very contested – and contestable.<sup>6</sup>

In Europe we do have a constitution in an empirical sense and in a material sense, just not a political or democratic Constitution.<sup>7</sup> The EU *material constitution* of the EU in a juridical or functional sense refers to the idea that the existing Treaties form a constitution for the institutional structure of Commission, Council, European Parliament, Commission and Court. Part of the constitutional fabric that has been knitted together over the years by the Court has related however not only to the legal order but also to the more political order. The Court has discovered and applied a fundamental ordering principle with political implications, namely the principle of institutional balance. It has used that principle to mark out in a rather preliminary and basic fashion a certain balance in the powers of political institutions, rationalized in particular in terms of the interests or constituencies represented. The inter-institutional balance of power within the EU is central to its constitutional order.<sup>8</sup>

By employing the term ‘*empirical constitution*’ I wish to focus attention in a more structural and institutional fashion on the manner in which the polity (embracing both the European and its interaction with the national) is ordered as a matter of fact.<sup>9</sup> This includes not only the components that go to make up the political and administrative/executive order of the EU level itself but also the changing nature of the relationship with the equivalent national systems. This living political (and non-political) matrix is an essential part of understanding what the EU is becoming and the nature and scope of the changes that it has effected on the national systems.

The European Union did not get its big “C” formal political Constitution but instead with the adoption of the replacement ‘Basic Treaty’ got another amending Treaty, the Treaty of Lisbon, with many of the very same substantive provisions. The latter clearly does not aim to be a political or democratic constitution in the sense of some of the provisions and rhetoric surrounding the failed Constitution for the EU. In this sense one can talk of the “deconstitutionalisation” of the Treaty of Lisbon as compared to its predecessor.<sup>10</sup> Much of the focus since the Basic Treaty has been adopted (and signed) has been on whether it is not the Constitution for the EU *in disguise*. In my view this is the wrong question and departure point, despite

6 See further, *Wiener*, Contested Meaning of Norms, A Research Framework, 5 *Comparative European Politics*, 1-17.

7 See further, *Curtin*, Making a Political Constitution for the EU, *European Journal of Law Reform*, 2006, 65-76.

8 See further *ibid.*

9 See *Snyder*, The Unfinished Constitution of the European Union. Principles, Processes and Culture, <http://opj.ces.uc.pt/portugues/novidds/comunica/FrancisSnyder.pdf>.

10 See, in this sense, *Barents*, Het Verdrag van Lissabon. Achtergronden en commentaar, 2008 at 109 et seq. who speaks of a “deconstitutionalization” operation or process and even of a “deconstitutionalized constitution” (chapter 25). I differ in nuance here although I suspect not that much in substance: for me the Lisbon Treaty is in many respects a constitutionalized treaty, ready for further ‘constitutionalization’ (see *infra*).

the fact that it can –initially - seem a big issue especially in those countries where it has to be decided whether or not to hold a referendum another time round<sup>11</sup>. Even the ‘Constitution for the EU’ was not a big ‘C’ Constitution that could be compared to the deep structures of national ‘Constitutions’. It included language and a few distinct provisions that were certainly state-like in their symbolism.<sup>12</sup> Especially in Part I it structured and ordered the basic principles of ‘government’ in a visible and largely accessible fashion. But for the rest it consisted in the main of institutional and substantive provisions that could have been adopted by the normal treaty amendment process (both parts 1 and 3). In fact, none of the provisions of the Treaty establishing a Constitution for the EU could *not* have been adopted by the normal treaty amendment procedure. What distinguished this Treaty for a Constitution for the EU from its successor (lower-key) Treaty were in my view two aspects, both of which were subsequently dropped or ‘hidden’ and fragmented. First, the tendentious rhetoric and language of a number of provisions of the Constitutional Treaty recalled rather explicitly state symbols (for example, flag and hymn etc) and institutions (for example, the Minister of Foreign Affairs). Second the attempt to present the main aspects of the exercise of power (legislative and non-legislative) in a manner that recalled state-like political systems. The latter was not completely dropped, just made more obtuse and opaque in the manner it was worked out in detailed provisions.

For the rest the Lisbon Treaty contains very largely the same provisions as the Constitutional Treaty, albeit ordered in a less coherent and transparent fashion in structural terms, as well as a number of extra (rather discrete) provisions.<sup>13</sup> It is beyond the scope of this contribution to analyze these provisions in any detail.<sup>14</sup> The Lisbon Treaty is a revised and already to some extent “constitutionalised” treaty containing further new provisions ripe for further constitutionalisation. In that sense it changes nothing in the existing *status quo* and does not, I would argue, fundamentally reorder either the political order of the EU nor its legal order. It tidies up, fills in gaps, consolidates, creates or renames some new actors and eliminates some redundancies and overlaps. The Lisbon Treaty is business as usual: a material constitution with no ambition to be a democratic or political big C constitution (indeed

11 See for example the opinion of the Dutch Council of State on this question, answering it, conveniently for the Dutch government, in the negative: Advisory Opinion of 15 February 2008, (W01.08.0004/I/K), [www.raadvanstate.nl](http://www.raadvanstate.nl).

12 See *Christiansen*, Towards Statehood? The EU’s Move Towards Constitutionalization and Territorialization, ARENA Working Paper Series 21/2005, [http://www.arena.uio.no/publications/working-papers2005/papers/05\\_21.xml](http://www.arena.uio.no/publications/working-papers2005/papers/05_21.xml).

13 For a useful overview of the similarities and differences between the two sets of treaties see the detailed table done by *Barents*, note 10 supra, at 123-132.

14 See however, for chapter and verse, *Fischer*, Der Vertrag von Lissabon. Text und Kommentar zum Europäischen Reformvertrag, 2008 and *Barents*, note 10 supra.

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manifestly and expressly not so). Alongside that exists the current and continually evolving empirical constitution.

### III. What are the 'practices' of 'constitutionalisation'?

If we dig a bit deeper from the surface there are further layers of meanings and understandings to be deconstructed in coming to grips further with what exactly we mean by the future of 'constitutionalisation without a Constitution'. For me this is without a political and democratic constitution which was what the Constitutional Treaty pretended to be but wasn't and what the Lisbon Treaty is not. So what is meant by the term 'constitutionalisation'?

Quite apart from the fact that the organizers of this conference chose this terminology and I simply stuck to it I am happy to use what I consider to be this rather low-key terminology especially when compared to the term 'constitutionalism', although I admit that the two terms are often not distinguished very carefully. *Constitutionalism* for me is a more profound and intense term. Modern constitutionalism entails in any event the three central elements of limited government, adhering to the rule of law and protecting fundamental human rights. These elements are set in place and kept functioning by a constitution whether this is a written or an un-written document. Constitutionalism is the broad meta-level term that is often used to refer to the difficult philosophical issues that surround the existence of a constitution. When it is used in this sense it includes questions such as why a constitution is legitimate, why it is authoritative and how it should be interpreted.<sup>15</sup> Such questions include the "deeper justificatory rationale for the particular constitutional rules that a legal system has adopted".<sup>16</sup>

*Constitutionalisation* on the other hand is more low-key and incremental, expressing the movement towards attaining defined constitutional features and one or other form of a 'constitution'. Constitutionalisation processes of the existing material constitution are less 'deep' than constitutionalism. Low intensity this can include the 'constitutional architecture of the pillars' that forms the basis of a constitutional unity in which norms in different pillars cannot be interpreted within the safe boundaries of their own legal sub-system. At the same time this is – what Bast coined – an 'incomplete constitutional unity': there is still both formal and substantive incoherence as principles (including direct effect and primacy) are not equally applicable in all parts of the Union and the institutional balance differs still in the

<sup>15</sup> See *Alexander*, Introduction, in: *Alexander* (ed.), 1998, 1 -13.

<sup>16</sup> See *Craig*, Constitutions, Constitutionalism and the European Union, *European Law Journal* (2001), 125 (127).

distinct policy areas.<sup>17</sup> The new Lisbon Treaty will certainly strengthen the constitutional unity, but as we have seen in recent case law in particular<sup>18</sup>, the European (small 'c') constitution has a strong tendency to develop itself, irrespective of treaty arrangements.

It is clear that, for example, Court judgments that insist upon and expand the domain of the rule of law can be understood within a framing of constitutionalism as well as constitutionalisation. The same goes for practices that emerge on the ground that reinforce accountable institutions also can be understood as constitutionalism as well as constitutionalisation. In any event the fact that practices are emerging at various levels below that of treaties, some hard law, some mere institutional practices that can nonetheless be understood in a broader constitutionalisation perspective.

First the role the Court of Justice currently plays and will continue to play in a broad constitutional perspective, sometimes leads to the deposit of salient 'sediments' that could not be deduced from the bald Treaty wordings. In other work I refer to the Court's role as that of a constitutional geologist.<sup>19</sup> This refers not only to the Court of Justice's own self-perception as to its changing role in an increasingly complex environment but also on how legal and institutional practices below treaty level operate so as to prepare the soil for more radical and structural treaty-level change. After all one of the great achievements of both the draft Constitutional Treaty and the Lisbon Treaty was to subsume the EC into the EU and to very largely do away with the pillar structure. The disguise has been lifted and the actor has been revealed for what it is: a unitary actor with its own political and legal system.

Basically my argument is that the Court over the course of the past decade in its case law adopted a unity approach to the structure of the EU Treaty that some would say went against the rather literal wording of the Treaties itself.<sup>20</sup> The Court has constructed an interpretative constitutional framework for the EU as a whole and not just for the Community legal system as such. Some have argued that the Courts case law knitting closer together the provisions of the second and third pillars was as fundamental and foundational as its original *van Gend en Loos* line of case law.<sup>21</sup> Be

17 See *Bast*, The Constitutional Treaty as a Reflexive Constitution, German Law Journal, 2005, 1433 (1438).

18 See most recently, the judgment of the Court of Justice in the so-called ECOWAS case, Case 91/05, *Commission v. Council (ECOWAS)*, 20 may 2008, not yet reported.

19 See *Curtin*, note 1 supra.

20 For a detailed analysis of the Court's recent case law in this regard see *Curtin/Wessel*, *Rechtsseenheid van de Europese Unie? De Rol van het Hof van Justitie in Processen van Constitutionele Sedimentatie*, *SEW- Tijdschrift voor Europees en economisch recht*, 2008, forthcoming. See too *Wessel*, The Constitutional Unity of the European Union: The Increasing Irrelevance of the Pillar Structure?, in: *Wouters/Verhey/Kiiver* (eds.), *European Constitutionalism beyond the EU Constitution*, 2008.

21 See, for example, Barents, case annotation of C-105/03, *Pupino*, *SEW- Tijdschrift voor Europees en economisch recht*, 2006, 1, 74 (77).

that as it may, this line of case law cannot now be consigned to the garbage can. The Court's role and "unity" case law will potentially remain of critical importance in the future with regard to CFSP only (as CJHA is fully integrated with the Court's normal role).

The fact is that in the recent cases – from *Pupino*, via *Yusuf/Kadi* to *Segi*, the Court is confronted with the question of the protection of human rights of individuals in Union-pillars that do not provide for the same legal protection as the Community. In all cases the solution seems the same: the Court either interprets the non-Community (Union) provisions in the light of overall Union law (*Yusuf/Kadi*), or it uses Community analogy to establish the outcome it considers necessary from a constitutional point of view (*Pupino*, *Segi*). Thus, the Court has turned itself into a constitutional Court of the *European Union* as a whole and does not shy away from combining different Union norms to reach a preferred outcome. The Court of Justice is thus not only busy performing a role as a constitutional geologist linking different layers of sedimentation in the EU context, it at the same time may be engaged in what Maduro once called more 'defensive constitutionalism'.<sup>22</sup> This involves the defence of certain core principles of the EC (EU) constitutional legal order against attack - or 'shafting' - from the outside. This phenomenon is also well illustrated by the recent opinion of Advocate General Maduro in the *Kadi/Yusuf* case.<sup>23</sup>

*Second*, the Court's role is supported by activities and practices by other actors that can also be understood as "constitutionalization". This includes in particular some inter-institutional agreements that step by step and from 'below' (by the institutional actors themselves) introduce elements into the decision making process and institutional inter-actions that may be important from a wider 'constitutional' perspective. Driessen put it in the terms<sup>24</sup>:

"The EU's political system is an evolving organism. Treaty amendments can provide for a framework but it takes tradition, conventions and implementing law to make the system tick... Interinstitutional conventions is the cartilage enabling the legal bones to move. Without it a certain constitutional arthritis is bound to occur".

Political scientist Adrienne Heritier views the matter of inter-institutional agreements from an empirical perspective but she too talks of the processes of what she terms "continuous constitution building". In her view this takes place in the rich web of informal institutionalization and complex relationships that grow up between formal and informal institutions. Her specific example concerns co-decision which "had complex rather than predetermined results in terms of its effects on the respec-

22 The expression is that of *Maduro* in "Europe and the Constitution: What if this is as Good as it Gets?", in: *Weiler/Wind* (eds.) *Rethinking European Constitutionalism*, 2000, 74-102.

23 Case C-402/05 P *Yassin Abdulah Kadi v. Council and Commission*, Conclusion of AG Poiares Maduro, 16 January 2008, nyr.

24 See *Driessen*, *Inter-Institutional Conventions in EU Law*, 2007, 266.

tive roles of the Council and the EP in the legislative process”.<sup>25</sup> The bargaining strengths of actors were not fully determined by existing formal institutions. Indeed the formally weaker European Parliament succeeded in getting important concessions. While the Council wishes to limit its direct cooperation with the European Parliament to informal forms of dialogue, the European Parliament is eager to use these new forms of decision making as the basis for a redefined relationship between the Council and the European Parliament in which the Council representatives are obliged to come to European Parliament committees. The deliberate strategy of the European Parliament seems to be to establish informal institutions and then leverage them into formal change. In the word of one interviewed official “when you get an informal procedure established with Parliament they want to concretize it in the Treaty or in an institutional agreement”.

But there may also be a win-lose perspective to what is happening in practice. The Council seems to be turning the tables on the European Parliament in a manner that could not have been foreseen from the text of the Treaties. This has to do with the informal practice or institution of “trilogue meetings”. These unwritten rules about the holding of trilogue meetings between the institutions made trilogues into an extremely successful instrument: no one could now imagine the procedure without them. ‘Trilogues’ however once they entered the informal institutional panorama did not long remain confined to the post second reading, pre-conciliation phase that they were planned for. They increasingly came to be used at the first reading and early second reading stage of co-decision. Indeed recent figures show that 80% of all agreements made under co-decision in the first 3 years of the current term of the European Parliament (2004-2007) were either agreed during the first reading (64%) or in an early second reading based on informal negotiations with resulting amendments directly integrated into the Council’s common position.<sup>26</sup> The new joint declaration by the European Parliament, Council and Commission on “practical arrangements for the co-decision procedure” states that: “the institutions shall cooperate in good faith with a view to reconciling their positions as far as possible so that, wherever possible, acts can be adopted at first reading”. This attempt –since 1999 - to extend trilogues backwards to the first and second readings so as to make the early agreement system workable has been remarkably successful.

In contrast to trialogues in conciliation, where the European Parliament has adopted amendments to a Council common position and the Council is obliged to respond to these, there is no common position at first reading. This means that the Council behind closed doors has to persuade Parliament to adopt amendments in

25 See *Farrell/Heretier*, Continuous Constitution Building in Europe: Co-Decision and Informal and Formal Institutions, *Governance*, 2003, 677-694 and *Farrell/Heretier*, Co-decision and Institutional Change, *West European Politics*, 2007, 285-300.

26 See for detailed figures, *Kurpas/Green/Kaczynski*, The European Commission after Enlargement: Does More Add Up to Less?, CEPS Special Report, February 2008, [www.ceps.be](http://www.ceps.be).

plenary that the Council can accept. In other words both institutions are negotiating - largely in secret - without either having finalized a point of departure for negotiation. There are increasingly concerns about a lack of transparency, democratic legitimacy and clarity on the procedural steps.

Inter-institutional rule making in the interstices of the formal rules seems to be particularly paradigmatic in the context of co-decision. But there are other examples too that have evolved over time into more formal rules and ultimately even find their way into hard treaty provisions.<sup>27</sup> These include comitology, the various informal agreements with the Commission that hardened into inter-institutional agreements including not only the provision of information on decision making by the Commission to the European Parliament and more recently the scrutiny reserve that in a sense in a wider form now is in the Treaties. On the whole one can place them in a wider perspective of constitutional agenda setting by the European Parliament in particular. A similar phenomenon can be discerned with the Commission in the driving seat, attempting to put and keep on the agenda the issue of the so-called "operational framework" of regulatory agencies, first via a draft inter-institutional agreement<sup>28</sup> and when the Council objected that there was no legal basis for the rather far-reaching measures proposed an inter-institutional "declaration".<sup>29</sup>

#### IV. Concluding Remarks

The geological metaphor raises the question of the overall processes of transformation of political order in Europe and the emergent topography of the EU as it evolves over time. It suggests that layered under the superficial outer crust of 'original' understandings (treaty texts as revised over the years) we may find more complex sediments of 'living' institutions and empirical practices. The planet's topography is after all the result of the daily operation of wind, rain, erosion and sedimentation as well as the usually imperceptible movement of land masses over millions of years. As more and more sediment accumulates it increases the pressure exerted on the sediment below. As the pressure increases, it fuses the sediment into a sedimentary rock layer. Over millions of years, layer upon layer of sedimentary rock is formed.

The time perspective of geological movements is of course sobering and incomparable with the -minute - time frame involved in the process of constitutionalisation in the EU to date. In using the term "constitutional sedimentation" in an article on the EU in 1996 Tom Eijsbouts sought to draw attention to this issue of *time* in

27 See *Eiselt/Slominski*, Sub-Constitutional Engineering: Negotiation, Content and Legal Value of Interinstitutional Agreements in the EU, 12 *ELJ* (2006), 209-225.

28 See Draft Inter Institutional Agreement on the Operating Framework for the European Regulatory Agencies, COM (2005) 59, OJC 2005, 123.

29 See COM (2008) 135 and SEC (2008) 323.

constitutional matters<sup>30</sup>. In his words: “Europe and the Constitution is just a matter of time”. Within a very limited time frame in the geological perspective the EU has not only developed its own legal order –distinct both from the international legal order and the national legal orders - but its political system has evolved too, as well as the tension between the two.

The development of legal and institutional “practices” is of course an incremental and cumulative process, often leading over time to formal changes in the constituent treaties or acts themselves or as explicit “inter-institutional agreements”. In the context of the EU political scientist Adrienne Heretier has focused on what she terms “the numerous inconspicuous changes of European institutional rules that are occurring on a daily basis between the large-scale treaty revisions. These small-scale changes may have consequences for the overall change of institutions, albeit not occurring in ‘a big bang’ institutional change, but in small steps”.<sup>31</sup> In other words such small-scale changes occur in the ‘shadow’ and are often only (much) later pieced together in a fashion that becomes (constitutionally) visible.

Such judicial and wider institutional practices arguably all form part of what can be termed a ‘sedimentary constitution’ in the EU context. This is not a democratic political constitution, nor even a formal constitution ratified as such by national political actors (parliaments or the peoples) but is part of a broader constitutional perspective on the manner in which both the political and legal systems are evolving and are intertwined in the perspective of some fundamental tenets of constitutionalism.

30 See *Eijsbouts*, Constitutional sedimentation, Legal Issue of European Integration, 1996, available at: <http://dare.uva.nl/document/11944>.

31 See *Heretier*, Explaining Institutional Change in Europe, 2007, p. 1.